Court of Queen's Bench of Alberta

Citation: Toronto-Dominion Bank v Bachand, 2021 ABQB 271

Date: 20210409
Docket: 1603 04373
Registry: Edmonton

Between:

The Toronto-Dominion Bank

Plaintiff/Applicant

- and -

Levi Bachand and Averyl Michaud

Defendants

Reasons for Decision
of
L.R. Birkett, Master in Chambers

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Introduction

[1] The plaintiff, The Toronto-Dominion Bank, brought an application for an order for sale to plaintiff in its foreclosure proceedings on an apartment style condominium in Edmonton, Alberta. As part of the application, the TD Bank sought a ruling on the outstanding condominium fees having priority over the plaintiff's mortgage. The Owners: Condominium Plan No. 8222909 (the Condominium Corporation) responded to the application.

[2] I heard lengthy argument from Counsel in morning Chambers with respect to the priority of the condominium charges over the TD mortgage, and in particular, the priority for the Condominium Corporation's solicitor and client costs. Counsel referred to caselaw which had not been provided, a recent Affidavit on which leave was sought to rely, and bylaws which were yet to be read.

[3] The matter was further complicated by the bankruptcy of the defendants. The Condominium Corporation had filed a proof of claim and received a dividend in each bankruptcy.

[4] I asked for written submissions. I ruled the matter would be decided as if heard on August 19, 2020, with interest capped as of that date.

[5] Counsel provided written Briefs. There was a further affidavit of Troy O'Donnell, filed on behalf of the Condominium Corporation on September 10, 2020.

[6] I will summarize the facts, set out the position of the parties and identify the issues. I will then look at each of those issues and provide an analysis and conclusion.

Summary of the facts

[7] Having reviewed the material filed electronically and the physical file, I have gleaned the following facts. More specific details will be provided in my analysis.

[8] The certified copy of title shows the TD mortgage as a first charge, registered in 2010 for the original amount of $233,222.00, followed by caveats registered by the Condominium Corporation in 2013 and 2014 for unpaid contributions. Subsequent to the caveats, are writs filed by the Condominium Corporation for a judgment obtained in Action No. 1403 18216 against each of the defendants, Bachand and Michaud.

[9] The judgment obtained by the Condominium Corporation is for special assessments, a sanction and interest. The judgment is set out in the Order of Justice R.A. Graesser dated March 19, 2015 for an *in personam* judgment against the defendants, jointly and severally, in the amount of $64,997.63 and costs on a solicitor and own client basis.

[10] The Order granted March 19, 2015 provided that the Condominium Corporation's rights were reserved to pursue any further *in personam* judgments should the defendants default in paying ongoing condominium contributions levied against them.

[11] The Order also provided for a one-day redemption period, failing which the condominium was to be offered for sale at a listing price of $235,000. The Condominium Corporation took no further steps to list or sell the property.

[12] The defendants each filed for bankruptcy on January 18, 2016. I was advised they were discharged from bankruptcy in February, 2019.

[13] On January 22, 2016, the Condominium Corporation filed a Proof of Claim Form 31 in each of the bankrupt's estate. Identified in Section 4(A) is an unsecured claim of $77,107.85, comprised of the judgment for $64,997.63, plus interest, costs and condominium arrears since the judgment.

[14] Identified in Section 4(C) in the Proof of Claim form filed by the Condominium Corporation is a secured claim of an unknown amount: "That in respect of this debt, the above-named creditor holds assets of the debtor valued at an unknown amount at this time due to the uncertainty as to what monies, if any, might be realized in a foreclosure of the subject condominium unit…". The security is listed as the caveat registered at the Land Titles Office on November 28, 2014.

[15] The Condominium Corporation received a dividend from the bankruptcy of the defendant Bachand and from the bankruptcy of the defendant Michaud.

[16] The TD Bank commenced this action by Statement of Claim filed March 9, 2016. The TD mortgage is a CMHC insured high-ratio mortgage granted under the terms of the *National Housing Act* with the defendants liable on the covenant to pay. The defendants were noted in default April 5, 2016. A Preservation Order was granted April 3, 2018.

[17] The TD Bank originally filed an application on June 21, 2017 for an order for sale to plaintiff. An Affidavit of Default sworn April 18, 2016 was filed in support of that application showing the amount owing under the TD mortgage to be $213,119.92.

[18] The condominium was appraised on behalf of the TD Bank at a fair market value of $220,000 in April 2016. In February, 2017, the appraiser reviewed recent sales and opined a value in the $210,000 to $215,000 range would not be unexpected. There is no further update on the value of the condominium.

[19] In response to the application for the sale to plaintiff, the Condominium Corporation filed two affidavits, on July 7, 2017 and July 24, 2017, from Troy O'Donnell, a member of the Board of Directors. The affidavits set out the amounts owing to the Condominium Corporation totaling a minimum of $106,430.87 for the outstanding judgment, monthly contribution arrears since the judgment, a monetary sanction, interest, and solicitor and client costs.

[20] The June 21, 2017 application by the TD Bank for a sale to plaintiff was adjourned *sine die*.

[21] Three years later, on July 24, 2020, the plaintiff filed this application for an order for sale to plaintiff. The Final Affidavit of Default filed in support, attached a Statement of Secured Indebtedness showing the TD Bank was now owed $254,643.54, inclusive of the outstanding principal, interest, property taxes paid, and property maintenance costs. The Statement lists outstanding condominium fees of $151,157.97. The affidavit states there is due to the plaintiff as of July 14, 2020 the sum of $405,801.51 plus costs.

[22] The sale to the plaintiff will result in a deficiency of approximately $40,000.00 plus costs, with the amount owing on the mortgage (about $255,000.00) set off against the fair market value of the condominium (about $215,000.00). The deficiency for the TD Bank will be significantly greater if it is required to pay any or all of amounts owing to the Condominium Corporation in priority to its mortgage.

[23] The parties to this application have set out their respective positions from which I have identified the issues to be resolved.

Position of the TD Bank and the Condominium Corporation

[24] The TD Bank seeks an Order for Sale to Plaintiff and a determination as to whether the caveat registered by the Condominium Corporation has priority over the mortgage and, if so, a determination as to the precise amount owing under the caveat.

[25] The TD Bank takes issue with the priority claimed by the Condominium Corporation. It is the position of the TD Bank that the Condominium Corporation abandoned its security under the *Condominium Property Act* and under the caveat registered against title. The Condominium

Corporation reduced its claim to an unsecured judgment, ceased efforts to enforce the security through sale of the property, and participated in the bankruptcy of the defendants. The Condominium Corporation filed a proof of claim as an unsecured creditor and received dividends in the bankruptcy proceedings. The TD Bank submits that the Condominium Corporation has lost its priority to be paid ahead of the mortgage.

[26] The Condominium Corporation seeks priority ahead of the TD mortgage for the contributions, special levies and interest provided by the *Condominium Property Act* and secured by its caveat. It is the position of the Condominium Corporation that the law submitted by the TD Bank regarding the bankruptcy of the defendants has no application to this case.

[27] The Condominium Corporation further seeks priority for all legal costs it has incurred, including those in connection with this action. The TD Bank submits the Condominium Corporation has no priority for its legal charges.

[28] These positions give rise to four broad issues.

The issues

[29] What is the nature of the priority claimed by the Condominium Corporation?

[30] Is the Condominium Corporation also entitled to priority for its legal charges?

[31] Has the Condominium Corporation lost its priority by reducing its claim to an unsecured judgment and receiving dividends in the bankruptcy proceedings of the defendants?

[32] What is the precise amount, if any, payable to the Condominium Corporation in priority to the TD Bank mortgage?

What is the nature of the priority claimed by the Condominium Corporation?

[33] To determine if the Condominium Corporation has lost its priority by reducing its claim to an unsecured judgment and receiving dividends in the bankruptcy proceedings and if it is entitled to priority for its legal charges, it is important to understand the nature of the priority given by the *Condominium Property Act*, RSA 2000, c C-22 [the *CPA*] in sections 39, 40 and 42.

[34] It is also important to understand what was charged by the Condominium Corporation to the owners and which charges formed the basis of the caveat, the judgment, and the unsecured claim advanced in the bankruptcy proceedings.

The *Condominium Property Act*

[35] What are the provisions of the *CPA* and what priority do they provide to the Condominium Corporation in collecting the charges levied against Bachand and Michaud as condominium unit owners and against the TD Bank as mortgagee?

The charges for contributions, special levies, and interest

[36] Section 39(1) of the *CPA* provides that a condominium board may by resolution (a) determine from time to time the amounts to be raised for the purposes of the operating account and the reserve fund and may raise those amounts by levying contributions on the owners at regular intervals and (b) determine from time to time amounts to be raised by special levy and raise those amounts in accordance with section 39.1.

[37] Section 39(1)(a) of the *CPA* allows the contributions to be levied (i) in proportion to the unit factors of the owners' respective units, or (ii) subject to the regulations, and if provided for in the bylaws, on a basis other than in proportion to the unit factors of the owners' respective units.

[38] Section 39(2) provides that a contribution shall not include any amount for the purpose of collecting from an individual owner (a) a monetary sanction under a bylaw made under section 35(1).

[39] Section 40(1) provides that a corporation may charge interest on any unpaid balance of a contribution owing to it by an owner. The rate of interest charged under subsection (1) is not to be greater than the rate of interest provided for by regulation.

[40] The Condominium Corporation charged monthly contributions, assessed special levies, imposed a sanction, and accrued interest on these charges against the owners, Bachand and Michaud. When payments were not forthcoming, the Condominium Corporation filed caveats and sued the owners. The details of the outstanding contributions, special levies, sanction and interest are found in the affidavits and supporting documents filed in the debt action and in the foreclosure action, as set out below.

The judgment

[41] Section 39.2 of the *CPA* provides for the payment and enforcement of contributions. Contributions and special levies are due and payable on the passing of the resolution by the board and in accordance with the terms of the resolution. A contribution and any interest charged under section 40, may be recovered by an action for debt by the corporation from a person who was an owner at the time when the resolution of the board was passed or at the time when the action was instituted, both jointly and severally. See s 39.2(2) *CPA*.

[42] The Condominium Corporation obtained a judgment for the special levies, a sanction and interest in the debt action, Action No. 1403 18216, against each of the owners, Bachand and Michaud. The judgment is set out in the March 19, 2015 Order of Justice Graesser.

[43] The affidavit of Colin MacDonald filed March 4, 2015 in the debt action sets out three special assessments levied in March, April and May of 2012 totaling $41,000.10 plus interest calculated at 18% per annum.

[44] The MacDonald affidavit also sets out a monetary sanction imposed in June of 2012 under the bylaws for $2,000.00, with interest calculated at 18% per annum.

