

CITATION: Carleton Condominium Corporation No. 396 v. Burdet, 2014 ONSC 7411  
COURT FILE NO.: 09-45430  
DATE: 2014/12/23

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

CARLETON CONDOMINIUM  
CORPORATION NO. 396

Plaintiff

- and -

CLAUDE-ALAIN BURDET, CLAUDE-  
ALAIN BURDET IN TRUST, 1457563  
ONTARIO CORPORATION, 1457563  
ONTARIO CORPORATION IN TRUST,  
JANET SUE BURDET, NELSON STREET  
LAW OFFICES, L'ACADEMIE  
CHRISTIANE SAUVE INC. and  
INTERNATIONAL BEAUTY DEPOT

Defendants

)  
)  
) Fabrice Gouriou and Nancy Houle, for the  
) Plaintiff

)  
)  
) Claude-Alain Burdet, for himself and in  
) trust, 1457563 Ontario Corporation, Nelson  
) Street Law Office and Janet Sue Burdet

)  
)  
)  
)  
) HEARD: June 18-20, 29, 2012 and May 12-  
) 15, 2014 (at Ottawa)

REASONS FOR JUDGMENT

KANE J.

[1] Carleton Condominium Corporation 396 ("CCC 396") commenced this action on June 23, 2009 (396 Action) and claims:

- (a) Judgments combined in the amount of \$289,070 for unpaid condominium fees to August 31, 2012, against the defendants, in addition to the prior summary judgment of \$178,759;
- (b) A declaration as to the validity of the Notices of Lien and Notices of Sale served by CCC 396 on the defendants; and

- (c) Vacant possession of the defendants' 23 condominium units including termination of any leases of those units.

[2] The defendants defended this action and counterclaimed against CCC 396.

[3] In their defence, the defendants deny owing any condominium fees to CCC 396. They allege their unit accounts in CCC 396 were and are in a credit position which, combined as of August 20, 2012, totalled \$124,910.

[4] The defendants allege in the alternative that if they owe condominium fees to CCC 396, they claim a right of setoff as the holders of promissory notes from CCC 396 which total \$296,887.

[5] This same \$296,887 is claimed in the counterclaim of the defendants in this action.

[6] This same \$296,887 is also the subject of a separate but related action (the "Dewan Action"), where this amount is alleged to be an account receivable owing by CCC 396 to Entrepise Ted Rubac Enterprises Inc. ("E.T.R.E.") for services provided. The validity of this alleged debt owed to E.T.R.E., is disputed in this and the Dewan Action.

#### **GENERAL BACKGROUND**

[7] Some background is required regarding this condominium and previous orders made in this and a related action, to understand why certain issues are not being determined in this trial and why certain defences are not relevant to the determination of the issues in this action. In particular, there are prior decisions in this and other actions between the parties which impacts certain debits and credits claimed in this trial.

#### **CARLETON CONDOMINIUM CORPORATION 396**

[8] CCC 396 is a three storey, 33 unit commercial building. This former warehouse building was converted into a commercial condominium in 1987.

[9] CCC 396 was created with the registration of its Declaration on November 18, 1987, under the then *Condominium Act*, R.S.O. 1980, c. 84, as amended, (this and the subsequent versions of this legislation, as applicable, shall be referred to as the "Act", unless otherwise indicated).

[10] 18 of the 33 units in this building are basement or half basement, Level A units. There is no water in these 18 basement units. There is a common washroom on this basement floor.

[11] The remaining 15 units in this condominium are on the first and second floors, or Levels 1 and 2. These 15 units are supplied with water and contain commercial offices or premises.

[12] The issue for years has been whether the 18 basement units each have a vote in CCC 396.

[13] Whether the 18 basement units have a vote depends upon whether they are classified as storage units.

[14] The original Declaration, registered on November 18, 1987, states the condominium consists of 15 industrial/commercial units and 18 storage units on Level A.

[15] This classification of the 18 basement units as storage units was important because s. 22 of the Act in force in 1987 and ss. 49 and 51 of the current Act state that;

(a) Voting by owners shall consist of 1 vote per unit, but

(b) Storage units shall have no vote.

[16] Under the original Declaration the 18 basement "storage" units had no vote.

[17] The Declaration provides that those 18 units own 16% of the common elements and must pay 16% of the common expenses. The other 15 units own 84% of the common elements and are responsible for 84% of the common expenses.

[18] Within one month of registering the Declaration, and before conveyance of title to any purchaser, the developer registered an amendment to it on December 10, 1987. The amended Declaration changed the unit description to "33 industrial commercial units". As a result, each of the 18 basement units had one vote, just like the other 15 condominium units.

[19] With this amended Declaration, the 18 basement units combined, held voting majority in CCC 396.

[20] The 18 basement units, one day after the registration of the amended Declaration, were conveyed to the developer's law firm, Soloway Wright. Soloways used the basement units for file storage throughout their 11-year ownership thereof according to the decision of the Court of Appeal in a previous action as to voting rights within this condominium: *Eberts v. Carleton Condominium Corp. 396*, [2000] O.J. No. 3773 (the "*Eberts Decision*").

[21] CCC 396 and ten of the 15 Level 1 and 2 unit owners (the "Minority" unit owners) have in several court actions sought to amend the Declaration so as to eliminate or reduce the voting rights of the 18 basement units.

[22] C.-A. Burdet, personally or in trust, and/or J. Burdet, in 1990 and 1993, purchased a total of 4 units located on Levels 1 and 2. C.-A. Burdet and J. Burdet are or were married to one another. The law office of C.-A. Burdet is located in one of these 4 units. J. Burdet is employed or works in that law office.

[23] According to the *Eberts Decision*, the Soloway law firm owned the 18 basement units for 11 years until they sold them to C.-A. Burdet in trust in January, 1997, and Mr. Burdet voted himself to become President of CCC 396. J. Burdet became the second voting Director of CCC 396.

[24] L.A. Burdet is the son of C.-A. Burdet. He is a Director and/or officer of 1457563 Ontario Corporation. 1457563 purchased a unit on Level 1 in 2001. L.A. Burdet became the third Director of CCC 396 in 2001.

[25] C.-A. Burdet in Trust, J. Burdet and 1457563, conveyed title of their 23 units to E.T.R.E. on June 15, 2012.

**EVENTS SUBSEQUENT TO THE JANUARY 1997 PURCHASE OF 18 BASEMENT UNITS**

[26] On February 26, 1997, the Board of Directors, led by C.-A. Burdet, and the owners at the AGM on that date, passed a total of 8 amendments to the by-laws of CCC 396. At that time, C.-A. Burdet and J. Burdet were 2 of the 3 Directors of CCC 396.

[27] Those 1997 amendments include:

- (a) Reducing the Board of Directors from 5 to 3 with 2 being a quorum;
- (b) Terminating the then management company of CCC 396 and permitting management by Directors of CCC 396, their agents or a new manager as contracted for by the President and Secretary;
- (c) Creation of a \$50 a day charge and a rental fee to owners who store material or equipment on the loading dock without written permission of the Board;
- (d) Creation of a \$50 a day charge and a rental fee to owners who store material or equipment on the loading dock without written permission of the Board;
- (e) Directors were to be paid \$50/hour and expenses for time spent in preparation for Board meetings;
- (f) Creation of parking violation management fees and regulations; and
- (g) A new water regulation amendment to Schedule A of by-law 1. This amendment changed responsibility as to the cost of municipal water charges from the common expense percentages in the Declaration, to a per unit water consumption liability based on individual unit water metered consumption. This amendment is relied upon by the defendant unit owners (the "Majority") to support their claimed annual water consumption credits.

[28] Some of the Minority unit owners, or their tenants, were charged parking and loading dock violations pursuant to the above amendments which they refused to pay. Liens as a result of that non-payment were registered against Minority units. 12% annual compound interest was charged on those penalties as provided for in by-law 1.

[29] As part of the above change to "self-management" in 1997, the services of E.T.R.E. were thereafter retained by the Directors of CCC 396 to carry out certain operational requirements of the condominium. E.T.R.E. retained individual contractors to perform specific services. The contractors customarily billed E.T.R.E. for their services. E.T.R.E. in turn, billed CCC 396 for the services performed by the contractors.

[30] The Minority believed:

- (a) E.T.R.E. was merely the alter ego of C.-A. Burdet and was being used by him to inflate the costs to CCC 396, for his financial benefit;
- (b) CCC 396 annually was incurring increasingly higher liabilities to E.T.R.E.; and
- (c) CCC 396 was being charged by C.-A. Burdet for legal services for his personal benefit or interest;

[31] The level of unrest among the Minority grew.

[32] In 1998 or 1999, the late Ms. S. Eberts, a Minority unit owner, brought an application against CCC 396 and C.-A. Burdet. She requested amendment of the Declaration to reduce the voting rights of the 18 basement units to three votes.

[33] In response to the increased legal costs of the Eberts litigation, the Board of Directors of CCC 396 in December, 1998, approved a special assessment and increased the 1999 operating budget of CCC 396.

[34] The Minority unit owners refused to pay that special assessment or the increased common element expense for that litigation cost which they considered to be for the benefit of the Majority and to their detriment.

[35] The Board of CCC 396 registered liens against the Minority units for the unpaid above special assessment fees and increased condominium fees.

[36] The application by Ms. Eberts was initially granted in 1999.

[37] The Ontario Court of Appeal in the Eberts Decision in 2000 overturned the trial decision and held that:

- (a) Condominiums are creatures of statute;
- (b) CCC 396's by-law 4 reduction of the voting rights of the 18 storage units, without amending the Declaration, was contrary to section 22(1) of the *Condominium Act*, which provided one vote per unit;
- (c) By-law 4 was inconsistent with and did not amend the Declaration;
- (d) An amendment of the Declaration or a by-law inconsistent with the *Condominium Act* is invalid pursuant to ss. 3(5);
- (e) A Declaration amendment was required to re-classify the 18 basement units as storage space in order to remove their votes; and
- (f) An amendment to the Declaration pursuant to ss. 3(4), requires the consent of all owners and mortgagees: *Eberts v. Carleton Condominium Corp. No. 396* (2000), 136 O.A.C. 317 (Ont. C.A.)

[38] Leave to appeal to the Supreme Court of Canada was denied.

[39] The issue as to the voting rights of the 18 basement units and the alleged abuse of that voting control by the Burdets, are the subject of the oppression action commenced by the Minority in 2001, namely, the Dewan Action.

[40] Mr. Brazeau is an expert witness for the plaintiff in this action. His firm, Marcel Leville ("M-L") was retained to advise what the Majority owe as arrears to CCC 396. Mr. Brazeau and M-L have in the past been retained by CCC 396 to perform the audit and prepare its annual financial statements. The Majority in this trial strongly oppose the opinion and work of M-L as to what the majority owes and accuracy of past annual financial statements prepared by M-L.

[41] In the summer of 2001, C.-A. Burdet as President of CCC 396, engaged M-L and Mr. Brazeau in particular, to prepare the financial statements of CCC 396 for the years ending December 31, 1998, 1999 and 2000. C.-A. Burdet interfaced with Mr. Brazeau as to these audits and the documentation requested by the auditor.

[42] In relation to this engagement, M-L in 2001 asked for information about the nature of the relationship between E.T.R.E., the President and other Board members of C.C.C. 396, as most of the expenses of C.C.C. 396 were from E.T.R.E. M-L believed that E.T.R.E. might have related party status to the President and/or other Board members which if true, should be disclosed in the 1998 to 2000 audited financial statements being prepared.

[43] According to Mr. Brazeau, C.-A. Burdet in response advised that any relationship of E.T.R.E. and Directors of CCC 396 was irrelevant to the audits being performed and would not be provided.

[44] M-L provided C-A. Burdet with M-L's draft audit statements for the years 1998 to 2000. C.-A. Burdet told Mr. Brazeau these drafts contained "fatal errors" but refused to identify what those errors were.

[45] C.-A. Burdet, by resolution of the Board of CCC 396 in 2002, hired another accountant, K. Lagasse, to prepare the audit statements for 1998 to 2000.

#### **COUNTERCLAIM OF C-A. BURDET IN TRUST AND J. BURDET IN CCC 396 ACTION**

[46] Pursuant to a previous decision in this action, the counterclaim in this proceeding of the Majority did not proceed to trial with this claim for arrears by CCC 396 against the Majority.

