Court of Appeal for Saskatchewan
Docket: CACV3089

Citation: *Goertz v The Owners Condominium Plan No. 98SA12401*, 2018 SKCA 41
Date: 2018-05-29

Between:

Robin James Goertz

Appellant
(Applicant)

And

The Owners Condominium Plan No. 98SA12401

Respondent
(Respondent)

Before:	Ottenbreit, Whitmore and Schwann JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Mr. Justice Ottenbreit
In concurrence:	The Honourable Mr. Justice Whitmore The Honourable Madam Justice Schwann
On Appeal From:	2017 SKQB 135, QBG 384 of 2017, Saskatoon
Appeal Heard:	January 10, 2018
Counsel:	Robin Goertz appearing on his own behalf Megan Lorenz for the Respondent

Ottenbreit J.A.

I. INTRODUCTION

[1] Robin James Goertz is the owner of condominium units registered as part of Condominium Plan No. 98SA12401. The Owners Condominium Plan No. 98SA12401 (Condo Corp) is a statutory corporation created pursuant to *The Condominium Property Act, 1993*, SS 1993, c C-26.1 [*CPA*]. Mr. Goertz appeals the decisions of the Queen's Bench Chambers judge dated May 12, 2017 (*Goertz v The Owners Condominium Plan No. 98SA12401*, 2017 SKQB 135 [*Chambers Decision*]), and June 6, 2017. The *Chambers Decision* determined primarily that the Condo Corp properly suspended Mr. Goertz's right to vote at its annual general meeting of owners (AGM) for failure to pay monies owed by him to the Condo Corp. That decision also dismissed Mr. Goertz's application respecting oppressive conduct and other relief sought against the Board of Directors of the Condo Corp (Board). The decision of June 6, 2017, dismissed Mr. Goertz's application to the Chambers judge to modify his *Chambers Decision* and to address certain issues that Mr. Goertz believed were not addressed therein.

[2] For the reasons hereinafter set forth, Mr. Goertz's appeal is dismissed.

II. FACTS AND BACKGROUND

[3] Mr. Goertz was the developer of land and condominium units that became registered as Plan No. 98SA12401. It is known as Erindale Village (Erindale). Erindale is comprised of 44 bare land units with similar dimensions. A bare land unit is defined by the *CPA* as land situated within a parcel and described as a unit by reference to boundaries governed by monuments placed pursuant to *The Land Surveys Act, 2000*, SS 2000, c L-4.1, rather than by reference to floors, walls and ceilings in a building. Mr. Goertz owns 11 units in Erindale.

[4] There is a grassed area of approximately 25 feet behind each unit. Although some or all of this area may not be common property, it is treated by the Condo Corp as common property and the Condo Corp incurs common expenses to maintain this area, for example, to cut the grass.

[5] The background that follows reflects a long-standing conflict between Mr. Goertz and the Condo Corp, the earliest signs of which appear to be a dispute about unpaid invoices the Condo Corp charged to Mr. Goertz in March 2014 for the cleanup of weeds at some of his units.

[6] Mr. Goertz was the treasurer of the Condo Corp from 2005 to mid-2014. He was also a long-time member of the Board until February 6, 2015. He was terminated as a Board member by the Board, ostensibly in accordance with s. 3.5 of Bylaw No. 1 of the Condo Corp (Bylaws) because he was in arrears of payment of monies he owed to the Condo Corp and because he was absent from three consecutive Board meetings without permission of the Board. At the AGM on March 8, 2015, the unit owners elected a new Board member in his place.

[7] On February 23, 2015, the Board passed a resolution requiring each owner to pay a deposit of one month's rent (the deposit) on each unit rented by the owner, effective April 1, 2015. The Board purported to pass the resolution in accordance with s. 11.11(e) of the Bylaws. The deposit was assessed because in the past the Condo Corp was required to pay a $4,000 insurance deductible when a tenant in a unit had shut off the water in the unit and the water pipes froze and cracked, resulting in damage to the common property.

[8] All owners renting their units were informed of their obligation to pay the deposit. This included Mr. Goertz, who received a request on March 9, 2015, from the Board to pay the deposit for each of what the Board believed to be his 10 rented units and to provide the names of his tenants in accordance with s. 12.10 of the Bylaws. Mr. Goertz declined to pay the deposits or provide the names requested.

[9] On April 2, 2015, Mr. Goertz began what turned into repeated requests to the Board for documentation. He asked for copies of the minutes of all Board meetings after February 6, 2015, minutes of the AGM of March 8, 2015, and a time and location to review the general ledger and all accounts for the Condo Corp from January 1, 2014, to that date.

[10] On April 11, 2015, Mr. Goertz notified the Board that after he received the requested information, it was his intention to call a meeting of the owners to address issues such as non-compliance of the Bylaws by members of the Board, selective enforcement of the Bylaws, whether Board members were committed to fair and equitable treatment of all owners, the

suitability of a specific director to remain a member of the Board in light of harsh comments sent to Mr. Goertz and copied to others by that director and to address the need for deposits.

[11] On April 15, 2015, the Board replied stating that because Mr. Goertz was no longer a Board member he was not entitled to copies of the minutes, but that he would receive a copy of the minutes of the March 8, 2015, AGM in accordance with past practice. Mr. Goertz's request to view the general ledger was denied on the basis that it was confidential and was, in any event, consistent with financial records presented to the owners at the March 8, 2015, AGM, which he did not attend. The Board explained to Mr. Goertz that it required deposits because of recent significant payouts of insurance deductibles and that it was instituting the deposit pursuant to s. 77(1) of the *CPA*. The Board also raised another issue with Mr. Goertz. The Board told Mr. Goertz that despite being asked to remedy the issue of dog feces littering the patio of his rental unit 458, the lawn in front of that unit and neighbouring unit 460, he had not done so. The Board indicated to him the damage caused by dog feces would be remedied by the Condo Corp and he would be billed for the cost.

[12] On May 13, 2015, the Board sent a third notice to Mr. Goertz requesting the deposits and indicating that he was in arrears of such payments. The Board indicated that the Condo Corp intended to pursue action against him if the deposits were not paid within ten days.

[13] The Condo Corp repaired the lawn damage mentioned previously and sent Mr. Goertz an invoice dated May 27, 2015, for $413.43. In December 2015, the Board advised Mr. Goertz of a second complaint about dog feces on the lawns of units 456, 458, and 462 from a tenant's dog in unit 458. Between May 2015 and February 2016, the lawn repair invoice and deposits remained unpaid.

[14] On February 16, 2016, the president of the Condo Corp informed Mr. Goertz that he was in arrears with respect to money he owed to the Condo Corp, including weeding bills outstanding since March 2014, the invoice for $413.43 since May 27, 2015, and deposits on his 10 rental properties since March 9, 2015. The Condo Corp advised Mr. Goertz that it would be invoking s. 41(8) of the *CPA* with regard to those arrears because they had been outstanding for more than 30 days. He was advised he would not be allowed to vote at the AGM on March 13, 2016, unless he conformed to s. 41(9–11) of the *CPA* and made payment of the outstanding amounts in a

manner satisfactory to the Board. Because Mr. Goertz had not provided the Board with the information it had requested about the rent for his units, the Board proposed that he should pay the sum of $1,612 for each unit, which represented the average of the deposits paid by owners of four other rented units in Erindale. He was also told that if he failed to make the proposed payments, the Board would proceed to Small Claims Court to collect the outstanding amounts, but that the Board trusted there could be some satisfactory arrangement made.

[15] Mr. Goertz's response on March 10, 2016, was to renew his April 2015 request for the minutes and financial documents of the Condo Corp and Board, ask for statements of account for his units, dispute the suspension of his right to vote at the AGM and suggest that the dispute be mediated or arbitrated. The Board responded with confirmation that Mr. Goertz would only be allowed to vote at the AGM on March 13 if he paid the outstanding sums requested from him. The Board suggested that although it had concerns regarding the confidentiality of the Board minutes and the general ledger, it was prepared to arrange for Mr. Goertz to review these documents at its lawyer's office and proposed a date and time to do so.

[16] Mr. Goertz, not having paid the sums requested by the Board, was not allowed to vote at the March 13, 2016, AGM. At that AGM the owners passed various amendments to the Bylaws including a definition for the term *contributions*. These amendments were filed with the Corporate Registry on March 30, 2016.

[17] The day after the AGM, Mr. Goertz renewed his request for copies of the Board minutes and asked for copies of the general ledger for 2014 and 2015, stating inexplicably that he would schedule a time to review the financial records after he got those very same documents. The Board responded on May 10, 2016, by again inviting Mr. Goertz to review the Condo Corp's documents, except for financial information, which the Board understood to be confidential, at its lawyer's office. Mr. Goertz did not accept this invitation.

[18] In April and July 2016, further invoices from the Condo Corp were sent to Mr. Goertz. These were for removal of dog feces from a lawn in the amount of $75 and for the cost of reseeding a lawn damaged by dog feces for $80.

[19] On May 30, June 21, and August 21, 2016, ostensibly in accordance with s. 81(1) of the *CPA* and s. 12.6 of the Bylaws, the Condo Corp sent notices out to Mr. Goertz's tenants requesting payment of the deposits directly from them.

[20] On October 25, 2016, the Condo Corp commenced an action in the Provincial Court under *The Small Claims Act, 1997*, SS 1997, c S-50.11, with a hearing set for March 30, 2017, claiming deposits on the ten units owned by Mr. Goertz and claiming payment for the outstanding invoices.

[21] On February 27, 2017, the Board advised Mr. Goertz he would not be allowed to vote at the AGM on March 13, 2017, unless he paid the deposits and invoices. The impasse between the Board and Mr. Goertz continued. Mr. Goertz made no payments on either the invoices or the deposits. Mr. Goertz was not allowed to vote.

[22] Mr. Goertz's response on March 6, 2017, was to request a statement of account for each of the 11 units that he owned detailing all charges and credits for the period January 1, 2014, to that date; minutes of the Board meetings in electronic format from February 1, 2015, to that date; general ledgers for the years 2014, 2015 and 2016; a certified copy of the Bylaws in print format; a list of the owners as at the date the notice was provided for the AGM; and, an estoppel certificate for 478 Perehudoff Crescent, which was part of Erindale.

[23] On March 9, 2017, the president of the Condo Corp responded to Mr. Goertz's March 6 requests. He noted that with respect to a statement of account for his units, Mr. Goertz could refer to his bank statements, but that any monies owing by him were set forth in the Small Claims Court proceedings. He advised that the Board minutes were confidential, as was the general ledger, and that Mr. Goertz had received the statements that had been reviewed by an accountant in past years. He told Mr. Goertz that a copy of the amended Bylaws had been delivered to him as part of the court proceedings, that the list of registered owners was confidential and that he could obtain the estoppel certificate on payment of the appropriate fee. He also indicated that the Board had blocked any further electronic communication from him and that he would have to communicate via Canada Post.

