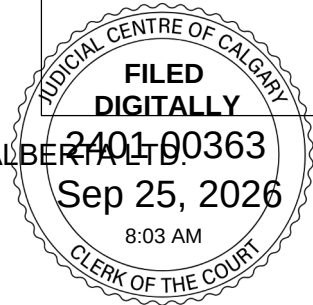


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COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
PLAINTIFF	ATB FINANCIAL
DEFENDANTS	STARKE CAPITAL CORP. and 1637102 ALBERTA LTD.
DOCUMENT	BENCH BRIEF OF ATB FINANCIAL
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCarthy Tétrault LLP Suite 4000, 421 7th Avenue SW Calgary AB T2P 4K9 Attention: Pantelis Kyriakakis / Nathan Stewart / Samantha Arbor Phone: 403-260-3536 / 3534 / 3506 Fax: 403-260-3501 Email: pkyriakakis@mccarthy.ca / nstewart@mccarthy.ca / sarbor@mccarthy.ca

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BENCH BRIEF OF ATB FINANCIAL

**TO BE HEARD BY
THE HONOURABLE JUSTICE C.D. SIMARD**

OCTOBER 2, 2026 at 2:00 p.m.

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I. INTRODUCTION

1. This bench brief is submitted by ATB Financial (“**ATB**”) in connection with BDO Canada Limited’s (“**BDO**”) application (the “**Application**”), in its capacity as court-appointed receiver and manager (in such capacity, the “**Receiver**”) of all present and after-acquired properties, assets, and undertakings (collectively, the “**Property**”) of Starke Capital Corp. (“**Starke**”) and 1637102 Alberta Ltd. (“**163 AB**”, Starke and 163 AB are collectively referred to as, the “**Debtors**”), seeking, among other relief, a declaration concerning the priority between ATB and Condominium Corporation No. 8111330 (“**Plaza 14**”), over approximately \$239,717 (the “**Disputed Funds**”) derived from the sale of the Lands (as defined below).
2. ATB’s priority over the Disputed Funds is based on a straightforward application of the legislative priority schemes under the *Land Titles Act* (Alberta) (the “**LTA**”) and the *Condominium Property Act* (Alberta) (the “**CPA**”). Simply put, ATB holds the first-ranking security interest over the Lands and all Property.
3. In contrast, Plaza 14’s position requires the Court to read in additional language not contained in the CPA, to expand the scope and effect of section 39.2 beyond its ordinary and grammatical meaning. The Legislature has provided a clear framework for addressing caveats and charges under s. 39.2, which does not include priority of payment. It is neither necessary nor appropriate to expand the CPA to include same. The CPA contains only one provision addressing the priority of a caveat for condominium contributions; s. 39.2(8) provides for “the same priority as a mortgage under the [LTA]”. Section 39.2(11) of the CPA, relied upon by Plaza 14, is an anti-vesting provision which applies only in certain limited, expressly enumerated circumstances, does not directly affect priority, and is not applicable in these circumstances.
4. In an effort to expand the scope of section 39.2 of the CPA to create priority, where the Legislature did not, Plaza 14 cites *in terrorem* theories that condominium corporations with outdated bylaws might be adversely affected if the Court determines that ATB has priority. There is no merit to that suggestion. The Application involves a narrow and unique set of circumstances. Any decision in the case at bar is unlikely to have wide-ranging implications. In particular, the unique circumstances at hand include that:
 - (a) Plaza 14 was served with notice of the applications seeking the appointment of the

Receiver, and the AVO (as defined below), and did not oppose either application or make arguments concerning vesting at that time;

- (b) the appointment of the Receiver had clear and unequivocal benefits over a foreclosure, including that the Receiver was best placed to fund necessary maintenance and expenses, engage with the property manager, and undertake efforts to lease the Lands prior to sale, in order to maximize value. Plaza 14 also took the benefit of these proceedings throughout, including by receiving payments directly from the Receiver, and the completion of significant work on the Building (as defined below), which would not have been paid or completed in a foreclosure; and,
- (c) even if Plaza 14 had opposed the vesting of the Plaza 14 Caveat in connection with the AVO, which it did not, such vesting would have been appropriate when considering the factors set forth in *Dianor #2*, and in particular, that Plaza 14's own Bylaws expressly and unambiguously contemplate that any caveats in favour of Plaza 14 will be subordinate to registered mortgages.

II. THE FACTS

A. Background

i. The Debtors and the Lands

- 5. The Debtors owned and operated a commercial property located at the municipal address of 811 14th Street NW, Calgary Alberta, and legally described as follows:

CONDOMINIUM PLAN 8111330
UNIT 28
AND 4690 UNDIVIDED TEN THOUSANDTH SHARES IN THE
COMMON PROPERTY
EXCEPTING THEREOUT ALL MINES AND MINERALS

(the "**Lands**").

First Report of the Receiver, dated November 24, 2025 ["First Report"], at para. 2.

- 6. 163 AB was the registered legal owner of the Lands. Starke conducted the related real estate operations, including leasing and property management.

First Report, at para. 12.

7. The Lands consist of the commercial space within a building located in Calgary, known as “Plaza 14” (the “**Building**”). Specifically, the Lands consist of nine (9) commercial units; five (5) of which were occupied when the Receiver was appointed.

First Report, at paras. 13 and 16.

8. The remaining twenty-seven (27) condominium units (the “**Residential Units**”) within the Building are residential.

Affidavit of G. Birrell, sworn on September 16, 2026 [“Birrell Affidavit”],
at Exhibit “A” [“Bylaws”], s. 1(q).

ii. ATB Loan and Security Documents

9. To fund operations, Starke entered into a Commitment Letter, dated May 7, 2019, between ATB, as lender, Starke, as borrower, and 163 AB, as guarantor, as subsequently amended pursuant to the Notice of Minor Change Agreement, dated November 15, 2021 (collectively, the “**Commitment Letter**”).