[47] The relief sought in the counterclaim in this action by C.-A. Burdet and J. Burdet is as follows:

- (a) A declaration of oppression against CCC 396;
- (b) Discharge of the liens registered against the Majority's units for alleged non-payment of condominium fees;

- (c) The termination of the court 2002 appointment of an Administrator of CCC 396 with management thereafter to be exercised by the Board of Directors; and
- (d) Damages.

[48] It was ordered on January 11, 2012, that this counterclaim overlapped with the Majority's counterclaim in the Dewan Action. The counterclaim in this action was ordered to proceed to trial separate from this claim by CCC 396 for post 2002 unpaid condominium fees owed by the Majority.

[49] The Majority's counterclaim herein for oppression against CCC 396, challenges and is based upon the actions of the 2002 court appointed Administrator of CCC 396, its failure to collect payment of condominium fees owing by the Minority to CCC 396 for the 1998 to 2001 period prior to the appointment of the Administrator and other actions of the Administrator as to its management of CCC 396 since 2002.

[50] The pre-2002 unpaid fees of the Minority are being determined in the Dewan Action along with the Minority's allegations of oppression by the Majority during the 1997 to 2001 time period.

[51] In the decision in this action dated January 11, 2012 (paras 23 to 40), the court held that there were common issues between this counterclaim and the issues in the claim and counterclaim in the Dewan action. A sequence as to the trial of these claims, the counterclaims and this action was accordingly ordered.

[52] The counterclaim in the present action was scheduled for trial in November, 2014 but was adjourned on consent initially to use those trial dates to complete the trial of the Dewan Action which had commenced, as the Majority acknowledged the decision in the Dewan Action will determine a number of issues in the Majority's counterclaim in this action. The health of C.-A. Burdet subsequently prevented the trial of this counterclaim to proceed as scheduled.

### DEWAN ACTION

[53] The Dewan Action was commenced by application in 2001 by the Minority owners and therefore some eight years before this 2009 CCC 396 Action.

[54] The Dewan Action originally was against C.-A. Burdet in Trust. C.-A. Burdet, E.T.R.E., 1443957 Ontario Inc. and CCC 396 were subsequently added as defendants.

[55] C.-A. Burdet in Trust defended this action and counterclaimed against the plaintiff Minority owners.

[56] The Minority in the Dewan Action seek:

- (a) A declaration that C.-A. Burdet, in Trust and personally, and his family members personally and as Directors of CCC 396, oppressed the Minority under s. 135 of the Act;

- (b) An order that the Minority may not vote as owners of the 18 basement units in CCC 396;
- (c) An order directing the Trust and its nominees to fully account for the \$496,773 identified in the November 24, 2005 report of the court appointed auditor;
- (d) An order directing the Trust and its nominees to pay CCC 396 all money improperly paid by or charged to CCC 396;
- (e) An order terminating CCC No. 396 pursuant to s. 128 of the Act as the continuance thereof as a condominium was impossible; and
- (f) The appointment of a Receiver/Manager of CCC 396 to conduct the sale of the assets of CCC 396 with proportional distribution of the proceeds.

[57] The Minority in the Dewan Action, allege that C.-A. Burdet, J. Burdet and L.A. Burdet, personally and as Directors of CCC 396, controlled the Board of Directors of CCC 396 and oppressed the Minority unit owners during the period 1998 to March of 2002, namely until the appointment of an interim Administrator of CCC 396.

[58] The Minority further alleges that:

- (a) The 18 basement storage units do not have voting rights, which voting control the Burdets have used from 1998 to 2002 to elect Directors, to control the Board and to pass resolutions, condo rules and by-laws to financially oppress the Minority, improperly place liens on their units and commence law suits to enforce payment of money not due from the Minority;
- (b) E.T.R.E. is the alter ego of Claude-Alain Burdet;
- (c) The Burdets caused CCC 396 to pay expenses personal to the Burdets or not verifiable, to E.T.R.E. which is not arm's length to Mr. Burdet;
- (d) C.-A. Burdet controls the Trust, his family members on the Board of Directors and E.T.R.E.;
- (e) E.T.R.E. has repeatedly ignored court orders to account for dealings in the period 1998 to 2002 between CCC 396 and E.T.R.E. and failed to deliver the invoices of third party service providers to E.T.R.E. which billed CCC 396 for such services;
- (f) Between 1998 and 2002, the Trust improperly caused CCC 396 to pay E.T.R.E. \$199,686 and an unjustified payable owing to E.T.R.E. of \$296,887, of which some \$161,000 is for the time and services charged by C.-A. Burdet; and
- (g) Between 1998 and 2002, the Burdet group sought to control as their own property, the assets and affairs of CCC 396 and to ignore the rights of the Minority.



[59] The Majority in their defence and counterclaim allege that:

- (a) Between 1997 and 2001, the Minority sought to control the assets and affairs of CCC 396 and to ignore the rights of the Majority;
- (b) The Minority commenced several actions to defeat the Majority's voting control of CCC 396 by attacking the voting rights of the 18 basement units;
- (c) The Minority attempted to paralyze the Board of Director's management of CCC 396 in the period 1997 to 2001;
- (d) The Minority's claim seeks cancellation of \$296,887 of valid debt of CCC 396 and reimbursement of \$159,873 to CCC 396;
- (e) The Minority breached condominium rules and failed to pay condominium fees. Those breaches resulted in substantial arrears owing to CCC 396, increased its debt which necessitated C.-A. Burdet, by personal guarantee, to borrow money to pay operational expenses of CCC 396. CCC 396 signed promissory notes to repay such borrowings to C.-A. Burdet. Those promissory notes total \$296,887 and remain due, unpaid and bear interest since 2002;
- (f) There is no conflict of interest between C.-A. Burdet and E.T.R.E.
- (g) The actions of the unit owner, Domicile Developments, constitute oppression of the Majority;
- (h) The 2002 court appointed interim Administrator lacked authority or power; and
- (i) The interim Administrator since 2002, has not acted independently and has sided with and preferred the Minority over the Majority.

[60] The Majority in their Dewan Action counterclaim seek:

- (a) Special and general damages in excess of \$4 million;
- (b) A direction that the Minority pay CCC 396 their outstanding arrears forthwith; and
- (c) An order terminating the interim Administrator and reinstating the management powers of the Board of Directors of CCC 396.

#### **DEWAN ACTION PROCEEDING**

[61] On November 29, 2001, the parties in the Dewan Action consented to an order by Granger J. (the "2001 Order") that:

- (a) The application was to proceed by statement of claim and a trial;

- (b) An interlocutory injunction was issued prohibiting the enforcement of liens registered against Minority units for alleged non-payment of condominium fees and halting the two actions commenced by CCC 396 for such arrears; and
- (c) A prohibition of action to recover the alleged condominium fee liability owed by the Minority.

[62] On April 2, 2002, Lalonde J. in the Dewan Action (the "2002 Order"):

- (a) Found C.-A. Burdet in contempt of the above 2001 Order, for proceeding in attempts to recover the arrears owing by the Minority;
- (b) Appointed CMG as interim Administrator of CCC 396, to manage its affairs in replacement of the Board of Directors and to carry out those duties "as it saw fit";
- (c) Directed that there was to be no meetings of CCC 396 or by-laws or resolutions passed without court approval;
- (d) Appointed M-L as auditors to conduct a forensic audit of CCC 396 for the years 1998 to 2001, including the financial activity of and the source and allocation of funds used by that corporation (the "Forensic Audit");
- (e) As to such Forensic Audit, C.-A. Burdet was ordered to forthwith produce all financial records relating to his management of CCC 396 and E.T.R.E. for the period 1998 to 2001;
- (f) C.-A. Burdet was ordered to pay unit owner P. Dewan \$8,494, being rent seized from that owner's tenant; and
- (g) The 2001 Granger J. prohibition of action to recovery the alleged arrears of the Minority was continued.

[63] The Majority in this and in the Dewan Action fault the interim Administrator for not recovering the arrears of the Minority since 2002. The Majority relies upon that failure to collect those arrears as a ground of their claim of oppression, as an entitlement in their counterclaim in the Dewan Action and the CCC 396 Action and as defence to the liability claim by CCC 396 against the Majority.

[64] The Majority's appeal of the 2002 Order appointing the interim Administrator was dismissed by the Divisional Court. That court held that C.-A. Burdet had demonstrated a "flagrant contempt" of the 2001 Order which prohibited him as President and CCC 396, from pursuit of Minority unit owners for their alleged arrears. The Court of Appeal denied leave to appeal that decision.

[65] Notwithstanding the Majority's loss of their appeal of the appointment of the interim Administrator and that M-L perform a forensic audit, the Majority in this action argue that:

“The very validity of these appointments (interim appointment of the Administrator and the Forensic Auditor) is seriously challenged, in the 01 action, ...” placing in issue “the legitimacy of the appointments to govern CCC396, retroactively to April 2002.” (paras. 164-165).

... the interlocutory April 2002 order is itself a nullity ....” (para. 252)

[66] Such arguments are incorrect given the Court of Appeal has upheld the 2002 Order appointing the interim Administrator and ordering a Forensic Audit. These are not valid or relevant arguments as to the issues in this trial.

[67] The 2004 Forensic Audit report states that C.-A. Burdet refused and delayed production of the invoices of E.T.R.E. and its alleged subcontractors for the period 1998 to 2001 which impaired the Forensic Audit. It also states that C.-A. Burdet, after the 2002 appointment of the Administrator, withdrew some \$37,000 from the bank account of CCC 396.

[68] In a decision dated April 25, 2005, C.-A. Burdet was ordered to;

- (a) Repay the \$37,000 to CCC 396 with interest; and
- (b) To produce all documents requested by court-appointed auditor, M-L, forthwith, in support of E.T.R.E.'s \$300,000 claim against CCC 396.

[69] The parties returned before Lalonde J. in the Dewan Action in 2007. The court determined that C.-A. Burdet had failed to produce the 1998 to 2001 underlying documentation from E.T.R.E. and its contractors, as ordered in 2002. That court determined that the \$300,000 claimed was not owed to E.T.R.E. Compensation was awarded under the oppression remedy against C.-A. Burdet.

[70] The Court of Appeal in 2008 held that the oppression remedies must be determined at trial. It set aside such final remedies but left in place the prohibition against enforcement of the arrears owed by the Minority and the law suits in relation thereto.

[71] The Majority in 2011 brought a motion to dismiss the Dewan Action for delay and to terminate the appointment of the Administrator of CCC 396, based in part on a) the failure of the Minority to comply with the 2001 Order to proceed by statement of claim b) the failure of the interim Administrator to provide financial statements to unit owners and c) the failure since the appointment of the interim Administrator in 2002 to hold annual meetings or arrange for the election of Directors.

[72] This 2011 motion to dismiss by the Majority was denied on September 30, 2011. By then, annual financial statement for CCC 396, up to 2010, had been delivered to unit owners. No unit owner since the 2002 order had requested court permission to hold condominium meetings or elections of Directors. The Dewan Action by September, 2011, was almost ready for trial.

[73] CCC 396 in this action, on September 11, 2011, was granted summary judgment for part of the arrears claimed against the Majority. Liability as to the balance was ordered to proceed to trial, resulting in this trial and this decision.

[74] The court rendered a trial scheduling decision in this and the Dewan Action on January 11, 2012.

[75] The court in this January 11, 2012 decision, determined that the \$296,887 damages claimed by Mr. Burdet in his counterclaim in this action, is related to the Minority's allegations that C.-A. Burdet improperly caused CCC 396 to pay some \$200,000 and to record another \$300,000 as owing to E.T.R.E. Inc., prior to the 2002 appointment of the Administrator.

[76] The court ordered that the claim in this action was to proceed to trial but that the Burdet \$276,887 counterclaim should "not however be added to the common expense liability trial" issues in the 396 Action, on the basis of "s. 84(3) of the Act and the need that some of the many issues between these parties proceed to trial."

[77] The court on January 11, 2012, ordered that this trial was to be completed before the trial in the Dewan Action and before presentation of the overdue reporting by the interim Administrator to the court.