[45] This affidavit evidence supports the judgment granted to the Condominium Corporation in the amount of $64,997.63, as being the special levies totaling $41,000.10, plus interest of $21,007.87 calculated at 18% per annum, and the monetary fine of $2,000.00, plus interest of $989.66 calculated at 18% per annum.

[46] Thereafter, the Condominium Corporation calculated post-judgment interest on the $64,997.63 as shown in Schedule A to the Proof of Claim Form filed in the bankruptcy proceedings.

[47] The Order of Justice Graesser dated March 19, 2015 granted "an *in personam* judgment against the defendants, jointly and severally, in the amount of $64,997.63 and costs on a solicitor and his own client basis, and with the exception of $2,989.66 [the sanction and interest], is a valid and enforceable charge against the [condominium] property".

[48] The Condominium Corporation registered writs on title for the full judgment obtained in Action No. 1403 18216 against each of the defendants, Bachand and Michaud. The writs are registered subsequent to the TD mortgage and, by operation of s 56 of the *Land Titles Act*, RSA 2000, c L-4, afford no priority to the Condominium Corporation.

[49] The March 19, 2015 Order also provided for a one-day redemption period. As a subsequent encumbrancer, if the Condominium Corporation was to proceed on its redemption order or to enforce the writs, it would be required to pay out the prior TD mortgage. The balance of sale proceeds, if any, would be applied to the debt to the Condominium Corporation.

[50] The Condominium Corporation did not proceed against the land, rather it asserted its claim for payment of unpaid contributions, interest and other charges against the TD Bank.

[51] By letter dated February 26, 2016, the Condominium Corporation advised the solicitor for the TD Bank of the amount owing for the judgment and subsequent arrears and sought the TD Bank's intentions with respect to paying the arrears and maintaining ongoing condominium contributions. Thereafter, the Condominium Corporation participated in the foreclosure proceedings commenced by the TD Bank on March 9, 2016.

[52] Foreclosing mortgagees will often pay the arrears and ongoing contributions and add the amounts paid to the outstanding mortgage balance, in recognition of the remedies afforded to a condominium corporation by the provisions of the *CPA*. The payments are made pursuant to s 39.2(3) of the *CPA* and are generally provided for in the terms of the mortgage. The remedies the condominium corporation can pursue against the mortgagee are twofold.

[53] Firstly, s 39.2 of the *CPA* provides that contributions and any interest charged may be recovered by an action for debt by the corporation from a person who was an owner at the time when the action was instituted. This means, subject to the two-year limitation period in the *Limitations Act*, RSA 2000, c L-12, the Condominium Corporation could recover unpaid contributions and interest by suing the TD Bank as the subsequent owner following the foreclosure.

[54] Secondly, the *CPA* allows a caveat registered by a condominium corporation to remain registered against the certificate of title of the unit following a foreclosure until the amount owing is paid. This creates a priority for the condominium corporation over the mortgagee within the foreclosure action itself. The Condominium Corporation may rely on the caveats for unpaid contributions it registered against the title to the condominium unit owned by Bachand and Michaud, even though the caveats are registered subsequent to the TD mortgage.

[55] The statutory priority given to a condominium corporation's caveat is set out in detail below.

The caveat

[56] In addition to recovery of contributions and interest by an action for debt, the Condominium Corporation is entitled to secure the owner's obligations by filing a caveat against the condominium unit. See ***Tutt v The Owners: Condominium Plan No. 7822572***, 2020 ABQB 213 [***Tutt***] at paragraph 35.

[57] Section 39.2(6) of the *CPA* provides that a corporation may file a caveat against the certificate of title to an owner's unit for the amount of a contribution levied on the owner and interest payable but unpaid by the owner.

[58] Section 39.2(7) provides that on the filing of the caveat under subsection (6), the corporation has a charge against the unit equal to the unpaid contributions and any interest owing.

[59] Section 39.2(8) provides that on and from the date of filing of the caveat, a charge under subsection (7) has the same priority as a mortgage under the *Land Titles Act* and may be enforced in the same manner as a mortgage.

[60] Section 39.2(10) provides that if a corporation has filed a caveat under this section, the corporation shall withdraw the caveat on the payment to it of the amount of the charge.

[61] Section 39.2(11) provides that notwithstanding subsection (8), if (a) a corporation has filed a caveat under this section, and (b) subsequent to the caveat's being filed another person gains title to the unit pursuant to (i) a foreclosure action ... and (c) an amount remains owing to the corporation with respect to the contribution and interest for which the caveat was filed, the caveat remains registered against the certificate of title of the unit until the amount owing is paid to the corporation.

[62] The effect of filing the caveat is to give the charge against the unit for the unpaid contributions and any interest owing the same priority and enforceability as a mortgage. Further, if the mortgagee or another person gains title to the unit pursuant to a foreclosure action, the caveat remains registered against the certificate of title of the unit until the amount owing is paid to the condominium corporation. This creates what has been referred to as a super-priority. See Master Schlosser's comments in ***Condominium Plan No. 8722887 v Callaghan,*** 2011 ABQB 638 [***Callaghan***] at paragraph 5.

[63] The caveat registered at the Land Titles Office on November 28, 2014 as instrument number 142 403 322 claims an interest pursuant to section 39 of the *Condominium Property Act* for the unpaid contributions levied by the Condominium Corporation on the unit, currently in the amount of $59,601.79, plus interest pursuant to sections 40 of the *Act*, plus all reasonable costs and expenses pursuant to section 42 of the *Act*.

[64] The three special assessments totalling $40,000.10 plus interest appear to have formed the basis of this caveat. A demand letter attached as Exhibit F to the affidavit of Colin MacDonald filed March 4, 2015 in the debt action confirms the special assessments plus interest accrued from May 15, 2012 to December 1, 2014 to be $59,824.21, which is consistent with the additional per diem intertest that would have accrued on the caveated amount. In paragraph 12 of the affidavit, Colin MacDonald states the amount owing under the caveat at December 16, 2014 was $60,127.51 with a per diem thereafter of $20.22, also consistent with the per diem interest accruing on the $41,000.10 special assessments.

[65] The Condominium Corporation claims it has priority over the TD mortgage for unpaid contributions in addition to the special assessments of $41,000.10 and accrued interest. Colin MacDonald says in paragraph 10 of his affidavit that through the caveat, the Condominium Corporation claimed an interest pursuant to section 39 of the *CPA* for the unpaid amount of $59,601.79 "plus future contributions so levied". However, the caveat registered November 28, 2014, does not specify that it was registered for the unpaid amount "plus future contributions so levied."

[66] The later affidavits filed in the foreclosure action show there were unpaid monthly condominium fees and monthly special assessments accumulating in addition to the amount owing for the special assessment identified in the caveat.

[67] Troy O'Donnell, a member of the Board of Directors for the Condominium Corporation, deposed in an affidavit filed July 7, 2017 that no payments had been received on the judgment nor had any monthly contributions been made thereafter. In that affidavit, Troy O'Donnell calculates future arrears at $21,395.54 as the balance in the ledger of monthly condominium fees and monthly special assessments and other charges accumulated since the March 19, 2015 judgment, less the legal charges.

[68] The further affidavit of Troy O'Donnell, filed July 24, 2017, indicates the last monthly contribution was paid in the month of January 2016 and calculates the monthly contribution arrears from February 1, 2016 to be $12,122.89, inclusive of interest to July 18, 2017. This affidavit does not address the monthly special assessments accumulating in the ledger. These are described as "SA loan Pymt - Due to Reserve" in the amount of $312.38 each month.

[69] The affidavit of Troy O'Donnell filed August 14, 2020 provides evidence of a total amount of $96,561.47 owing for contributions and special levies, sanctions, charge-backs and legal charges. This is shown in the Ledger attached as Exhibit A to the affidavit. Troy O'Donnell states this total consists of $58,499.62 for contributions and special levies, $2,200.00 for sanctions and $1,365.26 for chargebacks. Legal charges are $34,496.59.

[70] A Calculation Sheet purporting to show the calculation of interest at the rate of 18% per annum on the principal amount of the condominium fees and special assessment arrears is attached as Exhibit B to the August 14, 2020 affidavit. The document shows a calculation of monthly condominium fees and monthly special assessments with a cumulative total of $60,177.65 before interest, and a total due to the corporation including interest of $61,095.11. The document does not show the total for the interest accrued on a cumulative basis.

[71] The August 14, 2020 Affidavit does not specifically mention the outstanding special assessments and interest contained in the *in personam* judgment or the caveat. Troy O'Donnell does say he relies on his previous affidavits and the affidavit of Colin MacDonald filed in the debt action.

[72] Counsel for the Condominium Corporation has excluded the sanctions and chargebacks from the priority claim set out in his Brief. This is in keeping with s 39(2) of the *CPA.*

[73] Counsel argues all other charges should be paid in priority to the TD mortgage pursuant to the caveat.

[74] The nature of the priority must be further examined to determine the extent of what can be claimed by the Condominium Corporation. Does the November 28, 2014 caveat provide a charge against the condominium unit for unpaid contributions levied by the Condominium Corporation in addition to the special assessments and interest notwithstanding the caveat does not specifically claim for future contributions?

[75] The answer lies in the interpretation of the provisions of the *CPA* as to the priority given to the Condominium Corporation on filing a caveat, and otherwise.

The priority

[76] The Alberta Court of Appeal in ***Condominium Plan No. 8222909 v Francis***, 2003 ABCA 234 [***Francis***] at paragraph 25 reiterated that individual sections of the *CPA* are to be read with other provisions of the *CPA* and the *CPA* as a whole. The Court stated that the words of the *CPA* are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the *CPA* and the intention of the legislature, referring to the principle of statutory interpretation set out in ***Re Rizzo & Rizzo Shoes Ltd***, [1998] 1 S.C.R. 27. See also ***Bank of Montreal v Bala***, 2017 ABQB 38 [***Bala***] at paragraphs 30 and 31.

[77] The Court of Appeal in ***Francis*** held that a condominium corporation does not enjoy the same powers of a natural person, as do most business corporations. Section 25(5) of the *CPA* states that the *Business Corporation Act* does not apply to a condominium corporation. As a condominium corporation is created by statute, it owes its existence to the *CPA* and can only undertake actions specifically authorized by the *CPA*. See ***Francis*** at paragraphs 26 and 27.

[78] The condominium corporation is authorized by section 39.2 of the *CPA* to file a caveat as a charge against the unit for the unpaid contributions and any interest owing and gives that caveat the same priority and enforceability as a mortgage. Where the unit is transferred to another person pursuant to foreclosure proceedings, the caveat remains registered against the certificate of title until the amount owing is paid to the condominium corporation, creating a super-priority. See ***Callaghan***. The caveat for unpaid contributions remains registered against title whether title is transferred pursuant to an order for foreclosure, an order for sale to the plaintiff, or an order confirming sale and vesting title to a purchaser.