Affidavit #1 of B. Spilchen, sworn January 9, 2024 [“Spilchen Affidavit”], at para. 16 and Exhibit “D”.

10. As security for the obligations owed to ATB, the Debtors executed, among others:
- (a) the General Security Agreement, dated May 3, 2016, granted by Starke Plaza 14 Ltd. (now Starke), to and in favour of ATB;
 - (b) the General Security Agreement, dated July 2019, granted by 163 AB, to and in favour of ATB;
 - (c) the Collateral Mortgage, dated May 3, 2016 (the “**Mortgage**”), granted by Starke Plaza 14 Ltd. (now Starke), to and in favour of ATB, in the principal amount of \$8,800,000, with respect to the Lands; and,
 - (d) the General Assignment of Rents and Leases, dated May 3, 2016, granted by Starke, to and in favour of ATB,
- (collectively, the “**Security**”).

Spilchen Affidavit, at para. 22 and Exhibits “F” - “H”.

11. ATB perfected its security interests under the Security, by registration, against: (i) the Certificate of Title for the Lands; and, (ii) the Debtors in the Alberta Personal Property Registry.

Spilchen Affidavit, at paras. 34-35 and Exhibit "J"-"L".

12. As at September 11, 2026, after accounting for all interim distributions made to ATB in these proceedings, the Debtors still owe ATB approximately \$7.78 million, plus accruing costs and interest.

Second Report of the Receiver, dated September 21, 2026 ["Second Report"] at para. 17.

iii. The Building Management and Bylaws

13. The relationship between the Lands and the Residential Units is governed by the Bylaws.
14. The Bylaws distinguish between commercial expenses, which are the expenses relating to the Lands, and those relating to the Residential Units.
15. The Bylaws also provide that certain common expenses, including expenses relating to the care, repair and maintenance of the Building envelope, insurance costs, and certain other matters, shall be shared. Specifically, shared costs shall be split between the Lands and the Residential Units, at a rate of approximately 46.9% and 53.1%; respectively.

First Report, at para. 15(b); Bylaws at ss. 1(f), 1(q).

16. In the event that an owner does not pay their share of contributions, the Bylaws provide that Plaza 14 has a lien on the estate of the owner, **subject to the rights of existing mortgagees** and any municipal authority in respect of unpaid taxes:

"30. a. The Corporation shall and does hereby have a lien on and a charge against the estate or interest of any Owner for any unpaid contribution, assessment, installment or payment due to the Corporation, which lien **shall be lien [sic] against such estate or interest subject only to the rights of any registered mortgagee** and any municipal or local authority in respect of unpaid realty taxes, assessments or charges of any kind against the Unit title or interest of such Owner. The Corporation shall have the right to file a caveat or encumbrance against the Unit title or interest of such Owner in respect of the lien or charge for the amount of such unpaid contribution, assessment, installment or payment as hereinbefore mentioned, and for so long as such unpaid contribution, assessment, instalment or payment remains unpaid, provided that such caveat or encumbrance shall not be registered until after the expiration of thirty (30) days (or any accelerated assessments, installments and payments), shall give to the Corporation a

mortgage or encumbrance for the full amount thereof and all contributions, assessments, installments and/or payments, and interest thereon at the Interest Rate from the due date or dates for payment of the same, and the Corporation shall be entitled to enforce its lien, charge and security and pursue such remedies as may be available to it at law or in equity, from time to time including the recovery by the Corporation of its legal fees and disbursements on a solicitor and his own client basis from such defaulting Owner.

[...] f. Notwithstanding all other provisions hereof **the lien, charge, or security created, as hereinbefore mentioned and referred to in the preceding paragraphs, shall be subject always and subordinate to, and shall not affect the rights of the holder of, any indebtedness secured by any registered mortgage** and the Corporation or other party shall, upon the request of such registered mortgagee, at the expense of such other party or the Corporation, as the case may be, execute and deliver such postponements, agreements or instruments of subordination as the said mortgagee shall reasonably require to fully and effectively establish or maintain its priority as a registered mortgagee in respect of a Unit title against which it has a *[sic]* registered its mortgage.”

Bylaws, at ss. 30(a) and (f) **[emphasis added]**.

B. The Caveat and Priority Dispute

i. The Plaza 14 Caveat

17. Between 2021 and 2023, Plaza 14 determined that the Building required certain post-tensioning system maintenance and proceeded with such repairs.
18. The Debtors made various payments towards their outstanding contributions, but, by the end of 2023, had failed to pay all assessed contributions.

Birrell Affidavit, at paras. 6-7.

19. Plaza 14 registered a caveat, on October 12, 2023, and Certificate of *Lis Pendens*, on December 1, 2023, against title to the Lands (the “**Plaza 14 Caveat**”).
20. The Plaza 14 Claim is in the aggregate amount of \$239,717.62, broken down as follows:
 - (a) Post tension / repair costs: \$115,861.89;
 - (b) Insurance: \$5,202.60;
 - (c) Legal Fees: \$60,480.27; and,

(d) Interest: \$58,172.86 (inclusive of pre and post-receivership interest),
(collectively, the **"Plaza 14 Claim Amount"**).

Second Report, at para. 21; Birrell Affidavit at para. 14.

21. The Receiver has opined that, "based on the Receiver's review of the Plaza 14 Claim, the underlying amounts generally appear to be supported **but the Receiver has had difficulty reconciling the exact amounts claimed and certain require further clarification**". Specifically: (i) "interest calculations (as interest has been compounded which does not appear to be the method of calculation set out in the by-laws)"; (ii) "the legal fee charges (to which supporting invoices have been redacted, leaving limited details to ascertain that the time was incurred specifically with respect to this matter)"; and (iii) "certain maintenance invoices where 100% was charged to 163 AB (as opposed to the proportional allocation of 46.9% in accordance with the by-laws)."