[24] A case management conference of the Small Claims matter had been set for March 30, 2017. Mr. Goertz served and filed the originating application that initiated this matter returnable March 30, 2017. In his application, Mr. Goertz requested a full spectrum of relief. This included an order that the Board provide the documents he had been requesting, a declaration that the definition of *contributions* in the Bylaws was *ultra vires* the statutory definition in the *CPA*, a declaration that he was not in arrears of contributions, and that he would be allowed to attend and vote at AGMs. He also requested an order under s. 99.2 of the *CPA* prohibiting the Board from engaging in oppressive conduct to him, an order under s. 99.1 of the *CPA* that the Condo Corp and the Board fulfill its duties pursuant to ss. 35 and 39 of the *CPA,* and an order that the Board adhere to the *CPA* and *The Condominium Property Regulations, 2001*, RRS c C-26.1 Reg 2 [*Regulations*], and not pass Bylaws contrary to the *CPA.* Last, he requested an order under s. 101 of the *CPA* appointing an administrator of the Condo Corp.

[25] On March 24, 2017, the Provincial Court judge transferred the Small Claims proceeding to the Court of Queen's Bench stating that Mr. Goertz had commenced a proceeding in that court dealing with the issues in the Small Claims matter and that the relief sought in the originating application was beyond the jurisdiction of the Provincial Court.

[26] It is common ground that Mr. Goertz had throughout paid his common expenses and reserve fund fees levied by the Condo Corp. To the date of the appeal hearing, Mr. Goertz had not paid the deposits or the invoices. One tenant of Mr. Goertz has paid the amount of the deposit directly to the Condo Corp.

III. THE CHAMBERS DECISION

[27] The Chambers judge at the outset noted that Mr. Goertz and the Condo Corp had agreed on some matters:

> [7] During the hearing before me on April 13, 2017, the following matters were clarified and agreed to by the parties:
>
> a. The CC has or will forthwith provide to Goertz hard copies of:
>
> i. Minutes of the board of directors from February 15, 2015 to the present;
>
> ii. The general ledger of the CC for the years 2014 through 2016;

iii. A list of the registered owners of the units in the CC; and

iv. Goertz will forthwith pay a charge of 25 cents per page for each page so copied and provided.

[28] The Chambers judge then addressed deficiencies in the evidence underlying Mr. Goertz's application, noting Mr. Goertz had improperly refused or neglected to disclose which of his units were rented, to whom and for how much. He also noted that during the course of the hearing before him Mr. Goertz had disclosed that four units were currently rented, two units had been rented in the past and the tenant of one unit had paid the deposit to the Condo Corp. The Chambers judge accepted this information as facts admitted for the purposes of the application.

[29] The Chambers judge addressed Mr. Goertz's submission that because the Condo Corp had not placed a certified copy of the Bylaws before the court, there were no Bylaws proven and he should therefore succeed in his application. The Chambers judge noted that it was Mr. Goertz's responsibility to place before him any evidence to support his application. He noted that there was no express statutory direction that a certified copy of the Bylaws was required in proceedings before the court and therefore he would apply the usual laws of evidence. In the absence of evidence to the contrary, he accepted the Bylaws were proven by the copies thereof exhibited to the affidavit of Mr. Baker. He noted that Mr. Goertz's position with respect to the Bylaws and his refusal to provide rental information were examples of unreasonable positions taken by Mr. Goertz in his relationship with the Condo Corp.

[30] The Chambers judge noted that it was the right of the Condo Corp pursuant to s. 77 of the *CPA* to require deposits. He determined it was not oppressive for the Condo Corp to proceed on the basis that Mr. Goertz was renting all units he owned and assess a deposit against each. He stated Mr. Goertz could easily have ensured that proper assessments of deposits occurred by providing the rental information he was obligated to provide.

[31] The Chambers judge reviewed Mr. Goertz's argument that the definition of *contributions* in the Bylaws was not in accord with the *CPA* and that the term was restricted to contributions to the common expenses and reserve funds and that, because he was not in arrears of such contributions, the suspension of his right to vote at the AGM was improper.

[32] The Chambers judge began his analysis by noting ss. 44(1) and 47(1)(e) and (n) of the *CPA* allow a condominium corporation to pass bylaws providing for control, management and administration of the units and common property. He also noted ss. 11.11(a) and (b) of the Bylaws allowed the Condo Corp to enforce the Bylaws and to correct any default by an owner resulting from his or her conduct or the conduct of an occupant of his or her unit and to pursue either the owner or occupant for the cost of remedying such default.

[33] The Chambers judge distinguished several cases cited by Mr. Goertz dealing with *The Condominium Property Act*, RSA 2000, c C-22. He concluded that these decisions did not assist him or provide guidance regarding the issue of whether the Condo Corp could suspend voting rights pursuant to s. 41 of the *CPA* or s. 7.8 of the Bylaws and whether the definition of *contributions* in the Bylaws was *ultra vires* the *CPA.*

[34] The Chambers judge proceeded to construe the term *contributions* using the modern principle of statutory interpretation set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 [*Rizzo*]. He noted that because the term was not expressly defined by either the *CPA* or the *Regulations* its meaning must be context and usage specific.

[35] He noted s. 47 of the *Regulations*, argued by Mr. Goertz as defining *contributions*, expressly limited its application to ss. 57 and 58 of the *CPA* and there was no basis to conclude that the Legislature intended s. 47 to apply to any other part of the *CPA*. He also noted that by virtue of s. 12 of *The Interpretation Act, 1995*, SS 1995, c I-11.2, the marginal notes of s. 47 of the *Regulations*, "contributions for common expense fund and reserve fund", were not part of the enactment but had been inserted for convenience of reference only and could not assist in the interpretation of the term.

[36] The Chambers judge noted that the word *contributions* was used in varying contexts and senses throughout the *CPA* and that its meaning in s. 41 must be sensitive to the context where it was used and the intention of the Legislature when dealing with voting rights. He determined that the Legislature could have limited the application of s. 41 to arrears of condominium fees or contributions to the common expenses fund or the reserve fund, but had not done so.

[37] He determined that the phrase "any contributions payable *with respect to the owner's unit*" (emphasis added) found in s. 41(5) and (8), and referred to in subsections (9), (10) and (11) of s. 41 of the *CPA*, in its ordinary and grammatical meaning, was broad and expansive, encompassing *debts* attributable to the owner's units. He noted the word *contributions* was used interchangeably with the concept of arrears, which could include both arrears for common expenses and reserve funds, as well as other debts. He observed there was nothing in the language in s. 41 or within the *CPA* as a whole that limited the scope of *contributions* or arrears to a specific category of debt to a condominium corporation. He concluded that nothing in the *CPA* in relation to common expenses or reserve funds could be interpreted as limiting the power of the Condo Corp to collect other indebtedness. He concluded that the words used in s. 41 could therefore extend to any *contribution*, assessment or indebtedness that had a connection to a unit. He did not determine whether the scope of the definition extended to "fines" as referenced in s. 99 of the *CPA*.

[38] The Chambers judge also noted that the express power to make Bylaws in s. 47 of the *CPA* did not limit the power of condominium corporations to collect other indebtedness owed by owners nor override the specific disenfranchisement of owners who are indebted as provided by s. 41. He noted that in Part IV of the *CPA*, ss. 54–64 were directed only at the common expenses fund and the reserve fund and did not govern relationships between owners and condominium corporations that arose independent of the apportionment scheme for those fees.

[39] The Chambers judge also stated that it would be unfair to the other owners of the Condo Corp to simply proceed to repair any damage to the common area caused by an owner or occupant using common expenses funds without looking to the responsible owner for indemnification. He noted that such indebtedness was not a common expense, but one to which the responsible owner was obligated to contribute. He noted that damages caused to the Condo Corp's property could have significant financial and operating consequences and it would be illogical to conclude that the Legislature intended it was only arrears of common expenses fund and reserve fund assessments that triggered the loss of entitlement to vote.

[40] He noted that s. 79.1 of the *CPA* made it clear that an owner had an obligation to pay a condominium corporation for the damage caused to common property of the condominium

corporation by the occupant of a unit and associated with this was the specific obligation to pay a deposit. He stated that ss. 34(4), 77(1) and 79.1(1) of the *CPA* demonstrated that a condominium corporation had the right and power to impose obligations other than for condominium fees and the right to collect indebtedness howsoever arising.

[41] The Chambers judge noted that s. 11.11 of the Bylaws that dealt with the right of the Condo Corp to pursue relief against a defaulting owner had initially been put in place by Mr. Goertz himself as the developer of the Condo Corp and that this provision was not amended by the March 2016, amendments to the Bylaws. He observed that, from the outset, all owners knew that they were responsible to pay both a damage deposit for rental units and the cost of repairing all damage done to common property by a tenant.

[42] The Chambers judge determined:

> [59] I am satisfied that the legislative intent in s. 41 was to give condominium corporations the right to, indeed the direction to deny voting rights until all indebtedness of an owner in respect of a unit was paid. It is significant that s. 41(9) speaks of payment of arrears with respect to the owner's unit "in a manner satisfactory to the board" before entitlement to vote is restored. The legislative intent to give the board the power to decide is express.

[43] He concluded:

> [62] It is clear to me, from the language used generally in the *Act*, that the legislature's intention was that if an owner owes monies to the condominium corporation in respect of his or her unit, the condominium corporation has the right to collect such monies, however that indebtedness arose. I am satisfied the legislature's intention in s. 41 was to restrict an owner's entitlement to vote whenever an owner owes money to the condominium corporation in respect of that owner's unit. This is a logical and efficient remedy to assist the corporations in collecting monies due to them by owners. The argument that the rights of the CC should be limited to the enforcement procedure provided in s. 99 of the *Act* cannot prevail because that section's focus is dealing with the contravention of Bylaws and fines for such contraventions.

[44] The Chambers judge determined that since he found the *CPA* itself contemplated that financial liability arising out of statutory obligations and tortious liability were *contributions in arrears* for the purposes of s. 41, he did not have to decide whether the Bylaws definition of *contributions* was *ultra vires* the *CPA*.

[45] Taking into account Mr. Goertz's disclosure of which units were rented, the Chambers judge concluded Mr. Goertz should have been entitled to vote at the March 13, 2016, AGM in

respect of six units that he owned, which were not rented, but not in respect of five units, which were rented, where *contributions* (including the invoices) were in arrears. Accordingly, he determined that the amendments of March 13, 2016, to the Bylaws, were validly passed by a two-thirds majority of the owners as required.

[46] The Chambers judge determined that there was no basis for a finding of oppressive conduct against the Condo Corp or for the appointment of an administrator since he found the Condo Corp acted properly throughout.

[47] He also found that the Condo Corp was entitled to solicitor–client costs of the proceedings based on his findings that its actions were proper, Mr. Goertz was generally unsuccessful and s. 11.11 of the Bylaws provided for solicitor–client costs to be recovered.

[48] The Chambers judge also determined that if the parties were unable to agree on what was owed by Mr. Goertz in respect of the invoices, either party could arrange for a summary determination of the claim to proceed before him.

[49] The formal order consequent to the Chambers judge's decision was taken out on May 30, 2017. On June 2, 2017, Mr. Goertz applied pursuant to *Queen's Bench Rules* 10-10 and 10-11 to address matters in the originating application he claimed the Chambers judge failed to adjudicate. These matters were that he be allowed to review the records of the Condo Corp on three days' notice, that he be allowed to attend and vote at AGMs and that there be an order pursuant to s. 99.1 of the *CPA* directing the Condo Corp and the Board to fulfill their duties pursuant to ss. 35 and 39 of the *CPA*.

[50] The Chambers judge, by fiat dated June 6, 2017, determined that Mr. Goertz's application raised matters well beyond those raised in his original application and that Mr. Goertz was seeking to have him modify his *Chambers Decision*. He found he was *functus* given that a formal order had issued. He stated the only matter on which he had retained jurisdiction was the summary determination of the claim on the invoices.