[79] Counsel for the Condominium Corporation points out the super-priority over the mortgagee only comes into play if the TD Bank pursues its foreclosure action to bring about a change of title. In the interval, the Condominium Corporation has to simply ensure its security remains in place. With the caveat in place, Counsel submits that the Condominium Corporation can claim all unpaid amounts owing to it by the owners (except the sanctions and charge backs) from the TD Bank. This includes the legal charges and the future contributions, in addition to the special assessments and interest enumerated in the caveat.

[80] A copy of the caveat registered on title in 2013 was not provided. We do not know if that caveat set out a specific amount owing for the special assessments levied in 2012 or for further or other unpaid contributions, or if the caveat specifically claimed for future contributions.

[81] The copy of the caveat registered on November 28, 2014 was provided. We know the Condominium Corporation claimed an interest pursuant to s 39 of the *CPA* for the unpaid contributions levied as the special assessments in 2012 in a specific amount, plus interest pursuant to s 40 *CPA*, plus all reasonable costs and expenses pursuant to s 42 *CPA*. We know that caveat did not specifically claim for future contributions so levied.

[82] Does the specific wording of the caveat limit the amount the Condominium Corporation can claim against the TD Bank in the foreclosure proceedings?

[83] In ***Bala***, Feehan J (as he then was) applied the principles in ***Francis*** to interpret the section of the *CPA* which allows for determining a condominium unit's share of a levy on a basis other than unit factors and concluded at paragraph 32: "Section 39(1)(c)(ii) is clear when read in the entire context of the *CPA*, in its grammatical and ordinary sense, harmoniously with the scheme of the statute, its object, and the intention of the Legislature's amendments in 2000."

[84] Similarly, I apply the principles in ***Francis*** to interpret the sections of the *CPA* which allow for the registration of a caveat by the condominium corporation. I conclude that the subsections in s 39.2 of the *CPA* are clear when read in the entire context of the *CPA,* in their grammatical and ordinary sense, harmoniously with the scheme of the statute, its object, and the intention of the Legislature. Once registered, the caveat acts as security until any and all amounts claimed pursuant to s 39 of the *CPA* for unpaid contributions are paid. This would include the specific amount set out in the caveat at the time of registration and future contributions. The caveat also provides security for the interest accruing on those contributions, pursuant to s 40 *CPA.*

[85] Furthermore, the Court of Appeal has determined that caveats are not invalid if they do not refer to the exact amount of the indebtedness secured. See ***Condominium Corp No 311443 v Goertz,*** 2016 ABCA 362 at paragraph 36:

> … Nothing in the *CPA* or the *Land Titles Act*, RSA 2000, c L-4 requires that a specific amount be identified in the caveat or that any such amount be accurate as of the date the caveat is filed. This is because the purpose of a caveat is not to create a right of recovery in a certain amount but rather it is to give third parties notice of a claim to some entitlement, the value of which is to be separately determined. Further, s 39(8) of the *CPA* does not say that any caveat filed must disclose the exact amount of arrears owed. Rather, the filing of a caveat creates a charge against the unit in question equal to the amount of arrears, whatever they may be.

[86] I find the caveat registered on title November 28, 2014 creates a charge against the condominium unit owned by Bachand and Michaud for the special assessments levied in 2012, originally in the amount of $40,000.10, plus accrued interest, and for the other unpaid contributions levied against the owners pursuant to s 39 of the *CPA,* plus interest accruing on those contributions.

[87] The Condominium Corporation is entitled to a super-priority for the charges against the unit created by the caveat. If the TD Bank pays the Condominium Corporation for the amount of the unpaid contributions and interest, the caveat will be withdrawn. If the TD Bank does not pay the amounts outstanding and pursues its order for a sale to plaintiff, the caveat remains registered against the certificate of title to the unit until the full amount of the charge is paid to the Condominium Corporation.

[88] It is important to note the Condominium Corporation is able to pursue both an action in debt against the owners and the registration of a caveat against the title to the condominium unit.

[89] Justice Manderscheid, when he was legal Counsel for the City of Edmonton, wrote ‘Condominium Contributions: A Matter of Priority’ for the *Alberta Law Review*, Volume 37(4) 1999. In his view, expressed at page 977, the remedies provided by what is now s 39 *CPA* are twofold and consist of the right to bring an action for debt and to create a legal charge against the unit title. He compared the operation of the *Municipal Government Act*, which contemplates an election of remedies, to the operation of *Condominium Property Act* [the *Act*] and concluded: “There are no election provisions in the *Act* that require the corporation to choose one remedy over that of another. Consequently, the corporation does not have to exhaust its rights under one remedy prior to the exercise of the other.”

[90] Justice Graesser stated in ***Tutt*** at paragraph 35: "Enforcement or collection of any required contributions may be taken by way of civil action, and the corporation is entitled to secure a unit owner's contribution obligations by way of filing a caveat against the unit under section 39.2."

[91] Applying the principles in ***Francis*** and ***Rizzo***, it is clear there are two separate remedies available. Subsections 2, 6, 7, and 8 of s 39.2 *CPA* are to be read in the entire context of the *CPA*, and in their grammatical and ordinary sense, harmoniously with the scheme of the statute, its object, and the intention of the Legislature in providing for the charging, payment and enforcement of condominium contributions. The subsections of s 39.2 *CPA* do not require the corporation to elect either to proceed in debt or to proceed by way of caveat, nor do they require one remedy to be exhausted prior to commencing another. The action in debt and the enforcement of security under the caveat may coexist and be pursued independently of the other.

[92] This analysis addresses the first of the four issues, in part. The nature of the priority claimed by the Condominium Corporation has been described generally, and specifically with respect to the super-priority in a foreclosure proceeding for charges for unpaid contributions and interest.

[93] The other three issues remain, namely:

> Is the Condominium Corporation also entitled to priority for its legal charges?
>
> Has the Condominium Corporation lost its priority by reducing its claim to an unsecured judgment and receiving dividends in the bankruptcy proceedings of the defendants?
>
> What is the precise amount, if any, payable to the Condominium Corporation in priority to the TD Bank mortgage?

Is the Condominium Corporation also entitled to priority for its legal charges?

[94] The Condominium Corporation seeks priority for all legal costs it has incurred, including those in connection with the foreclosure action. Counsel for the TD Bank argues legal expenses with respect to enforcing the caveat or for collecting unpaid contributions are recoverable against the owner only and do not become a priority charge against the condominium unit for which the mortgagee would be responsible.

[95] The evidence put forward by the Condominium Corporation through the affidavit of Troy O'Donnell filed August 14, 2020 is that the legal charges are $34,496.59. As part of, or in addition to, those legal charges, is a Bill of Costs taxed on a solicitor and own client basis in the amount of $5,630.99 on April 10, 2015 and one taxed in the amount of $5,612.25 on February 16, 2016.

[96] To determine the priority claimed by the Condominium Corporation for legal charges, it is necessary to look at the legislation and caselaw and the effect of the condominium bylaws.

Section 42 of the *Condominium Property Act*

[97] Applying the principle in ***Francis***, the entitlement of the Condominium Corporation to priority for its legal charges must be specifically authorized by the *CPA*.

[98] Section 42 of the *CPA* provides that where a corporation takes any steps to collect any amount owing under section 39, the corporation may (a) recover from the person against whom the steps were taken all reasonable costs, including legal expenses and interest, incurred by the corporation in collecting the amount owing, and (b) if a caveat is registered against the title to the unit, recover from the owner all reasonable prescribed expenses incurred by the corporation with respect to the preparation, registration, enforcement and discharge of the caveat.

[99] Section 42(a) creates a statutory entitlement to recover reasonable legal charges incurred in collecting outstanding contributions and special levies from the person against whom the collection steps were taken. Where the condominium corporation has registered a caveat for outstanding contributions and special levies, s 42(b) creates a further statutory entitlement to recover reasonable prescribed expenses incurred with respect to the caveat from the owner.

[100] The entitlement of the Condominium Corporation to recover legal charges and expenses is specifically authorized by the *CPA*. The entitlement is to recover reasonable legal charges for steps taken in collecting outstanding contributions and to recover reasonable expenses with respect to the caveat. The *CPA* does not specifically provide for full indemnity or solicitor and own client costs. Section 42 is silent regarding an entitlement of the Condominium Corporation to a priority for its legal charges.

The caselaw on priority for legal charges

[101] It is the position of the Condominium Corporation that I am bound, as a Master of the Court of Queen's Bench, by the decision in ***Condominium Plan No. 052 6233 v Seehra***, 2014 ABQB 588 [***Seehra***] which held that a condominium corporation has priority over a mortgagee in regards to the costs incurred in enforcing a caveat. Justice Lee concludes, at paragraph 59, from his analysis of the cases and the bylaws: "In the result, subject to assessment of the solicitor-client costs by the assessment officer, the [condominium corporation's] expenses in the circumstances of this matter form part of the [owner of the] Unit's assessment for contributions under the *CPA*, s 39, and constitute caveatable interests in priority to RBC's registered mortgage."

[102] Counsel for the Condominium Corporation acknowledges there are conflicting cases which could be considered if the matter was being heard by a Justice, however, the comments in those cases that would go against a priority are *obiter dicta* and not binding.

[103] Counsel for the TD Bank states that while collective contributions are treated as *in rem*, legal expenses with respect to enforcing the caveat or collecting unpaid contributions are *in personam*. Counsel submits that Graesser J in ***Tutt*** effectively summarized the law. Starting at paragraph 50, Graesser J refers to the decision of Feehan J (as he then was) in ***Bala***:

> I agree with Feehan J's analysis and conclusions. Legal costs, whether on a Schedule C basis, a full indemnity basis, or any other basis, do not become a charge against the unit under the provisions of section 39 of the *Condominium Property Act*. All that is recoverable against the unit under section 39 is the amount of any unpaid contributions together with interest at the rate set in the bylaws. Feehan J added the costs of filing the caveat, but excluded legal costs. He ruled that the filing costs fell under section 42. Legal costs may only be enforced against the owner and not directly against the unit by filing a caveat under section 39.

[104] I also agree with Feehan J's analysis and conclusions in ***Bala***. I find the comments in ***Bala*** and ***Tutt*** are not *obiter dicta* but are binding on me.

[105] In ***Seehra***, the mortgagee participated in the litigation between the condominium corporation and the owner; in ***Bala***, the condominium corporation participated in the foreclosure action between the mortgagee and the owner. In ***Seehra***, Lee J determined legal charges provided for in the bylaws formed part of the contributions and were thereby afforded a priority pursuant to s 39 of the *CPA*; in ***Bala***, Feehan J determined legal charges, even where provided for in the bylaws, were afforded no such priority.