Second Report, at para. 22.

ii. Receivership Proceedings

22. On January 18, 2024, ATB obtained an Order (the **"Receivership Order"**) of the Court, appointing BDO as the Receiver of the Property.

First Report, at para. 1; Receivership Order, granted on January 18, 2024.

23. Plaza 14 was provided with service of ATB's application to appoint the Receiver. Plaza 14 did not oppose the appointment.

Affidavit of Service of Katie Hynne, sworn January 16, 2024, at para. 2 and Exhibits "A" and "B".

24. ATB sought the appointment of the Receiver because, as set forth in the affidavit filed in support of the receivership application:

- (a) a Garnishee Summons had been served, in respect of 163 AB, by a creditor, which indicated that the Debtors had failed to pay creditors other than ATB and Plaza 14;

Spilchen Affidavit, at para. 14(f).

- (b) prior to the Receiver's appointment, due to the low occupancy, the Debtors retained a listing agent to lease and sell the Lands; however, no progress was made in obtaining new leases for the unoccupied portions of the Lands;

Spilchen Affidavit, at para. 47.

- (c) the Lands required lease-up efforts and a corresponding marketing process, before a sales process could be commenced, in an effort to increase realizations, all of which required additional funding;

Spilchen Affidavit, at para. 15.

- (d) ATB was unwilling to provide additional liquidity to the Debtors, and there was no further credit available to the Debtors under the Commitment Letter. The required funding was only available from ATB, within receivership proceedings, to be secured by a court-ordered charge against the Debtors' Property; and,

Spilchen Affidavit, at para. 15.

- (e) ATB had serious concerns about the Debtors' ability to direct a sales or leasing process, given that the Debtors appeared to have no management and made no progress toward finding new tenants or obtaining renewals from existing tenants.

Spilchen Affidavit, at para. 48.

- 25. The appointment of the Receiver was, specifically, sought to maximize the value of the Debtors' property, by: (i) entering into new leases with respect to the Lands; (ii) stabilizing the Debtors' operations and preventing further erosion of ATB's collateral; and, (iii) subsequently, marketing the Lands and chattels in a collective, court-supervised process for the benefit of all stakeholders.

Spilchen Affidavit, at paras. 48 and 54(e).

- 26. The Receiver's activities, following its appointment, included, among other things: (i) negotiating and entering into a property management agreement; (ii) undertaking critical and material repairs and maintenance; (iii) preserving existing tenancies and engaging with tenants; (iv) initiating a request for proposal to select commercial leasing brokers; (v) selecting a leasing broker and, through the broker, attempting to secure new tenants and negotiating with interested parties; (vi) engaging a commercial brokerage to

assist with the sale of the Lands; (vii) completing a tax appeal; and, (viii) listing the Lands for sale and ultimately negotiating a sale.

First Report, at paras. 17 and 37.

27. All of these steps were funded, by ATB, through the Receiver's Borrowings Charge.

First Report, at paras. 23, 37(f).

28. During the course of these proceedings, the Receiver made various payments and disbursements which benefitted Plaza 14 and the Building, as well as the overall value of the Lands, including: (i) \$639,752 in respect of repairs and maintenance; (ii) \$90,104 in insurance; and, (iii) \$82,500 in commissions in connection with leasing and sales efforts.

First Report, at Appendix "D".

29. ATB has been advised by the Receiver, following service of the Second Report, that: (i) the amount paid **directly** to Plaza 14 by the Receiver during these proceedings, is approximately \$71,736.40, in relation to insurance, repairs/maintenance, and engineering reports; and, (ii) approximately \$12-15,000 in receiver's fees and disbursements, excluding legal fees and disbursements, were incurred in connection with reviewing the Plaza 14 Claim and the priority dispute.
30. On December 5, 2025, the Court granted the Approval and Vesting Order (Sale by Receiver) (the "**AVO**"), approving the sale of the Lands.

Approval and Vesting Order (Sale by Receiver), granted on December 5, 2025 ["AVO"].

31. The AVO states, in pertinent part:

"Upon delivery of a Receiver's certificate to the Purchaser substantially in the form set out in Schedule "A" hereto (the "Receiver's Closing Certificate"), all of the Debtors' right, title and interest in and to the Purchased Assets listed in Schedule "B" hereto shall vest absolutely in the name of the Purchaser (or their nominee), **free and clear of and from any and all caveats**, security interests, hypothecs, pledges, **mortgages, liens**, trusts or deemed trusts, reservations of ownership, royalties, options, rights of pre-emption, privileges, interests, assignments, actions, judgements, executions, levies, taxes, writs of enforcement, charges, or other claims, **whether contractual, statutory, financial, monetary or otherwise, whether or not they have attached or been perfected, registered or filed and whether secured, unsecured or otherwise** (collectively, "**Claims**") [...]

For the purposes of determining the nature and priority of Claims, net proceeds from sale of the Purchased Assets (to be held in an interest bearing

trust account by the Receiver) **shall stand in the place and stead of the Purchased Assets** from and after delivery of the Receiver's Closing Certificate and all Claims including Encumbrances (but excluding Permitted Encumbrances) shall not attach to, encumber or otherwise form a charge, security interest, lien, or other Claim against the Purchased Assets **and may be asserted against the net proceeds from sale of the Purchased Assets with the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.** [...]"

AVO, at paras. 3, 8 **[emphasis added]**.

32. Plaza 14 was served with the Receiver's application for the AVO and did not oppose same.
33. Plaza 14 advised the Receiver that the Plaza 14 Claim was estimated to be in the amount of \$330,000 and requested a corresponding holdback. The Receiver agreed to hold back \$330,000 until the priority dispute between ATB and Plaza 14 could be determined.