[78] In this same order, the court listed the issues to proceed to trial in this action (paras. 26-29 and 39), are:

- (a) How much liability is owed by each defendant per unit for common expenses, to CCC 396;
- (b) The individual defendant unit owners statements of account per unit at the commencement of the appointment of the Administrator in 2002;
- (c) The expenses and receipts of CCC 396 since the Administrator's appointment;
- (d) The basis of any special assessments since 2002 and the per unit share thereof;
- (e) The calculation of each defendant's liability for expenses, periodic common expenses per unit and the defendants payments on account;
- (f) The calculation of each defendant's indebtedness to CCC 396 as of the date of registration of liens and Notices of Power of Sale by the condominium if possession or sale are claimed by CCC 396;
- (g) The validity of the registered liens and the notices of sale registered and served on the Majority;
- (h) Whether CCC 396 is entitled to possession of the subject units; and
- (i) The trial issues were to exclude the \$296,000 claim by Mr. Burdet and the payments to and liability owed to E.T.R.E.

[79] The January 11, 2012 order that there be a separate trial of the Majority's counterclaim in this CCC 396 Action was not appealed. The separate trial of that counterclaim did not prevent

the Majority from making full defence to the claim that they have defaulted in payment of assessed condominium fees or determining the quantum thereof.

[80] The powers and duties of the interim Administrator were settled in the Dewan Action by court order dated April 3, 2012.

[81] Discoveries, property inspections, addition of parties and amendments of pleadings were scheduled and ordered in the Dewan Action in August and December, 2012.

[82] The Majority's motion to dismiss the Dewan Action was dismissed on September 30, 2011, being the same date as the granting of partial summary judgment in the CCC 396 Action against the Majority. The Majority were unsuccessful in their appeal of both of those decisions.

### **CCC 396 AND DEWAN TRIALS**

[83] The trial of this action started in June, 2012 but not completed in the time scheduled. The trial eventually concluded in May, 2014, with written submissions delivered during the summer of 2014. The resumption of this trial was delayed due to the health condition of C.-A. Burdet.

[84] The March 24, 2014 trial date of the Dewan Action was adjourned to permit completion of the trial of this action, including receipt of the M-L Report 3 and the completion of Mr. Brazeau's testimony. Mr. Brazeau testified in this action and was scheduled to testify in the Dewan Action.

[85] The trial of the Dewan Action proceeded on September 9 to 19, 2014 but was not completed in the allotted time. It is to resume and be completed in January, 2015.

### **CCC 396 FINANCIAL STATEMENTS 2001 TO 2011**

[86] M-L was retained by the Administrator to prepared annual statements of CCC 396 during and for the years 2001 to 2011.

[87] These annual financial statements have been the subject of considerable evidence as well as criticism by the Majority. The Majority in great detail has pointed to alleged deficiencies in these financial statements and uses that criticism to attack the credibility and accuracy of Mr. Brazeau and M-L's calculation of arrears owing by the Majority to CCC 396.

### **CONFLICTING EVIDENCE AND CREDIBILITY OF MR. BRAZEAU AND L.A. BURDET**

[88] The principal witnesses for the parties were Mr. Brazeau for CCC 396 and L. A. Burdet for the Majority.

[89] Mr. Brazeau is a Chartered Accountant and partner in the firm of M-L. In that capacity, he and his firm have provided accounting services of CCC 396 since 2001 on the retainer by C.-A. Burdet, by court appointment in 2002 to perform the Forensic Audit and by the retainer of the Administrator on behalf of CCC 396, since 2002.

[90] L.A. Burdet and Mr. Chesney, also a Chartered Accountant with extensive experience involving condominiums, criticized Mr. Brazeau and M-L for omissions or misstatements in the annual financial statements of CCC 396. Such criticism includes failing to obtain, review and reflect by-law provisions in the financial statements and therefore non-compliance with accounting industry guidelines.

[91] These areas of complaint are relevant to the credibility of Mr. Brazeau and the reliability of the three M-L Reports. Subject to several defences issued determined below, these financial statements are secondary however to the central issue and evidence in this action, namely what condominium fees since 2002 were levied against the Majority and have not been paid.

[92] L.A. Burdet was centrally involved in the management of CCC 396 through E.T.R.E. Inc. and later as a Director of CCC 396. He was employed, compensated by and/or held positions within E.T.R.E. He is or was the President of the defendant 1457563, a unit owner in CCC 396. Through E.T.R.E., he manages the 21 Majority units in CCC 396. Although personally not a party in this action, L.A. Burdet has a personal interest in this litigation, unlike Mr. Brazeau.

[93] L.A. Burdet acknowledges he is not a chartered accountant. He relies upon his business experience and technology expertise to pinpoint errors in the accounting systems of CMG, CCC 396 and M-L. He alleges that the bookkeeping and data records of CMG since 2002 and the reports of M-L contain substantial errors, are biased by omission and lack transparency and objectivity, to the benefit of the Minority. His testimony and affidavits indicate that he has meticulously combined through the financial records and reports produced over time by the Administrator and M-L and the records of the Majority.

[94] L.A. Burdet alleges the records maintained by CMG as interim Administrator of CCC 396 and by M-L were withheld from the Majority or produced at the last moment and cannot in any event be relied upon.

[95] The reliability of the accounting records maintained by the Administrator is the central issue among these above complaints. M-L obtained and reviewed all records presented to it by the Administrator and by the Majority in preparation of the three M-L Reports.

[96] L.A. Burdet presented his own calculations as to debits charged to and payments made the Majority and the Minority.

[97] The evidence establishes that the Administrator, normally in December, sent all unit owners an annual budget in the years 2003 through to 2010. Those budgets each contain a detailed list of:

- (a) The current year budget with revenue and a list of expenses;
- (b) The proposed budget for the next year with the same level of detail as above, including the following year's total condominium fees; and
- (c) A list of each unit's share and cost of monthly condominium fees for the following budget year.

[98] These annual budgets informed unit owners as to the current and budgeted revenues, expenses and what the coming year's condominium fees would be. The Majority therefore knew from these budgets and their own records how much of the assessed condominium fees they were to pay and paid.

### **TRIAL CHRONOLOGY**

[99] This trial commenced June 18, 2012 but was not completed in the time allotted.

[100] CCC 396 called Mr. Brazeau from the firm M-L as its expert to review, calculate and provide his opinion as to the amount owing per unit by the defendants to CCC 396. He testified and presented his first and addendum M-L reports dated February 29 and May 31, 2012.

[101] L.A. Burdet filed a detailed affidavit and accounting schedules critiquing the first two reports of M-L.

[102] Mr. Brazeau's schedule did not permit completion of his testimony in chief and cross-examination. With consent of the parties, his cross-examination was adjourned to a later date. Mr. Luc Andre Burdet then testified and raised arguments and adjustments which had not been addressed in Mr. Brazeau's original and amended report or his testimony. This then completed the trial time allotted. This court ordered that Mr. Brazeau review a transcript of testimony of L.A. Burdet and file a supplementary report addressing any new arguments or adjustments raised by L.A. Burdet, with L.A. Burdet then to be entitled to respond to any such supplementary report from Mr. Brazeau.

[103] M-L, as requested, produced M-L Report 3 dated October 5, 2012, which responds to the Majority's criticism of the M-L Reports 1 and 2 and the evidence presented at trial by L. A. Burdet.

[104] L.A. Burdet in response to M-L Report 3, filed a further detailed affidavit and calculations dated November 29, 2013 critiquing the M-L Report 3.

[105] The Majority then brought a motion for summary judgment to dismiss this action based on the M-L Report 3. That motion was dismissed for the reasons dated November 23, 2012. Leave to appeal that decision was denied.

[106] The Majority also filed a report from their expert witness, Mr. Chesney, dated April 21, 2014.

### **CHESNEY'S EVIDENCE AND CREDIBILITY OF MR. BRAZEAU**

[107] Mr. Chesney is a chartered accountant. He is experienced in the business of condominium accounting and financial statements.

[108] The Majority argues that this expert's critique of the accounting and reporting performed or not performed in the annual financial statements of CCC 396 between 2002 and 2011 by M-L, demonstrate those financial statements are non-compliant with requirements under GAAP and

ICAO Guidelines and that diminishes the credibility of Mr. Brazeau on the issue as to how much of condominium fees assessed against the Majority have not been paid.

**ICAO/CICA NON-COMPLIANCE BY M-L**

[109] M-L is not a party to this action. The financial statements and reports it prepared are evidence in this action. It is only the M-L Reports however which directly address current liability of the Majority.

[110] M-L unilaterally made corrections in M-L Report 2 prior to the commencement of this trial. Based on testimony of L. A. Burdet, M-L responded in presentation of its M-L Report 3.

[111] I agree with the Majority that the absence of information in past financial statements such as not including by-law required calculation of compound interest on Minority debt, the lack of reference to and accounting as to the water by-law adjustments and why unqualified financial statements were issued requires consideration as to the reliability of calculations of the indebtedness owed by the Majority in M-L Report 3.

[112] Mr. Chesney testified that M-L has the responsibility to review all by-laws of a condominium and to apply or report upon them in the financial reporting to the condominium. He states due diligence was required by M-L to become aware of by-law requirements and report upon the financial implication of CCC 396 by-laws, such as charging compounded interest on overdue accounts of the Minority and the water regulation setoff creating unit liability based on individual unit consumption. The Majority relies upon such factors to support of their allegations that the Minority owners owe more than recorded on the books of CCC 396 and the fee assessments against the Majority accordingly were unnecessarily increased.

[113] Mr. Brazeau disagreed with this criticism. He points to the numerous meetings with C.-A. Burdet as to the preparation of the 1998 to 2001 financial statements and their subsequent meetings or exchanges in the preparation of the M-L Forensic Report. He alleges that as the President, a Director and instructing officer of CCC 396, C.-A. Burdet never disclosed, verbally or in response to documents requested, the existence of the water allocation regulation or the need to financially incorporate the results thereof into unit owner arrears. He stated his first knowledge of this water by-law came upon his court attendance in this trial during the 2012 portion thereof. The Majority's faulting of M-L not being aware of this requirement, originates with C.-A. Burdet's failure to disclose the same, since 2000. There is no evidence contradicting this testimony.

[114] Mr. Brazeau testified that C.-A. Burdet refused to articulate what were the alleged "significant errors" in the draft CCC 396, 1998 to 2001 financial statements prepared by M-L. There is no evidence contradicting this testimony of Mr. Brazeau.

[115] Of interest, the Majority point to no portion of the 1998 to 2001 CCC 396 annual financial statements prepared by their auditor replacement firm of K. Lagasse, in which that firm records interest payable on overdue fees owned by owners such as the Minority or any adjustment pursuant to the per unit water regulation.



[116] Mr. Brazeau acknowledged meeting with counsel for the Minority in finalizing his firm's 2004 Forensic Report. It would have been better had that not occurred given the dispute as to the liability of the Minority. It is unknown however whether CCC 396 at the time, unlike today, was then represented by independent counsel. Given the highly litigious environment amongst the unit owners and the absence of Minority owners' representation amongst the exclusive Burdet Board of Directors, it is understandable that M-L wanted at least some input from the Minority.

[117] Any error of the M-L firm in meeting with Minority legal counsel in 2004 is separate in time and subject from the issue in this action; namely what fees were assessed by CCC 396 and unpaid by the Majority.

[118] The non-disclosure of these by-laws as to unit allocation of water charges and 12 % interest on overdue unit owner accounts, may be the responsibility of several people, starting with C.-A. Burdet in 2000.

[119] Subsequent to April, 2002, Mr. Brazeau was taking instructions from a court appointed Administrator who advised M-L that the validity of the arrears recorded owing by the Minority was doubtful and was the subject of an ongoing action.

[120] CCC 396 pursuant to the Lalonde J. 2002 order was prevented from collecting these Minority arrears. No unit owner, the President or the Board, sought to specifically amend that interim order. Is interest payable on arrears which a court by interim order prohibited CCC 396 to collect? That is an issue in the Dewan trial.

[121] M-L in annual financial statements recorded such Minority arrears, without interest. It appears that such financial statements should, at least as a note thereto, indicate the potential liability for interest accruing on this recorded unpaid debt of the Minority.

[122] It was the responsibility of the Administrator to seek court direction regarding the enforceability of the Minority arrears. Any request for such directions however is partially responded to by (a) that issue already being litigated in the Dewan Action and (b) the 2001 and 2001 Orders prohibit action to recover the arrears of the Minority.

[123] Any failure to seek court direction regarding the arrears of the Minority in any event is not the responsibility of the M-L. Nor is it a defence to any liability of the Majority. The arrears of the Minority are being determined in the Dewan Action.