[106] Justice Feehan's decision is an appeal from Master Schulz' decision in ***Bank of Montreal v Bala***, 2015 ABQB 166. With respect to legal charges, Master Schulz followed Master Smart in ***Condominium Corporation No 0425117 v Jessamine***, 2011 ABQB 644 and Master Schlosser in ***Callaghan***, while disagreeing with Justice Lee in ***Seehra*** and Master Prowse in ***Condominium Plan No 8210034 v King***, 2012 ABQB 127. Justice Graesser, in ***Tutt***, also reviewed these decisions and agreed with Justice Feehan's conclusions in ***Bala***.

[107] The learned Justices and Masters have ably set out their respective review of the case law and conclusions drawn. I will not repeat them here. My own review has led me to prefer Justice Feehan's analysis of s 42 of the *CPA* and to determine I am bound by the decision in ***Bala***.

[108] Justice Feehan provides a brief summary of each of the relevant cases, however his analysis focuses on the principles of statutory interpretation set out in ***Rizzo*** and ***Francis***.

[109] The issue of whether solicitor/client or full indemnity costs attract a statutory priority over a foreclosing mortgagee is addressed in paragraphs 69 to 74 of ***Bala***.

[110] The condominium corporation applied to vary the amount of a redemption order to collect from the mortgagee the amount owing under s 39 of the *CPA*. Feehan J found 'on the plain wording of s 42(a) of the *CPA*', the condominium corporation is entitled to its reasonable costs, including legal expenses in collecting that amount:

> However, that provision does not make those reasonable costs and legal expenses themselves a "contribution" pursuant to s 39 of the *CPA*. As a result, although reasonable costs and legal expenses are recoverable as taxable costs in the proceedings before this Court and the Court below, they do not become a contribution and do not attract a statutory priority.…
>
> The proper interpretation of s 42(a) of the *CPA* is that those costs can be collected *in personam* against "the person against whom the steps were taken", in this case BMO.…
>
> Such costs are in fact recoverable from BMO, but they do not form part of the "contribution", do not constitute a statutory charge against the Unit, and do not attract a priority. They are recoverable *in personam*, much as other costs in an action.

[111] Justice Feehan then addressed the issue of whether the expenses related to the caveatable interest of the condominium corporation attract a statutory priority over a foreclosing mortgagee. He set out how those legal expenses were treated in each of ***King***, ***Callaghan***, ***Jessamine***, and ***Seehra***.

[112] Again, looking at "the entire context of the *CPA*, in its grammatical and ordinary sense, harmoniously with the scheme of the statute, its object, and the intention of the Legislature…", Feehan J provides his analysis and conclusion in ***Bala*** at paragraphs 79 through 82:

> The filing of a caveat is provided for in s 39(7) of the *CPA*. It is the filing of the caveat that secures and provides notice of a statutory charge against the Unit equal to the unpaid contribution pursuant to s 39(8), and if the corporation has filed the caveat and an amount remains outstanding, that amount enjoys a statutory priority pursuant to s 39(12) of the *CPA*.
>
> Section 42(b) provides that if a caveat is registered against title to the Unit, the condominium corporation may "recover from the owner" (as opposed to "from the person against whom the steps are taken" as in s 42(a)) all reasonable expenses incurred by the corporation with respect to the preparation, registration, enforcement and discharge of the caveat.
>
> However, unlike the addition of interest to the contribution in s 41, the *CPA* does not expressly provide that the cost of preparation, registration, enforcement and discharge of the caveat may be considered as a contribution under s 39.
>
> I recognize that the costs of preparation, registration, enforcement and discharge of the caveat are necessary components in order to achieve a statutory charge against the Unit and a priority over the mortgagee. Nevertheless, I find on a plain reading of s 42(b) that such costs are not amounts owing under s 39, nor are they equated to such amounts. Therefore, I find the Master erred in finding that those charges formed part of the caveatable interest. Those charges remain recoverable only *in personam* "from the owner".

[113] Justice Feehan then comments on the priorities available to a condominium corporation for *in personam* claims, including an action in debt. "Additionally, a claim against an owner is caveatable against a unit title, even though it is not a statutory charge nor does it obtain priority over a mortgagee." See ***Bala*** paragraph 83.

[114] Graesser J described it this way in ***Tutt*** at paragraph 55:

> Subject to limitation periods and the provisions of the specific condominium corporation's bylaws, cost obligations may constitute a charge against the owner's interest in the unit and could be separately caveated. That type of charge would not take priority over previously registered encumbrances, and would not be caveatable after a title change.

[115] In ***Bala***, Feehan J concluded the condominium corporation could collect its legal expenses as an *in personam* judgment, but not with *in rem* priority, against the mortgagee. The reasonable expenses incurred by the condominium corporation with respect to the preparation, registration, enforcement and discharge of the caveat against the unit do not constitute a statutory charge or achieve priority as being a "caveatable interest". These charges remain collectible *in personam* against the owner of the unit.

The effect of the condominium bylaws

[116] The condominium corporation in ***Bala*** advanced its position against the BMO as mortgagee based on the provision in its bylaws. The bylaws entitled the corporation to be paid by

the defaulting owner the costs incurred in preparing and registering the caveat, in enforcing or seeking to enforce the corporation's lien and in discharging the caveat, all on a solicitor and his own client full indemnity basis. The bylaw also provided that the corporation shall not be obliged to discharge any caveat until all arrears of the owner, including interest and all such costs, are fully paid.

[117] Master Schulz awarded these costs, in an amount to be assessed for reasonableness on a solicitor and own client full indemnity basis, to be collected as an *in personam* judgment. Feehan J found the Master did not err in her determination with respect to the costs and legal expenses claimed. However, that determination should be interpreted to properly reflect that the condominium corporation's full indemnity costs are not recoverable by it as a contribution, nor do they constitute a statutory charge against the unit, nor attract a statutory priority under the *CPA*, but they are recoverable *in personam* against the unit owner.

[118] Master Schulz found an additional collection remedy is given to the condominium corporation in s 42(b) for "all reasonable expenses incurred by the corporation with respect to the preparation, registration, enforcement and discharge of the caveat" and that these legal expenses, and only these legal expenses, could be collected from the owner as part of the caveatable interest protected by s 39 of the *CPA*. Notwithstanding the wording of the bylaw, Feehan J held on a plain reading of s 42(b) that such costs are not amounts owing under s 39, nor are they equated to such amounts. He found the Master erred in finding those charges formed part of the caveatable interest. Those charges remain recoverable only *in personam* "from the owner".

[119] In the case at hand, the Condominium Corporation advanced its position against the TD Bank as mortgagee based on the provision in section 8.1(c) of its bylaws entitling the Corporation to not only be paid its legal fees on a solicitor and client indemnification basis, but to have those fees charged to the owner as an assessment. Counsel submits that ***Seehra*** supports their position.

[120] I find this position to be without merit on both the facts and the law. Section 8.1(c) falls under the heading "Maintenance" in the bylaws and provides that costs or expenses expended or incurred by the Corporation in correcting, remedying or curing an infraction violation or default, including legal fees on a solicitor and client indemnification basis, shall be charged to the owner as an assessment. The amounts claimed by the Condominium Corporation against the TD Bank are for collecting outstanding monthly contributions and special levies, not for expenses incurred in remedying a default. This section of the bylaws does not apply. The law is set out in ***Bala***.

[121] The Condominium Corporation advances the further position that section 8.4(a) of its bylaws creates a lien and caveatable charge against the interest of the owner for any unpaid assessment, instalment or payment, including interest on arrears, due to the Corporation. Section 8.4(a) falls under the heading "Default in Payment of Assessments and Lien for Unpaid Assessments, Instalments and Payments". It provides that the Corporation shall be entitled to be paid by the defaulting owner all costs incurred, including administration and legal costs on a solicitor and client indemnification basis, in pursuing and collecting upon the arrears; the Corporation shall not be obliged to discharge any caveat until all the arrears of the owner, including interest, administrative, and legal costs on a solicitor and client indemnification basis, are fully paid.

[122] Counsel for the Condominium Corporation submits that bylaw 8.4(a) provides for the registering of a caveat, entitlement to interest at the rate of 18% per annum, and a priority for legal costs on a solicitor and client indemnification basis.

[123] Counsel also points out the March 19, 2015 Order of Justice Graesser in the debt action granted both an *in personam* and *in rem* judgment against the defendants. The exact wording is:

> IT IS FURTHER ORDERED that the Plaintiff [Condominium Corporation] is hereby granted an *in personam* judgment against the Defendants, jointly and severally, in the amount of $64,997.63 and costs on a solicitor and his own client basis, and with the exception of $2,989.66 [the sanction and interest], is a valid and enforceable charge against property legally described as follows: [the condominium unit]

[124] It is not perfectly clear on reading the Order whether the phrase 'and costs on a solicitor and his own client basis' means the costs are included as part of the *in rem* judgment or the costs are in addition to the judgment. Given section 8.4(a) of the bylaw, and the submission of Counsel, I expect the draft of the Order was intended to provide a charge against the property for the outstanding contributions and for solicitor and client costs.

[125] Considering Justice Graesser's recent endorsement of ***Bala*** in ***Tutt***, it is unlikely that his Order granted today would include the award of costs, whether on a solicitor and his own client basis or otherwise, in the same form of judgment as the outstanding contributions. Unlike the contributions and interest component of the judgment, legal costs do not become a charge against the unit under the provisions of s 39 of the *CPA*. All that is recoverable against the unit under s 39 is the amount of any unpaid contributions together with interest at the rate set out in the bylaws. See ***Tutt*** paragraph 50.

[126] If it was intended the costs would also become a valid and enforceable *in rem* charge against the property, a caveat registered to protect that interest would not have the same super-priority given to a caveat registered to protect s 39 contributions.

[127] It is not clear on reading section 8.4(a) that the bylaw was intended to permit the legal costs incurred on a solicitor and client indemnification basis in pursuing and collecting the contribution arrears to also be included in the caveatable charge against the unit. It provides that the caveat shall not be discharged until these costs are paid.

[128] Where condominium bylaws allow for costs to be recovered against a defaulting owner on a solicitor and client full indemnity basis, and also provide such costs constitute a charge against the owner's interest in the unit, there is an agreement charging land which may support a caveat. That caveat would not take priority over previously registered encumbrances or transfer to the new title following a foreclosure. See ***Tutt*** 55 through 59.

[129] As stated by Graesser J, "No priority for costs is recoverable under the *Condominium Property Act* or the caveat contemplated in section 39. However, where claims are stated in the bylaws to be a charge against the owner's unit, those claims are at law caveatable as they constitute an interest in land." Graesser J observes "That may have the unfortunate result of requiring two caveats: one under the *Condominium Property Act* provisions and the other under the bylaws."