Second Report, at para. 18.

III. ISSUES

34. The issue to be determined in the within application is whether ATB or Plaza 14 has priority to the Disputed Funds.

IV. LAW

A. General Priority of Registrations

35. Section 14(3) of the LTA provides that, generally, priority of registrations on title is dependent upon the serial number of each registration:

14(3) For purposes of priority between mortgagees, transferees and others, **the serial number assigned to the instrument or caveat shall determine the priority of the instrument or caveat filed or registered.**

*Land Titles Act, RSA 2000, c. L-4, at s. 14(3) **[emphasis added]** [BOA TAB 3].*

36. Advances under a mortgage granted in respect of a specific principal sum, such as the Mortgage, are granted priority notwithstanding the subsequent registration of a caveat:

Priority of mortgage

104(1) On registration of a mortgage for a specific principal sum, the mortgage obtains priority in accordance with section 14 of this Act for all advances and obligations secured pursuant to the terms of the mortgage, notwithstanding that they are made or incurred subsequent to the registration, on or after January 1, 1983, of any other instrument or caveat.

LTA, at s. 104(1) [BOA TAB 3].

B. Registration of A Caveat For Unpaid Condominium Contributions

37. Section 39.2 of the CPA permits the registration, by condominium corporations, of caveats regarding unpaid contributions. Specifically, s. 39.2 states, in pertinent part:

Payment and enforcement of contributions

39.2(1) A contribution is due and payable on the passing of a resolution by the board under section 39 in accordance with the terms of the resolution of the board.

[...] **(3)** Where a contribution, including any interest owing, is not paid by the owner, the mortgagee may pay any amount owing in respect of that contribution and add that amount to the amount owing to the mortgagee under the mortgage.

[...] **(6)** 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.

(7) 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.**

(8) 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.**

[...] **(11)** Notwithstanding subsection (8), if

- (a) a corporation has filed a caveat under this section,
- (b) **subsequent to the caveat's being filed another person gains title to the unit pursuant to**
 - (i) a foreclosure action,
 - (ii) an action for specific performance, or
 - (iii) a tax recovery proceeding under the Municipal Government Act,

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.

CPA, s. 39.2(1), (3), (6)-(8), (11) [BOA TAB 1] **[emphasis added]**.

V. ARGUMENT

A. The Mortgage Has Priority Over the Plaza 14 Caveat

38. The Mortgage has priority over the Plaza 14 Caveat, under both the LTA and the CPA.

i. The Mortgage Has Priority Under the LTA

39. The LTA provides that priority is based on the order of registration. Specifically:

[...] Section 104 is clear: an advance takes priority over other claimants from the date of registration of the mortgage, other than with respect to builder's lien claimants and certain PPSA claimants.

Westpoint Capital Corporation v Solomon Spruce Ridge Inc,
2017 ABQB 497 (CanLII), at para. 58 [BOA TAB 18];
LTA, ss. 14 and 104 [BOA TAB 3].

40. Section 39.2(8) of the CPA provides that a caveat under s. 39.2 shall have “the same priority as a mortgage under the *Land Titles Act*”.

41. ATB's Mortgage was registered against the Lands on May 26, 2016, with instrument number 161 122 251. The Plaza 14 Caveat was registered against the Lands on December 10, 2023, with instrument number 231 312 319.

42. Paragraph 8 of the AVO provides that, when assessing the relative priority of “Claims”, such Claims shall have “the same priority as they had with respect to the Purchased Assets immediately prior to the sale, as if the Purchased Assets had not been sold and remained in the possession or control of the person having that possession or control immediately prior to the sale.” **[emphasis added]**.

43. Immediately prior to the sale of the Lands, sections 14 and 104(1) of the LTA, and 32.9(8) of the CPA, provided that priority would be determined by the timing of registration.

44. Accordingly, under the LTA and CPA, the Mortgage has priority over the Plaza 14 Caveat.

ii. Section 39.2 of the CPA Does Not Grant Any Super-Priority

45. The CPA does not elevate or grant priority to the Plaza 14 Claim.
46. The CPA is to be strictly interpreted, so as to provide certainty to owners and corporations alike. Specifically, as stated by Justice Ritter, in considering a challenge to the method of collecting condominium fees which did not comply with the CPA, “It is not the role of the courts to enlarge what the legislature has chosen to provide for whenever a possible inequity may occur as a result of the enforcement of the plain meaning of the legislative provision. [...] **The scheme of the Act does not permit a court to impose what it considers to be fair on a case-by-case basis. Rather, the scheme is designed to provide certainty to owners and corporations alike.**”

Condominium Plan No. 8222909 v. Francis, 2003 ABCA 234 [BOA TAB 11], at paras. 30 and 32 [emphasis added].

47. Plaza 14 suggests that several provisions, being ss. 39.2(3), (7), (8), and (11), evidence the Legislature’s intent that s. 39.2 charges rank ahead of prior registered mortgages; despite s. 39.2(8) of the CPA expressly confirming that this is not the case.
48. Plaza 14 is incorrect. The section 39.2 framework is intentionally narrow and provides a balanced means of protecting mortgagees and condominium corporations in specified circumstances. Specifically:
- (a) **Section 39.2(3)** of the CPA permits a mortgagee to “pay any amount owing in respect of that contribution and add that amount to the amount owing to the mortgagee under the mortgage”. Rather than constituting a recognition of relative priorities (insurance costs, for instance, are an unsecured claim), this mechanism allows a mortgagee to protect their interests and collateral, directly, should they elect to do so. It is not a recognition that the claims being paid have **priority**, but rather a right or option which may (or may not) be exercised by the mortgagee, in their discretion. Nothing in the CPA requires that these expenses be paid in priority to the mortgage; if the mortgagee does not elect to pay them.
- Spilchen Affidavit at Exhibit “G” (Mortgage)*, ss. 4(c), 5(g), 16(c).
- (b) **Sections 39.2(6) and 39.2(7)** do not speak to priority, but create a registerable charge against lands. Specifically, pursuant to s. 39.2(6), 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." 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." These provisions **create** the charge; not any special priority.

