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Section 134(5) Costs: Recent Decisions and Guiding Principles

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If, in the course of a compliance application, a condominium corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, s. 134(5) of the *Condominium Act, 1998* (the "Act") provides that the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit. However, courts have discretion to fix costs and "additional actual costs" and are more frequently exercising this discretion. Courts will look at factors such as the conduct of the board in bringing enforcement proceedings, whether the costs are reasonable or excessive and can be substantiated. If it appears that a reduction in costs is appropriate, it may be granted.



The Ontario Court of Appeal recently gave a thorough discussion of a court's discretion to assess and fix costs and "additional, actual costs" in condominium enforcement cases. In *TSCC 1633 v. Baghai Development Limited* the Court of Appeal's points were:

- s. 134(5) costs are subject to the Court's discretion under s. 131(1) of the *Courts of Justice Act* and rule 57.01 of the *Rules of Civil Procedure*. Quoting the lower Court: "In other words, section 134(5) ... does not allow the applicant to expend or authorize its counsel to expend any amount and then ask that it be completely indemnified for costs that are otherwise disproportionate and unreasonable. The Court retains its discretion to determine what amount of costs is fair and reasonable and to award no costs where appropriate."
- An award of costs should consider what is reasonable for a losing party to pay to a winning party. An award of "additional, actual costs" under s. 134(5) should consider the costs the condominium paid to its own counsel.
- "while s. 134(5) ... may entitle [the condo] to get more than it would get in an ordinary award of costs, the provision for "additional, actual costs" does not automatically lead to whatever amount is claimed. Section 134(5) does not give counsel license to spend the client's money with impunity."
- The condominium corporation could have avoided much of the expenses claimed if it had tried to arbitrate a solution, instead of embarking on a scorched earth campaign.

In *DSCC 187 v. Morton*, the condominium corporation was successful in its compliance application requiring an owner to remove his dogs. The application judge awarded partial costs against the owner for \$10,000. The condominium corporation liened the owner's unit for \$73,802.91, representing the full legal expenses incurred to obtain the order and therefore the "additional actual costs" under s. 134(5). The owner brought a motion to limit the costs payable to \$10,000. The motions judge ordered a total costs amount of \$29,000. The corporation appealed, pleading that the motions judge failed to explain how she arrived at the \$29,000 figure which she was required to do as per *TSCC 1633 v. Baghai*. The owner cross-appealed, submitting that the corporation had failed to provide any evidence that it had incurred any additional costs beyond the \$10,000. The court deciding the appeal agreed that the motions judge had failed to provide the calculations for reaching the \$29,000 figure. However, the appeal court held that the corporation had failed to provide necessary evidence to support its "additional actual costs" claim. Since the only evidence was the very first costs award of \$10,000, the costs payable by the owner were limited to that amount. After deducting costs of the motion and the appeal in favour of the owner, the condominium corporation actually ended up owing the owner and the court ordered the lien to be discharged. Failure of the condominium corporation to provide evidence of its "additional actual costs" ended up costing the corporation dearly.

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Courts will not only look at the amount of legal fees a condominium is attempting to recover, but also the steps taken in the dispute. Attempts to find a solution are important. Before instructing the condominium's lawyer to proceed against an owner or occupant with full force, boards are wise to consider whether any conciliatory avenues are appropriate, even if they are not required. While the Act requires mediation and arbitration only in certain circumstances, boards should nevertheless consider (and document) steps which indicate a willingness to resolve the dispute without legal intervention in every case.

In the case of *TCECC 1508 v. Stasyna, et. al.*, the condominium was entirely successful on its compliance application, requiring unit owners to remove landscaping on common elements. However, the court found that "mediation, though not mandatory, could have resolved this conflict in a more cost-effective manner. The [condominium] unnecessarily wasted time and expense by insisting on bringing these proceedings." As a result, the court awarded the condominium its partial indemnity costs (which are approximately 50-60% of the actual legal fees paid to the corporation's lawyer), reduced by a further 20%. The court released a further endorsement on costs which confirmed that the partial indemnity, less 20% costs award was meant to be the entire costs award, including "additional, actual costs." This is a strong message to boards that not every dispute should head immediately to court. If owners are willing to meet in good faith and try and resolve a matter outside of court, this route should be explored.

The previous examples should be heeded in giving instructions to the corporation's lawyer, recognizing that he or she will likely be the one justifying the enforcement steps and the costs claimed to the court. For example, in *PSCC 767 v. 2069591 Ontario Inc. et al*, the condominium corporation was entirely successful on its application against a unit owner and its tenant for the tenant's violation of exclusive use provisions in the declaration and the owner's failure to take all reasonable steps to ensure the tenant's compliance. Dockets were provided by the condominium corporation and the judge found the costs being sought by the condominium to be reasonable with no cause to reduce their value. The judge found the owner to be liable for the full amount, including "additional, actual costs," which could be collected in the same manner as common expenses from the owner. The judge also noted that it the owner had the "first responsibility to see that the requirements of the corporation are complied with". The judge did however allow the owner to collect up to half of the costs from the tenant.

The above decisions reinforce the facts that if a condominium, on an enforcement application, expects to be awarded its full costs, including "additional, actual costs," it must be sensible in its enforcement and the legal fees it is claiming must be proportionate, reasonable and substantiated. A court will recognize the purpose and effect of s. 134(5) costs when the corporation comes to the proceeding with its best foot forward.