[124] The evidence of Mr. Chesney as to what the Ontario Chartered Accounting Guidelines or policy requires to be reported in condominium annual financial statements, although relevant to credibility, does not alter the issue of arrears of assessed and unpaid condominium fees of the Majority.

[125] The three M-L reports as to debits and credits to the unit accounts of the Majority, examined various levels of accounting data maintained by the interim Administrator as well as the historical accounting records presented by the Majority.

[126] In argument (paras. 236 to 240), the Majority submit that; "Jurisprudence has found it improper for an auditor to act as an expert for matters this auditor's firm has audited. Here the

situation is even more conflictual since it is the expert's own audit work that is in question." *Bailey v. Barbour*, 2013 ONSC 7397, at 17-23, 323-324 and *Abbott and Haliburton Company v. WBLI Chartered Accountants*, 2013 NSCA 66, at paras. 3, 10, 24, 26, 28, 44, 26.

[127] During this trial, the Majority made no such objection to Mr. Brazeau's qualification to provide opinion evidence as to the quantum of indebtedness owed by the Majority, perhaps reserving that argument for another court.

[128] This action is not directly about the audited annual financial statements of CCC 396 prepared by M-L for the period 2002 to 2011, portions of which the Majority rely on as to the liability of the Minority.

[129] CCC 396's annual financial statements are secondary and not the primary evidence as to the liability of the Majority.

[130] The allegations as to the annual financial statements of CCC 396 since 2002 and Guideline non-compliance in relation to those statements, are relevant as to credibility, but those subjects are not identical to the separate engagement of the M-L firm by CCC 396 to review and provide an opinion as to what condominium fees were levied by that corporation against the Majority and how much of those have not been paid.

[131] The primary evidence of CCC 396, as to the liability of the Majority for assessed and unpaid condominium fees, are the M-L three reports, the information therein referred to and the evidence of Mr. Brazeau.

[132] This court rejects the Majority's allegation that:

- (a) M-L's lack of awareness of the water unit allocation regulation;
- (b) The non-recording of Minority interest arrears in CCC 396's financial statements;
- (c) M-L's correction of information in M-L Reports 2 and 3;
- (d) The failure of CMG to seek court direction as to the recorded arrears of the Minority; or
- (e) The late delivery by the Administrator to unit owners of financial statements prepared by M-L;

constitutes evidence of M-L's "participation in a conspiracy against the Majority". Such allegation ignores the charged, hostile and dysfunctional environment within this small condominium, at the personal and structural level and the difficulty that presented in obtaining timely access to necessary reliable and complete, versus proportional accounting information. Further instances of that difficulty are referred to below.

[133] I agree with the Majority that this trial is "not about the professional liability of M-L or Mr. Brazeau beyond the issue of their credibility". Notwithstanding that admission

however, the Majority then submit (para. 240) that “it is the expert’s (M-L’s) own audit work which is in issue.” This court disagrees with that submission.

[134] M-L Reports 1, 2 and 3 are the conclusions of an expert calculating fees assessed by CCC 396 against the Majority, the evidence of payments towards such debt and then the consideration of the reliability of that evidence in light of the reporting in the historical financial statements prepared by M-L.

[135] This court found that:

- (a) Mr. Brazeau was a credible witness in that errors and lack of information were admitted and corrected. His testimony was not exaggerated or unsupported; and
- (b) The M-L Reports as corrected and M-L Report 3 in particular constitute reliable evidence as to the condominium fees assessed against and unpaid by the Majority.

[136] A court benefits from an expert amending and correcting their original position and testimony in response to discovered errors and new disclosed information.

#### **MAJORITY’S DEFENCES REGARDING LIABILITY**

[137] The court will now address the defences presented by the Majority.

#### **AMOUNTS OWED BY CCC 396 TO E.T.R.E. (paras. 229 and 230)**

[138] The Majority in argument, repeats in great detail their testimony as to the errors made in the annual CCC 396 financial statements by M-L. The Majority however then argues that such financial statements establish *prima facie* proof of the amount of liability owed by CCC 396 to E.T.R.E.

[139] What if anything is owed to E.T.R.E Inc. by CCC 396, is an issue in the Dewan Action. It is not an issue to be determined in this action. It is not a defence of the Majority unit owners to alleged liability owed by them for unpaid condominium fees.

#### **CLAIMS OF MISCONDUCT BY ADMINISTRATOR, M-L AND CCC 396**

[140] In their written submissions, the Majority seeks:

- (a) Dismissal of this action because the Majority owes nothing to CCC 396;
- (b) The Majority, based on alleged egregious conduct of CCC 396, including:
  - (i) its bias against the Majority owners;
  - (ii) its secretive, fallacious and misleading accounting process;
  - (iii) its lack of transparent governance; and
  - (iv) its abundant violations of the corporate and provincial legislation

seeks:

- (c) Dismissal of this action as a nullity *ab initio*;
- (d) Reversal of the 2011 Summary Judgment in the amount of \$109,440;
- (e) A credit to the Majority units of an aggregate amount of \$180,803.87 to be allocated to each unit account according to its percentage of CCC 396 ownership. Such \$180,803 is the Majority's 42.8% combined share interest in the common elements under the Declaration; and
- (f) Punitive damages in the order of \$122,589.51.

[141] The Majority's written argument (paras.33 to 62) outlines alleged misconduct since 2002, which it submits constitutes bias against the Majority; namely secretive, fallacious and misleading accounting process, the lack of transparent governance and violations of the legislation, by the Administrator and M-L. This echoes the Majority's counterclaim in this action which is not part of this trial.

[142] Obviously, errors by the Administrator or M-L may impact the liability determination of the Majority. Subject to that qualification, the Majority has provided no basis or authority that CCC 396 is liable for errors or misconduct by the Administrator or M-L.

[143] The Administrator and M-L are not parties to this action.

[144] The Administrator is a court appointed officer. Action against it may not be commenced without court order pursuant to paragraph 10 of the April 3, 2012 order in the Dewan Action. No such permission has been sought or granted.

[145] Dismissing the Majority's motion for Summary Judgment for dismissal of the 396 Action, without prejudice to the Majority's right to present argument in this trial, is not court permission to the Majority to sue the Administrator or M-L who are not parties in this action.

[146] The Majority's claims against CCC 396 are not a defence to CCC 396's claim for their unpaid condominium expenses.

#### **INDEBTEDNESS OF MAJORITY UNITS**

[147] Mr. Brazeau, the M-L Reports, L.A. Burdet in his affidavits and testimony have vastly different opinions as to the liability position of the Majority.

[148] The extent of their differences, recorded in the M-L Third Report and L.A. Burdet's affidavit dated November 29, 2013, as to the liability of the Majority and the Minority is summarized in Schedule "A" hereto.

[149] There are multiple reasons for these differences which raise issues, some of which are to be determined in this trial while others are to be determined in the Dewan Action.

[150] The interim Administrator should have:

- (a) Reported at least annually to the court and thereby to the owners since its appointment in 2002;
- (b) Distributed the annual financial statements to all unit owners sooner than occurred; and
- (c) Sought directions from the court on contentious issues such as the indebtedness shown on the books of CCC 396 as owing by the Minority, the validity of the water regulation given the level of hostility between the Majority and Minority and the requirements under the Act.

[151] As indicated in previous decisions in this and the Dewan Action, the Minority knowingly benefitted in not issuing its statement of claim in the Dewan Action as ordered in 2001 and failing to do so until ordered to comply in 2009. Those benefits arose in the 2002 appointment of the interim Administrator and the assignment of all management to the Administrator. That appointment deprived the Majority of their voting control. Owner meetings remained available since 2002, subject to prior court approval.

[152] The Majority conveniently ignore however that they failed to seek judicial intervention since 2002 to hold the interim Administrator accountable to report to them, to report to the court and for the late delivery of annual financial statements. Occasional emails or letters sent on behalf of the Majority to the Administrator is not the issue and were not sufficient in light of the quantum of ongoing litigation and frequent court attendances between the parties.

[153] The Majority knew that the interim Administrator did not for some ten years enter their units to record their water meters but never sought court intervention on that issue.

[154] C.-A. Burdet has directed numerous law suits on behalf of CCC 396 and has been sued repeatedly in relation to this condominium. He has represented CCC 396, himself and the Majority owners in these actions, including appeals, for years. He is experienced in civil litigation.

[155] The Majority, since 2002, could have sought court direction as to the Administrator and its management of CCC 396 regarding the above issues. The Majority elected not to do so.

[156] The failure of the Majority to seek judicial relief and accountability of the interim Administrator was a conscious decision and raises doubt as to some of the complaints of L. A. Burdet ten or twelve years later in his testimony and his affidavits in this action.

[157] The issues in this action must be decided on the evidence presented as to the events as they unfolded, not on what could or should have occurred.

#### **MAJORITY HAS NO OBLIGATION TO PAY CONDOMINIUM FEES**

[158] The Majority allege that the actions of others, waives their obligation to pay condominium fees. This court disagrees.

[159] Section 84(1) of the Act creates the obligation on unit owners to pay their proportion of common expenses.

[160] Section 84(3) states that the above obligation does not cease and is not diminished by a unit owner's claim against the condominium corporation.

[161] Claims are a higher level or a more formal form of a complaint. If owner's claims against the corporation do not halt their obligation to pay common expenses, owner's complaints against the corporation are equally irrelevant to their continuing obligation to pay condominium fees. Complaints against the condominium corporation are not a defence to the obligation to pay one's share of condominium fees.

[162] The exclusion of claims against the corporation under s. 84(3) as a defence, logically, should be interpreted to exclude claims against a party other than the condominium corporation as a defence to the s. 84(1) obligation. Exempting unit owners from paying their common expenses, because they have a claim against a third party, would defeat the very interest ss. 84(1) and (3) were designed to protect.

[163] The Majority argues their obligation to pay condo fees under section 84(1), is subject to the preamble "Subject to the other provisions of this Act." The Defendants submit that because CCC 396 repeatedly and systematically violated key provisions of "this Act, the defendants were no longer obligated to contribute what the Plaintiff arbitrarily and discriminatingly defined as ""contribution to common expenses"" and sought to impose on them." (Paras. 170 to 174)

[164] This argument is without merit. It incorrectly suggests that unit owners are relieved of the s. 84(1) obligation to pay fees if they feel the condominium has breached a provision of the Act. Section 84(3) states exactly the opposite.

#### **MINORITY'S DEBT AS A DEFENCE**

[165] The Majority in evidence and argument rely heavily upon the alleged indebtedness owed by the Minority to CCC 396, and particularly the appropriate calculation thereof. That liability issue is the subject of the Dewan Action.

[166] Indebtedness of one unit owner and the failure of the condominium corporation to collect that debt is not, in light of s. 84 of the Act, an excuse or defence for another unit owner's failure to pay assessed fees.

[167] The Majority argue that the 2007 and 2009 special assessments by CCC 3096 would not have been necessary if the Minority had paid or been forced to pay their arrears. The Majority therefore deny liability for their share of those two special assessments.

[168] This trial is not about what level of debt is owed by the Minority, the quantification thereof and their failure under s. 84 of the Act to pay the same. That is being determined in the trial of the Dewan Action now underway.

[169] The Minority unit owners in addition are not parties to this action. The Majority did not include the Minority owners in their counterclaim in this action. This court cannot decide liability of unit owners who are not parties to this action.

[170] The 2001 Order and the 2002 Order prohibit C.-A. Burdet and CCC 396 from pursuing recovery of the alleged debt owing by the Minority prior to trial. Beyond unsuccessfully appealing the 2002 order, the Majority never sought variation to that prohibition.

[171] The court in the Dewan Action may determine that the Minority owners during 1998 to April, 2002, are indebted to CCC 396 together with interest. In that case, the debt determined owing by the Minority to CCC 396 will result in a judgment.

[172] Any judgment and payment of liability determined owing to CCC 396 by the Majority in this action, and/or by the Minority in the Dewan Action, may result in surplus funds within CCC 396. That surplus within CCC 396 can be dealt with in accordance with s. 84(2) of the Act. This court may also consider the enforcement date of any judgment against the Majority in this action.

[173] The above possibilities currently are theoretical and do not impact Majority liability or quantum determination in this action.

[174] Each of these factions in CCC 396 have the same legal obligation under s. 84(1) of the Act, namely to pay condominium fees levied by the corporation and dispute liability thereafter. Instead, each faction has ignored condominium fee assessments, ignored this statutory obligation, paid what they wanted to and attempt to shield their obligation by alleged liability or wrongdoing of the other faction.