CPA, at ss. 39.2(6)-(7) [BOA TAB 1].

- (c) **Section 39.2(8)** of the CPA does speak to priority, and confirms 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***"; which, as set out above, engages a priority assessment based on the timing of registration of each interest, pursuant to ss. 14 and 104(1) of the LTA.

CPA, at s. 39.2(8) [BOA TAB 1];
LTA, at ss. 14 and 104(1) [BOA TAB 3].

- (d) **Section 39.2(11)** of the CPA does not effect or refer to priority. Instead, s. 39.2(11) confirms that, *if* specific conditions precedent are met (which require, among other things, that title is transferred pursuant to "a foreclosure action", "an action for specific performance", or "a tax recovery proceeding under the *Municipal Government Act*"), the caveat "**remains registered** against the certificate of title of the unit until the amount owing is paid to the corporation". Nothing in s. 39.2(11) would prevent a mortgagee from receiving payments in priority to the caveat. The only matter s. 39.2(11) addresses is vesting.

CPA at s. 39.2(11) [BOA TAB 1] [**emphasis added**].

49. Unlike the statutory priorities provided for other registrable caveats or interests, such as builders' liens and municipal taxes (each of which specifically refers to the priority of the applicable interest *vis-à-vis* a registered mortgage), the CPA does not provide for any specified, statutorily-created priority for a condominium corporation's caveat.

Prompt Payment and Construction Lien Act, RSA 2000, c P-26.4, s. 11 [BOA TAB 5];
Municipal Government Act, RSA 2000, c M-26, s. 348 [BOA TAB 4];
CPA at s. 39.2(8) [BOA TAB 1].

50. The fact that section 39.2(11) of the CPA does not refer to receiverships or sales in insolvency proceedings (which have their own statutory and common law tests for the

vesting of interests) should not be assumed to be an oversight. Courts assume that every word in a statute “is intended to have a meaning and is not merely surplusage”.

R v HB, 2022 ABCA 240 at para. 9 [BOA TAB 13], citing *Alberta (Education) v The Canadian Copyright Licensing Agency*, 2012 SCC 37, [2012] 2 SCR 345, at para 47 BOA TAB 6]; *CHRC v Canada (sub nom Mowat)*, 2011 SCC 53, [2011] 3 SCR 471, at para 38 [BOA TAB 10].

51. The scope of s. 39(2) is limited to creating a charge and preventing vesting of the interest, in certain circumstances. Accordingly, the CPA does not provide for any form of “super priority” for the Plaza 14 Caveat.
52. The cases cited by Plaza 14 in support of its “super priority” argument are distinguishable and are not applicable in the circumstances. Specifically:
 - (a) *Tutt v The Owners: Condominium Plan No. 7822572*, 2020 ABQB 213 (“**Tutt**”) involved, as conceded by Plaza 14, “different facts”. *Tutt* was an appeal from a costs decision, which arose from the ordinary course enforcement of condominium bylaws and fees, outside of insolvency or mortgage foreclosure proceedings. The **foreclosure** in *Tutt* was commenced by the condominium corporation (and was determined by Justice Graesser to have been commenced unreasonably, as no amounts were owing to the corporation), and there was no priority dispute. Justice Graesser’s commentary, cited by Plaza 14, concerning the “exception to indefeasibility” arising under s. 39.2 of the CPA, was *obiter* for illustrative purposes and dealt only with the general principles of a **foreclosure proceeding**; and,

Tutt v The Owners: Condominium Plan No. 7822572, 2020 ABQB 213 at paras. 1-3, 19, 71-72
[BOA of Plaza 14, at TAB 10]; Bench Brief of Plaza 14, at para. 41.
 - (b) *Condo Plan v Owners and Mortgagees*, 2025 ABKB 43 (“**Condo Plan**”), addressed, as conceded by Plaza 14, “a different section of the Act and different proceeds”. *Condo Plan* did not involve insolvency proceedings or a receivership. It concerned the wind-up of a condominium corporation in the aftermath of a fire, and the bylaws at issue in that case simply did not “address the situation that actually occurred” (unlike the Bylaws in the case at bar, which squarely address priority). The condominium corporation in *Condo Plan* did not receive the benefit of receivership proceedings at the expense of the mortgagee, as occurred in this case, where Plaza 14 and the Building obtained direct and indirect benefits from the appointment of the Receiver. The Court’s decision also assumed that

enforcement would occur by foreclosure; which was reasonable given the facts at hand (including that there was no operating business and no building to be leased or occupied which would justify the appointment of a receiver). All of which differentiates *Condo Plan* from the present circumstances.

Condo Plan v Owners and Mortgagees, 2025 ABKB 43 at paras. 7-8, 60, 67 [BOA of Plaza 14, at TAB 9]; Bench Brief of Plaza 14, at para. 38.

53. Furthermore, the Plaza 14 Caveat has been vested from title to the Lands, pursuant to the AVO, which is a final, entered order. Plaza 14 had notice of the AVO. The anti-vesting provisions under s. 39.2(11) have no room for application, in the circumstances.