IV. ISSUES

[51] Mr. Goertz, using a scattergun approach, lists six major issues in his factum, which in total encompass 16 ancillary issues, some of which are new and had not been argued before the Chambers judge. These can fairly be restated and be subsumed in the following six broad issues:

(a) Did the Chambers judge err by determining the Condo Corp properly assessed deposits;

(b) Did the Chambers judge err in his interpretation of the term *contributions* in the *CPA* and Bylaws;

(c) Did the Chambers judge err in holding that the Condo Corp could deny Mr. Goertz the right to vote at the AGMs;

(d) Did the Chambers judge err in failing to find that the conduct of the Condo Corp and the Board was oppressive;

(e) Did the Chambers judge err in dismissing the application to address non-adjudicated matters; and

(f) Did the Chambers judge err in awarding costs against Mr. Goertz.

V. ANALYSIS

[52] Before I turn to the analysis of the six broad issues set out above, it is necessary to address the following ancillary issues that have a bearing on and inform my analysis:

(a) the nature of condominium ownership;

(b) the indoor management rule;

(c) the Bylaws; and

(d) the small claims action.

A. The Nature of Condominium Ownership

[53] A quick review of the nature of condominium ownership provides context for the decisions made by the Condo Corp and the parties' dealings in this matter. Unlike ownership of a separate, privately-owned dwelling, condominium ownership comes with a bundle of rights and obligations determined by statute and bylaws, which attempt to strike a balance between the interests of the individual unit owner and the interests of the collective unit owners. This concept was explained in *Westmorland County Condominium Corporation No. 29 v Estabrooks*, 2012 NBCA 26, 385 NBR (2d) 230:

> [50] While condo units are real property for all purposes, the *Act* imposes limits on the freedom of choice that commonly accompanies ownership of real property. Those limits are designed to reflect the communal nature of condominium ownership and living. As noted nearly four decades ago in *Hidden Harbour Estates Inc. v. Norman* (1975, Fla App D4), 72 ALR (3d) 305, "[i]nherent in the condominium concept is the principle that to promote the health, happiness and peace of mind of the majority of the unit owners, living in close proximity and using facilities in common, each unit owner must give up a certain degree of freedom of choice which he might otherwise enjoy in separate, privately owned property". Perhaps the best general description of the condominium regime in effect in all common law provinces was provided by Cromwell J.A., as he then was, in *2475813 Nova Scotia Ltd. v. Rodgers*, 2001 NSCA 12, [2001] N.S.J. No. 21 (QL):
>
> > The term "condominium" refers to a system of ownership and administration of property with three main features. A portion of the property is divided into individually owned units, the balance of the property is owned in common by all the individual owners and a vehicle for managing the property, known as the condominium corporation, is established: see A.H. Oosterhoff and W.B. Rayner, *Anger and Honsberger Law of Real Property* (1985), Vol. II, s. 3801 and Alvin B. Rosenberg, *Condominium in Canada* (1969). The condominium may be seen, therefore, as a vehicle for holding land which combines the advantages of individual ownership with those of multi-unit development: Oosterhoff and Rayner at s. 3802. In a sense, the unit owners make up a democratic society in which each has many of the rights associated with sole ownership of real property, but in which, having regard to their co-ownership with the others, some of those rights are subordinated to the will of the majority: see Robert J. Owens et al. (eds), *Corpus Juris Secundum* (1996), Estates § 195, Vol. 31, p. 260 [emphasis added in *Rodgers*].
> >
> > As Oosterhoff and Rayner wisely observed, the success of a condominium depends in large measure on an equitable balance being struck between the independence of the individual owners and the interdependence of them all in a co-operative community. It follows, they note, that common features of all condominiums are the need for balance and the possibility of tension between individual and collective interests: at s. 3802. …

B. The Indoor Management Rule

[54] Mr. Goertz makes a general argument that the Condo Corp cannot avail itself of the indoor management rule to legitimize any of its actions. While this may be correct, the rule is irrelevant in this case. I will explain.

[55] A condominium corporation is a creature of statute and can only undertake actions its statute specifically authorizes. It does not have the powers of a natural person as do business corporations (*Condominium Plan No. 8222909 v Francis*, 2003 ABCA 234 at paras 26–29, [2003] 11 WWR 469, leave to appeal to SCC dismissed, [2003] SCCA No 446 (QL) [*Francis*]). Accordingly, the indoor management rule that a person dealing in good faith with a corporation is entitled to assume prescribed formalities have been met (i.e., apparent authority) does not apply to condominium corporations (*Francis* at paras 39–41).

[56] However, the Condo Corp is not relying on its apparent authority to justify its decision to assess a deposit and to suspend Mr. Goertz's voting rights. Rather, it submits its actions are specifically authorized by the *CPA* under ss. 41 and 77. The rule is therefore irrelevant in this case.

[57] Another rule comes into play in this case assuming that the decision of the Condo Corp is statutorily grounded. It is the business judgment rule. This rule was explained by Hoy A.C.J.O. in the context of oppression remedy analysis in *3716724 Canada Inc. v Carleton Condominium Corporation No. 375*, 2016 ONCA 650, 61 BLR (5th) 173 [*3716724 Canada Inc.*]:

> [49] This rule has been reinforced in numerous decisions over the years. Significantly, in *BCE Inc. v. 1976 Debentureholders*, 2008 SCC 69, [2008] 3 S.C.R. 560, the leading case on the oppression remedy, the Supreme Court of Canada explained that a court reviewing a board's decision must show some deference, at paras. 40 and 111–112:
>
> > The "business judgment rule" accords deference to a business decision, so long as it lies within a range of reasonable alternatives. It reflects the reality that directors, who are mandated under s. 102(1) of the *CBCA* to manage the corporation's business and affairs, are often better suited to determine what is in the best interests of the corporation. This applies to decisions on stakeholders' interests, as much as other directorial decisions.
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> > …
> >
> > [The oppression remedy] claim must be considered from the perspective of the duty on the directors to resolve conflicts between the interests of

> corporate stakeholders in a fair manner that reflected the best interests of the corporation.
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> …
>
> Provided that, as here, the directors' decision is found to have been within the range of reasonable choices that they could have made in weighing conflicting interests, the court will not go on to determine whether their decision was the perfect one. [Citations omitted.]
>
> [50] While the business judgment rule was developed in the context of for-profit businesses, it has been applied to not-for-profit corporations as well: see, for example, *Hadjor v. Homes First Society*, 2010 ONSC 1589, 70 B.L.R. (4th) 101, at paras. 47-52. And courts in other jurisdictions have applied the rule when reviewing decisions rendered by condominium boards: see, for example, *Yusin v. Saddle Lakes Home Owners Ass'n*, 73 A.D.3d 1168 (N.Y. App. Div. 2010); and *Black v. Fox Hills N. Cmty. Ass'n*, 599 A.2d 1228 (Md. Ct. Spec. App. 1992).
>
> [51] Moreover, the rationale underlying the business judgment rule in the corporate law context is also applicable to condominium corporations. As representatives elected by the unit owners, the directors of these corporations are better placed to make judgments about their interests and to balance the competing interests engaged than are the courts. For instance, in this case the security concerns arose in part as a result of the condominium's location, and the Board members' knowledge of that area is clearly an advantage that they enjoy over any court subsequently reviewing their decision.
>
> [52] The *Act* provides that the directors are the ones responsible for managing the affairs of a condominium corporation: s. 27(1). They are also required to act honestly and in good faith, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances: s. 37(1). Like their counterparts in corporate statutes, these provisions suggest that courts should be careful not to usurp the functions of the boards of condominium corporations.

[58] In my view, insofar as decisions of the Board and Condo Corp are *intra vires*, the business judgment rule as described above applies to those decisions.

C. The Bylaws

[59] A theme underlying Mr. Goertz's submissions is that the Chambers judge was wrong to base his interpretation of *contributions* on the Bylaws amended March 13, 2016, as they were exhibited to Mr. Baker's affidavit. As he did before the Chambers judge, he argues that, because there was not a copy of the Bylaws certified by the Corporate Registry, they were not properly before the Chambers judge and there was therefore no evidence that the March 13 amendments were validly passed.

[60] The Condo Corp amended its Bylaws at the AGM on March 13, 2016. The amended Bylaws were filed March 30, 2016, with the Corporate Registry. The Bylaws exhibited to

Mr. Baker's affidavit are a consolidation along with a copy showing the amended portions and the registry filing stamp.

[61] Notably, Mr. Goertz did not place any Bylaws in evidence before the Chambers judge. He now attempts to have this Court base its decision on the 2003 version of the Bylaws set forth at Tab W of his book of authorities by arguing they are the only "certified" Bylaws before the Court. That version was not before the Chambers judge. Mr. Goertz could easily have provided it, but as a tactic chose not to do so. This Court will not have regard to Tab W. It is not evidence.

[62] I am in complete agreement with the Chambers judge's handling of this issue. There being no Bylaws to the contrary provided by Mr. Goertz, the Chambers judge was entitled to base his decision on the Bylaws exhibited to the affidavit of Mr. Baker. This appeal will be determined on the basis of those Bylaws as well.

D. The Small Claims Action

[63] Mr. Goertz makes a technical argument that the Small Claims matter was not properly before the Chambers judge. He submits that, because there was no order under s. 11(3) of *The Small Claims Act* that the matter be recommenced or directions given for continuation, the matter was not properly before the Chambers judge. The argument is without merit. Section 11(3) is permissive. It was not necessary to make an order under that section. In *Markwart v Blaine Lake (Rural Municipality No. 434)*, 2005 SKQB 356 at para 12, the Court properly observed that by virtue of s. 4 of *The Small Claims Act, 1997* and s. 40 of *The Queen's Bench Act, 1998*, SS 1998, c Q-1.01, a Queen's Bench judge has concurrent jurisdiction over the subject matter in the Small Claims action. The issue of the invoices was therefore properly before the Chambers judge as a result of his concurrent jurisdiction. In any event, the claims made by the Condo Corp for payment of the invoices and payment of the deposits was subsumed in Mr. Goertz's application challenging the assessment of the deposits and the suspension of his right to vote, the substance of which could not be dealt with by the Provincial Court.

[64] I turn now to the broad issues set out above.

E. Did the Chambers judge err by determining the Condo Corp properly assessed deposits?

[65] The Board assessed the deposits by resolution dated February 23, 2015, in accordance with s. 11.11(e) of the Bylaws and s. 77 of the *CPA*. The Chambers judge concluded that pursuant to ss. 34(4), 77(1) and 79.1(1) of the *CPA*, the Condo Corp had the right and power to impose such an obligation on Mr. Goertz and the right to collect it. Mr. Goertz makes several arguments that the Chambers judge erred by determining the Board was entitled to do so. Before I address these arguments, it is necessary to review the statutory authority of the Condo Corp to assess deposits.

[66] The starting point for statutory interpretation and the determination of the Board's authority is the "modern rule" described in *Rizzo*: "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (at para 21).

