

CHARGEBACKS: ARE THEY – OR WILL THEY BE – PERMITTED?



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Many condominium declarations contain an indemnification, or “chargeback”, provision (“indemnification provision”) that outlines the circumstances in which a condominium can charge back costs to an owner, and add those costs to the owner’s common expenses. The specific language of each indemnification provision can vary from declaration to declaration. However, the following wording is very common:

“Each unit owner shall indemnify and hold harmless the condominium from and against any loss, costs, damage, injury or liability whatsoever which the condominium may suffer or incur resulting from or caused by an act or omission of such owner, their agents, occupants, tenants, (etc...) to or with respect to the common elements and/ or all other units (except for damage covered by the condominium corporation’s insurance).”

Again, condominium corporations generally rely on these indemnification provisions to add chargebacks to an owner’s common expenses. The chargebacks can include a variety of costs, such as management, administrative and legal costs associated with an owner’s breach of the condominium’s governing documents.

The question is: **Is the wording of the indemnification provision sufficient to cover these particular costs?**

Anticipated amendments to the *Condominium Act* will provide some clarity in terms of what can and cannot be charged back to a unit owner as a common expense (further explained below). In the meantime, a recent Divisional Court decision has provided some judicial guidance on how condominiums should be interpreting their indemnification provisions.

The Divisional Court in *Wexler v. Carleton Condominium Corporation No. 28* dealt with the interpretation of an indemnification provision (that was almost identical to the above-noted wording) contained in the condominium’s declaration.

In the *Wexler* case, an owner had sued the condominium corporation – and lost. The issue then became: Did the condominium corporation have the right to a special cost award (i.e. to recover ALL of its legal costs) based on the indemnification provision? The Court said “no”. The Court said that the indemnification provision did not apply (at least to the legal costs relating to that particular Court dispute).

Based on the language of the indemnification provision, the Divisional Court stated that the provision “is not applicable as there has been no loss, costs, damage, injury or liability suffered or incurred with respect to the common elements and/or all other units caused by an act or omission by the unit owner.” In other words, the language of the indemnification

provision did not give the corporation the authority to recover other costs and expenses beyond those specifically related to the common elements and/or all other units. The Court essentially said that the legal costs (at least in that case) didn't fall within the wording of the indemnification provision.

This is a particularly noteworthy decision, because, as noted above, many condominium declarations have indemnification provisions that contain similar wording to the wording in CCC No. 28's indemnification provision. Based on the *Wexler* decision, such a provision will only apply to losses, costs, damages, injuries, or liability caused by an act or omission of the owner with respect to the common elements and/or units. Accordingly, the standard language used in many indemnification provisions in Ontario may only be sufficient to recover costs and expenses that relate to the "common elements and/or all other units" and the concern is that some costs may not qualify.

As a result, condominiums may want to consider amending their declarations to replace these indemnification provisions with clearer indemnification provisions.

This is especially so in light of coming changes to the *Condominium Act*. The anticipated amendment to section 7(4) of the *Condominium Act* will state that a condominium declaration may specify the common expenses of the condominium and the circumstances that may result in the addition of any amount to the contribution to the common expenses payable for the owner's unit to indemnify or compensate the condominium. These changes will confirm that a condominium may only add costs it incurs to the common expenses for a unit when the declaration clearly permits such a chargeback. As such, condominiums will only be entitled to seek indemnification from a unit owner through common expenses when the declaration clearly so permits. A provision in the By-laws or Rules does not appear to be sufficient, except where this is otherwise authorized by the Act.

Further, the coming amendments will also provide a new process for unit owners to challenge any costs or expenses added to their common expenses as a "chargeback". Currently, the only process available for a unit owner to challenge a chargeback is through the Courts. When the new amendments come into force, a unit owner will be able to challenge a chargeback by way of Application to the

Condominium Authority Tribunal – CAT – for quite modest fees. Furthermore, condominium corporations generally won't be able to recover legal costs of the CAT process (i.e. if the corporation seeks assistance from legal counsel to respond to the owner's Application).

As a result, unit owners will have an accessible and inexpensive process available to challenge certain costs that have been charged to their common expenses. When challenging certain costs that have been charged back to their common expenses, unit owners may try to rely on the *Wexler* decision and section 7(4) of the amended *Condominium Act* that together MIGHT be taken to confirm that the typical language used in condominium indemnification provisions does not indemnify the condominium from all costs and expenses it incurs to enforce the Act, Declaration, By-laws and Rules.

Overall, it is important for condominiums to consider amending their indemnification provision to carefully outline the costs and expenses that the condominium may charge back to the unit owner's common expenses. In particular, if a condominium wishes to recover fees such as administrative fees, additional management fees and/or legal fees related to violations of the Act, Declaration, By-laws or Rules (by adding such amounts to the owner's common expenses), it is a good idea to ensure that the indemnification provision contained in the declaration clearly permits such chargebacks. While amending a condominium's declaration will not allow the condominium to avoid the new process when a unit owner challenges a cost or expense, it will certainly give the condominium a better chance of success in recovering such costs and expenses. ■

James Davidson is one of the founding partners of DHA and has been practicing condominium law for over 30 years. James represents condominium corporations, their directors, owners, and insurers throughout Eastern Ontario. His experience also includes building deficiencies, shared property interests, co-ownership and construction law. Jim is proud to be an associate (ACCI) and also a fellow (FCCI) of the Canadian Condominium Institute.

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