54. This outcome is also consistent with Plaza 14's own Bylaws, which state, in pertinent part:

30(a) The Corporation shall and does hereby have a lien on and a charge against the estate or interest of any Owner for any unpaid contribution, assessment, instalment or payment due to the Corporation, which lien shall be a lien against such estate or interest **subject only to the rights of any registered mortgagee and any municipal or local authority in respect of unpaid realty taxes, assessments or charges of any kind against the Unit title or interest of such Owner.** The Corporation shall have the right to file a caveat or encumbrance against the Unit Title or interest of such Owner in respect of the lien or charge for the amount of such unpaid contribution, assessment, instalment or payment as hereinbefore mentioned, and for so long as such unpaid contribution assessment, instalment or payment remains unpaid...

[...] f. Notwithstanding all other provisions hereof **the lien, charge, or security created, as hereinbefore mentioned and referred to in the preceding paragraphs, shall be subject always and subordinate to, and shall not affect the rights of the holder of, any indebtedness secured by any registered mortgage** and the Corporation or other party shall, upon the request of such registered mortgagee, at the expense of such other party or the Corporation, as the case may be, execute and deliver such postponements, agreements or instruments of subordination as the said mortgagee shall reasonably require to fully and effectively establish or maintain its priority as a registered mortgagee in respect of a Unit title against which it has a *[sic]* registered its mortgage."

Bylaws, at ss. 30(a) and (f) **[emphasis added]**.

55. Plaza 14 asserts that s. 34.1(1) of the CPA overrides the subordination contemplated by the Bylaws. Section 34.1(1) of the CPA states:

Conflict with bylaws

34.1(1) If there is a conflict between a bylaw and this Act or the regulations, this Act or the regulations, as the case may be, prevail.

CPA at s. 34.1(1) [BOA TAB 1].

56. However, as described above, there is no statutory priority provided to a condominium corporation's caveat under the provisions of the CPA, and nothing in the CPA requires a mortgage to be subordinate to a condominium corporation's caveat. To the contrary, the CPA contemplates that priority will be determined under the LTA. The subordination of the Plaza 14 Caveat, pursuant to the Bylaws, is not inconsistent with the CPA or LTA. Furthermore, there is no indication that s. 34.1(1) is intended to be a "sword" (used by the condominium corporation against third parties) rather than a "shield" (ensuring that owners are protected from *ultra vires* bylaws). Holding Plaza 14 to the terms of its own Bylaws does not create a conflict with the CPA; where none otherwise exists.

iii. The Plaza 14 Caveat Has Been Vested Off Title

57. Any arguments in relation to vesting or the preservation of the Plaza 14 Caveat through section 39.2 of the CPA, should have been raised previously; first, at the receivership application, and second, at the AVO application.
58. However, even if Plaza 14 had raised vesting-based arguments, the Plaza 14 Caveat can be vested off title to the Lands in an insolvency proceeding; and was.
59. The Plaza 14 Caveat is an *in rem* financial interest, which can be vested. In this case, particularly given the subordination clause contained in the Bylaws, pursuant to which Plaza 14 voluntarily subordinated its rights and interests in favour of any mortgagee, the vesting of the Plaza 14 Caveat was appropriate.
60. As set out in *Dianor #2*, the factors to be considered, in determining whether vesting of an interest in land is available and appropriate, include:
- (a) the nature of the interest in land, and specifically, "whether the interest in land is more akin to a fixed monetary interest that is attached to real or personal property subject to the sale (such as a mortgage or a lien for municipal taxes), or whether the interest is more akin to a fee simple that is in substance an ownership interest in some ascertainable feature of the property itself";

- (b) whether the interest holder has agreed to vesting, which includes consideration of any contractual subordination clause which may apply, so as to ensure “that the express intention of the parties is given sufficient weight and allows parties to contractually negotiate and prioritize their interests in the event of an insolvency”; and,
- (c) **if the first two factors prove to be ambiguous or inconclusive**, the court may then engage in a consideration of the equities to determine if a vesting order is appropriate in the particular circumstances of the case.

Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc., 2019 ONCA 508, at paras. 105-110 (quotation para. 108) [Dianor #2] [BOA TAB 17].

61. The equities the Court may consider include: (i) consideration of the prejudice, if any, to the interest holder; (ii) whether the interest holder may be adequately compensated from the proceeds of the disposition or sale; (iii) whether, based on evidence of value, there is any equity in the property; and (iv) whether the parties are acting in good faith.

Dianor #2, at para. 110 [BOA TAB 17].

62. The *Dianor #2* test applies in favour of the vesting of the Plaza 14 Caveat:
- (a) the nature of the Plaza 14 Caveat is a fixed, monetary interest, akin to a financial encumbrance such as a mortgage, which is capable of being vested;
 - (b) the Bylaws confirm that any caveat in favour of Plaza 14 will be subordinated to any registered mortgage. Specifically, Plaza 14’s lien shall be “**subject only to the rights of any registered mortgagee** and any municipal or local authority in respect of unpaid realty taxes, assessments or charges of any kind against the Unit title or interest of such Owner” and “shall be **subject always and subordinate to, and shall not affect the rights of the holder of, any indebtedness secured by any registered mortgage**”¹ [emphasis added]. As the Court recognized in *Dianor #2*, such a subordination clause militates in favour of vesting, and should be given effect to reflect freely negotiated agreements between the parties. Furthermore, giving effect to the subordination clause will *increase* commercial certainty, rather than undermining it as argued by Plaza 14. Mortgagees who have

¹ Nearly identical wording is used in multiple sections of the Bylaws addressing Plaza 14’s lien rights: Bylaws at ss. 30(a) and (f).

relied upon a voluntary subordination in advancing funds will, reasonably, expect same to have some substantive meaning;

- (c) secured parties may be entitled to rely even on an *implied* subordination contained in a security agreement, to which they are not party, if the agreement acknowledges priority for their interest. In contrast, the Bylaws are unambiguous and confirm, in the same clauses granting Plaza 14 its lien and caveat rights, that same will be subject to registered mortgages; and,