[130] I conclude there are several problems with the Condominium Corporation's reliance on bylaw s 8.4(a) and the March 19, 2015 Order to support their priority claim against the TD Bank.

[131] Firstly, s 8.4(a) does not support a charge of interest on arrears for unpaid assessments at the rate of 18% per annum. The bylaws attached to the March 4, 2015 affidavit of Colin MacDonald do not amend the original provision in s 8.3(a) for the assessment of common expenses. The bylaw requires each owner to pay any and all assessments made pursuant to that provision and further to pay interest on all assessments or payments in arrears 'at the rate of fifteen (15) per centum per annum'.

[132] Secondly, the wording of s 8.4(a) does not support an agreement charging land and caveat for the legal costs incurred on a solicitor and client indemnification basis.

[133] Thirdly, to the extent s 8.4(a) purports to remove the obligation of the Corporation to discharge its caveat until all the arrears of the owner, including administrative, and legal costs on a solicitor and client indemnification basis, are fully paid, the bylaw is *ultra vires* s 42 of the *CPA*, as set out in ***Bala*** and ***Tutt***.

[134] Fourthly, the collection of assessment arrears falls under s 39 of the *CPA*. The recovery of costs where the Condominium Corporation takes any steps to collect any amount owing under section 39 is determined by s 42(a) and 42(b). The claim for legal costs on a solicitor and client indemnification basis, in pursuing and collecting upon the arrears and with respect to the caveat must be assessed for reasonableness.

[135] Fifthly, the costs determined by s 42 are recovered by the Condominium Corporation *in personam*, and not with *in rem* priority against the TD Bank. See ***Bala*** and ***Tutt***.

Conclusion on entitlement to priority for legal charges

[136] In determining the priority claimed by the Condominium Corporation for legal charges, I have looked at the legislation and caselaw and the effect of the condominium bylaws.

[137] I have concluded that the Condominium Corporation is not entitled to priority for its legal charges.

[138] The Condominium Corporation may recover from the person against whom the steps were taken, which may include the TD Bank, all reasonable costs, including legal expenses and interest, incurred in collecting the amount owing for its unpaid contributions and special levies.

[139] The Condominium Corporation may recover from the owner, but not the TD Bank, all reasonable prescribed expenses incurred by the Corporation with respect to the preparation, registration, enforcement and discharge of the caveat registered against title to the unit. If the caveat remains after the TD Bank takes ownership, then arguably, the TD Bank would bear the cost of discharge of the caveat.

[140] That leaves two further issues to be determined: the issue of the potential loss of the Condominium Corporation's priority claim for unpaid contributions and interest by participation in the defendants' bankruptcy proceedings, and the issue of the precise amount, if any, payable to the Condominium Corporation in priority to the TD Bank mortgage.

[141] Although the Condominium Corporation is not entitled to claim a priority for its legal charges, it does have a claim for reasonable legal expenses incurred for the steps taken against the TD Bank to collect unpaid contributions. Some of those steps were taken during the course of the defendants' bankruptcy proceedings.

[142] I will comment on the effect that the participation of the Condominium Corporation in the defendants' bankruptcy proceedings had on the outstanding legal charges, including those claimable against the TD Bank.

Has the Condominium Corporation lost its priority by reducing its claim to an unsecured judgment and receiving dividends in the bankruptcy proceedings of the defendants?

The Bankruptcy and Insolvency Act

The Bankrupts

[143] At the time they filed for bankruptcy on January 18, 2016, the defendants, Levi Bachand and Averyl Michaud were in significant arrears with the Condominium Corporation. They had not paid the March 19, 2015 *in personam* judgment against them for $64,997.63, plus interest and costs, and there was an outstanding balance of $20,597.07 in the Ledger of monthly charges and payments. They had fallen behind on their TD mortgage payments.

[144] The Condominium Corporation had filed writs against the jointly owned condominium unit and in the Personal Property Registry. It had issued garnishee summonses against accounts at the TD Bank and against the debtors' employers, resulting in a receipt of $829.77 on June 4, 2015.

[145] The bankruptcy documents are not in evidence but clearly the defendants were facing financial pressure. Section 2 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*] defines a bankrupt as a person who has made an assignment or against whom a bankruptcy order has been made; it is the legal status of the person.

[146] A debtor becomes a bankrupt by committing an act of bankruptcy. The most common act of bankruptcy occurs where the debtor has ceased to meet his or her liabilities generally as they become due and makes an assignment of his or her property to a trustee for the general benefit of creditors. See s 42(1)(a) and (j) *BIA*.

[147] The claims provable in bankruptcy include all debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt's discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt. See s 121(1) *BIA*.

[148] On discharge from bankruptcy, the bankrupt is released from all claims provable in bankruptcy, with certain exceptions. See s 178(2) *BIA*.

[149] At the time they filed for bankruptcy on January 18, 2016, the defendants, Levi Bachand and Averyl Michaud were indebted to the Condominium Corporation for the *in personam* judgment, which included the special levies and interest and the monetary sanction and interest, and for significant legal charges. The defendants would have been released from these debts on their discharge from bankruptcy in February 2019.

[150] The Condominium Corporation would no longer be able to collect from the bankrupt owners any amounts for the monetary sanction and interest or for the legal charges incurred in pursuing them for payment and with respect to the caveats registered against title. As I have determined above, the Condominium Corporation is not able to claim these amounts against the TD Bank. The prior garnishee funds and the dividends received in the bankruptcy are all the Condominium Corporation is able to recover for the monetary sanctions and interest and these legal charges.

[151] The Condominium Corporation would no longer be able to collect from the bankrupt owners personally for the outstanding contributions, special levies and any interest accrued on these amounts. However, the caveats remained on title. The Condominium Corporation seeks to assert a priority claim and to collect these amounts from the TD Bank.

[152] As determined above, the Condominium Corporation may recover the costs for steps taken against the TD Bank in collecting the amount owing for its unpaid contributions and special levies, pursuant to s 42(a). Insofar as the legal costs were not incurred for steps taken in collecting against the bankrupts or with respect to the caveats, the legal charges recoverable from the TD Bank are unaffected by the bankruptcy.

[153] The issue then is narrowed to whether the Condominium Corporation has lost its s 39 *CPA* super-priority claim for the special levies, contributions and interest against the TD Bank by participating in the bankruptcy proceedings.

[154] The Condominium Corporation participated in the bankruptcy proceedings by filing a Proof of Claim Form 31 in each of the bankrupt's estate. The Proof of Claim identified an unsecured claim comprised of the judgment for $64,997.63, plus interest, costs and condominium arrears since the judgment. Dividends were paid to the Condominium Corporation from the bankruptcy of each of the defendants.

[155] The Condominium Corporation's claim as an unsecured creditor has been released on receipt of the dividends and on the discharge of the bankrupts.

[156] The Proof of Claim form also identified a secured claim of an unknown amount, secured by the caveat registered at the Land Titles Office on November 28, 2014.

[157] Has the Condominium Corporation's claim as a secured creditor also been released on receipt of the dividends and on the discharge of the bankrupts?

[158] To determine if the claim as a secured creditor and the super-priority claim against the TD Bank have been released by the Condominium Corporation's participation in the bankruptcy proceedings, it is necessary to examine the provisions and options for secured creditors set out in the *BIA*.

The Secured Creditors

[159] Section 2 of the *BIA* defines a secured creditor as a person holding a mortgage, charge or lien on or against the property of the debtor as security for a debt due or accruing due to the person from the debtor. The Condominium Corporation and the TD Bank are secured creditors for the purpose of the bankruptcy proceedings.

[160] A creditor, including a secured creditor, may apply to the court for a bankruptcy order and participate in the bankruptcy in the same manner as if they were an unsecured creditor pursuant to s 43 of the *BIA*. There was nothing before me to indicate the Condominium Corporation applied as a secured creditor for a bankruptcy order. The TD Bank did not participate in the bankruptcy at all, nor was it required to.

[161] From the date of bankruptcy on January 18, 2016 and until the bankruptcy trustee was discharged, there was a stay of proceedings for the recovery of a claim provable in bankruptcy provided for in s 69.3(1) *BIA*. Accordingly, there was a stay of enforcement against the bankrupts for the *in personam* judgment, including a stay of execution on the writs and garnishee summonses issued by the Condominium Corporation.

[162] Notwithstanding the stay, the TD Bank was able to commence its action on March 9, 2016 and continue the foreclosure proceedings. Section 69.3(2) provides that the bankruptcy of a debtor does not prevent a secured creditor from realizing or otherwise dealing with its security in the same manner as the secured creditor would have been entitled to realize or deal with it if this section had not been passed.

[163] Rule 4.34(1) of the *Alberta Rules of Court* also provides for a stay of proceedings on bankruptcy, as the assets of the debtor are transferred to the trustee. The action is stayed until an order to continue has been obtained.

[164] The court may lift the bankruptcy stay if it is satisfied the creditor is likely to be materially prejudiced by the continued operation of the stay or on other equitable grounds. See s 69.4 *BIA*.

[165] Typically, the court in foreclosure proceedings is asked to lift the stays pursuant to both s 69.4 *BIA* and r 4.34, and does so. Typically, the trustee in bankruptcy will release its interest in the secured property, subject to any excess equity which may be available for the bankrupt's estate.

[166] The TD Bank served the trustee in bankruptcy with notice of its applications for an Order - Sale to the Plaintiff. The trustee was not represented at the hearing on August 19, 2020. The TD Bank was able to proceed with its foreclosure action, essentially, outside of the bankruptcy proceedings.

[167] It appears the Condominium Corporation did not apply to lift the stay. The Condominium Corporation did not pursue its redemption order granted March 19, 2015 to proceed against the condominium unit but rather asserted its priority claim for payment of unpaid contributions, interest and other charges in TD Bank's foreclosure proceedings. By letter dated February 26, 2016, the Condominium Corporation advised the solicitor for the TD Bank of the amount owing for the judgment and subsequent arrears and sought the TD Bank's intentions with respect to paying the arrears and maintaining ongoing condominium contributions.

[168] This left the secured claim of the Condominium Corporation in limbo while the TD Bank advanced its foreclosure proceedings. However, The Condominium Corporation did not sit idle. It participated in the bankruptcy of each of the defendants by filing a Form 31 and receiving a dividend.

[169] The TD Bank submits that the Condominium Corporation lost its ability to assert its priority claim for payment of unpaid contributions, interest and other charges in the foreclosure proceedings by this participation in the bankruptcy.

The Condominium Corporation's participation in the bankruptcy

[170] To determine if the Condominium Corporation has lost its priority, or remains entitled to claim priority for the outstanding balance secured by its caveat, it is important to review the nature of the priority given by s 39 *CPA* and to understand the options for secured creditors given by sections 127 and 128 *BIA*.

