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## The Case Of The Collectible Legal Costs

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A recent Supreme Court of BC decision<sup>1</sup> recently confirmed that a strata corporation is entitled to collect its reasonable legal fees which are incurred for the purpose of enforcing a bylaw. The Judge also clarified the process to be used to initiate the claim and what factors could be considered when determining whether the costs were reasonable.

In *Stevens*, the strata corporation had previously obtained an order in July 2017, prohibiting Ms. Stevens, who was under the age set by the strata corporation's age bylaw, from occupying the strata lot. The order also contained various conditions limiting Ms. Stevens attendance at the strata lot and prohibiting Ms. Stevens from communicating directly with the strata council regarding the dispute. All communications were required to be sent to the property manager or the strata corporation's lawyer and were not to contain threatening, harassing or abusive language. As part of its application the strata corporation sought costs including costs pursuant to section 133 of the *Strata Property Act*, (the "Act") however the issues of costs was not addressed as part of the July 2017 order.

Subsequently, believing that Ms. Stevens continued to reside in the strata lot and had breached the order prohibiting contact with the strata council, the strata corporation applied to court for a declaration that Ms. Stevens was in breach of the July 2017 order and therefore was in contempt of court. The strata corporation sought an order for the sale of Ms. Stevens' strata lot and for payment of the strata corporation's actual legal fees and disbursements.

During the intervening period between the two Supreme Court actions, the strata corporation had obtained a judgment in Provincial Court against Ms. Stevens for the payment of fines in the amount of \$13,400. Also during this time Ms. Stevens filed two dispute notices with the Civil Resolution Tribunal and filed her own petition against the strata corporation.

Although the Judge was unwilling to find that Ms. Stevens had continued to reside in the strata lot in breach of the July 2017 order, the Judge did find that Ms. Stevens was in breach of that order because she had communicated with the strata council directly about the dispute.

The Judge refused to order the forced sale of the strata lot and noted that Ms. Stevens had listed it for sale. The Judge then considered the strata corporation's claim pursuant to section 133 of the Act for its actual legal costs, which the strata corporation claimed were reasonably incurred to enforce and defend its bylaws.

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<sup>1</sup> *The Owners, Strata Plan NWS 3075 v. Stevens*, 2018 BCSC 1784

Section 133 of the Act provides:

- (1) The strata corporation may do what is reasonably necessary to remedy a contravention of its bylaws or rules, including
  - (a) Doing work on or to a strata lot, the common property or common assets, and
  - (b) Removing objects from the common property or common assets.
- (2) The strata corporation may require that the reasonable costs of remedying the contravention be paid by the person who may be fined for the contravention under section 130.

Although section 133 of the Act has been applied in a number of cases to permit the strata corporation to recover expenses, such as landscaping or other costs that the strata corporation has incurred to remedy a contravention, it has not been previously applied to permit the recovery of legal fees incurred to remedy a bylaw contravention.

The first issue that the Judge considered was what procedural steps the strata corporation must follow to recover its legal costs pursuant to section 133(2) of the Act. The Judge noted that the *Condominium Act*, which was the legislation in place prior to the *Strata Property Act*, required a strata corporation to bring an action in debt to recover legal fees after a judgement established that bylaws had been contravened rather than seeking recovery by way of a costs award. In other words, in order to recover the legal fees under the *Condominium Act*, a strata corporation was required to bring a separate action after the strata corporation had obtained judgement confirming a bylaw breach. The Judge found that section 133 of the Act did not require a separate debt action. The Judge held that the claim for the recovery of the costs of remedying a contravention of the bylaws could be included in a court action in which the strata corporation was seeking compliance with the bylaw.

It should be noted that the Judge declined to consider the claim for legal costs based on a “legal fees charge

back” bylaw. However, such a determination was not fatal to the strata corporation’s claim since the Judge was willing to accept that legal costs fit within section 133 of the Act which permitted the recovery of the reasonable costs incurred to remedy a bylaw contravention.

The next issue for the Judge was the matter of the amount of the legal fees that the strata corporation could recover. In *Stevens* the strata corporation sought an order that the matter of legal costs be referred to the Registrar for an assessment and determination of the actual legal costs, fees and other disbursements reasonably incurred by the strata corporation. The Judge accepted that the Registrar is best placed to assess the reasonableness of the costs claimed pursuant to section 133 of the Act. However, in doing so, the Judge made various observations on what constitutes reasonableness.

The Judge found that proportionality was an important consideration in assessing whether the strata corporation’s costs were reasonable. The Judge noted that reasonable costs are those necessary for the proper presentation of the case. The result or degree of success was also a relevant factor. Where a strata corporation is not successful in establishing that a bylaw has been breached, the legal costs cannot be said to be costs incurred to remedy a contravention.

The Judge also commented that the costs incurred in relation to the Provincial Court application and the Civil Resolution Tribunal were not recoverable as they related to the *Stevens* matter. The Judge noted the strata corporation had made no submissions regarding its entitlement to such costs. Additionally, with respect to the Provincial Court matter, the strata corporation had advised the Provincial Court Judge that its costs were not recoverable. With respect to the Civil Resolution Tribunal the Judge noted that section 20 of the *Civil Resolution Tribunal Act* provides that parties are generally required to represent themselves. Ultimately, the matter of the costs that the strata corporation will recover will be determined by the registrar.

Although helpful in confirming a strata corporation's ability to collect legal fees incurred to enforce a bylaw, some additional questions remain. For example, in determining reasonableness, the court found that reasonable costs include those necessary for the proper presentation of the case. What is not clear is whether such costs include legal costs relating to initial legal advice that was provided to the strata corporation with respect to the likely enforceability of the bylaw, costs incurred for correspondence exchanged between the strata corporation's lawyer and the owner or their lawyer in respect of the alleged breach or costs for the strata corporation's lawyer to attend a hearing if one is requested by the owner.

see how the Civil Resolution Tribunal responds to the *Stevens* decision.

The costs that may be recovered if bylaw compliance is sought through the Civil Resolution Tribunal is also unclear. The Judge in *Stevens* correctly noted that the *Civil Resolution Tribunal Act* provides that parties are generally required to represent themselves. Nonetheless, even though a council member may represent the strata corporation during the process, many strata corporations seek legal advice regarding the issues as noted above and also require assistance when applying to the Civil Resolution Tribunal for an order for compliance with a bylaw and the payment of fines. The Civil Resolution Tribunal itself has recognized that a strata corporation may use a lawyer as a helper. Such costs are arguably costs incurred to remedy the contravention of a bylaw, however, will the Civil Resolution Tribunal find such legal expenses to be "reasonable" costs?

If the Civil Resolution Tribunal is willing to require an owner to pay the strata corporation's legal costs to enforce a bylaw, unlike a court, it is unclear whether the Civil Resolution Tribunal will direct the determination of what is reasonable to a Registrar. Thus, it may be that the tribunal member will determine the reasonableness of costs incurred to enforce a bylaw. However, it may be that the tribunal refers the matter to a Registrar for determination.

Strata corporations pursuing bylaw enforcement through the Civil Resolution Tribunal that have incurred legal expenses should discuss with their lawyers whether the claim should include the legal fees incurred to enforce the bylaw. In the meantime, we will have to