[175] The Majority argues that the monthly condominium fees would have been lower if the Minority had paid their alleged arrears, which according to the Majority, combined totalled some \$101,000 in 2002.

[176] The Majority was aware in 2002 upon the appointment of the Administrator that CCC 396 recorded the Minority owed this \$101,000.

[177] The Administrators distributed annual budgets to all owners. Those annual budgets for example, from 2003 to 2007, record revenue versus expense figures which are almost equal to one another or are very close to one another, each year. The annual revenues are condominium fees.

[178] The annual expenses recorded in the 2003 budget, cites the annual 2002 expenses which totalled some \$92,000. The annual expenses in the annual budgets for 2003 to 2007 remained at some \$60,000. Those annual expenses were virtually offset each year in the budgets by the amount of the announced condominium fees to be charged for that year. The Majority therefore should have known that the Minority was not paying their recorded arrears.

[179] The 2001 Order and the 2002 Order prohibit the President of CCC 396, C.-A. Burdet, and CCC 396 from taking any steps "to enforce any provisions of the Condominium Act, 1998, relative to alleged defaults and contributions to common expenses by the applicants (the Minority) until the issues raised in the motion are decided by this court..."

[180] The Majority with the above information:

- (a) Are correct that, if the Minority paid CCC 396 their recorded \$101,000 arrears, condominium fees for example in 2003 and 2004 would likely have been lower;
- (b) Were fully aware that CCC 396 and the Administrator in this period and thereafter, did not collect the subject arrears from the Minority; and
- (c) Never requested the court to remove the above prohibition and to direct the Administrator to collect such debt.

[181] Despite their above knowledge, including their knowledge of these 2001 and 2002 court orders; the Majority ten years later presents these arrears and the failure to collect the same as a defence and shield to their default and liability for unpaid condominium fees. In this defence, they make allegations of bias and improper conduct by CCC 396, the interim Administrator and M-L because the arrears of the Minority have not been collected and the recordings thereof are understated.

[182] The liability of the Minority is being determined in the Dewan Action. Any such liability is owed to CCC 396. It is not an entitlement of the Majority.

[183] Assignment for consideration of the Minority arrears to a third party to enable it to recover that debt, which the Majority argues the Administrator should have done, is merely an attempt to circumvent the 2001 and 2002 interim orders prohibiting collection. That is conduct this court is not prepared to condone.

[184] The continued attempt by the Majority to use this recorded Minority debt as a defence in this action is an attempt to prejudge the determination of that Minority liability issue in the Dewan Action. It is an invalid defence in this action.

#### **RIGHT TO SETOFF OF \$296,887**

[185] The defendants in paragraph 35 of their defence and 44 (e) (v) of their counterclaim, seek the right of setoff for any liability owed under promissory notes from CCC 396. The amount of liability of such promissory notes, are not pleaded by the Majority in their statement of defence.

[186] As on the summary judgment motion (para. 44), the defendants in this trial have not introduced into evidence the pre-2002 promissory notes from CCC 396 they rely upon to offset their liability to CCC 396 and allegedly totalling \$296,887. The financial statements of CCC 396 show this to be a contingent liability of CCC 396, owing to E.T.R.E. Inc.

[187] This September 30, 2011 determined that:

- (a) The level of relationship M-L noted between C.-A. Burdet and E.T.R.E. Inc., appears to show a direct relationship and level of control by C.-A. Burdet of E.T.R.E. (paras. 46 and 47);



- (b) The failure of C.-A. Burdet to produce invoices from service providers to E.T.R.E. Inc. for the period 1998 to 2001 (paras 47 and 48);
- (c) The apparent positions of conflict involving E.T.R.E. Inc., C.-A. Burdet and his position as a Director of CCC 396 (paras. 48 to 51, 56 to 57);
- (d) The \$296,887 the defendants claim as owing to Mr. Burdet or several or all of them, was not proven to be a setoff or counterclaim by the defendants against CCC 396, nor an issue in this action (paras. 53 to 61); and
- (e) The lack of proof that the \$296,887 was assigned by E.T.R.E. Inc. to Mr. C.-A. Burdet.

[188] No direct evidence was led in this trial as to the specific promissory notes or the individual amounts thereof as occurred in the summary judgment motion granted to CCC 396, beyond reference thereto in the in audited financial statements of CCC 396.

[189] Indebtedness is recorded owing in promissory notes by CCC 396 to E.T.R.E. in the financial statements of CCC 396. E.T.R.E. is not a claimant in this action and was only recently added in order to be bound by the decision herein as transferee of the Majority units.

[190] No evidence was led in this trial as to who such promissory notes are payable to other than E.T.R.E.

[191] The appropriateness of the liability owing to E.T.R.E. Inc. of \$296,887 is a central issue to be determined in the Dewan Action. The counterclaim as to this debt is not part of this trial.

[192] For the above reasons, the \$296,887 allegedly owing by CCC 396 to E.T.R.E. is not available as a setoff to the claim of CCC 396 for unpaid condo fees in this action.

### **MAJORITY'S EVIDENCE AS TO THEIR UNIT ACCOUNT BALANCES**

#### ***MONTHLY CONDOMINIUM FEES***

[193] In their statement of defence, the Majority correctly allege that at that point in time, the Administrator had failed to give them financial statements of CCC 396 for the period 2002 to 2008 and had held no annual meetings.

[194] They allege that the amount claimed in the liens of the Majority units is inaccurate and that amounts paid by the Majority owners to CCC 396 have been misapplied amongst their individual unit accounts.

[195] CCC 396 was partially successful on its motion for summary judgment on September 30, 2011, in this action against the Majority for unpaid condominium fees. The court therein;

- (a) Awarded partial summary judgment against the Burdet defendants in the amount of \$109,440.52;

- (b) Directed the release to CCC 396 of \$104,185 held in trust by counsel for CCC 396; and
- (c) Determined a trial was necessary as to the additional \$163,000 claimed owing by CCC 396, along with the validity of the liens and notices of power of sale against the defendant units.

[196] This court on the above summary judgment motion was unable to determine the liability issue in excess of \$109,442, due to the inadequate state of the records presented on the motion, including the absence of a per unit statement of account starting in 2002.

[197] The Majority unsuccessfully appealed this summary judgment decision granting partial judgment in the amount of \$109,440.52 for unpaid condo fees for the period April 1, 2009 to August, 2011 and payment towards that judgment by release of the \$104,185.16 held in trust.

[198] The Court of Appeal indicated that the issues in this trial, as contained in (para.2) of the January 11, 2012 order, were not appealed. That court held that the Act applies in this case and s. 84(3) (b) required payment of the unpaid condominium fees, regardless of the Majority's claim of offset.

[199] On this summary judgment motion argued in October, 2010, the Majority acknowledged (paras. 40 and 65), that they had made no payments to the Administrator or CCC 396 for 28 months between March 30, 2009 and August of 2011.

[200] The Majority in the affidavit of L.A. Burdet, exhibit 27, tab L, acknowledge they made no monthly condominium payments on their units between:

- (a) July 1 and October 30, 2002, totalling some \$12,816;
- (b) September, 2003 and May, 2004, totalling some \$19,000; and
- (c) May 1, 2009 and March 30, 2012, totalling some \$179,600.

[201] All of this contradicts the testimony of L.-A. Burdet in this trial that the Majority "never stopped paying monthly condominium fees".

[202] The above non-payments of condominium fees breached s. 84 of the Act and contravened the direction in the 2002 Order that condominium fees must be paid to the Administrator.

#### **COLLATERAL ATTACK ON SUMMARY JUDGMENT OF \$109,440**

[203] The Majority in argument request that the summary judgment against them of \$109,440 be set aside.

[204] The Majority according to their calculations claim as of October 26, 2010 a combined credit balance for their units of \$71,091.51, without interest and \$107,791.79 with interest. The Majority are thereby seeking to reverse the above summary judgment which is inappropriate.

[205] The summary judgment decision determined that a minimum of \$109,440 was owed and granted a final judgment in that amount. The Court of Appeal dismissed the Majority's appeal of that decision.

[206] The evidence confirms that the amount of that judgment was owed as of that date.

[207] That summary judgment for \$109,440.52 is not now an order subject to correction under rule 59.06.(1) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[208] The Majority has not on the evidence, proven fraud or relevant unknown facts later discovered under rule 59.06 (2) to justify setting aside that judgment.

[209] This is another attempt by the Majority to appeal that summary judgment against them. The reasons of that judgment include the admission of non-payment of that amount by the Majority.

[210] The arrears of the Majority exceed the amount of that judgment.

#### ***2007 AND 2009 SPECIAL ASSESSMENTS***

[211] The Majority did not pay their share of these two special assessments levied by the Administrator by CCC 396.

[212] The Majority challenge the validity thereof and argue neither would have been required had the Minority paid CCC 396 their arrears of condominium fees, penalties and interest. These are similar allegations to those in their counterclaim in the Dewan Action. Liability again of the Minority is being determined in the Dewan trial. Such alleged liability is not a defence in this trial.

#### ***MAJORITY'S DECEMBER 2007 ARREARS***

[213] In argument, the Majority (paras. 174-175) submits that their accounts were not in a negative position in December, 2007. This conveniently ignores the December 31, 2007 special assessment by CCC 396, of which the Majority's share was \$64,168 and which the Majority failed to pay.

#### ***MAJORITY ARREARS AFTER 2007***

[214] As to their arrears after December 2007, the Majority argue that they made "reasonable contributions" to common expenses and therefore complied with their s. 84(3) obligations under the Act. "Reasonable contributions" is not the test under s. 84(3).

[215] As to post December, 2007 arrears, the Majority submits that the opening words of s. 84, "Subject to the other provisions of the Act" relieves them of their subsequent default because CCC 396:

- (a) Breached a number of its obligations including the non-disclose of annual financial statements and restatements until 2011;

- (b) Refused to disclose financial information requested by the Majority;
- (c) Failed to apply the condo by-laws against the Minority;
- (d) Discharging arrear liens registered against the Minority; and
- (e) Failed to comply with sections 17, 55, 135 and 136 of the Act.

[216] This is an inaccurate interpretation of the introductory phrase of s. 84. Such an interpretation would defeat s. 84(3) (b) which creates a continuing obligation to pay condo fees, despite a claim against the corporation.

[217] This is but another example of the Majority arguing enforcing payment against them would be unfair and therefore relieves them of their obligation to pay condominium fees, because the interim Administrator and the Minority are in breach of obligations under the Act. That form of logic, impairs the financial viability of CCC 396. It is what s. 84(3) (b) is specifically enacted to prevent.

#### ***2007 SPECIAL ASSESSMENT***

[218] In 2007, CCC 396 had major roof repair expenses exceeding \$190,000.

[219] The 2006 annual financial statements indicate that as of December 31, 2006, CCC 396:

- (a) Had annual expenses for 2006 exceeded condominium revenue by almost \$30,000;
- (b) That major repair expenses in 2006 exceeded that year's contributions to the reserve fund by some \$2,000;
- (c) That the operations side of CCC 396 owed its reserve fund \$36,000; and
- (d) That liabilities (including some \$297.5K principal owing to E.T.R.E. Inc.) exceeded net assets by \$76,000.

[220] The 2007 annual financial statements indicate that as of December 31, 2007:

- (a) Operating expenses exceeded condominium revenue by \$2.4K;
- (b) Major repair expenses exceeded reserve fund revenue, which included a special assessment of \$141.5 K, by \$37K; and
- (c) Operations in CCC 396 then owed the reserve fund \$85.6K, up from \$36K in 2006.

[221] The Administrator on December 31, 2007, levied a special assessment totalling \$141,500. The Majority's share of that was \$64,168.50 which it did not pay.

[222] In argument (paras. 257-261), the Majority, having not led qualified evidence as to the then condition of the roof or what level of repair was required, submits the level of roof repairs contracted by the Administrator were excessive, inappropriate, exceeded the then financial capacity of CCC 396 and should not have been performed.

[223] The Majority are the first to argue that unit owners are bound by decisions made by the Board. The 2002 order transferred that management function to the Administrator.

[224] The Majority had to have seen the replacement of the roof on this building being carried out. The Majority once again decided to not seek court intervention to stop those repairs then being carried at the direction of a court appointed officer. The Majority incorrectly now eight years later raise the level of roof 2007 repair to deflect the issue of their liability for unpaid common expenses.