***Kubota Canada Ltd. v Case Credit Ltd.*, 2005 ABCA 139, at paras. 1, 14, 20-25 [BOA TAB 12].**

- (d) although the first two considerations weigh in favour of vesting and it is thus not necessary to consider the equities, in the circumstances, the equities would also support vesting, as: (i) ATB, as a lender seeking to rely upon voluntarily-provided subordination clause, will suffer a material deficiency in the recovery of its secured claim in any event, confirming that there was no equity in the Lands when the AVO was granted; (ii) ATB acted in good faith in seeking the appointment of the Receiver and did so for commercially reasonable reasons, including (as expressed prior to the Receiver's appointment) to maximize the value of the Lands by undertaking repair, maintenance, and leasing efforts prior to sale. ATB expended significant funds to this end, including: (a) approximately \$812,356 funded by ATB and paid by the Receiver for the benefit of the Building; and, (b) approximately \$71,736.40 paid directly to Plaza 14; and, (iii) Plaza 14 did not raise its concerns with the proposed form of proceeding in a timely manner, and in the circumstances of this case, benefitted from the Receiver's appointment and expenditures.

- 63. Accordingly, the Plaza 14 Caveat was properly vested.
- 64. Plaza 14 has attempted to minimize the impact of the Bylaws' subordination clause, by asserting that if "the Court found the subordination clause meant the condominium corporation could not assert priority, the entire condominium collections framework would collapse for nearly every condominium that has not updated their bylaws since the 1990's (when subordination clauses were common)".
- 65. Even assuming (without evidence) that statement is accurate, the fact that some condominium corporations may not have updated their bylaws since the 1990s is no reason to ignore clear statutory provisions and established caselaw.

B. Plaza 14's Policy and Equity Arguments Are Without Merit

66. Plaza 14 asserts that, if this Honourable Court determines that ATB has priority over the Disputed Funds, it would upend commercial certainty and result in a "dangerous precedent" which would be inconsistent with Plaza 14's interpretation of legislative intent.

**CPA, s. 39.2(3), (7), (8), and (11) [BOA TAB 1];
Bench Brief of Plaza 14, at paras. 22, 26-27, 41.**

67. These arguments are without merit, as: (i) the suggestion that the Court must read between the lines to determine the Legislature's intent has no application in this case, as the Legislature has used clear and unambiguous language to express its intent; and, (ii) the Application involves a unique and narrow set of factual circumstances, which limit the application of any decision to the immediate facts.

i. Policy Does Not Require Departing from Principles of Statutory Interpretation

68. There are numerous reasons why the Legislature may have chosen to exclude reference to receiverships or other insolvency proceedings in drafting the CPA.² The plain language of s. 39.2 (11) of the CPA is capable of only one meaning,³ and that meaning does not include "receivership proceedings" within its ambit. The Legislature specified three categories to which s. 39.2 will apply, none of which include the circumstances at hand.
69. Parties rely upon the commercial certainty provided by a legislative scheme; not just condominium corporations and owners, but also lenders, lien claimants, taxation authorities, and others. Expanding the meaning of s. 39.2(11) beyond the circumstances which it specifically addresses risks undermining those expectations and the corresponding certainty relied upon in assessing risk. This is particularly the case in the present circumstances, as Plaza 14 has already taken the benefit of these proceedings.

² For instance, insolvency proceedings often involve various collective problems similar to those faced by condominium corporations seeking the collection of contributions, and require additional flexibility in addressing sales and the distribution of proceeds of a debtor's assets. Receivership proceedings are also better suited to addressing an operating business, such as the Debtors' business, than piecemeal enforcement by a mortgagee acting solely through a redemption order, preservation order, or similar foreclosure mechanism. Furthermore, in insolvency proceedings, specific tests already apply to determine whether an interest can and should be vested.

³ "Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament." *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42, at para. 26, quoting Driedger, *Construction of Statutes* (2nd ed. 1983) [BOA TAB 9].

Approximately \$812,356 of the Receiver's disbursements were to the benefit of the Building, including \$639,752 in respect of repairs and maintenance, which exceeds the amount claimed under the Plaza 14 Caveat.

70. Upholding the relative priority of the Mortgage and the Plaza 14 Caveat will not affect foreclosure proceedings, municipal tax enforcement proceedings, or actions for specific performance, where section 39.2 will continue to apply.

ii. There Is No Inequity Arising from ATB's Choice of Remedies

71. Plaza 14 argues that ATB should have proceeded by foreclosure, rather than seeking the Receiver's appointment, and that is inequitable for Plaza 14 to suffer a worse outcome in receivership proceedings than in a foreclosure. There is no merit to this argument.
72. This Court has recognized that, as a general principle, a secured creditor is entitled to make an election of remedies when pursuing enforcement.
73. As stated by Justice Marion in *Bank of Nova Scotia v Smiling Simba Learning Academy Inc.*, a case where the respondents argued that receivership would be too expensive and a foreclosure would be more appropriate:

[34] BNS asserts that the Property is complex given its zoning and is not a simple sale matter, and BNS has a right to choose its remedy. Further, BNS is concerned about SSLA's past conduct and lack of cooperativeness [...].

[...] [52] BNS could have commenced foreclosure proceedings. It could have agreed to a judicial sale order. However, unless outweighed by other factors, a secured creditor, like BNS, is entitled to elect its security enforcement path: *Bank of Montreal v Haro-Thurlow Street Project Limited Partnership*, 2024 BCSC 47 at para 95.