Directors' Code of Ethics

J. Robert Gardiner, B.A., LL.B., ACCI, FCCI



Directors are encouraged to participate democratically and ethically in managing the Corporation's affairs using the following guidelines during their term as a Director:

Honesty and Good Faith – Act honestly and in good faith. Do nothing to violate the trust of the unit owners.

Care, Diligence and Skill – Exercise the degree of care, diligence and skill of a reasonably prudent person in comparable circumstances. Make a concerted effort to attend all Board and owners' meetings. Act responsibly and with due diligence to become familiar with the affairs of the Corporation and to uphold its Declaration, Description Plans, By-laws, Rules, resolutions, policies, agreements and requirements of the *Condominium Act* and other legislation.

Conflict of Interest – Avoid any actual or potential conflict of interest, direct or indirect, with respect to any material contract, transaction, building deficiency claim, warranty claim, legal action, proceedings or any matter detrimental to the Corporation. If you become aware of any conflict, disclose the nature and extent of the interest in writing to the board at the

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first opportunity or at the next board meeting where such contract or transaction is first considered. Do not be present during discussion of the contract or transaction at a board meeting, vote or be counted in the quorum. Your disclosure should be recorded in the minutes of the meeting. Do not promote your own interests or those of any owner, resident, family member, friend or contractor to the detriment of the Corporation. Do not seek any special benefits or privileges as a Director or Officer or accept any compensation either personally or on behalf of any other person except as permitted by a by-law. Act only in the best interests of the Corporation as a whole, do not favour the interests of any individual or group of owners or residents.

Confidentiality – Throughout your term and after do not disclose to any person (including your spouse) information decided by the Board to be confidential or privileged or which reasonably ought to be deemed confidential. When in doubt, request determination by a resolution of the Board.

Good Conduct – At all times, conduct yourself in a professional and businesslike manner at meetings of directors or owners. Approach all Board issues with an open mind, preparing to make the best decisions on behalf of the Corporation. Avoid shouting, interrupting, monopolizing discussions, rude comments, disruptions, dirty tricks or ego trips. Hold your temper. If your voice rises in pitch or volume, get it under control. Act ethically with integrity and in accordance with legal criteria. Comply with rules of good conduct, principles of good governance, procedural rules of order and deal with others in a respectful manner.

Support – Abide by decisions of the majority of the Directors even if you disagree. Do not deprecate directors with whom you disagree, but reserve the right to express your own views to owners upon non-confidential issues.

Defamation – Refrain from expressing any detrimental supposition, erroneous or defamatory statement about the Corporation, any owner, resident, director, officer, manager, staff or contractor of the Corporation. Only publicly state such information in an accurate, unbiased and non-malicious manner.

Dirty Tricks – Do not use “dirty tricks” in the course of an election, but act honestly, honourably, fairly and in a straight-forward manner. Do not seek election as a Director by trashing the reputation of another person.

Abuse of Proxies – When collecting proxies, do not make any false, misleading, fraudulent or defamatory statements. Fairly inform the proxy grantor how you intend to exercise any vote with respect to the proxy.

Minimize Conflict – Attempt to prevent or minimize conflict and disruption and promote good relations amongst persons involved in the condominium community. Promote a first class image for the Corporation, its units, owners and residents.

Performance of Duties – Commit the necessary efforts, exercise the appropriate leadership and assume such duties as may reasonably be required to fulfill your role as a Director or Officer. Participate in conducting the Board’s business in the form of resolutions, policies, rules or by-laws as the circumstances require. Become well-informed on issues and agenda items in advance of meetings. Assist the Board to supervise, monitor and direct the on-going daily management of the Corporation by the property manager. Duly consider the information and advice provided by the property manager and others and seek opinions from experienced professionals when necessary to reach a proper decision. Follow the precept: “Directors direct; managers manage.”

Monitor Financial Health – Pay particular attention to the financial health, physical state of maintenance and repair, management, administration, appearance and welfare of the Corporation. Support required funding of the reserve fund and an appropriate funding plan to fulfill the criteria of the Corporation’s current Reserve Fund Study or Update. Assist in preparing or reviewing the Corporation’s annual Budget in a manner which appropriately reflects the actual financial needs of the Corporation, regardless of owners’ complaints when it becomes necessary to increase common expenses. Ensure common expenses are collected on time or lienied within the statutory period. Monitor the investments, bank accounts, interim and year-end financial statements. Carefully review contract proposals, quotes and tenders in order to assist in negotiating preferred contractual terms for services rendered to the Corporation at a beneficial cost. Monitor any duties which have been delegated.

Scope of Authority – If elected or appointed as the President, Secretary, Treasurer or other officer of the Board, refrain from autocratic governance, but act properly within the scope of your authority and in response to the will of the Board. Never exercise authority as a Board member except when acting in a meeting of the Board or as delegated to do by the Board.

Education – Recognizing that governance of a condominium corporation involves complex and changing requirements, continue to educate yourself by reading relevant publications. Support attendance by one or more board members at any condominium seminars presented by the Canadian Condominium Institute (CCI) at the cost of the Corporation.



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