[171] The subsections of s 39.2 *CPA* do not require the corporation to elect to proceed in debt or to proceed by way of caveat, nor do they require one remedy to be exhausted prior to commencing another. The action in debt and the enforcement of security under the caveat may coexist and be pursued independently of the other.

[172] The action in debt taken by the Condominium Corporation against the owners was stayed as a result of the bankruptcy. The bankrupts have been released from liability for the *in personam* judgment and the legal costs charged to them.

[173] The enforcement of security under the caveat may be pursued by the Condominium Corporation independently of the action in debt, according to the provisions of s 39 *CPA*. The bankruptcy does not prevent the Condominium Corporation, as a secured creditor, from realizing or otherwise dealing with its security in the same manner as it would have been entitled to if there was no stay of proceedings, according to the provisions of 69.3(2) *BIA*.

[174] The Condominium Corporation could have enforced the charge secured by the caveat in the same manner as a mortgage but chose not to act on its redemption order. The Condominium Corporation instead relies on the super-priority given to its caveat through the foreclosure proceedings taken by the TD Bank. The stay of proceedings does not prevent the Condominium Corporation from dealing with its security in this manner outside the bankruptcy proceedings.

[175] However, the TD Bank argues the Condominium Corporation has lost the ability to deal with its security outside the bankruptcy proceedings by reducing its claim to an unsecured judgment and receiving dividends in the bankruptcy proceedings of the defendants.

[176] The act of reducing the claim to an unsecured judgment against the defendants does not, in and of itself, prevent the Condominium Corporation from also pursuing its remedies under the caveat according to the *CPA*.

[177] Does advancing that claim as an unsecured judgment through participation in the bankruptcy proceedings by filing a Proof of Claim Form 31 and receiving dividends, prevent the Condominium Corporation from also pursuing its remedies under the caveat against the TD Bank?

[178] To determine if the Condominium Corporation has lost its priority, or if it remains entitled to enforce its security under the caveat against the TD Bank, it is necessary to consider the effect of filing a Proof of Claim Form 31 and receiving a dividend as a secured creditor.

Proof by Secured Creditors

[179] Every creditor is required to prove their claim to be entitled to share in any distribution of the bankrupt's estate. See s 124(1) *BIA*.

[180] Secured creditors have options under the *BIA*. The secured creditor may realize on its security and not prove the claim, as authorized by s 69.3(2). This is what the TD Bank has done.

[181] The secured creditor may realize on its security and prove the balance of the claim due after deducting the net amount realized, as provided for in s 127(1) *BIA*.

[182] The secured creditor may surrender its security to the trustee for the general benefit of creditors and prove the whole claim due, as provided for in s 127(2) *BIA*.

[183] The trustee may serve notice on a secured creditor to file a proof of security giving the details required by s 128(1) *BIA*, including the value at which the creditor assesses the security. If the proof of security is not filed in time, the trustee may, with leave of the court, dispose of the secured property free and clear of the security. The secured creditor is entitled to receive a dividend only of the balance due after deducting the assessed value of the security: s 128(2) *BIA*. The trustee may redeem the security on payment to the secured creditor of the debt or the value of the security as assessed by the secured creditor, pursuant to s 128(3) *BIA*.

[184] There is no evidence the trustee required the Condominium Corporation to file a proof of security. It appears the Condominium Corporation voluntarily submitted a proof of claim pursuant to s 127 *BIA*.

[185] What exactly did the Condominium Corporation submit in the bankruptcy proceedings?

[186] The affidavit of Troy O'Donnell filed September 10, 2020 attaches the Proof of Claim Form 31 [Proof of Claim] filed by the Condominium Corporation on January 22, 2016 in each of the bankrupt's estates. The Condominium Corporation, through its legal counsel, certified "That the debtor was, at the date of bankruptcy, namely the 18th day of January 2016, and still is, indebted to the creditor in the sum of $77,107.85, as specified in the statement of account attached and marked Schedule 'A'".

[187] Schedule A to the Proof of Claim shows the debt to be comprised of the March 19, 2015 judgment amount of $64,997.63 plus interest, the April 10, 2015 Bill of Costs, condominium arrears accumulated since March 19, 2015, further fees and disbursements, and a credit for $829.77 received on June 4, 2015. Supporting documentation was also provided.

[188] Under Section 4(A) of the Proof of Claim, headed "Unsecured claim of $77,107.85", the Condominium Corporation states: "That in respect of this debt, the above-named creditor does not hold any assets of the debtor as security other than indicated in section 4(C) below and regarding the amount of $77,107.85, the above-named creditor does not claim a right to a priority."

[189] Under Section 4(C) of the Proof of Claim, headed "Secured Claim of an Unknown Amount at This Time", the Condominium Corporation states: "That in respect of this debt, the above-named creditor holds assets of the debtor valued at an unknown amount at this time due to the uncertainty as to what monies, if any, might be realized in a foreclosure of the subject condominium unit, particulars of which are as follows: Caveat dated November 21, 2014

registered at the Land Titles Office on November 28, 2014 as instrument number 142 403 322". A copy of the caveat was attached.

[190] Troy O'Donnell deposes that from the bankruptcy of the defendant Levi Bachand, the Condominium Corporation received the amount of $2,770.48 and from the bankruptcy of the defendant Averyl Michaud, $231.34. I assume these amounts were paid by the trustee to the Condominium Corporation as a distribution of "dividends among the unsecured creditors entitled thereto." See: s 148(1) *BIA*.

[191] It is clear from the Proof of Claim Form 31 the Condominium Corporation intended to submit an unsecured claim in the bankruptcy of the defendants. It is not clear from the Proof of Claim whether the Condominium Corporation intended to realize on the caveat and prove the balance of the claim in the bankruptcy, or whether it intended to surrender that security and prove the whole claim due.

[192] The claim submitted as Schedule A to the Proof of Claim is the "whole claim due". It is essentially the same claim submitted by letter dated February 25, 2016 to the TD Bank for payment.

[193] The Condominium Corporation did not realize on its security and prove the balance of the claim in the bankruptcy, as provided for in s 127(1). There is no evidence of an assessment of the value of the security to allow the remaining balance of the claim to be quantified for the purpose of paying a dividend, pursuant to either s 127(1) or s 128 *BIA*.

[194] The TD Bank argues the Condominium Corporation has surrendered its security and proven the whole of its claim in the bankruptcy, pursuant to s 127(2) *BIA*. The Condominium Corporation argues that a proof of claim can be filed both as an unsecured creditor and as a secured creditor.

[195] It seems from the position taken by the Condominium Corporation, it did not expressly intend to surrender its security. However, a secured creditor may, by its conduct, make an implied surrender of security to the trustee. Counsel for the TD Bank submits that by proving its claim as an unsecured creditor and receiving dividends, the condominium Corporation has impliedly abandoned it security.

Implied surrender of security

[196] There are no provisions in the *BIA* for deemed or implied surrender of a secured creditor's security. Judicial interpretation of the operation of the s 127 and s 128 of the *BIA* is helpful in the analysis of the circumstances under which an implied surrender of security may be found.

[197] Counsel both refer to ***Cutting Edge Foods Inc (Re),*** 2008 ABQB 340 [***Cutting Edge***]. Justice Topolniski considered sections 127 and 128 *BIA* in determining whether or not the Superintendent's levy was payable on dividends received by a secured creditor.

[198] Counsel for the Condominium Corporation submits that Topolniski J acknowledged, at paragraph 142 of ***Cutting Edge***, a proof of claim could be filed for both as an unsecured and a secured creditor. The paragraph does say the secured creditors 'had filed proofs of claim as both secured and unsecured creditors in a proposal' but it but does not say what effect that might have

had on the decision in the case, or otherwise. That paragraph does not support the Condominium Corporation's position.

[199] Justice Topolniski observes at paragraph 103: "when secured creditors want a dividend from the estate, they must become involved in the bankruptcy and with the trustee by complying with ss 127 to 132."

[200] Referring to s 127 *BIA,* at paragraph 37, Topolniski J states: "Secured creditors may choose to participate in a bankruptcy by surrendering their security or proving the balance due them after realizing their security."

[201] At paragraph 97, Topolniski J talks about the filing of a Proof of Claim Form 31 as follows:

> Section 128 refers to "proof of security," not "proof of claim." A "proof of claim" is what a secured creditor delivers to the trustee under s. 127 where the secured creditor seeks to claim for any deficiency after realizing on the security or surrenders the security to the trustee for the general benefit of the creditors. The form prescribed by the Superintendent for both types of proof is the same - Form 31, entitled "Proof of Claim." Directive 10 uses the language of Form 31 rather than that of s. 128. The interchangeable use of the terms "proof of claim" and "proof of security," coupled with the dual use of Form 31, adds an unnecessary element of confusion to the mix.

[202] There is nothing in the material to suggest the trustee in bankruptcy requested a proof of security from the Condominium Corporation pursuant to s 128 of the *BIA.* Section 128(1) and not s 127 is listed under the title to the completed Proof of Claim Form 31. However, this same form is apparently used for both proof of security and proof of claim.

[203] Has the Condominium Corporation surrendered its security to the trustee, as contemplated by s 127(2) *BIA*, by its conduct in completing the Proof of Claim as both an unsecured and a secured creditor, advancing the whole claim due, and receiving dividends in the bankruptcy?

[204] The topic of implied surrender is discussed in Houlden & Morawetz, *Annotated Bankruptcy and Insolvency Act,* (4th) at page 5-136:

> A secured creditor may by its conduct make an implied surrender of security to the trustee. The cases on this issue have not been entirely consistent. Some cases have held that acts such as filing a claim as an unsecured creditor, failing to value security, voting as an unsecured creditor, acting as an inspector, or receiving a dividend as an unsecured creditor may constitute an implied surrender…
>
> In ***Andrew v. FarmStart*** (1988), 71 C.B.R. (N.S.) 124, [1989] 2 W.W.R. 127, 54 D.L.R. (4th) 406, 71 Sask. R. 146 (C.A.); leave to appeal to S.C.C. refused 73 C.B.R. (N.S.) xxvii (note), [1989] 4 W.W.R. 1xx (note), 57 D.L.R. (4th) viii (note), 102 N.R. 158 (note) (S.C.C.), the Saskatchewan Court of Appeal summed up (correctly, it is submitted) the law on surrender by course of conduct as follows: Whether a secured creditor has made an election to surrender its security by course of conduct is a question of fact. To constitute a surrender, the actions must be irrevocable, unequivocal and unconditional. A proof of claim itself, without reference to a security or without valuation of it, is not *per se*, such a

> surrender, because it does not meet the criteria for surrender, although it is evidence which tends to show that the creditor has elected to surrender. When a court is called upon to decide whether or not there has been a surrender by course of conduct, it must consider all the relevant facts and circumstances, of particular importance will be whether the secured creditor acted deliberately or as a result of error and whether the action of the secured creditor misled or caused prejudice to the trustee or other creditors. The acceptance of a dividend as an unsecured creditor may indicate surrender, since it may prejudice other creditors; on the other hand, it may simply indicate a claim in excess of the value of the security. The question is: Does the conduct of the secured creditor show that the creditor has elected to share in the bankruptcy for its full claim and is abandoning his or her security to the trustee for the benefit of the creditors?