***Bank of Nova Scotia v Smiling Simba Learning Academy Inc.*, 2025 ABKB 11 (CanLII), at para. 52 [BOA TAB 8], citing *Bank of Montreal v Haro-Thurlow Street Project Limited Partnership*, 2024 BCSC 47 at para 95 [BOA TAB 7].**

74. ATB's choice of remedy in this case was based upon its stated desire to maximize value, to the benefit of all creditors and stakeholders. Following the Receiver's appointment, the Receiver carried through on its mandate by funding critical repairs and shared costs, carrying out operations, making significant efforts to lease the Lands, and ultimately, canvassing the market for the highest and best offer for the Lands. Plaza 14 received benefits in these proceedings that it would not have in a foreclosure; including ongoing

payments of insurance costs and maintenance, funded by ATB. Plaza 14 was evidently content to receive these benefits during the proceedings, and its opportunistic late submissions regarding ATB's choice of remedy have no merit.

First Report, at paras. 17, 23, and 37.

75. The receivership proceedings benefitted all stakeholders and creditors, to a far greater extent than would be the case in foreclosure proceedings, and the amount expended by the Receiver (with funding from ATB) exceeds the quantum of the Plaza 14 Caveat.

C. In the Alternative, the Plaza 14 Claim Should Be Taxed, Subject to Accounting and Cost Allocation

i. Plaza 14's Legal Fees Should be Subject to Taxation

76. A substantial portion of the Plaza 14 Claim relates to legal fees, which have not been reviewed or put in evidence. If the Court determines that Plaza 14 has priority to the Disputed Funds, Plaza 14 should be required to proceed to taxation to ensure that the costs claimed are consistent with the legislative scheme, which contemplates that:

- (a) a contribution, levied generally upon the owners, "may include reasonable and relevant administrative costs and legal fees, including expenses and interest, incurred by the corporation";

CPA, s. 39(2) [BOA TAB 1].

- (b) the CPA permits legal fees in relation to the ***enforcement of contribution obligations*** to be recovered from the "person against whom the steps were taken" (which includes both owners, and tenants) and, if a caveat is registered, to recover certain prescribed fees against the owner of the unit; and,

CPA, s. 42 [BOA TAB 1].

- (c) the prescribed legal fees which may be recovered against the owner are limited to "legal and other professional fees and disbursements associated with preparing, registering and discharging the caveat" and "the cost of registering and discharging the caveat under the *Land Titles Act*".

Condominium Property Regulation, Alta Reg 168/2000, s. 74.1 [BOA TAB 2].

ii. The Plaza 14 Claim Should Be Subject to Accounting

77. The Receiver has identified concerns with the Plaza 14 Claim as presented, noting that “the underlying amounts generally appear to be supported but the Receiver has had difficulty reconciling the exact amounts claimed and certain require further clarification”. In the event that the Plaza 14 Claim has legal priority, which is denied, the Receiver should be directed to review and approve the particulars thereof prior to any distributions.

iii. Cost Allocation is Appropriate

78. In the event that the Plaza 14 Claim has priority to the Disputed Funds, the Plaza 14 Claim should be subject to an allocation of the costs of these proceedings.
79. This Court has the jurisdiction to allocate the costs of an insolvency proceeding, provided that the resulting allocation is fair and reasonable in the circumstances. Plaza 14 received benefits from the proceedings, as described above. Allocation is fair and reasonable.

Re Hunters Trailer & Marine Ltd, 2001 ABQB 1094 at para. 15 [BOA TAB 15];
Re Winnipeg Motor Express Inc, 2009 MBQB 204 at para. 42 [BOA TAB 16] (leave to
appeal to MBCA ref'd, 2009 MBCA 110), citing *Re Hickman Equipment (1985) Ltd. (In
Receivership)*, 2004 NLSCTD 164 at para. 17 [BOA TAB 14].

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24TH DAY OF SEPTEMBER, 2026



Pantelis Kyriakakis / Nathan Stewart /
Samantha Arbor
Counsel to ATB Financial

VI. LIST OF AUTHORITIES

Statutes

1. *Condominium Property Act*, R.S.A. 2000, c. C-22, at sections 34.1(1), 39(2), 39.2(1), 39.2(3), 39.2(6)-(8), 39.2(11), and 42;
2. *Condominium Property Regulation*, Alta Reg 168/2000, at section 74.1;
3. *Land Titles Act*, RSA 2000, c. L-4, at sections 14, 14(3), 104, and 104(1);
4. *Municipal Government Act*, RSA 2000, c M-26, at section 348;
5. *Prompt Payment and Construction Lien Act*, RSA 2000, c P-26.4, at section 11;

Case Law

6. *Alberta (Education) v The Canadian Copyright Licensing Agency*, 2012 SCC 37, [2012] 2 SCR 345;
7. *Bank of Montreal v Haro-Thurlow Street Project Limited Partnership*, 2024 BCSC 47;
8. *Bank of Nova Scotia v Smiling Simba Learning Academy Inc*, 2025 ABKB 11 (CanLII);
9. *Bell ExpressVu Limited Partnership v Rex*, 2002 SCC 42;
10. *CHRC v Canada (sub nom Mowat)*, 2011 SCC 53 at para 38, [2011] 3 SCR 471;
11. *Condominium Plan No. 8222909 v. Francis*, 2003 ABCA 234;
12. *Kubota Canada Ltd. v Case Credit Ltd.*, 2005 ABCA 139;
13. *R v HB*, 2022 ABCA 240;
14. *Re Hickman Equipment (1985) Ltd. (In Receivership)*, 2004 NLSCTD 164;
15. *Re Hunters Trailer & Marine Ltd*, 2001 ABQB 1094;
16. *Re Winnipeg Motor Express Inc*, 2009 MBQB 204;
17. *Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc.*, 2019 ONCA 508; and,
18. *Westpoint Capital Corporation v Solomon Spruce Ridge Inc*, 2017 ABQB 497 (CanLII).