[67] The Condo Corp had the responsibility to manage and administer the units and the condominium property by virtue of s. 35 of the *CPA*, the relevant portions of which are as follows:

> **35**(1) A corporation is responsible for the enforcement of its bylaws and the control, management and administration of the units, and of the common property and common facilities.
>
> (2) Without restricting subsection (1), the duties of a corporation include the following:
>
> > (a) to keep the common property, common facilities and services units in a state of good and serviceable repair and to maintain them properly;

[68] The Board exercises the powers and performs the duties of the Condo Corp (s. 39(1) of the *CPA*). Pursuant to s. 44(1) of the *CPA*, the discharge of the statutory duties imposed by s. 35(1) is expressed through bylaws that provide for the control, management and administration of the units, common property and facilities.

[69] The subject matter of those bylaws is governed by s. 47(1) of the *CPA*, the relevant portions of which are as follows:

> **47**(1) Subject to the regulations, a corporation may pass bylaws:
>
> …

> (e) governing the management, control, administration, use and enjoyment of the units, common property and common facilities;
>
> (f) governing the maintenance of the common facilities and common property;
>
> (g) governing the use and management of the assets of the corporation;
>
> …
>
> (m) respecting the conduct, generally, of the affairs of the corporation;
>
> (n) for carrying out anything required or permitted to be done by the corporation pursuant to this Act.

[70] The Condo Corp's specific statutory authority to assess deposits is found in s. 77(1) of the *CPA*, which reads as follows:

> **77**(1) The corporation may require the owner of a residential unit who rents the unit to pay to, and maintain with, the corporation a deposit in an amount that does not exceed the maximum amount of a security deposit pursuant to *The Residential Tenancies Act, 2006*.
>
> (2) The corporation may use the deposit for the maintenance, repair or replacement of:
>
> > (a) any real or personal property of the corporation or any of the common property, common facilities or services units that is damaged, destroyed, lost or removed by a person residing in or on the rented unit; or
> >
> > (b) any of the common property for which an owner is permitted to exercise exclusive use pursuant to section 72 that is damaged, destroyed, lost or removed by a person residing in or on the rented unit.

[71] The deposit is held in trust for the purposes of s. 77 of the *CPA* as long as the unit is rented. If a corporation has used the deposit it must, pursuant to s. 79, deliver to the owner a statement of account showing the amount used and the purpose for which it was used and the balance of the deposit that was not used.

[72] Section 77 is found in Part VII of the *CPA*, which deals specifically with tenants. Sections 77–79.1(1) are part of a scheme that manages the financial risk to a condominium corporation of damage caused by a tenant. Section 76 makes it a condition of an owner's tenancy agreement that the tenant shall not cause damage to the real or personal property of the corporation or the common property or contravene the bylaws. The purpose of a deposit is to help enforce that condition and assist a condominium corporation to defray the cost of any breach thereof arising from that unit. Section 77 may be construed as requiring a payment of money in respect of a specific unit because it obligates the owner "of a residential unit who rents *the* unit" (emphasis added).

[73] Section 79.1(1) of the *CPA* allows a condominium corporation to sue the owner for the amount of damage in excess of the deposit up to the limit of the insurance deductible. This scheme protects a condominium corporation by looking to compensation for any loss, first to the deposit made by the owner, then to the liability of the owner for any excess up to the amount of the insurance deductible and thereafter to insurance. It is also clear from the foregoing that s. 77 is designed to reduce the financial risk to a condominium corporation from loss or damage that would ultimately otherwise be borne by all unit owners as a common expense.

[74] The assessment of the deposit is *prima facie* consistent with the Condo Corp's statutory duties under ss. 35(2) and 44(1) of the *CPA* to manage, control and administer the units and common property, and to protect the financial well-being of the collective owners. It is also consistent with the Condo Corp's powers in s. 47(1) to pass the Bylaws for such management, control and administration, and specifically for carrying out something permitted by the *CPA*, i.e., deposits under s. 77. All of these sections can be read to impose an obligation on the Condo Corp to act positively to protect that financial interest by invoking s. 77 when necessary.

[75] Based on the foregoing, the Board had the authority to determine if a deposit was necessary and, if so, to assess one. Indeed, Mr. Goertz does not dispute the Board had the power to do so. Rather, he submits that the Board could not properly exercise that power for a number of reasons. I turn to Mr. Goertz's specific arguments.

[76] Mr. Goertz first submits that it is unfair for him as a landlord to be treated differently than owners who occupy their units. There is no merit to this. Mr. Goertz has admitted that the Board has the right to assess a deposit. It is permitted by the *CPA*. His complaint in this regard is with the statute and not the Board.

[77] Mr. Goertz next argues there was no need for the deposits. He notes deposits were not required on any rented units since the inception of the Condo Corp in 1998. He argues that there had been no damages or expenses to the common property caused by past tenants that would necessitate the imposition of a deposit and the only evidence presented by the Condo Corp as justification for assessing deposits was the need to offset potential insurance claims. Accordingly, he argues that the vote by the Board to assess deposits was improper. This argument must fail.

[78] Pursuant to s. 82 of the *CPA*, the only condition precedent to the assessment of a deposit under s. 77 is that the Condo Corp has passed a Bylaw allowing it to do so. This, it did. Otherwise, s. 77 does not speak to the timing of the decision to assess a deposit or to any specific need justifying the decision. Had the Legislature wanted to impose such pre-conditions, it could have done so.

[79] The Board has a statutory duty to manage and administer the units in the course of which it must balance the private and communal interests of the owners. Its actions in assessing the deposit must be measured against that duty. There is nothing in the previously listed sections of the *CPA* which requires the Condo Corp to maintain the status quo if it is not in the best interests of the collective owners. The Condo Corp was entitled to be proactive and ensure that any future damage by a tenant was defrayed by the deposit. It is, after all, too late once the damage happens. A requirement that the Condo Corp wait to assess a deposit until there is a demonstrated need resulting from past damage, such as is implicit in Mr. Goertz's argument, is inconsistent with effective financial management and management of the risk of damage, and would result in the unit owners collectively bearing the burden of any loss.

[80] Even if need were a requirement as Mr. Goertz argues, such need has been established. The evidence of need is found in the affidavit of Mr. Baker dated April 3, 2017. There he states the Board had a concern over a water damage claim in unit 488 and the deductible of $4,000 paid by the Condo Corp. A review of the resolution assessing the deposit attached as exhibit "J" to Mr. Baker's affidavit shows that the Board was concerned that it had to fully cover the $4,000 deductible for the damage to unit 488. A deposit might have defrayed that expense.

[81] Mr. Goertz next submits a deposit is unnecessary because any insurance deductible that would be reduced by the use of the deposit is, pursuant to s. 65(5) of the *CPA*, a common expense, which pursuant to s. 65(6) can, in the case of damage, be added to the common expenses payable by the owner of the damaged unit. While Mr. Goertz is correct in stating the effect of s. 65(5) and (6), these provisions cannot fetter the Condo Corp's ability to determine how it will manage, control and administer the units and common property as described above. It is open to the Condo Corp to determine which option, that under s. 65 or under s. 77, it will use in respect of the recovery of money for damage to a unit.

[82] Mr. Goertz also argues that the deposit was not justified because damage caused to lawns by dogs of his tenants and the attendant bills were not referable to common property given the configuration of Erindale as bare land units. However, this point goes to whether the Condo Corp can use the deposit to defray such damages and has no bearing on whether it was justified in exercising its powers under s. 77 to assess a deposit.

[83] Mr. Goertz next argues that the Board could not assess the deposit because the doctrine of laches applied and prevented the Board from exercising its statutory rights under s. 77. I note that Mr. Goertz did not make this argument before the Chambers judge – at least not in written form – and certainly the Chambers judge did not deal with such argument. Laches is a new argument. Generally speaking, this Court does not entertain new arguments or issues because it is a court of error. Consequently, if the matter was not an issue in the court below there is no decision to review for error in this Court. However, this Court may exceptionally hear such an argument provided there is no new evidentiary base required to sustain it and where there will be no unfairness to the opposing party: *Meier v Saskatchewan Institute of Agrologists*, 2016 SKCA 116 at paras 28 and 29, 405 DLR (4th) 506. In this case, the Condo Corp has, in its factum and oral argument, addressed the argument and there is no further evidence required. There will be no unfairness to the Condo Corp if this Court deals with the issue.

[84] As a first point, Mr. Goertz's argument that delay has been fatal to the assessment of the deposit can be answered without reference to the jurisprudence governing laches. The concluding paragraph of s. 11.11 of the Bylaws states that the Condo Corp or the Board shall not be liable or accountable for any failure or delay in exercising its remedies, one of which is the assessment of the deposit in s. 11.11(e). This provision predated the March 2016 amendment to the Bylaws. Section s. 44(3) of the *CPA* governs to bind Mr. Goertz as an owner with respect to that provision. It reads as follows:

> **44**(3) The bylaws of a corporation bind the corporation and the owners to the same extent as if the bylaws:
>
> (a) had been signed and sealed by the corporation and by each owner; and
>
> (b) contained covenants on the part of each owner with every other owner and with the corporation to observe, perform and be bound by all the provisions of the bylaws.

[85] On this basis, Mr. Goertz is deemed to have agreed that the Board will not be liable for its failure to assess the deposit earlier. This is the short and complete answer to the issue of delay and the submission regarding laches.

[86] However, I will nevertheless address the laches argument on its merits. I turn first to the governing law. In this respect I have reviewed the Ontario and Alberta trial court cases cited by Mr. Goertz in support of his argument regarding laches. They are of no assistance.

[87] The elements of the doctrine of laches was set out by La Forest J. in *M.(K.) v M.(H.)*, [1992] 3 SCR 6 at 77–78:

> In turn, this formulation has been applied by this Court; see *Canada Trust Co. v. Lloyd*, [1968] S.C.R. 300; *Blundon v. Storm*, [1972] S.C.R. 135.
>
> The rule developed in *Lindsay* is certainly amorphous, perhaps admirably so. However, some structure can be derived from the cases. A good discussion of the rule and of laches in general is found in Meagher, Gummow and Lehane, *supra*, at pp. 755-65, where the authors distill the doctrine in this manner, at p. 755:
>
> > It is a defence which requires that a defendant can successfully resist an equitable (although not a legal) claim made against him if he can demonstrate that the plaintiff, by delaying the institution or prosecution of his case, has either (*a*) acquiesced in the defendant's conduct or (*b*) caused the defendant to alter his position in reasonable reliance on the plaintiff's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb. …
> >
> > Thus there are two distinct branches to the laches doctrine, and either will suffice as a defence to a claim in equity. What is immediately obvious from all of the authorities is that mere delay is insufficient to trigger laches under either of its two branches. Rather, the doctrine considers whether the delay of the plaintiff constitutes acquiescence or results in circumstances that make the prosecution of the action unreasonable. Ultimately, laches must be resolved as a matter of justice as between the parties, as is the case with any equitable doctrine.

[88] Laches operates as an equitable defence to an equitable claim, but not to a legal claim. That principle has been one of long standing: see *Anderson v Municipality of South Vancouver* (1911), 45 SCR 425; *Heron v Lalonde* (1916), 53 SCR 503.

[89] A statutory right is a legal right. This Court in *Quinn v Prairiedale (Rural Municipality No. 321)* (1958), 15 DLR (2d) 399 (Sask CA), held that mere laches and delay could not operate to defeat statutory rights under *The Land Titles Act*. The Supreme Court of Canada in *St. Ann's Island Shooting and Fishing Club v The King*, [1950] SCR 211, stated that "there can be no

estoppel in the face of an express provision of a statute". The Court did not mention laches specifically in this case, however similar principles apply since laches is a sub-type of estoppel. That estoppel is not effective against a statutory duty or obligation was noted in *Francis* at para 37, where a condominium corporation unsuccessfully argued that its otherwise illegal actions should be legitimized on the basis that they had not been challenged over time.