[225] As of December 31, 2007, the combined indebtedness of the unit accounts of the Majority totalled \$60,048. The Majority had unpaid arrears on December 31, 2007.

### ***2009 SPECIAL ASSESSMENT***

[226] A second special assessment was levied on November 13, 2009. It totalled \$152,381, of which the Majority's share was \$68,488. The Majority also refused to pay this assessment.

[227] The purpose of the 2009 special assessment was to reduce the accumulating deficit in the General Fund of CCC 396. That deficit in December, 2008, was \$288,730 and would have been \$351,727 in 2009, but for this 2009 special assessment. It remained a deficit of \$184,543 on December 31, 2009, even after this special assessment.

[228] The 2009 financial statements of CCC 396 also indicate that:

- (a) Operating expenses in 2009, without this special assessment, would have exceeded revenue by \$48,194; and
- (b) The 2009 general fund deficit of \$184,543 exceeded the reserve fund by \$57,440.

[229] It is to be remembered that no monthly condominium fees were paid to CCC 396 by the Majority between May 1, 2009 and April 30, 2012, totalling some \$179,600. That liability exceeds the amount of the 2009 special assessment and almost equals the remaining deficit in this General Fund as of December 31, 2009.

[230] The special assessments in 2007 and 2009 were appropriate and are valid.

[231] The Majority was required and failed to pay their share of the two special assessments, totalling \$132,616. L. A. Burdet in his calculations and evidence incorrectly records that liability as having been paid by the Majority.

### **OWNERSHIP OF CCC 396 ASSETS**

[232] The Majority submits (paras. 150 to 162) that:

- (a) The arrears of the Minority were and are reliable debts of CCC 396 because they have been reported in the unqualified audited financial statements prepared by M-L;
- (b) The Majority has “ownership rights over 42.779% of these CCC 396 assets” including these account receivables owed to CCC 396 by the Minority; and
- (c) CCC 396 was required to collect the arrears from the Minority or else it must assign the arrears of the Minority to a third party lender and use the consideration received from that assignment to pay the Majority’s share of what otherwise would be a special assessment against the Majority.

[233] Based on the above logic, L. A. Burdet credits the Majority accounts for “their share”, or ownership interest in the accounts receivable on the books of CCC 396, thus suggesting incorrectly, “payments” by the Majority including their “payment” of their share of the 2007 and 2009 special assessments.

[234] The Majority rely upon *Mazzon v. Wentworth Condominium Corporation No. 102*, 2012 ONCA 447, para. 9, to support their argument that they as unit owners have proportionate “ownership rights” to the account receivables owed the corporation.

[235] The Majority are not alone in this interpretation.

[236] Condominium Act – User’s Guide, A. Loeb, p. 111, states: “Note that a condominium does not legally own property, as all assets are owned by all of the unit owners in the same proportions as their common interests appear in the declaration.” This broad wording by this author, on its face, supports the Majority’s position.

[237] The issue in *Mazzon, supra*, involved money received by a condominium corporation and then disbursed by it. A former unit owner and others presented grounds to claim the money from the corporation, the Directors and others.

[238] The court held that the plaintiffs’ claims failed because the funds belonged to the condominium corporation. The court held that the plaintiffs have no direct interest in the funds. (para.11 and 13) The decision in *Mazzon* is contrary to this argument of the Majority.

[239] Any ownership confusion likely arises due to the wording of s. 18(2) of the Act, which states:

18(2) The owners share the assets of the corporation in the same proportions as the proportions of their common interests in accordance with this Act, the declaration and the by-laws.

[240] The Legislature could have, but did not in s. 18 (2), use more direct language, such as: “The owners own the assets of the corporation in the same proportion ...”

[241] The Legislature used the term “ownership” and a type of real property ownership in ss. 11 (1) and (2) of the Act.

[242] As to ownership of units and common elements, ss. 11(1) and (2) indicate those are assets owned by the unit owners.

[243] There are several instances where the Act provides when unit owners are entitled to receive a share of assets realized.

[244] Condominium corporations may be terminated under Part VIII of the Act whereupon the provisions of the Act cease to apply, namely:

- (a) Where the owners consent to termination of the condominium under s. 122;
- (b) In the case of substantial damage under s. 123;
- (c) Upon sale of all of the property under s. 124;
- (d) Upon expropriation under s. 126; and
- (e) Upon termination of the condominium by court order pursuant to s 128.

[245] Sections 124 and 126 each state that proceeds from sale and expropriation are to be paid to unit owners.

[246] Unlike s. 124 and 126 of the Act, sections 122, 123 and 128 are silent as to the owners' entitlement upon such events occurring. Section 129 specifically addresses that question and proves for distribution of net assets proportionately among the owners.

[247] Notwithstanding the articulation of owners' entitlement under sections 124 and 126, the Legislature nonetheless in s. 129, repeats the blanket provision that when the Act ceases to apply, the remaining assets belong to the unit owners.

[248] Section 84(2) by comparison, prohibits the distribution of a common surplus to unit owners.

[249] To interpret the phrase "The owners share the assets of the corporation" in s. 18(2), as "the owners own the assets of the corporation", opens a flood gate to claims to ownership, entitlement and possession of assets owned by the corporation, for which the Act provides little protection. If s. 18(2) creates ownership interest in all assets of the corporation, what prevents an owner demanding their share of condominium bank account balances or account receivables owed the corporation?

[250] The Act repeatedly refers to a condominium corporation's ownership of assets, as in sections 17(1) and (2), 18(1), 93(2) and 97(1), (2), (3) and (4). Such corporate assets must be other than condominium units or common elements. Bank accounts and account receivables of the corporation are among such additional assets.

[251] Section 1(1) of the Act defines a corporation created under the Act to be a corporation.

[252] Section 5 of the Act again confirms it is a corporation and without share capital. The non-application of the *Corporations Act* does not diminish the status of a corporation created under the Act.

[253] Section 92(1) of the *Legislation Act, 2006*, S.O. 2006, c. 21, Schedule F, states that a provision of an Act in Ontario that creates a corporation:

... gives it power to have perpetual succession, to sue and be sued and to contract by its corporate name, ..., and to acquire, hold and dispose of personal property for the purposes for which the corporation is incorporated; ...

[254] Bank accounts established by a condominium corporation and accounts receivables owed to that corporation are assets owned by the condominium corporation and are not owned and accessible by individual unit owners. It is incorrect to interpret s. 18(2) otherwise.

### **WHEN WAS \$104,815 PAID**

[255] The motion for summary judgment by CCC 396 was partially successful. The court concluded (paras. 67- 68, 77-78) that the Majority, having not paid condominium fees for 28 months from May 1, 2009 until August 1, 2011, independent of the Majority's debt balances prior to March 31, 2009, and excluding their non-payment of the November 13, 2009 special assessment, were indebted to CCC 396 in the amount of \$109,440.52 as of October 26, 2010.

[256] The Majority claims it made a payment to CCC 396 of \$104,815 on April 9, 2009, and criticizes M-L's recording of that payment in 2011.

[257] CCC 396 issued notices of sale in February 19, 2009 against units of the Majority for alleged indebtedness totalling \$96,354.34.

[258] The Majority in response, on April 9, 2009, paid \$104,815.16 under protest, to the lawyers of CCC 396. The Majority's payment term was that such money "be retained in that law firm's trust account and not released to CCC 396 pending the trial in this matter." Those payment terms were complied with until this court in its reasons granting summary judgment dated September 11, 2011, ordered release of those monies to CCC 396. Those payment terms of the Majority were in direct contradiction of s. 84(3)(b) of the Act.

[259] The Majority's calculations in this trial credit themselves with payment of \$104,185.16 on April 9, 2009, being the date of payment with the above condition it not be released to CCC 396 before trial. The Majority then claim interest thereon as it increased their combined condominium fee account credit balance. That payment was not received by CCC 396 until 2011, not in 2009.

[260] The argument of the Majority that they should be credited with this amount as of April 9, 2009 because "the money was there... The fact the plaintiff (CCC 396) refused to take it does not prevent the credit to apply", is illogical, without merit and is rejected.



**LIEN DISCHARGE IRREGULARITIES (Paras. 219 to 223)**

[261] Court direction should have been sought by the interim Administrator before discharging the pre-2002 liens registered against Minority units.

[262] Those discharges however have nothing to do with the level of arrears of the Majority and relate in no way to the credibility of M-L.

**OPENING UNIT ACCOUNT BALANCES**

[263] The Majority commence their calculations by crediting themselves for water account credits they claim, dating back to 1996. The Majority claims an annual credit for this up to and including 2012.

[264] The Majority's opening credit for water charges totals \$16,632.94. Such opening credit contradicts the evidence of Mr. Davidson who testified that C.-A. Burdet told him upon CMG's 2002 appointment as Administrator, that the opening accounts for the Majority unit owners should each record a zero balance. There is no evidence contradicting this testimony. This evidence contradicts the running accounts Majority credit balances presented and claimed by L. A. Burdet as of June, 2002.

**WATER "BY-LAW" CREDIT**

[265] The Majority claims entitlement to a credit for their lower consumption and therefore their lower liability for annual water charges to CCC 396 by the City of Ottawa.

[266] The Majority alleges the Administrator has failed to implement this by-law and M-L failed to adjust its reporting to reflect these credit entitlements owed to the Majority.

[267] The Majority claims its lower annual consumption of water entitles them to an annual credit to their unit accounts and an annual debiting to the Minority unit accounts to reflect the latter's greater liability. To this extent, the Majority claims its unit accounts should these water consumption credits and the Administrator's and M-L's failure to do so overstates the liability of the Majority.

[268] The annual water consumption credits as of December 31, claimed by the Majority, are:

- (a) 1996/97- \$6,675
- (b) 1998 – \$3,312
- (c) 1999 – \$3,319
- (d) 2000 – \$3,325
- (e) 2001 – \$3,142
- (f) 2002 – \$2,320
- (g) 2003 – \$1,609
- (h) 2004 – \$1,096
- (i) 2005 – \$1,555
- (j) 2006 – \$2,025
- (k) 2007 – \$2,568

(l)	2008 –	\$2,454
(m)	2009 –	\$3,298
(n)	2010 –	<u>\$8,942</u>
Total:		\$45,640

[269] The claim against the Majority by CCC 396 commences with the appointment of the Administrator in April, 2002, taking over management of CCC 396 from the Burdet Board.

[270] The Majority calculates their combined running account balances, calculated from December 31, 1997, were in a credit position continuously and totalled \$21,594 as of April 1, 2002. The water credits claimed by the Majority for the years ending 1996 to 2001 total \$19,775, thus forming the vast majority of the total credit balance claimed by Majority as of the appointment of the Administrator in April 2002.

[271] Mr. Davidson testified he met with C.-A. Burdet upon the court appointment of his firm and was told that the Majority unit accounts were at a zero balance in April, 2002 which is how the Administrator recorded those units.

[272] The Majority claims that each unit's consumption of water pursuant to a "by-law" of CCC 396 regulated and provides that:

- (a) Each unit is to be individually metered;
- (b) Owners unit accounts to be debited annually for their larger consumption and therefor proportionate cost of water consumed; and
- (c) In the case of the Majority, are to be credited for their lower water consumption cost.

[273] Mr. Brazeau testified that:

- (a) The relevant provision is the February 27, 1997, Amended Schedule A of By-Law No. 1, Section 19, referred to as the water "by-law";
- (b) The existence of this "by-law" amendment, or the need to adjust for this obligation between unit owners, was never communicated to M-L;
- (c) C.-A. Burdet in the summer of 2001 in retaining and instructing M-L to audit CCC 396 for the years ending 1998 to 2000, did not disclose this "by-law" amendment or the annual adjustment to unit owners accounts for this reason;
- (d) Mr. Brazeau was never aware of this amendment regarding water charges and metering until it was revealed during this trial in May, 2012. M-L thereupon included this calculation on M-L Report 3;
- (e) It is almost impossible for an auditor to know the existence of this water "by-law" without the client informing the auditors;

- (f) The audited financial statements of CCC 396 prepared by K. Lagasse, for the years ending December 31, 1998 to 2001, reveal no unit owner adjustment for water consumption or reference to this water "by-law";
- (g) It appears from documentation that for the years 1996 and 1997, CCC 396 was unable to obtain annual meter readings from two of the Minority units. One unit for a while did not have a water meter, while the other unit refused entry to obtain the reading. The water expenses attributed to those two units could not be adjusted in those years based on consumption. The Majority nonetheless claims a credit in 1996 and 1997;
- (h) The water credit calculations of L.A. Burdet for the benefit of the Majority for the years 1996 to 2010 fails to adjust for the City of Ottawa's fixed "Fire Supply Fee" which should be allocated on the basis of unit ownership percentage in the Declaration;
- (i) The City's sewer charge is a percentage of total consumption charges to CCC 396. To be consistent, it should be adjusted between owners like water consumption but was not in L.A. Burdet's calculations;
- (j) L.A. Burdet's calculations of unit water credits and debits do not account for the cost of water consumption in common areas like the common washroom on each floor of the building; and
- (k) M-L and L. A. Burdets water consumption adjustments regarding the Majority since 2006 are different.