[205] In ***Zemlak (Bankruptcy of) (Re)***, 2003 ABQB 622, the trustee argued the actions of the secured creditor Jirah, the holder of a builders' lien, amounted to surrender of security. Registrar Laycock found they did not. He quoted the passage, as it then was, from Houlden & Morawetz and concluded at paragraph 9:

> The conduct of the secured creditor does not show an unequivocal surrender of security. The secured creditor has not taken a dividend from the bankruptcy nor has it ever filed as an unsecured creditor. The fact that the lien claimant has not taken steps to advance the lien claim is not evidence of a deliberate surrender of security. It is therefore my conclusion that the lien claimant neither expressly or by implication surrendered its security.

[206] The case is distinguished on its facts as the Condominium Corporation did file as an unsecured creditor and take a dividend from the bankruptcy of the defendants. Although the Condominium Corporation has not taken steps to advance its redemption order, it has advanced its secured claim in the TD Bank foreclosure proceedings.

[207] The Court in ***Bank of Montreal v King***, 2003 ABQB 491, considered s 127(2) *BIA* and found the Bank did not surrender its security by submitting a proof of claim as an unsecured creditor where the proof of claim did not say that and it could not be implied. The employee submitting the proof of claim was not aware the Bank was a secured creditor. On discovering this error, an amended proof of claim was submitted, which the trustee declined to act on. At paragraph 27, Master Funduk concluded: "Before a creditor can make a conscious decision to surrender its security it must know that it has security."

[208] The case is distinguished on its facts as the Condominium Corporation was well aware of its security in submitting a proof of claim as an unsecured creditor. The case is similar as the proof of claim did not say the Condominium Corporation was surrendering its security, nor can that be implied.

[209] The Court in ***Hollingshead (Re) (Trustee of),*** 1999 ABQB 355, considered s 127(2) *BIA* and found the Bank did not surrender it security by initially submitting a proof of claim as a secured creditor and then later amending it to unsecured after the trustee determined the security invalid. Master Laycock quoted from the *1999 Annotated Bankruptcy and Solvency Act* by Houlden and Morwitz and at paragraph 9, concluded there was no "irrevocable, unconditional and unequivocal act of surrender." There were not sufficient facts for the Court to conclude that the Bank knew anything about "the concept of surrender and the benefits that may flow to the

creditors as a result of making a surrender". The Court found: "The mere fact of refiling as an unsecured creditor is not a surrender."

[210] Similarly, there are not sufficient facts before this Court to conclude the Condominium Corporation considered the concept of surrender and the benefits which may flow to the creditors as a result of making a surrender.

[211] The Court in ***Morrison v Toronto Dominion Bank***, 1980 CanLII 1149 (AB QB), examined the reasons for holding in certain instances a secured creditor who proves in bankruptcy thereby abandons its security. At paragraphs 15 and 16, Justice MacDonald stated:

> The purpose of the rule was explained in *Re Hoare; Ex parte Ashworth* (1874), LR. 18 Eq. 705 at 711, thus:
>
> > "Now what is the meaning of the provisions that creditors holding security shall not prove without either producing their securities and having them valued, or giving them up, or forfeiting them? It means that the estate which is to be administered among the creditors shall not be diminished by some one creditor, who holds security, taking part of that estate and coming to take his dividend out of what then remains."
>
> From the above and other cases it seems clear that the purpose of the rule was to prevent the secured creditor from, at the same time, benefitting by holding his security and taking advantage of sharing in the bankruptcy except to the extent of a deficiency which had been determined or at least disclosed. Where it was clear that the creditor had elected to prove in bankruptcy for the whole debt, he was held to have abandoned his security.

[212] At paragraph 20, MacDonald J restated the law: "In brief, it is my opinion that the secured creditor loses his security when his conduct or his omission indicates that he has elected to share in the bankruptcy for his full claim and is therefore taken to have abandoned his security." He concluded, in the circumstances, no case had been made out for holding the bank had abandoned its security. The bank had disclosed its full position, was unable to put a reasonably accurate value on its security and did not take any dividend from the trustee.

[213] The case is similar as the Condominium Corporation disclosed its full position and was not able to accurately value it security. The case is distinguished on its facts as the Condominium Corporation did take dividends from the trustee.

[214] The Court in ***Re Pelyea and Canada Packers Employees Credit Union Ltd***, 1969 CanLII 378 (ON CA), found that a secured creditor was not precluded from enforcing its security merely by filing a claim in the bankruptcy and opposing the bankrupt's unconditional discharge where the creditor was never required to value it security and received no dividend from the bankrupt's estate.

[215] The Condominium Corporation was not required to value its security based on the information before the Court but it did receive dividends from the bankrupt's estates.

[216] Several of these cases identify the taking of a dividend in the bankruptcy by the secured creditor as a factor in determining whether there has been an implied surrender of security. A dividend was not in fact taken by the secured creditor in the above-noted cases, except in the case of ***FarmStart***. A closer look at that decision is warranted.

[217] The Saskatchewan Court of Appeal in ***Andrew v FarmStart*** 1988 CanLII 217 (SK CA) framed the issue on appeal as "whether, in a bankruptcy, a secured creditor will be deemed to have surrendered his security if he files a claim as a preferred creditor for the entire debt without valuing the security and accepts a dividend." This is the same issue faced by the Condominium Corporation here.

[218] The bankrupt, Mr. Andrew, was the owner of a parcel of land which was subject to three mortgages. It was common ground that at all times, there was no value to the third mortgage in favour of FarmStart because the amount owing on the first and second mortgages exceeded the value of the land. FarmStart filed a proof of claim with the trustee in bankruptcy claiming preference as a Crown Corporation and received a dividend.

[219] During the administration of bankrupt's estate, the trustee released its interest in the parcel of land. Subsequent to the bankrupt's discharge, the first and second mortgagees were paid out and discharged their mortgages. The land was sold and the proceeds held in trust pending the application by the bankrupt to remove the FarmStart mortgage from title.

[220] The Court of Appeal reviewed the findings of the Chambers judge and the law on implied surrender and dismissed the appeal, concluding:

> In this case, the secured creditor did disclose his security. The Chambers judge found, as a matter of fact, that the secured creditor acted as it did because everyone concerned knew the value of the security at that time to be zero. The judge in effect found that the appellant had disclosed its security, valued it at zero, and was therefore entitled to claim for the full amount due to it as an unsecured creditor and entitled to take a dividend as an unsecured creditor. The controlling factors are that the secured creditor did not misrepresent the situation to anybody, and that the mortgage was disclosed both in the particulars of the appellant's claim and in the bankrupt's own statement of affairs. Since it was disclosed, and since there was no demand for valuation, there was no prejudice to other creditors or the bankrupt by the respondent in filing as an unsecured creditor and in taking a dividend. There was no irrevocable, unconditional and unequivocal act of surrender. Thus, on the facts as found by the Chambers judge, which are supported by the evidence, he was entitled to find no surrender of the security.

[221] The Condominium Corporation fully disclosed in the Proof of Claim the existence and nature of its security held by the caveat. Since the security was disclosed, and since there is no evidence of a demand for valuation by the trustee to proceed under s 128 *BIA* or evidence to the contrary, I conclude there was no prejudice to other creditors or the bankrupts by the Condominium Corporation filing as an unsecured creditor and taking the dividends.

[222] Where the actions of the Condominium Corporation do not mislead or cause prejudice to the trustee or other creditors, the acceptance of a dividend does not indicate surrender. The actions of the Condominium Corporation in these circumstances do not amount to an unequivocal, unconditional and irrevocable surrender of its security.

[223] The acceptance of a dividend as an unsecured creditor may, on the other hand, indicate a claim in excess of the value of the security. The question posed by Houlden & Morawetz is: Does the conduct of the secured creditor show that the creditor has elected to share in the bankruptcy for its full claim and is abandoning the security to the trustee for the benefit of the creditors?

[224] The Condominium Corporation filed its proof of claim form on January 22, 2016 identifying that it held assets of the debtor, secured by a caveat, valued at an unknown amount due to the uncertainty of what monies might be realized in a foreclosure of the condominium unit.

[225] Whether the Condominium Corporation was referring to the uncertainty of what monies might be realized in the "foreclosure" of the condominium unit through its own redemption order or the TD Bank foreclosure proceedings, the acceptance of the dividends could reasonably indicate a claim in excess of the value of the security.

[226] The March 19, 2015 redemption order provided for a list price of $235,000 with a TD mortgage secured as a first charge registered on title in the amount of $233,222. In April 2016, the information in the foreclosure proceedings indicated the TD Bank was owed approximately $213,000 against a fair market value of $220,000. The debt claimed by the Condominium Corporation in the bankruptcy was $77,108, a claim in excess of the value of the security on these figures.

[227] The TD foreclosure action was commenced after the bankruptcy proceedings. The Condominium Corporation asserted its full claim against the TD Bank by letter dated February 25, 2016, approximately a month after filing its proof of claim in the bankruptcy.

[228] I have determined the super-priority afforded by caveat under the *CPA* is limited to payment of outstanding contributions and interest. The Condominium Corporation is not entitled to claim priority for the monetary sanction and interest or for the legal charges incurred collecting from the owners; these cannot be collected from the TD Bank by operation of the *CPA* and can no longer be collected from the discharged bankrupts. The claim is in excess of the value of the security.

[229] It is more likely than not the Condominium Corporation intended to realize on its security and prove the balance of the claim due after deducting the amount realized, as provided for in s 127(1) *BIA*.

[230] Considering the relevant facts and circumstances, the acceptance of the dividends as an unsecured creditor indicates a claim in excess of the value of the security. The conduct of the Condominium Corporation does not show that it had elected to share in the bankruptcy for its full claim and had abandoned the security to the trustee for the benefit of the creditors. The Condominium Corporation has not expressly or impliedly surrendered its security.

[231] The Condominium Corporation has not lost its priority by reducing its claim to an unsecured judgment and receiving dividends in the bankruptcy proceedings of the defendants. The Condominium Corporation may realize on its security notwithstanding the discharge of the bankrupts. See ***FarmStart***.

[232] With the bankrupts' condominium unit in foreclosure proceedings, the Condominium Corporation must realize on its security by relying on the super-priority afforded by the caveat over the TD Bank mortgage.