[90] Based on the foregoing, I am not satisfied that the doctrine of laches applies to the Board's exercise of its statutory rights under s. 77 because those rights are legal in nature.

[91] Even if the doctrine applied, the case for laches must be made out on the evidence: see *Olney v Great West Life Assurance Company*, 2014 SKCA 47 at para 75, [2014] 8 WWR 293. In this case, the evidence shows only mere delay and, as the foregoing case law demonstrates, that is not enough to establish laches. Mr. Goertz has not provided any evidence that the absence of a deposit over the years amounts to acquiescence by the Condo Corp in relation to some behavior on his part, which the Condo Corp now challenges. Nor is there evidence that Mr. Goertz, in reliance on the absence of a requirement for a deposit, has somehow altered his behavior so that it would be unjust to now require him to pay.

[92] Last, Mr. Goertz's invocation of laches is disingenuous. He was a member of the Board until February 2015 when the resolution to assess the deposit was passed. He had therefore, in all the years prior to that, participated as a Board member in the very laches for which he now complains.

[93] Before I leave the issue of the Condo Corp's right to assess a deposit, I must address Mr. Goertz's corollary argument that the Board had no right to contact his tenants to request the deposit as a result of his failure to pay it. The deposit is a liability of the owner and he is required to pay it as I have explained. Section 12.6 of the Bylaws speaks to the owner's obligation to pay assessments apart from common expenses and reserve fund expenses levied against the unit owner. It also states that the owner assigns to the Condo Corp the rent from the tenant such as may be required to pay such amounts owing. The Board's request directed to the tenants to pay the deposit is in keeping with this section of the Bylaws to the extent it concerns deposits.

[94] Accordingly, Mr. Goertz's arguments that the Condo Corp cannot exercise its statutory powers to assess a deposit fail. The Board had the right and, indeed, the responsibility to assess the deposit. Mr. Goertz was obligated to pay it. The Chambers judge was correct in making those determinations.

F. Did the Chambers judge err in his interpretation of the term *contributions* in the *CPA* and Bylaws?

[95] Mr. Goertz argues that the Chambers judge erred in finding the definition of *contributions* in the Bylaws was not *ultra vires* the *CPA* and the *Regulations*. He submits that as a result he should not have been denied the right to attend and vote at the March 13, 2016, AGM and AGMs thereafter. He argues additionally that the definition of *contributions* determined by the Chambers judge renders his right to challenge the invoices pursuant to s. 99 of the *CPA* meaningless.

[96] The relevant portions of s. 41 of the *CPA* read as follows:

> **41**(1) Subject to subsections (2) and (5) to (12), each owner has a number of votes that bears the same proportion to the total number of votes as the owner's unit factor bears to the total of the unit factors.
>
> (2) Subject to the right of any owner to ask for a vote by unit factors in person or by proxy, the bylaws of a corporation may provide for voting by show of hands for specified purposes.
>
> (3) Unless otherwise provided for in this Act, all questions proposed for the consideration of the owners at a meeting of owners shall be determined by a majority of the votes cast.
>
> (4) The bylaws of a corporation may provide for a proportion in excess of a majority vote with respect to subject matters that are indicated in the bylaws.
>
> (5) A corporation may pass bylaws respecting an owner's right to vote where any contributions payable with respect to the owner's unit are in arrears, including:
>
> (a) restricting the owner's right to vote or prohibiting the owner from voting; or
>
> (b) allowing the owner to vote.
>
> (6) If a corporation has not passed a bylaw respecting the matters set out in subsection (5), subsections (8) to (11) apply to the corporation and its owners.
>
> (7) If a corporation has passed a bylaw respecting the matters set out in subsection (5), subsections (8) to (11) do not apply to the corporation and its owners.
>
> (8) An owner is not entitled to vote at a meeting if any contributions payable with respect to the owner's unit have been in arrears for 30 days or more at the time of the meeting, unless the subject-matter of the vote is one that requires a unanimous resolution pursuant to this Act.

> (9) An owner who is not entitled to vote pursuant to subsection (8) may vote if the corporation receives payment of the arrears with respect to the owner's unit in a manner satisfactory to the board before the meeting is held or at the meeting immediately before the vote.
>
> (10) At least 10 days before a meeting of the owners, the corporation shall give written notice to any owner whose contributions are in arrears, or may be in arrears, for 30 days or more at the time of the meeting.
>
> (11) The notice required pursuant to subsection (10) must include a statement that the owner will not be entitled to vote at the meeting if the arrears are not paid in full in a manner satisfactory to the board before the meeting is held or at the meeting immediately before the vote.

[97] By virtue of s. 41(6), ss. 46(8)–(11) apply when similar bylaws have not been passed by a condominium corporation. However, provisions which parallel s. 41 regarding suspension of an owner's right to vote were incorporated into s. 7.8 of the Bylaws by virtue of amendments passed at the March 2016 AGM.

[98] The germane provisions of the Bylaws are:

> **Section 7.8 Right to Vote**
>
> Subject to the provisions of this paragraph, and of paragraph 7.9 as to the authorized representatives of any body corporate and paragraph 7.12 as to joint owners, at any meeting of unit owners in respect of which the Corporation has prepared the list referred to in paragraph 7.4 every person who is named in such list shall be entitled to vote the unit factors shown thereon opposite his or her name. In the absence of such a list, every person shall be entitled to vote at the meeting who at the time is entered in the property register as the owner, first mortgagee or other person entitled to vote with respect to one or more units.
>
> An owner is not entitled to vote at a meeting if any contributions payable with respect to the owner's unit have been in arrears for 30 days or more at the time of the meeting, unless the subject-matter of the vote is one that requires a unanimous resolution pursuant to this Act.
>
> An owner who is not entitled to vote pursuant to subsection (7.8) may vote if the corporation receives payment of the arrears with respect to the owner's unit in a manner satisfactory to the board before the meeting is held or at the meeting immediately before the vote.
>
> At least 10 days before a meeting of the owners, the corporation shall give written notice to any owner whose contributions are in arrears, or may be in arrears, for 30 days or more at the time of the meeting.
>
> The notice required pursuant to subsection (10) must include a statement that the owner will not be entitled to vote at the meeting if the arrears are not paid in full in a manner satisfactory to the board before the meeting is held or at the meeting immediately before the vote.
>
> (A111–112)

[99] The definition of *contributions* as passed at the March 2016 AGM reads as follows: "'Contributions' means an amount payable by an owner in respect of a unit that the Corporation may charge to The Owner by the Act or these bylaws" (Bylaws s. 1.1).

[100] Mr. Goertz argues the term *contributions*, whether in the Bylaws or s. 41 of the *CPA*, is restricted to contributions to the common expenses and reserve funds based on the wording of ss. 57 and 58 of the *CPA*, which refer to contributions. He also relies on s. 47 of the *Regulations*, which reads as follows:

> **47** For the purposes of sections 57 and 58 of the Act, the corporation shall raise the amounts required for the common expenses fund or the reserve fund by levying contributions on the owners of the units:
>
> (a) in proportion to the unit factors of their respective units; or
>
> (b) if a scheme of apportionment for contributions to the fund has been established pursuant to sections 48 and 49, in accordance with that scheme.

[101] However, these sections of the *CPA* and the *Regulations*, viewed by themselves, tell little about the meaning of the term *contributions* as used in s. 41. The term is not defined by the *CPA*. The scope and meaning of that term *as used* in s. 41 must therefore be assessed in the context of the *CPA* as a whole using the approach to statutory interpretation as set forth in *Rizzo*. As did the Chambers judge, I will approach the matter on the basis that the statutory definition will determine whether the scope of the definition in the Bylaws is in accordance with the *CPA*.

[102] The first few subsections of s. 41 deal with the voting rights of owners and the exercise of that right. I note first that s. 41 is preceded by sections regarding the composition, powers and duties of the corporation, the board of directors and annual meetings of a corporation. It is followed by specific sections dealing with voting and detailed sections concerned with the enactment of bylaws, which govern the management, administration, use and enjoyment of the units, common property and the affairs of the corporation. Section 41 is therefore situated in Part III of the statute in the context of the governance of the Condo Corp. It is a reasonable inference and a corollary that *contributions* in s. 41 is used in the broad context of governance. The subsections suspending the right to vote are a method of enforcing payment of monies owing to the corporation. As such, they can be seen as a tool for a condominium corporation to manage and administer the corporation.

[103] By contrast, the sections referred to by Mr. Goertz in support of his argument, ss. 55–58, are situated in Part IV of the *CPA*, which is devoted exclusively to the establishment and management of the two basic condominium fees: the common expenses fund and the reserve fund. These sections are followed by provisions that deal with the details of the condominium corporation's obligation to set and manage the common expenses fund and the reserve fund.

[104] It is also instructive to compare how the term *contributions* is used in s. 41 and in ss. 55–58. Sections 41(5) and (8) use the term as part of a phrase: "contributions payable with respect to the owner's unit". The phrase "arrears with respect to the owner's unit" in s. 41(9) is clearly referable to the term *contributions* in ss. 41(5) and (8). There is no reference in s. 41 restricting the term to either the common expenses fund or the reserve fund.

[105] By contrast, in ss. 55–58, and other sections in Part IV, the term *contributions* is almost always followed by the words "to the common expenses fund" or "to the reserve fund" or is otherwise referable to those two funds. The best example of this is s. 56(1), which reads as follows:

> **56**(1) The corporation shall levy on the owners of the units condominium fees consisting of:
>
> > (a) contributions to the common expenses fund in amounts determined in accordance with section 57; and
> >
> > (b) contributions to the reserve fund in amounts determined in accordance with section 58.

[106] Another example is s. 63(1), which refers to the right of a condominium corporation to register a lien against the title of a unit holder for failure to pay the monies referred to in ss. 55–58. It refers to "a *contribution* to the common expenses fund or the reserve fund" (emphasis added).

[107] Likewise, the wording of s. 47 of the *Regulations* connects the term *contributions* to both funds and also restricts its effect to ss. 57 and 58 of the *CPA*.

[108] I conclude from the foregoing that the term *contributions* as used in s. 41 has a more expansive meaning than when used in ss. 57 and 58 where its meaning is restricted to denoting monies payable for the common expenses fund or reserve fund. As used in s. 41, the term can encompass other monies payable to a condominium corporation with respect to the owner's unit,

such as deposits, in addition to monies payable respecting those two funds. This makes sense because a deposit, common expenses and reserve fund expenses are all levied pursuant to a specific statutory provision with respect to a specific unit.

[109] Mr. Goertz argues that the deposit is not a debt and is shown by the Condo Corp in its financial statements as trust monies rather than an account receivable. He submits it cannot be a *contribution*. There is no merit to his submission. Section 77 of the *CPA* explicitly allows a condominium corporation to "require the owner … to pay". Therefore, it imposes a financial obligation on an owner, who is bound by the provisions of the *CPA*, to pay the deposit once it is assessed. It is therefore money Mr. Goertz owes to the Condo Corp even though it will be held in trust.