[274] In argument, the Majority agreed to adopt the water credit/charge calculations recorded in M-L Report 3.

[275] The current requirement within CCC 396 to apportion its annual water cost between unit owners is invalid.

[276] C.-A. Burdet has been concerned since 1995 that several of the Minority owners were consuming more water than other owners and not therefore paying their proportionate share of the water charges of CCC 396 from the City of Ottawa.

[277] Water costs of CCC 396 historically had been a common expense for which unit owners were obligated to contribute, based on their condominium percentage expense liability as stated in the Declaration.

[278] As the then Secretary and Treasurer of CCC 396, C.-A. Burdet wrote on behalf of the Board to unit owners on December 19, 1995. He stated that the Board of CCC 396 required installation within 30 days of individual water meters in each unit. The meters were to be provided by the corporation with the owners to be responsible for the cost of installation.

[279] No meters were installed in the 18 basement units, which are not serviced with water.

[280] The stated rationale for this announcement was the: "flagrant abuse of the current common element character of the water supply; CCC 396 incurred an incredible surge by over 300% in water consumption during 1995 during 1995; last year's water bill was \$2,702, this year's will exceed \$9,000. Several documented violations of the Rules concerning water usage have now come home to most and have become a major financial burden."

[281] No by-law authorization is quoted in support of the above requirement of meters and individual liability for water consumption.

[282] In February, 1997, the Board of CCC 396 determined that a "by-law" amendment was required to create unit owner obligation for individual water consumption costs to be calculated using these meters.

[283] On February 26, 1997, the Board and owners, at the AGM of CCC 396, enacted an amendment to Schedule A of By-Law No. 1. It provides that city water consumption per unit is to be assessed by CCC 396 and calculated and paid by each unit owner. To accomplish that end, water meters were to be installed in each unit. Unit owners are required to provide access to their units to record consumption.

[284] The AGM minutes record that 31 of the 33 units were eligible to vote, that 29 voted on this subject with 28 in favour and one abstention. Two unit owners were held to be ineligible to vote, one of whom, and another owner, left the meeting before the vote. Only 28 unit owners consented to this "by-law" amendment.

[285] The above AGM resolution states:

The Board is directed to immediately take the necessary steps to bill water consumption according to water meter readings in each individual unit as stipulated in By-Law No. 1, Schedule A. The remaining water consumption from the common elements shall be paid by the Corporation. Water consumption by individual owners in derogation of the Rules and Regulations shall be assessed by the Board and billed directly to those same owners.

[286] Neither the "by-law" amendment, nor the AGM resolution state that they are effective retroactively and yet the Majority seeks a retroactive credit including 1996.

[287] The subject water "by-law" conflicts with the Declaration which should have but has not been amended to permit this change.

[288] The Act in force in 1997 was the *Condominium Act*, R.S.O. 1990, c.C-26 (the "1990 Act")

[289] Section 1(1) of the 1990 Act defines "common expenses" as the expenses related to the performance of the objects and duties of a corporation and all expenses specified as common expenses in the Act or in a declaration.

[290] Section 3(1) (d) of the 1990 Act requires that the declaration contain a statement of the proportions, expressed in percentages allocated to the units, in which the unit owners are to contribute to the common expenses.

[291] Section 32(1) of the 1990 Act provides that the owners shall contribute towards the common expenses in the proportions specified in the declaration.

[292] Section 28 (1) of the 1990 Act permits the Board of Directors to pass by-laws, not contrary to this 1990 Act or to the declaration.

[293] Section 28(1) of the 1990 Act allowed a corporation to pass by-laws governing the assessment and collection of contributions towards the common expenses, but not the amount of owners' contributions thereto: *Basmadjian v. York Condominium Corp. No. 52*, 1981 CarswellOnt 534 at para. 13 (Ont. H.C.J.).

[294] Pursuant to ss. 29(1) of the 1990 Act:

- (a) The Board may make rules respecting the use of common elements respecting the use of common elements and units or any of them to promote the safety, security or welfare of the owners and of the property or for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of other units;
- (b) Such rules shall be consistent with the Act, the declaration and the by-laws; and
- (c) A provision in a rule inconsistent with the Act is governed by the provision in the Act.

[295] The Declaration of CCC 396 states:

- (a) Each owner shall contribute to the common expenses in the proportion set for each unit in Schedule D. (para. 1.5);
- (b) Each owner is required to pay the corporation his proportionate share of common expenses as may be provided for in the by-law of the corporation. Common expenses include the expenses listed in Schedule E. (para. 2.1);
- (c) Schedule D lists the common expense percentage contribution for each unit; and
- (d) Schedule E provides that common expenses include all charges to the corporation for water.

[296] By-Law 1 of CCC 396 states:

- (a) The Board shall assess and levy against unit owners all expenses incurred in the proportion unit owners are required to contribute to the common expenses of the corporation as set forth in the declaration. (para. 11.1) (emphasis added);

- (b) The Board shall prepare annual budgets and include an estimate of expenses for the following year. Such budgeted expenses shall be allocated and levied by the Board among unit owners in accordance with the proportional unit responsibility for expenses as set forth in the declaration. (para. 11.1);
- (c) Each owner is required to pay the corporation the amount of the Board's assessment of that unit.(para.11.2); and
- (d) Owners are required to obey the rules and regulations listed in Schedule A of by-law 1. Owners may make additional rules or regulations respecting the use of common elements to prevent unreasonable interference with the use and enjoyment if units and common elements.(para.13.1) (above emphasis added)

[297] Schedule A of by-law 1, which is what was amended, contains 18 rules and regulations regarding the permitted use of units and common elements, such as the use of water apparatus, signage, conduct increasing the risk of fire, debris, electrical circuits, parking etc.

[298] The February 26, 1997 "by-law" amendment, states it is an amendment to Schedule A, "Rules and Regulations" of by-law 1.

[299] Two new rules and regulations, number 19 and 20, by this amendment were added to the Schedule A, Rules and Regulations of by-law 1.

[300] This amendment to the Schedule A, Rules and Regulations of by-law 1, does not amend the above relevant provisions of the Declaration, nor the above provisions of by-law 1, beyond Schedule A rules and regulations attached to by-law 1.

[301] The requirement that each unit owner is responsible to pay the cost of their individual water consumption conflicts with the designated percentage responsibility of unit owners to pay for the common expense of water in the Declaration and conflicts with by-law 1. Both create responsibility, independent of a unit's level of consumption, to pay their proportionate share of the water expense incurred by the corporation pursuant to the obligation percentages in the Declaration.

[302] These amendments to Schedule A, Rules and Regulations in addition, are not regulations relating to the enabling purpose of such rules as stated in by-law 1; namely, the permitted or prohibited use of units or common elements and the avoidance of interference with the use by owners of their unit or the common elements.

[303] An amendment to the Declaration and by-law 1 was required to create water cost liability based on individual unit consumption rather than the Declaration fixed percentage of the corporation's common expense for that utility.

[304] This 1997 water regulation amendment is invalid pursuant to *Eberts, supra*.

[305] The Majority is not entitled to such water credits.

**\$8,494.62 ATTORNMENT OF RENT**

[306] The Majority submits this subject demonstrates lack of credibility and bias of M-L against the Majority.

[307] Under the Burdet management in 2001, CCC 396 took the position that P. Dewan owed condominium arrears for his unit. The Burdet management therefore had CCC 396 garnish the rent of Mr. Dewan's tenant for seven months commencing in September, 2001. CCC 396 credited the unit account of Mr. Dewan with each monthly garnishment of rent.

[308] That garnishment by CCC 396 should have halted in November, 2001, because the 2001 Order prohibited any further steps to recover the alleged Minority arrears. CCC 396, under Burdet management, continued to garnishee rent from this unit for four more months, namely until March, 2002.

[309] The 2002 Order appointing the interim Administrator ordered C.-A. Burdet in Trust to pay the garnisheed amount of \$8,494 to Mr. Dewan. C.-A. Burdet disobeyed that direction for over three years, even after his unsuccessful appeals of the 2002 Order.

[310] Lalonde J. on April 29, 2005 in the Dewan Action, repeated his 2002 direction to C.-A. Burdet to pay Mr. Dewan \$8,494, plus \$1,044 interest, for a total of \$9,539.

[311] The parties submit the accounting in CCC 396 indicates that corporation credited the Dewan unit account in June, 2005 with \$8,494. This crediting by CCC 396 is not evidence of or compliance with these two court orders which require that:

- (a) Mr. Burdet is to pay Mr. Dewan; and
- (b) Mr. Burdet in 2005 is to pay Mr. Dewan, \$9,539.

[312] Credibility is impaired when parties breach court orders.

[313] Liability of the Minority is to be determined in the Dewan Action. Evidence therein will be led whether C.-A. Burdet in June, 2005, in fact made a payment to CCC 396 in the amount of \$8,494, which will then reflect whether Mr. Dewan received a double credit on this issue and owes this money to CCC 396 and whether CCC 396 therefore owes this "double payment" to C.-A. Burdet.

**CCC 396'S RECEIPT OF \$4,308 ATTORNEED RENT IN FEBRUARY, 2005**

[314] The Majority submit (paras. 224-228) that they are entitled to a credit in this amount for rent attorned in February, 2005 by CCC 396 as reflected in M-L Report 3,(T-5).

[315] The Majority are incorrect that M-L grants the Minority the same credit for attornment of rent in M-L Report 3, (T- 13). That is an issue to be determined in the Dewan Action.

[316] L.A. Burdet misstates the reporting of this issue in the M-L Report 3.

[317] M-L Report 3 is clear that:

- (a) The journals of CMG in this month record a payment against certain Minority accounts in this amount;
- (b) The above payments seem to come from several Minority owners, but that might not be the case;
- (c) The cheques to identify who are the payors of this amount, are no longer available; and
- (d) The evidence of L.A. Burdet does not identify the name of the Majority tenant he alleges this rent was garnisheed from or present proof of the garnishment.

[318] The criticism of and alleged bias of M-L by L. A. Burdet on this issue is unjustified.

[319] The evidence as to whether the Majority or Minority is entitled to a credit for this amount is contradictory. The reason for that includes the passage of time, the unavailability of the cheques in payment thereof, the lack of annual reporting to court by the interim Administrator and the failure of both factions to require that reporting.

[320] On balance, it appears this is a credit the Majority is entitled to as reflected in the M-L Report 3, appendices 3, 4 and 5.

#### **INTEREST BY-LAW 1**

[321] The Majority submits (para. 254) that s. 11(5) of by-law 1, which provides that arrears of common expenses owed to CCC 396 bear interest at the rate of 12% annually and compounded monthly, is "valid and must be applied".

[322] CCC 396 does not dispute this obligation. M-L calculated arrears of the Majority on that basis in M-L Report 3, appendices 11 to 14.

[323] Section 11(5) of by-law 1 is valid and enforceable.

#### **CONCLUSION AS TO LIABILITY**

[324] The Majority's allegation and calculations that they have never been and are not in arrears is rejected based on the above determination of the issues identified. The calculations by the Majority are inaccurate.

[325] The calculations of L.A. Burdet, given the rejection of the above claims to credits for matters such as the 2002 opening credit balances for the Majority, credits for lower water consumption such as "ownership" of their share of CCC 396 receivables invalidate his calculations as to the liability of the Majority.



[326] The evidence as to the Majority's liability to CCC 396 is M-L Report 3 and Mr. Brazeau's testimony in relation thereto. This court on the civil standard of proof, accepts the calculations and conclusions in M-L Report 3 as to the indebtedness of the Majority unit owners.

