

## Chargebacks – Ensuring they are Collectable

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One of the biggest concerns for strata corporations when faced with a leak, fire or other situation that causes damage is who is going to pay for that damage. In the Winter 2015 Edition of the CHOA Journal, Adrienne Murray discussed the responsibility for repairing damage where the cost is below the strata corporation's insurance deductible. If the common property is damaged, the strata corporation is responsible for repairing it. However, what can be done if the damage is caused by an owner, tenant or occupant? Similarly, if the damage is above the insurance deductible, the strata corporation is required to pay the deductible. However, what can be done if the damage is caused by an owner, tenant or occupant?

In either of those circumstances, the strata corporation would most likely chargeback those invoices to the owner's account. An owner asks the strata corporation to investigate an issue with the pipes and the strata corporation's investigation concludes that the issue relates to part of the strata lot. In that scenario, the strata corporation charges back the investigation costs to the owners' account. Owners are also charged back for costs incurred by the strata corporation from the owner's cheque bouncing. If an owner fails to clean their parking stall in contravention of the bylaws, the strata corporation charges back the cleaning costs to the owner. The strata corporation is involved in a lawsuit with an owner and the strata corporation charges back their law firm's invoices to the owner.

Have these chargebacks been validly applied? A strata corporation derives its powers from the *Strata Property Act* (the "Act"), the *Strata Property Regulations* (the "Regulations"), and its bylaws and rules. Its ability to charge strata fees is derived from section 92 of the Act. Its ability to assess a special levy is derived from section 108 of the Act. Its ability to charge user fees is derived from section 110 of the Act and section 6.9 of the

Regulations. So, on what basis can the strata corporation charge back all those other amounts.

When it comes to damages below the deductible and the deductible itself, section 158 of the *Strata Property Act* allows a strata corporation to sue the responsible owner. To chargeback those costs, the strata corporation must have a bylaw that permits it to charge them back. The bylaw should be carefully drafted to ensure that the strata corporation does not inadvertently make it difficult to collect. For example, in *Strata Plan LMS 2446 v. Morrison*, the court concluded that because the strata corporation's bylaw set the negligence standard, the strata corporation must prove negligence in order to charge back the deductible. If properly worded, the strata corporation's bylaw can apply the "responsibility" standard. That standard only requires that the damage arise from a component of the strata lot, which is the owner's responsibility to repair and maintain.

Similarly, before any other type of invoice is charged back, you should ask what provision of the Act, Regulations, bylaws or rules allows the council to charge this back. If the answer is because the owner contravened a bylaw, then section 135 of the Act must be followed before the charge back can be applied. This requires the strata corporation to send a notice to the owner outlining the particulars of the alleged bylaw contravention. The strata corporation must also give the owner an opportunity to respond or a hearing, if requested. After the deadline to respond passes, the council must meet to consider the allegations, any written response, and any submissions made at a hearing. The council must then decide whether the bylaw was contravened, whether to fine, and if the council has decided to fine, how much that fine should be. Once that decision is made, it should be minuted in the minutes of the council meeting and a letter should

be sent advising the owner of the decision. Failure to follow those steps will render the chargeback uncollectable.

Finally, there is the issue of legal fees that the strata corporation has incurred as a result of a dispute with an owner. Sections 167(2) and 171(6) of the Act make it clear that an owner involved in a lawsuit with a strata corporation is not required to contribute to the strata corporation's legal expenses. In addition, sections 133(2) and 118(a) of the Act allows the strata corporation to charge back the strata corporation's "reasonable" legal costs to remedy a bylaw contravention or to collect monies owing under a Form G – Certificate of Lien. Beyond sections 133(2) and 118(a), there is nothing in the Act or Regulations that allow for the charge back of actual legal invoices. In addition, in both situations, the court has concluded that "reasonable" does not equal full indemnity, but instead is based on the Tariff in the Supreme Court Civil Rules. To get around the Tariff, some strata corporations have a bylaw that provides that they are entitled to full indemnity. The court in *Blackmore v. Strata Plan VR 274* suggested that it may be open for the strata corporation to pursue the balance of the legal fees by relying on the bylaw in a separate court proceeding. The validity of such bylaws has not been challenged. Nor has the court considered whether the application of such a bylaw would be significantly unfair. Regardless, the message is clear, if a strata corporation wants to have any chance in trying to charge back its actual legal expenses, it must have a clearly worded bylaw that allows it to do so.

Strata corporations typically want those responsible for expenses to pay for them. Owners want to minimize increases to their strata fees. One way to accomplish this is to charge back expenses to owners. However, before an expense is charged back, you have to determine what provision of the Act, Regulations, bylaws or rules allows for this chargeback. If it is permitted, have all the steps been taken before the charge back is levied? Without the proper authority, any attempt to collect those chargebacks in court will fail. It is important that the strata corporation have the necessary bylaws to allow for the chargebacks it may want to try to collect.