[110] Mr. Goertz argues that an expansive definition of the term would allow the Condo Corp to suspend his voting rights on the basis of the unpaid invoices sent by the Condo Corp to him and therefore would deprive him of the benefit of ss. 98 and 99 of the *CPA* to dispute them. These sections read as follows:

> **98** A corporation may recover from an owner by an action for debt any sum of money expended by the corporation for:
>
> (a) repairs to the owner's unit;
>
> (b) work done in complying with a notice or order by a local authority or other public authority with respect to the owner's unit.
>
> **99**(1) If an owner, tenant or other person who resides in or on a unit contravenes a bylaw of the corporation, the corporation may take proceedings pursuant to *The Small Claims Act, 1997* to recover from the owner, tenant or other person or any combination of them:
>
> (a) a penalty of not more than $500 with respect to that contravention; and
>
> (b) subject to the limits in *The Small Claims Act, 1997*:
>
> (i) compensation for any damage to the common property, common facilities or services units resulting from the contravention of the bylaw up to the deductible limit of the insurance policy obtained by the corporation; and
>
> (ii) any actual costs incurred by the corporation to enforce the bylaw against the defendant.
>
> (2) In an action pursuant to subsection (1), the corporation must establish to the satisfaction of the judge of the Provincial Court of Saskatchewan who hears the matter that the bylaw:
>
> (a) was properly enacted; and

> (b) was contravened by the owner, tenant or other person residing in or on the unit.
>
> (3) On hearing the matter, the judge may:
>
> (a) dismiss the action or give judgment against the defendant in the amount being sued for or any lesser amount that appears proper in the circumstances; and
>
> (b) may make any award as to costs that is permitted by *The Small Claims Act, 1997*.
>
> (4) A corporation may not commence an action pursuant to this section unless it is authorized by bylaw to do so.
>
> (5) For the purposes of subsection (2), a copy of a bylaw that is certified by the Director as a true copy of the bylaw filed in accordance with this Act is, in the absence of evidence to the contrary, proof:
>
> (a) of the contents of the bylaw; and
>
> (b) that the bylaw was properly enacted.
>
> (6) The commencement of an action against a person pursuant to this section does not limit or derogate from a remedy that an owner or the corporation may have against that person.

[111] The short answer to Mr. Goertz's argument is that these sections are not for the benefit of an owner per se, but merely allow a condominium corporation to sue an owner if it so chooses, to recover monies expended for repairs to the owner's unit and penalties and damage compensation for any breach of the bylaws. These sections do not require the Condo Corp to sue with respect to the claims he disputes nor do they give Mr. Goertz a right to demand all such disputed matters be dealt with in court.

[112] Notably, s. 99(6) clearly states that commencement of an action does not limit or derogate from any remedy the Condo Corp may have against an owner. Section 77 and the deposit is such a remedy. The two sections do not in any way condition the power of the Condo Corp to levy the deposit. Section 77 allows a condominium corporation to levy the deposit, despite the fact that it may be used to satisfy a disputed claim and despite the fact there has not been a court's adjudication of that claim. This is not to say that the owner cannot continue to dispute the claim thereafter and argue the use of the deposit by the condominium corporation was improper.

[113] Based on my previous analysis, the deposit is payable when levied, not when any disputed claims that it might satisfy are resolved. Non-payment of the deposit allows the Condo

Corp to invoke s. 41, whether the claim is disputed or not, and indeed whether or not any claim exists.

[114] However, I agree with Mr. Goertz that monies payable in the nature of disputed tortious claims are generally not caught as *contributions* under s. 41(8) until they have been properly adjudicated as owing and payable by the court. This would be the case where, for example, a condominium corporation attempts to invoke s. 41 for that portion of any disputed claim that is in excess of the deposit. I will explain why.

[115] The right of an owner to vote at an AGM in respect of his or her unit is a statutory right granted by s. 41(1). It is a very important right and fundamental to the nature of condominium ownership. It protects the voice of the owner in the affairs of a condominium corporation. As such, it should not be attenuated lightly. The provisions of the *CPA* suggest this is the case. The *CPA* only, and clearly, restricts the right to vote in one other circumstance: where a mortgagee may exercise the right (s. 42). It can be inferred that, with respect to disputed tortious claims, s. 41 requires some measure of certainty that the claim is *payable* before the owner's right to vote can be affected.

[116] The term *contributions* as it is used in s. 41 of the *CPA* requires that monies must be "payable". It may be said that disputed tortious claims by a condominium corporation are not payable in the same way as, for instance, *contributions* to the common expenses fund, reserve fund and deposits. These types of *contributions* are statutorily mandated, fundamental to the financial health of a condominium corporation and are *prima facie* payable when they are levied in accordance with ss. 57(2) and 58(4) of the *CPA* and the Bylaws with respect to the first two levies. Section 77(1), although worded differently than ss. 57(2) and 58(4), has the same effect with respect to the deposit, as explained earlier.

[117] There is no provision in the *CPA* to allow a unit owner to dispute the levying or assessment of those statutorily mandated monies. That is not to say that an owner cannot otherwise challenge them. Rather, based on ss. 57(2), 58(4) and 77(1) and the absence of any statutory mechanism to challenge those levies, they are presumed until proven otherwise to be properly owing and payable to the condominium corporation. In that sense, there is sufficient certainty that for the purpose of s. 41 the statutorily mandated monies are "payable" and can be

properly said to be *contributions*, which, if unpaid, are in arrears. Suspension of the right to vote is simply the statutorily mandated tool to ensure payment of these essential sums of money. An owner may choose not to pay these levies, but the Condo Corp has the legal right to suspend his or her voting rights for such non-payment.

[118] Tortious claims are, for the purpose of s. 41, on a different footing than the statutorily mandated levies. They are, generally speaking, not fundamental to the financial health of a condominium corporation. They are claims and not statutorily mandated levies. There is not the same certainty they are payable. Given the construction of s. 41 and the nature of tortious claims, such disputed and unresolved claims do not fall within the expansive definition of *contributions* in the same way as failure to pay monies owing in respect of the common expenses fund, the reserve fund and deposits. However, if a condominium corporation sues and the court grants judgment in its favour, that amount can be said to be certain and payable and is properly caught by s. 41 as a *contribution*.

[119] A construction of the term *contributions* to include the deposit and undisputed or adjudicated tortious claims is consistent with the scheme of the *CPA* to ensure that the financial viability of the condominium corporation is protected. It honours the owner's right to dispute tortious claims. Such a construction is also consistent with the governance and administrative tools of a condominium corporation under the *CPA* to enforce the payment of sums owing by owners, but require that the monies are payable before the owner's right to vote is attenuated. On this basis, the definition of *contributions* in the Bylaws, insofar as it refers to deposits and undisputed or resolved tortious claims, accords with the provisions of the *CPA*.

[120] Although the Chambers judge erred by finding that the term *contributions* encompassed disputed tortious claims of the Condo Corp, he did not err in his conclusion that *contributions* in s. 41 of the *CPA* encompassed the deposit.

G. Did the Chambers judge err in holding that the Condo Corp could deny Mr. Goertz the right to vote at the AGMs?

[121] Mr. Goertz argues that the Chambers judge erred by finding he owed the amount set out in the invoices and by using that finding as a reason to determine the Condo Corp appropriately

denied him the right to vote. He submits this deprived him of an opportunity to challenge the invoices in court. He notes that issue was to be adjudicated after the Chambers application was decided, if the parties could not agree.

[122] The Chambers judge did not at any point specifically adjudicate what sums of money, if any, were owed by Mr. Goertz with respect to the various invoices for lawn repairs caused by dog feces. The only direct reference by him to the invoices is found at paragraphs 19 and 20 of his decision. In paragraph 19 he merely listed them and observed that, had Mr. Goertz paid the deposits, those invoices might have been paid out of that fund. In paragraph 20, he merely noted the Small Claims action included the invoices. The Chambers judge, at paragraph 70, clearly reserved the issue of the invoices for summary determination if the parties could not agree.

[123] However, at paragraph 65 the Chambers judge referred to the unpaid "damage obligation" with respect to units 456 and 458 as a basis for determining Mr. Goertz could not vote in respect of those units. While this could be seen as a determination that the amounts referred in the invoices were owed, I do not read his comments in that way given his explicit reservation of the issue. Such comments merely reflect the Chambers judge's erroneous construction of the term *contributions* as encompassing disputed tortious claims. However, that error does not affect the result that the Condo Corp could appropriately suspend Mr. Goertz's right to vote. I will explain.

[124] The Chambers judge's determination that Mr. Goertz was in arrears of payment of the deposits and therefore in arrears of payment of *contributions* grounded his finding that the suspension of Mr. Goertz's right to vote under s. 41(8) of the *CPA* was appropriate. His decision is justifiable on this basis. Although the Chambers judge was correct in finding that Mr. Goertz could not vote with respect to some units, he erred with respect to the scope of his decision.

[125] The Chambers judge found Mr. Goertz's voting rights were properly suspended with regard to five units, which included the two units where invoices for lawn damage were outstanding. He came to this conclusion based on Mr. Goertz's admissions as to the state of the rental of his 11 units. Unfortunately, those admissions are largely unhelpful in answering the question of Mr. Goertz's right to vote at the 2016 AGM (or the AGM in 2017) and the validity of the Bylaw amendments made at the 2016 meeting. This is because the admissions, for the most

part, related to the state of the rentals at the date of the hearing. The admissions told the court nothing about the actual state of the rentals at the date of the March 2016 and March 2017 AGMs and whether the Condo Corp could legitimately suspend the right to vote for those meetings.

[126] The evidence germane to how many units were rented by Mr. Goertz relating to the dates of the 2016 and 2017 AGMs is set forth in Mr. Baker's affidavit, i.e., that Mr. Goertz owned 11 units, using one for himself and the others as rental units. The Condo Corp candidly admitted there was uncertainty as to how many units Mr. Goertz had actually rented out. This is because Mr. Goertz stubbornly refused to comply with his mandatory statutory obligation to the Condo Corp under s. 78(1) to "give … the name of the tenant". Had he done so, the Board would have known which units were actually rented at the relevant times. The Board made a number of requests to obtain the information, to no avail. The Board was transparent that failure by Mr. Goertz to pay the deposits would result in the suspension of his right to vote. However, even that threat did not cajole him into disclosing the information. That this is a significant breach of the statute by Mr. Goertz cannot be understated. It is essential that a condominium corporation get information regarding the rental of a unit. This is underlined by s. 75 of the *CPA*, which makes it a condition precedent to an owner renting a unit, that he or she give notice of his or her intention to do so and provide an address for service of notices pursuant to that part of the *CPA*.

[127] The whole basis of the Board's suspension of Mr. Goertz's right to vote was the assumption that ten units were being rented. The Board was forced to make such assumption because Mr. Goertz was in breach of his statutory duties. Mr. Goertz clearly disputed numerous other issues with the Board, but did not dispute that assumption in his affidavit evidence filed with the Chambers judge. In the absence of accurate information from Mr. Goertz, the Board was entitled to make the assumption it did with respect to the number of rented units. Until it heard to the contrary, it was justified in requiring a deposit for each unit. Viewed from a business judgment perspective in the context of the Condo Corp's and Board's obligation to manage and administer the units, this was a reasonable decision in the face of Mr. Goertz's obstinacy.