[327] This court concludes that on the civil standard of proof, the Majority unit owners are indebted to CCC 396 and judgment is hereby granted to the plaintiff:

- (a) For the principal amount per defendant for their unit(s) as set forth in M-L Report 3, tab 4, and Schedule "B" hereto, plus;
- (b) Interest on the principal indebtedness from the date recorded owing in M-L Report 3, tab 4, pursuant to paragraph 11.5 (a) of by-law 1, "at the rate of 12% per annum and shall be compounded monthly until paid", to August 31, 2012 and to December 23, 2014 for prejudgment interest; and
- (c) Against E.T.R.E. as to the above amounts in relation to its current ownership of the 23 units.

[328] M-L Report 3, tab 4, establishes the principal debt owing per unit and the date such debt became due. M-L Report 3, tab 11 establishes the Majority's combined running principal debt, plus interest at 12% per annum, compounded monthly on that combined Majority debt. The total of such combined principal and interest to August 31, 2012, is \$289,070.37.

[329] M-L Report 3 does not contain the calculation of interest per annum in the amount of 12%, compounded monthly, per unit, which is required to settle the amount of judgment per unit. The principal debt per unit, the date it became due, the interest rate level and its calculation frequency on such debt, plus the total combined total of principal and interest for all Majority units, however have all been proven.

[330] The amount and date such principal debts per unit became due, together with the rate and frequency of interest calculation thereon permits this court, through multiplication and addition, to calculate the interest due on the principal debt unpaid in M-L Report 3, tab 4, per unit, to August 31, 2012, and thereafter, to date to incorporate prejudgment interest.

[331] This court in this decision has already made a number of calculations. The above elements to be multiplied and added to calculate compound interest per unit are already in evidence.

[332] Time restraints prevents this court itself making the multiplications and additions per unit required to record compounded interest per unit, which counsel are hereby required to complete in order to settle the terms and total of this judgment.

[333] Counsel are by January 16, 2015, to exchange their calculation per unit of 12% compound interest on the principal debt recorded in M-L Report 3, tab 4, to August 31, 2012 and to December 23, 2014. In the event of a dispute as to the calculation thereof, counsel shall appear in court on January 30, 2015, with their interest calculations and totals, their objections to those of the other parties and their draft judgment. This court will thereupon settle the interest calculations and the judgment.

**LIENS AND NOTICES OF SALE UNDER LIENS**

[334] In its September 30, 2011 Reasons, paras, 5-8 and 18-21, this court determined that:

- (a) On April 29, 2005, CCC 396 registered condominium liens to secure unpaid common expenses pursuant to s. 85 of the Act on basement units 1 through 10 and 13 through 18;
- (b) The liens against those 16 basement units were for unpaid expenses pursuant to the 2002 and 2005 orders of Lalonde J. in the Dewan Action, in the amount of \$72,248.83;
- (c) CCC 396 registered liens on March 31, 2008 against Units 2, 3, and 9 (Level 1) and Units 2 and 3 (Level 2) securing common expense arrears owing for the three months prior to that date which combined totalled \$52,525.05;
- (d) On February 19, 2009, CCC 396 executed and delivered notices of sale under lien pursuant to Part III of the *Mortgages Act*;
- (e) CCC 396, as to the \$72,248.83, alleged it only received \$51,253.52;
- (f) The defendants paid the full amount ordered in the 2002 and 2005 Orders by June 10, 2005, by paying \$20,996.31 to counsel for Patrick Dewan et al. and \$51,252.52 to the interim Administrator of CCC 396, for a total of \$72,248.83; and
- (g) CCC 396 alleged there were unpaid common expenses for each of these units as of June 10, 2005.

[335] According to M-L Report 3, appendix IV; by June 10, 2005, the Majority had paid the \$72,248.83 owing under the 2002 and 2005 orders of Lalonde J. The Majority however by that date, for most of the Majority units, remained indebted to CCC 396 as follows:

- (a) Each of the then 18 basement units was indebted for unpaid condominium fees. Under appendix IV of M-L Report 3, seventeen of those units each owed \$207.70. One unit, A-4, owed \$558.13. The total debt of these 18 units on June 10, 2005 was \$4,090.56;
- (b) Units 101-B and 101-C as of this date, had credit balances each in the amount of \$1,749.82; and
- (c) Units 106, 202 and 203 each were indebted to CCC 396 on this date in the amount of \$397.56 for 106 and \$1,521.62 for unit 202 and 203.

[336] Under s. 85(7), CCC 396 was required as of June 10, 2005, to register a discharge of the liens against units 101-B and 101-C. Those two liens cannot now be relied upon to claim possession or sale thereof as no new liens against those two units were subsequently registered.

***UNITS 1 TO 10 AND 13 TO 18, Basement Level A***

[337] CCC 396 on April 29, 2005, registered one lien against 16 of the 18 basement units, then registered in the name of C.-A. Burdet in Trust, for unpaid common expenses in the amount of \$72,248.83. The liens are registered against units 1 to 10 and 13 to 18, Level A.

[338] No lien was registered against units 11 and 12, Level A, by CCC 396. (exh. 1, T-13 and 25) C.-A. Burdet in Trust conveyed title to Units 11 and 12, Level 1, to two separate persons on April 4, 1997 and then had title thereto conveyed back to him in October, 2003.

[339] Although the \$72,248.83 listed in the liens registered against basement units 1 to 10 and 13 to 18, were for costs which the Majority paid on June 10, 2005, each such unit on April 25 and June 10, 2005 also owed arrears of condominium fees. Those arrears are covered by and secured by this lien under s. 85(1) (3) of the Act.

[340] The same 16 basement units continuously owed unpaid condo fees from April 2005 until August 30, 2012 (exh. 23, T-4) notwithstanding the payment from trust received on September 1, 2011.

[341] The liens against units 1 to 10 and 13 to 18 are valid.

[342] CCC 396 issued Notices of Power of Sale under Lien for each of units 1 to 10 and 13 to 18, Level A, dated February 19, 2009. Each of those 16 notices claim unpaid condominium fees, special assessment arrears, interest plus \$1,000 legal fees and disbursements, totalling \$40,523. Of that total, some \$35,600 is for unpaid condominium fees and special assessments.

[343] Exhibit 23, T-4, indicates that the unpaid principle arrears in February 2009, for each of these 16 basement units was approximately \$1,500.

[344] The principal amounts claimed due are materially overstated. These Notices of Power Sale against these 16 units are invalid, *Grenville Goodwin Ltd. v. MacDonald*, 1988 ONCA, 4737, p.765-769 and *Toronto-Dominion Bank v. Pallet Developments Ltd.*, (1984), 47 O.R. (2d) 251. Such notices will have to be re-issued with the resulting redemption periods.

***5 UNITS ON LEVELS 1 AND 2***

[345] CCC 396 on March 31, 2008, registered:

- (a) One lien against unit 2, Level 1, for unpaid Condominium fees in the amount of \$10,820.35;
- (b) One lien against unit 3, Level 1, for unpaid common expenses in the amount of \$10,820.35;
- (c) One lien against unit 9, Level 1, for unpaid common expenses in the amount of \$7,456.50;

- (d) One lien against unit 2, Level 2 for unpaid common expenses in the amount of \$11,638.18; and
- (e) One lien against unit 3, Level 2 for unpaid common expenses in the amount of \$11,789.67.

[346] On March 19, 2008, each of the above 5 units, pursuant to exhibit 23, tab 4, owed arrears of condominium fees.

[347] On February 19, 2009, CCC 396 served a Notice of Power of Sale under Lien for each of these five Majority units, for unpaid condominium fees, special assessments, interest and \$1,000 legal cost. The debt amount listed in these notices for unpaid condo fees and special assessments, excluding interest and costs, was:

- (a) Unit 2, Level 1 - \$10,140;
- (b) Unit 3, Level 1 - \$10,128;
- (c) Unit 9, Level 1 - \$6,698;
- (d) Unit 2, Level 2 - \$9,040; and
- (e) Unit 3, Level 2 - \$9,040.

[348] The above notices each claim additional amounts for interest and costs.

[349] M-L Report 3 (exh23, T-4) identifies the amount owing in February, 2009, for each of these units, without interest, was:

- (a) Unit 2, Level 1 - \$5,258;
- (b) Unit 3, Level 1 - \$5,258;
- (c) Unit 9, Level 1 - \$6,305;
- (d) Unit 2, Level 2 - \$9,501; and
- (e) Unit 3, Level 2 - \$9,501

[350] The Notices of Power of Sale for units 2 and 3, Level 1, materially overstate the arrears of condominium fees then owing are therefore invalid and will have to be re-issued with the resulting redemption period.

[351] Such notices of sale against unit 9, level 1 and units 2 and 3, level 2 however are valid.

#### **POSSESSION AND EXERCISE OF NOTICES OF POWER OF SALE**

[352] The validity of the alleged arrears of the Minority is yet to be determined in the Dewan Action.

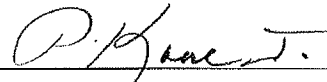
[353] Given the failure of the Minority to comply with the 2001 Order to convert that action from application to a statement of claim, it would be inequitable given the relatively imminent conclusion of the Dewan trial, to subject Majority owners in the interim to the delivery up possession and permit sale of those units, until CCC 396 knows how many units in total are to be sold. Presumably the defective notices of power of sale will be corrected, served and result in a further redemption period.

[354] In short, CCC 396 will soon know how many and how much all units owners in this building owe for arrears.

[355] Given the factions are limited to two and the January, 2015 conclusion of the Dewan Trial; the rights exercisable by CCC 396 under the above valid Notices of Power of Sale are suspended until the expiration of 30 days following the date of the decision in the Dewan Action whereupon they may be exercised.

### COSTS

[356] Written submissions for cost by claimants thereof are to be served and filed within 30 days from the date hereof. Any reply thereto is to be served and filed three weeks after the date of being served with submissions seeking costs.

  
\_\_\_\_\_  
Kane J.

**Released:** December 23, 2014

**SCHEDULE "A"****COMBINED ACCOUNT BALANCES – INCLUDING %**

<b>Date</b>	<b>M-L</b>		<b>A.L. Burdet</b>	
	<b>Majority</b>	<b>Minority</b>	<b>Majority</b>	<b>Minority</b>
June, 2002	\$0	\$81,724 (-)	\$22,738 (+)	\$118,040 (-)
December, 2011	\$257,391 (-)	\$294,378 (-)	\$93,722 (+)	\$422,646 (-)
August 20, 2012	\$289,070 (-)	Not indicated	\$124,910 (+)	Not indicated
	*No water consumption credits		*Includes annual water consumption	
			A credits to Majority	
			B debits to Minority from and including 1996	

**SCHEDULE "B"**

<b>Unit/Level</b>	<b>Defendant</b>	<b>August 31, 2012 Debt Owing, Including 12% Interest Compounded Monthly</b>
1 - A	Claude-Alain Burdet in Trust	\$4,424.89
2 - A	"	"
3 - A	"	"
4 - A		\$1,853.27
5 - A	"	\$4,424.89
6 - A	"	"
7 - A	"	"
8 - A	"	"
9 - A	"	"
10 - A	"	"
11 - A	"	"
12 - A	"	"
13 - A	"	"
14 - A	"	"
15 - A	"	"
16 - A	"	"
17 - A	"	"
18 - A	"	"
2 - 1	1457563 Ontario Corporation	\$24,928.77
3 - 1	"	\$3,384.80
9 - 1	Janet Sue Burdet	\$19,297.80
2 - 2	Janet Sue Burdet	\$27,035.80
3 - 2	"	"

**CITATION:** Carleton Condominium Corporation No. 396 v. Burdet, 2014 ONSC 7411

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

CARLETON CONDOMINIUM CORPORATION NO.  
396

Plaintiff

**- and -**

CLAUDE-ALAIN BURDET, CLAUDE-ALAIN  
BURDET IN TRUST, 1457563 ONTARIO  
CORPORATION, 1457563 ONTARIO  
CORPORATION IN TRUST, JANET SUE BURDET,  
NELSON STREET LAW OFFICES, L'ACADEMIE  
CHRISTIANE SAUVE INC. and INTERNATIONAL  
BEAUTY DEPOT

Defendants

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**REASONS FOR JUDGMENT**

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Kane J.

**Released:** December 23, 2014