

Where There's Smoke

Amlani Decision: Are legal costs recoverable from unit owners?

By Sarah Morrey



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(February 4, 2020, 11:16 AM EST) -- Condominium corporations are obligated under the *Condominium Act* to enforce compliance of their governing documents, which oftentimes requires assistance from legal counsel in the form of a non-compliance letter.

Customary practice within the condo community has been to charge back the associated legal costs to the non-compliant owner; however, after the release of a recent decision of the Superior Court of Justice, some industry professionals are taking the position that the chargeback of these legal costs is not permissible without a court order.

The case, *Amlani v. York Condominium Corp. No. 473* [2020] O.J. No. 209, emphasizes two significant takeaways for condominium corporations in dealing with non-compliant unit owners: (i) act reasonably, and strive to resolve the non-compliance in a non-adversarial way, especially if the corporation's governing documents require it, and (ii) carefully review the language of the declaration's indemnification provision to ensure that compliance-related costs can be charged back to a unit.

A longtime smoker and his wife moved into the condo, making sure there were no restrictions on smoking at the time of purchase. After moving in, some of the neighbouring residents began to complain about the second-hand smoke that was emanating from the unit. The corporation took some steps to seal the unit and complaints stopped for about two years.

In response to new complaints, the owner took numerous steps to lessen the smoke migration and sought to work with the corporation to resolve the issue co-operatively. The owner repeatedly requested to meet with the board of directors and even offered to retain an engineer, at his own cost, to prepare a report and opine on possible solutions. The corporation declined the owner's requests to meet and made several unreasonable demands, including that the owner stop smoking entirely. In response, the owner voluntarily moved out of his unit until a mutual resolution could be reached.

After the owner moved out, the corporation passed a no-smoking rule, but gave existing smokers the option to be exempt from the rule. The corporation refused the owner's request to be exempt on the basis that the exemption was for current residents, and the owner was no longer residing in the unit.

The corporation incurred over \$25,000 in legal costs, which it subsequently charged back to the owner. The corporation registered a lien against the unit, and eventually tried to force its sale, whereupon the owner commenced a court application.

In its analysis of the facts, the court held that the corporation had acted both unreasonably and oppressively. Furthermore, the corporation had failed to negotiate in good faith, which was a requirement under the corporation's bylaws.

Indemnification clauses that corporations rely on to charge back various costs often fall under two categories:

1. Costs that have been incurred by the corporation for damage done to the common elements or other units; and

2. Costs that have been incurred by the corporation in enforcing the governing documents against an owner (including rules).

The corporation took the position that its indemnification provision fell into the latter category, thereby allowing it to charge back compliance-related costs against the unit owner. The court found this position unreasonable, as the provision did not explicitly permit the recovery of costs incurred for a breach of the governing documents, and the owner did not cause any damage to the units or common elements.

In its analysis of the corporation's indemnification provision, the court also reviewed s. 134(5) of the *Condominium Act*, which allows condominium corporations to recover all costs incurred in obtaining a compliance order against a unit owner in the same manner as common expenses. The court differentiated costs that are recoverable under s. 134(5) and the costs that the corporation was attempting to recover in the case at hand on the basis that the costs incurred in dealing with the owner were not incurred in obtaining a compliance order.

The court has previously confirmed that with an appropriately worded indemnification provision and different, less oppressive facts, a corporation can charge back compliance and enforcement costs as common expenses without a court order. For example, in *Italiano v. Toronto Standard Condominium Corporation No. 1507* 2008 OREG, the court confirmed that costs, including legal fees, incurred by a corporation in abating noise can be collected in the same manner as common expenses.

The Act is consumer protection legislation. This includes protection against owners who single-handedly cause the corporation to incur legal costs due to their non-compliance with the governing documents. It would be contrary to the interests of all owners for a corporation not to be able to charge back the legal costs it incurs in sending an enforcement letter to a non-compliant owner when the declaration permits doing so. Innocent unit owners should not have to bear the cost associated with the misconduct of one owner.

Indeed, although not yet in force, the amendments to the *Condominium Act* are going to specifically provide that these types of indemnifications provisions are valid, and disputes pertaining to these clauses will be heard at the Condominium Authority Tribunal.

Until the amendments to the *Condominium Act* are in effect, condominium corporations must ensure, if charging back compliance-related costs to unit owners, that: (i) the declaration has a strong indemnification provision, and (ii) the corporation has acted reasonably, with a view to resolve the non-compliance co-operatively.

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