[128] The suspension of Mr. Goertz's right to vote on ten units was therefore justified at the time it was imposed by the Board, on the basis of his failure to pay the deposits alone. Mr. Goertz's right to vote at the 2016 and 2017 AGMs was therefore validly suspended with

respect to all ten units. The corollary is that the amendments to the Bylaws passed at the 2016 AGM were validly passed. In light of the foregoing, it does not matter that the Chambers judge erred as previously described by including the two units for which invoices were outstanding in his calculation of Mr. Goertz's voting rights.

[129] Likewise, even if the Chambers judge's methodology is used and two units are eliminated from Mr. Goertz's voting suspension (as a result of my analysis above), leaving him the right to vote on three units, it would not have made any difference to the outcome of the Board's approval of the March 2016 amendments to the Bylaws. Based on a total of 41 units for which there would have been a right to vote, the amendments were passed by 27 votes, which was the required two-thirds majority.

H. Did the Chambers judge err in failing to find that the conduct of the Condo Corp and the Board was oppressive?

[130] Mr. Goertz argues that the Chambers judge erred in finding the Condo Corp and the Board did not engage in oppressive conduct toward him. The centrepiece of Mr. Goertz's claim for oppressive conduct was the statutory interpretation issue and the suspension of his right to vote. This factored significantly in the decision of the Chambers judge. Accordingly, he dealt with oppression remedies in a summary way. He did not consider the list of alleged oppressive conduct item-by-item, finding instead that the Condo Corp acted properly throughout and, as such, there was no basis for such a finding. I see no error in his approach to the issue. Had he approached the matter on an item-by-item basis, the result would have been no different. I will explain.

[131] I must, however, deal first with the shifting sands of Mr. Goertz's claim in this regard. In oral argument, Mr. Goertz submitted that all of the actions of the Board and Condo Corp were oppressive conduct. This is at odds with his submissions before the Chambers judge. In his written argument filed with the Chambers judge, he cites only failure to enforce the Bylaws in a fair and equitable manner, non-disclosure of documents, denial of voting rights at the 2016 and 2017 AGMs, denial of attendance at the 2017 AGM and the passing of amendments to the Bylaws in March 2016 as examples of oppressive conduct.

[132] In his prayer for relief in his factum, Mr. Goertz identified the alleged oppressive conduct as denial of his rights to receive minutes, financial records and a listing of registered owners, denial of his right to attend and vote at the AGM held March 13, 2017, selective enforcement of Bylaws by the Board, and unlawful contact of his tenants for payment of the deposit despite there being no indebtedness as contemplated by s. 81 of the *CPA*. Although Mr. Goertz alleges other examples of oppressive conduct in his factum, I will address only those items for which he sought relief from the Chambers judge. Logically, that is the relief he claims the Chambers judge has erroneously failed to give.

[133] Based on my previous analysis, the actions of the Condo Corp and Board regarding the definition of *contributions*, the assessment of the deposit and the suspension of the right to vote were not oppressive conduct. I have also previously dealt with the matter of Mr. Goertz's tenants being contacted. This, as well, is not oppressive conduct given my analysis. This leaves only items such as selective enforcement of the Bylaws and refusal to provide financial records to be dealt with.

[134] I turn to the governing provision of the *CPA*. The oppression remedy is set out in s. 99.2:

> **99.2**(1) An owner, a corporation, a developer, a tenant, a mortgagee of a unit or other interested person may apply to the court for an order if the applicant alleges that the conduct of an owner, a tenant, a corporation, a developer or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant.
>
> (2) On an application pursuant to subsection (1), if the judge determines that the conduct of an owner, a tenant, a corporation, a developer or a mortgagee of a unit is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant, the judge may make any order the judge considers appropriate, including:
>
> (a) an order prohibiting the conduct alleged in the application; and
>
> (b) an order requiring the payment of compensation.

[135] Based on this section, the criteria for finding that there has been oppression is that the conduct must be or threaten to be oppressive or unfairly prejudicial to the applicant, or unfairly disregard the interests of the applicant.

[136] The oppression remedy in s. 99.2 of the *CPA* has not been the subject of analysis by this Court. However, jurisprudence in other appellate courts is germane. Section 135 of Ontario's *Condominium Act, 1998*, SO 1998, c 19, dealing with the oppression remedy is worded in a very

similar fashion to s. 99.2 of the *CPA*. Cases regarding that provision have established a two-part test, enunciated in *BCE Inc. v 1976 Debentureholders*, 2008 SCC 69 at para 56, [2008] 3 SCR 560 [*BCE Inc.*], to be applied in determining whether impugned conduct amounts to oppression. To establish if there has been oppressive conduct warranting a remedy, the claimant must demonstrate (a) that there has been a breach of its reasonable expectations, and (b) that, considered in the commercial context, the conduct complained of amounts to "oppression", "unfair prejudice" or "unfair disregard": see *Metropolitan Toronto Condominium Corporation No. 1272 v Beach Development (Phase II) Corporation*, 2011 ONCA 667 at para 6, 285 OAC 372; *3716724 Canada Inc.* at para 29. Given the similarity of the Ontario statute and the *CPA*, this two-part test can be applied to the analysis under s. 99.2 of the *CPA*.

[137] Based on the foregoing, the oppression remedy under s. 99.2 addresses three kinds of unfair conduct:

(a) oppressive conduct;

(b) unfairly prejudicial conduct; and

(c) conduct that unfairly disregards the interests of the claimant.

[138] The nature of the conduct described above was explained in *Ryan v York Condominium Corporation No. 340*, 2016 ONSC 2470, where Perell J., in construing s. 135 of the Ontario statute, said the following:

> [78] Oppressive conduct is coercive, harsh, harmful, or an abuse of power. Unfairly prejudicial conduct is conduct that adversely affects the claimant and treats him or her unfairly or inequitably from others similarly situated. Unfair disregard means to ignore or treat the interests of the complainant as being of no importance [citations omitted].
>
> [79] In *Walla Properties Ltd. v. York Condominium Corp. No. 478*, *supra*, at paras. 23-24, Justice Harvison Young described conduct that falls within the oppression remedy of the *Condominium Act, 1988* as follows:
>
> > [23] In the corporate law context, oppressive conduct requires a finding of bad faith, while conduct that is unfairly prejudicial or that unfairly disregards the interests of the applicant does not: see *Brant Investments v. Keeprite Inc.* (1991), 3 O.R. (3d) 289 (C.A.) at 305-306. Oppressive conduct has been described as conduct that is burdensome, harsh and wrongful. Unfair prejudice has been held to mean a limitation on or injury to a complainant's rights or interests that is unfair or inequitable. Unfair disregard means to unjustly ignore or treat the interests of the complainant as being of no importance: see *Niedermeier, supra*, and

> *Consolidated Enfield Corp. v. Blair* (1994), 47 A.C.W.S. (3d) 728, [1994] O.J. No. 850 (Gen. Div.) at para. 80. Loeb suggests that in the context of condominium law:
>
> > … "unfairly prejudicial" more appropriately describes deception, or different treatment for what may seem to be similar categories, whether financial or otherwise. "Unfairly disregards," however, may more accurately describe an alleged failure to take into account a legitimate minority interest or viewpoint: see Audrey M. Loeb, *Condominium Law and Administration*, looseleaf (Scarborough, Ontario: Thomson Carswell, 1998) at 23-23.
>
> [24] When determining whether conduct falls within the meaning of s. 135, the court must be mindful that the oppression remedy protects the reasonable expectations of shareholders or unit owners. Reasonable expectations should be determined according to the arrangements that existed between the shareholders or unit owners of a corporation: see *Naneff v. Con-Crete Holdings Ltd.* (1995), 23 O.R. (3d) 481 (C.A.). In addition, the court must examine the cumulative effect of the conduct complained of.

[139] I accept the foregoing as a correct description of the nature of the types of conduct that may be found to be oppressive under s. 99.2 of the *CPA*.

[140] The selective enforcement of the Bylaws that Mr. Goertz alleged before the Chambers judge was set out in exhibit "A" to his affidavit of March 15, 2017, as well as in his affidavit of April 7, 2017. Mr. Goertz alleged that members of the Board had violated the Condo Corp's Bylaw No. 2 by parking in visitor parking, parking on the roadway, not picking up animal feces, permitting a sale sign for unit 430 on the property, improperly erecting fences and other breaches as detailed in his affidavits. Mr. Goertz argued these breaches are oppressive to him and that the role of Board members was to uphold the provisions of such Bylaws.

[141] As a first point, Mr. Goertz argues s. 3.20 of the Bylaws imposes a duty of care on the directors of the Condo Corp to act in the best interests of the corporation and comply with the *CPA*, which includes a duty to act in good faith, with honesty, and with care and diligence. He argues that they have not done so with respect to the management of the corporation. Mr. Goertz cites harsh words addressed to him by a member of the Board as evidence of bad faith. While this conduct is regrettable behaviour, I see nothing in the whole of the evidence, including the conduct discussed below, which demonstrates a lack of good faith.

[142] However, there does appear to be non-compliance with some of the terms of Bylaw No. 2, i.e., parking, fencing, animal feces and signage. It is a reasonable expectation of owners that members of the Board would, whenever possible, comply with the Bylaws dealing with those issues. But not every failure to meet reasonable expectations will give rise to the equitable considerations that ground actions for oppressive conduct (*BCE Inc.* at paras 67 and 89). Put another way, not every misstep, unkind word or inept and uninformed handling of a situation by the Board (as happened here) that runs afoul of the Bylaws amounts to oppression. The conduct complained of must amount to oppression, unfair prejudice or unfair disregard of the complainant's interests.

[143] Looked at as a whole, the Bylaws violations, while wrong, are not in this case so coercive, harsh, harmful or an abuse of power as to be oppressive. That is not to say that failure by members of a condominium corporation board to require their own compliance with bylaws relating to parking, fences, animal feces and sale signs can never amount to oppressive conduct if such conduct continues for any substantial time or is pervasive. In this case, these failures do not rise to the level of prejudicial conduct that adversely affects Mr. Goertz, treats him unfairly, inequitably or ignores his interests as being of no importance. There is, for example, no evidence that the Bylaw violations were burdensome or harsh to him personally. While the owners can reasonably expect that the Bylaws would be complied with, in this context the failure to enforce the Bylaws does not amount to oppression, unfair prejudice or unfair disregard.

[144] With respect to Mr. Goertz's allegations of not receiving certain documentation, this appears to be a moot issue considering the parties had agreed at the Chambers hearing that certain documentation would be provided. In short, with the agreement before the Chambers judge with respect to the provision of the documents, a remedy under s. 99.2 with respect to their disclosure is not necessary. If Mr. Goertz has not received the documents as of the date of the issuance of this decision, his remedy, given this agreement, is to enforce that matter in the court below.

[145] Based on the evidence before the Chambers judge, the criteria in s. 99.2 for oppression have not been met. The Chambers judge did not err in finding that oppression had not been proven.

I. Did the Chambers judge err in dismissing the application to address non-adjudicated matters?

[146] Mr. Goertz, citing *Queen's Bench Rules* 10-10 and 10-11, argues that certain matters were not adjudicated by the Chambers judge and certain relief sought was not dealt with. These matters include that Mr. Goertz be allowed to review the records of the Condo Corp on three days' notice, that he be allowed to attend and vote at AGMs and that there be an order pursuant to s. 99.1 of the *CPA* directing that the Condo Corp and the Board to fulfill their duties pursuant to ss. 35 and 39 of the *CPA*. He also submits that the Chambers judge failed to address the Condo Corp's failure to provide a reply to his notice to admit facts.