[233] I have described the nature of the priority claimed by the Condominium Corporation, determined it is not entitled to priority for legal charges, and concluded the priority afforded by the caveat was not surrendered in the bankruptcy proceedings. The final issue to be addressed is the amount payable to the Condominium Corporation by the TD Bank.

What is the precise amount, if any, payable to the Condominium Corporation in priority to the TD Bank mortgage?

[234] I am not able to calculate the precise amount payable to the Condominium Corporation by the TD Bank to satisfy the priority claim. The affidavit and other evidence are set out below. The Condominium Corporation will need to review its records to make an accurate calculation of the unpaid special levies, monthly contributions and interest. Additionally, the claim for legal charges payable by the TD Bank pursuant to s 42 *CPA* will need to be quantified.

[235] I will recap my ruling on what is payable in priority to the TD mortgage and summarize the evidence and other information made available. In doing so I will identify the areas for clarification.

[236] I have found the caveat registered on title November 28, 2014 creates a charge against the condominium unit for the special assessments levied in 2012, originally in the amount of $40,000.10, plus accrued interest, and for the other unpaid contributions levied against the owners pursuant to s 39 of the *CPA*, plus interest accruing on those contributions. Once the precise amount is quantified, the TD Bank will pay the Condominium Corporation and the caveat will be withdrawn.

[237] I ruled this matter would be decided as if heard on August 19, 2020, with interest capped as of that date.

Special assessments and interest

[238] The special assessments in the amount of $40,000.10 plus interest to August 19, 2020 are to be paid in priority to the TD mortgage. Once the rate of interest is confirmed, the precise amount payable for these special assessments and accrued interest may be calculated.

Outstanding contributions and interest

[239] The outstanding contributions and interest, excluding the special assessments levied in 2012, will need to be quantified. Counsel for the Condominium Corporation has referred to these as "future arrears". There have been various methods to calculate those through the affidavits of Troy O'Donnell, letters from Counsel, the property management Ledger and spreadsheets.

[240] The Condominium Corporation advised the TD Bank by letter dated February 25, 2016 that the defendants owed condominium fees and penalties of $82,660.19, enclosing the March 19, 2015 Order and judgment, the two taxed Bills of Costs and the Verification Statement dated February 18, 2016 and a calculation of future arrears. Legal charges were identified in the amount of $25,930.29 at that time.

[241] Troy O'Donnell deposed in an affidavit filed July 7, 2017 that no payments had been received on the judgment nor had any monthly contributions been made thereafter. In that affidavit, Troy O'Donnell calculates future arrears at $21,395.54 as the balance in the ledger of monthly condominium fees and monthly special assessments and other charges accumulated since the March 19, 2015 judgment, less the legal charges.

[242] The further affidavit of Troy O'Donnell, filed July 24, 2017, indicates the last monthly contribution was paid in the month of January 2016 and calculates the monthly contribution arrears from February 1, 2016 to be $12,122.89, inclusive of interest to July 18, 2017. This affidavit does not address the monthly special assessments which are also accumulating in the Ledger. These are described as "SA loan Pymt - Due to Reserve" in the amount of $312.38 each month.

[243] The affidavit of Troy O'Donnell filed August 14, 2020 provides evidence of a total amount of $96,561.47 owing for contributions and special levies, sanctions, charge-backs and legal charges. This is shown in the Ledger attached as Exhibit A to the affidavit. Troy O'Donnell states this total consists of $58,499.62 for contributions and special levies, $2,200.00 for sanctions and $1,365.26 for chargebacks. Legal charges are $34,496.59.

[244] Counsel for the Condominium Corporation has acknowledged the $2,200.00 for sanctions and $1,365.26 for chargebacks are not collectible from the TD Bank.

[245] Attached as Exhibit B to the August 14, 2020 affidavit is a spreadsheet entitled "Calculation of Condominium Fee and Special Assessment Arrears". The monthly condominium fees and monthly special assessments are $60,177.65 before interest. The interest has not been totalled on a cumulative basis. There is no specific mention of the *in personam* judgment. Legal charges are $34,496.59.

[246] The spreadsheet reflects payments made, presumably by the TD Bank, in the amount of $633.33 per month for the months of September 2019 through August 2020.

[247] The "Monthly Special Assessment Charge" identified on the spreadsheet and in the Ledger as "SA loan Pymt - Due to Reserve" in the amount of $312.38 per month has not been paid. There is no explanation of what this charge is for. That will need to be clarified.

[248] With respect to the interest payable, more evidence may be needed. As noted above, Condominium bylaw s 8.4(a) does not support a charge of interest on arrears for unpaid assessments at the rate of 18% per annum. The original provision for the assessment of common expenses is set out in bylaw s 8.3(a) and requires each owner to pay any and all assessments made pursuant to that provision and further to pay interest on all assessments or payments in arrears 'at the rate of fifteen (15) per centum per annum'. The bylaws attached to the March 4, 2015 affidavit of Colin MacDonald do not amend these bylaws.

[249] Once the rate of interest is confirmed and the "future arrears" or monthly contributions and monthly special assessments are determined, the precise amount payable for outstanding contributions and accrued interest may be calculated.

Legal expenses and interest

[250] The Condominium Corporation has a statutory entitlement to recover all reasonable costs, including legal expenses and interest, incurred in collecting outstanding contributions and special levies from the person against whom the collection steps were taken, pursuant to s 42(a) *CPA.*

[251] The condominium owners were released from liability for any legal charges incurred by the Condominium Corporation in collecting against them on their discharge from bankruptcy. The Condominium Corporation has no recourse to the TD Bank to collect those amounts.

[252] The Condominium Corporation may recover reasonable legal charges incurred for the steps taken against the TD Bank in collecting the outstanding contributions and special levies prior to and in the foreclosure proceedings.

[253] Once the TD Bank obtains title to the condominium unit through the Sale to Plaintiff Order, it will be the owner. The Condominium Corporation has a further statutory entitlement to recover reasonable prescribed expenses incurred with respect to the caveat from the owner, pursuant to s 42(b) *CPA*. Accordingly, the Condominium Corporation would be entitled to recover the reasonable expenses incurred with respect to the discharge of the caveats from the TD Bank.

[254] These legal charges for collecting contributions and expenses for discharge of the caveat may be claimed against the TD Bank *in personam* only and not in priority to the mortgage or as a condition of discharging the caveat.

[255] The claim by the Condominium Corporation for legal costs on a solicitor and client indemnification basis, in pursuing and collecting upon the arrears and with respect to the caveat, must be assessed for reasonableness and may be taxed.

[256] The evidence put forward by the Condominium Corporation through the affidavit of Troy O'Donnell filed August 14, 2020 is that their legal charges are $34,496.59. The largest portion of those charges were incurred in collecting from the defendants and included expenses incurred with respect to registering and enforcing the caveat against the condominium owners. That portion is no longer recoverable because of the bankruptcy of the defendants.

[257] The legal charges identified by the Condominium Corporation at the time of bankruptcy were $25,930.29, as shown on the Ledger and set out in the February 26, 2016 letter to the TD Bank. I expect the portion of these legal charges that relate to collection from the TD Bank are minimal, if any.

[258] A further invoice for $6,064.38 was billed to the Condominium Corporation March 31, 2018 and an invoice for $1,672.15 was billed on May 9, 2019. The responsibility of the TD Bank for these legal charges will need to be confirmed.

[259] There was a Bill of Costs taxed on a solicitor and own client basis in the amount of $5,630.99 on April 10, 2015, following the March 19, 2015 Order which was included in the unsecured claim advanced by the Condominium Corporation in the bankruptcies. There was a second Bill of Costs taxed on a solicitor and own client basis in the amount of $5,612.25 on

February 16, 2016. The two Bill of Costs were included in the in the Verification Statement filed in the Personal Property Registry on February 18, 2016 for combined taxed costs of $11,243.24.

[260] These documents were provided to the TD Bank by the Condominium Corporation with the February 25, 2016 letter. Whether these costs are part of, or it or in addition to, the legal charges identified in the letter in the amount of $25,930.29 is immaterial. The two Bill of Costs were claimed against the defendants and extinguished on their discharge from bankruptcy. The Condominium Corporation is no longer able to collect these costs.

[261] Once the rate of interest is confirmed and the portion of legal charges attributable to the TD Bank is determined, the precise amount payable for legal expenses and interest may be calculated.

[262] In summary, the precise amount payable to the Condominium Corporation in priority to the TD Bank mortgage will be the total of amount payable for the special assessments and accrued interest and the amount payable for outstanding contributions and accrued interest.

[263] In addition, the TD Bank will be responsible for their portion of the legal charges for collecting contributions and interest and for the expense to discharge the caveats. These costs may be claimed against the TD Bank *in personam* only and not in priority to the mortgage or as a condition of discharging the caveat.

[264] The claim by the Condominium Corporation for legal costs on a solicitor and client indemnification basis, in pursuing and collecting the arrears and with respect to the caveat, must be assessed for reasonableness and may be taxed.

[265] The Condominium Corporation may retain the $829.77 received on June 4, 2015 through its garnishee efforts and the dividends of $2,770.48 and $231.34 from the bankruptcy of the defendants as contributions towards the monetary sanctions and interest and the legal charges incurred registering the caveats and pursuing collection from the owners. The balance will remain unpaid.

Conclusion

[266] The issues raised in this application for an Order for Sale to Plaintiff as between the TD Bank and the Condominium Corporation have been determined.

[267] The nature of the priority claimed by the Condominium Corporation is described in the analysis of s 39 of the CPA.

[268] The Condominium Corporation is not entitled to priority for its legal charges as concluded from the analysis of s 42 CPA, following the decision in ***Bala***.

[269] The Condominium Corporation has not lost its priority by reducing its claim to an unsecured judgment and receiving dividends in the bankruptcy proceedings of the defendants, as concluded from the analysis of s 127 *BIA* and applying the test for implied surrender in the ***FarmStart*** decision.

[270] The precise amount payable to the Condominium Corporation in priority to the TD Bank mortgage is yet to be determined. The amount payable for the special levies and contributions and interest are to be calculated and are payable to the Condominium Corporation in priority to

the TD mortgage. The reasonable legal charges and interest and expenses attributable to the TD Bank for collection of contributions and the discharge of the caveats are to be assessed or taxed.

[271] Costs of this application may be addressed through brief written submissions if counsel are unable to agree.

[272] The submissions and arguments of Counsel were appreciated in resolving this "morning special".

Heard on the 19th day of August, 2020.
Written Submissions received on the 8th day of October, 2020
Dated at the City of Edmonton, Alberta this 9th day of April, 2021.

L.R. Birkett, Q. C.
M.C.Q.B.A.

Appearances:

Gowling WLG (Canada) LLP
Tyler Bond
for the Applicant

Biamonte LLP
Brian S. Sussman, Q.C.
for the Respondent