[147] With respect to access to the documents sought, Mr. Goertz fails to recognize the issue was dealt with by agreement. The Chambers judge merely set out in paragraph 7 of his decision the terms of the agreement. There was no direction to provide the documents on three days' notice as argued by Mr. Goertz. Although the request to review the records on three days' notice was not specifically dealt with as an individual item by the Chambers judge, I conclude this relief, which could only have been referable to the specific documents requested by Mr. Goertz in his motion, was not necessary because the issue had been dealt with by agreement between the parties.

[148] In asking the Chambers judge to deal with his right to attend and vote at meetings, Mr. Goertz inexplicably does not seem to understand the import of the Chambers judge's decision that he *could* attend meetings and vote with respect to the unit he occupied and those which were unrented. He could also have done so in respect of rented units once he had paid the deposits with respect to those units.

[149] Mr. Goertz's request that the Chambers judge make an order under s. 99.1 that ss. 35 and 39 of the *CPA* be generally complied with appears, based on the text of Mr. Goertz's application, to relate primarily to documents. This matter is dealt with by the agreement regarding documents.

[150] In reviewing the decision of the Chambers judge, the formal order and the fiat dated June 6, 2017, and looking at the arguments of Mr. Goertz in the court below, I am satisfied the

Chambers judge dealt with all the matters raised by Mr. Goertz as they were presented to him and was *functus* with respect thereto, subject to the debt action on which he retained jurisdiction.

J. Did the Chambers judge err in awarding costs against Mr. Goertz?

[151] Mr. Goertz submits the Chambers judge erred in awarding solicitor–client costs against him. I turn first to the governing law.

[152] The law with respect to solicitor–client costs and the attendant standard of review was set forth in *Phillips Legal Professional Corporation v Vo*, 2017 SKCA 58, [2017] 12 WWR 779:

> [150] It is common ground that costs are in the discretion of a Chambers judge. An appeal court will interfere only if it is shown that the order was made arbitrarily or without regard to the applicable principles (*L.R. v V.D.R.*, 2006 SKCA 39 at para 10, 279 Sask R 306; *Siemens v Bawolin*, 2002 SKCA 84 at para 97, [2002] 11 WWR 246 [*Siemens*]). The same standard of review applies to solicitor-client costs as well. The difference between party-party costs and solicitor-client costs is that an appellate court will be concerned to ensure that solicitor-client costs are awarded rarely (*Siemens* at para 98).
>
> [151] This Court in *Hope v Gourlay*, 2015 SKCA 27, 384 DLR (4th) 235, said:
>
> > [47] The exceptional nature of solicitor–client costs is well known. The framework principles which govern their award were outlined by this Court in *Siemens v Bawolin*, 2002 SKCA 84, [2002] 11 WWR 246. There, Jackson J.A. writing for the Court at para. 118, summarized those principles as follows:
> >
> > > …
> > >
> > > 1. solicitor and client costs are awarded in rare and exceptional cases only;
> > >
> > > 2. solicitor and client costs are awarded in cases where the conduct of the party against whom they are sought is described variously as scandalous, outrageous or reprehensible;
> > >
> > > 3. solicitor and client costs are not generally awarded as a reaction to the conduct giving rise to the litigation, but are intended to censure behaviour related to the litigation alone;
> > >
> > > 4. notwithstanding point 3, solicitor and client costs may be awarded in exceptional cases to provide the other party complete indemnification for costs reasonably incurred.

[153] Mr. Goertz argues that the Chambers judge erred in awarding solicitor–client costs against him. He submits that he was largely successful in his application in that the Condo Corp

was forced to provide certain documents and the Chambers judge recognized his right to vote regarding six of eleven units. To the extent he was unsuccessful, he argues the Chambers judge was wrong to order costs against him.

[154] The Chambers judge, given his conclusions, found that the Condo Corp was the successful party and therefore Mr. Goertz was liable to pay costs. He determined the Condo Corp was entitled to recover solicitor–client costs from Mr. Goertz on the basis of s. 11.11 of the Bylaws, which specifically provided for the same and for Mr. Goertz's liability for all expenses incurred in connection with court proceedings.

[155] Mr. Goertz's submission that he was successful with respect to the disclosure of documents mischaracterizes the Chambers judge's handling of the issues concerning minutes, general ledger and list of registered owners. The evidence clearly indicates that the Condo Corp had, for the most part, agreed to provide these documents *prior* to the application, but arrangements to do so could not be concluded. There was no order with respect to these documents. The Chambers judge merely confirmed what the parties had agreed to on disclosure. The Chambers judge provided no relief to Mr. Goertz as a successful litigant on this point.

[156] Mr. Goertz was indeed successful in having his voting rights affirmed on six out of 11 units he owned. However, this is not a result of success based on any meritorious arguments by him. As explained above, up to the date of the hearing of the application Mr. Goertz had stubbornly refused to disclose which of his units were rented and the names of his tenants as he was required to do pursuant to s. 78 of the *CPA*. The number of units he actually rented at the relevant times appears nowhere in his affidavit material. In open court, when pressed, he orally provided information regarding the current rental status of his units and some information regarding past rentals. Thus, the argument that he was successful in obtaining an order that he could attend meetings and vote with respect to six of his units is disingenuous. Had Mr. Goertz indicated to the Board which of his units were being rented and otherwise provided the information required to properly assess deposits, he would likely have had voting rights with respect to those six units much earlier than the application.

[157] I agree with the Chambers judge that the central issue in the application was the definition of *contributions* and the underlying issues of whether the deposit was a *contribution* –

the nonpayment of which justified the suspension of voting rights. On that issue, Mr. Goertz was wholly unsuccessful.

[158] It was open to the Chambers judge to rely on s. 11.11(a) of the Bylaws as a basis for awarding solicitor–client costs. Mr. Goertz was the developer of the condominium property. It is clear from both his affidavit material and his written argument before the Chambers judge that he was very familiar with the Bylaws and their detail as well as with the *CPA*. As such, he must have been aware of s. 11.11(a). There is no reason why that provision would not apply to him in this case. This is precisely the finding of the Alberta Court of Appeal in *Condominium Corporation No 311443 v Goertz*, 2016 ABCA 362, leave to appeal to SCC dismissed, 2017 CanLII 23867, where, as the Court described it, Mr. Goertz (also the litigant in those proceedings) failed to pay monthly condominium contributions based on a stubbornly held but flawed interpretation of the provisions of the Alberta *Condominium Property Act*, RSA 2000, c C-22. The Court sustained a solicitor–client costs award against Mr. Goertz noting as a factor that the governing bylaws provided for such recovery.

[159] While solicitor–client costs are an exception, it is clear from the foregoing summary of the germane principles that they can be awarded to provide the other party complete indemnification. The Chambers judge determined, relying on s. 11.11(a) of the Bylaws, that this was an appropriate case to make such an order. Given the deferential standard of review, there is no basis to interfere in this regard.

VI. OTHER RELIEF REQUESTED

[160] For the sake of completeness, I will address the relief requested by Mr. Goertz in Part VI of his factum. The relief requested in paragraphs 180–186, 188 and 191 has been dealt with by my analysis or obviated by it. The relief requested in paragraph 187 for an order directing the Condo Corp to comply with s. 39(3) of the *CPA* and provide audited financial statements for the years 2014–2016 will not be granted. Mr. Goertz argues the Board failed in its duties to provide an audited financial statement in accordance with the *CPA*. Mr. Goertz was the treasurer of the Condo Corp and a Board member for many years until immediately before his dispute with the Board. It appears during his tenure he participated in providing only review engagement

statements and thereby failed to comply with the *CPA*. He had never taken issue with those statements. His complaint now in this regard is disingenuous. I accept the explanation of the Board that the members, being volunteers, were simply not aware of the requirement in view of past practice. Given that counsel for the Condo Corp has indicated audited financial statements are being prepared, no order is necessary.

[161] Mr. Goertz, in paragraph 189, asks for the appointment of an administrator pursuant to s. 101 of the *CPA* on the basis that it is warranted by the conduct of the Board. He makes only a perfunctory argument respecting this matter at paragraph 178 of his factum. The Chambers judge acknowledged that Mr. Goertz sought to have an administrator appointed in conjunction with s. 99.2 of the *CPA*, but found no basis for making such an appointment. Mr. Goertz did not raise this issue in his notice of appeal. However, the Condo Corp has addressed it in its factum and, accordingly, I will address it briefly.

[162] Sections 101(1) and (2) of the *CPA* read as follows:

> **101**(1) A corporation or any person having an interest in a unit may apply to the court for the appointment of an administrator.
>
> (2) The court may, in its discretion, appoint an administrator for an indefinite period or for a fixed period on any terms and conditions as to remuneration or otherwise that it considers appropriate.

[163] Based on s. 101, the appointment of an administrator is discretionary and can be made on any terms the court considers appropriate. There is nothing in s. 101 that points to the factors that inform such a decision. There is little jurisprudence regarding this section. In *Sharpe v Condominium Plan No. 460* (1989), 1998 CarswellSask 460 (WL) (QB), the applicant argued that based on the failure to hold an annual meeting and provide certain financial information to the owners, the appointment of an administrator was necessary. The Chambers judge, in dismissing that application, observed that normally an administrator is appointed to investigate and resolve financial irregularities or mismanagement that could have an adverse affect on interested parties. I agree that these factors cited as reasons to appoint an administrator inform a decision under s. 101: see also *Smooke v Rosemont Estate Condo Corp 101222494*, 2017 SKQB 201, 80 RPR (5th) 277.

[164] In British Columbia, the parallel *Strata Property Act*, SBC 1998, c 43, provision allows for an order to be made if it "is in the best interests of the strata corporation" (s. 174(2)): a provision that is similar to s. 101 of the *CPA* reflects an exercise of discretion. In *Norenger Development (Canada) Inc. v The Owners, Strata Plan NW 3271*, 2016 BCCA 118 at para 44, 397 DLR (4th) 435, the Court observed that the overarching purpose of that provision was to address dysfunction within the corporation. Section 101 of the *CPA* has an identical purpose.

[165] The statutory responsibility to manage and administer the corporation under s. 35 lies with its elected board pursuant to s. 39(1). While in some cases the appointment of an administrator is warranted, it is a drastic step that seriously undercuts that responsibility. Any application for the appointment of an administrator will need cogent evidence that the board is no longer able to adequately discharge its statutory duties and that the corporation is in a state of such dysfunction that its actions will adversely affect the collective owners. Whether there is such dysfunction must be decided on a case-by-case basis.

[166] Nowhere in Mr. Goertz's affidavit materials is there any evidence with respect to why an administrator should be appointed. The affidavit evidence as a whole suggests that while the Board and its members were not entirely blameless with respect to carrying out their statutory duties, there was no basis for finding that the conduct of the Board created the level of dysfunction that warranted the appointment of an administrator and attendant intrusion into the affairs of the Condo Corp and associated expense.

VII. CONCLUSION

[167] The appeal of Mr. Goertz is dismissed. For essentially the same reasons as set forth by the Chambers judge with respect to costs on the application before him, the Condo Corp shall have its costs on a solicitor–client basis.

"Ottenbreit J.A."
Ottenbreit J.A.

I concur. "Whitmore J.A."
Whitmore J.A.

I concur. "Schwann J.A."
Schwann J.A.