

Resolving Those *%&#! Condominium Disputes

For the last several years do you remember hearing about those changes to condominium law? Passed by the Ontario legislature back in 1998, some of us might even have given up believing the new Act would ever be proclaimed. As of May 5, 2001 the Condominium Act, 1998 is finally in force in Ontario. If you live or work in a condominium, are thinking of moving into one or if you provide advice about condominiums you need to know about the many changes to the law affecting condominiums in Ontario. The focus of this article is one part of that new regime: the settlement of disputes in condominiums.

What is the mediation requirement?

The new Act deems a mediation clause to be part of almost every agreement affecting a condominium. This means that most disputes within condominiums must attempt to reach settlement using mediation or if mediation fails the situation must proceed to arbitration before anyone involved will be permitted to go to court for a resolution.

The mediation shall be by a person selected by the parties. According to section 132 of the Condominium Act, 1998 the mediator shall "confer with the parties and endeavour to obtain a settlement" with respect to the disagreement submitted to mediation. Payment for the mediator's fees and expenses will be according to the terms of the settlement resulting from the mediation or as specified in the notice by the mediator that the mediation has failed. The only disputes which are not required to go to mediation are those where the parties have previously submitted the same matter to mediation.

If a mediator has not obtained a settlement between the parties then the disagreement proceeds to arbitration. The timeframe for the matter to go to the arbitration process is 60 days after the matter was submitted to mediation if no mediator is selected or 30 days after the selected

mediator provides a notice that the mediation has failed. The arbitration process is governed by the Ontario Arbitration Act, 1991.

In what situations do we have to use mediation?

The deemed mediation clause applies to the following situations:

- A. an agreement between a condominium corporation and a "declarant", a freehold or leasehold owner of land who registers it as a condominium;
- B. an agreement between two or more condominium corporations;
- C. an agreement between a corporation and an owner about change to the units or common elements;
- D. an agreement between a condominium corporation and a person managing the property;
- E. a disagreement between a declarant and the purchasers of a unit with respect to a budget statement or the obligations of a declarant; and
- F. a declaration between a condominium corporation and the owners of its units as to the declaration, by-laws or rules.

Can we just sue - and skip the mediation and arbitration?

The short answer is "no". Section 134 of the Condominium Act, 1998 sets out the possibilities for a Order from the court to enforce compliance. None of these court remedies is available if the mediation and arbitration processes are available. According to Joe Hoffer, an Ontario lawyer who practices exclusively in this field, "if the [condominium] corporation makes an application to the court to enforce a by-law as against an owner, the court may throw it out on the basis that it is a disagreement that should have been submitted to mediation under section 132: a costly ruling if it occurs."

What is mediation?

Mediation is a process provided by an impartial third party to assist two or more parties to resolve their dispute. The parties to a mediation meet privately with the mediator to resolve their dispute on their own terms.

What is arbitration?

Arbitration is useful when the parties cannot work out the resolution themselves. The arbitrator is an impartial third party who makes a decision after a hearing in which evidence is presented by the parties. Arbitrations may be held in private, and not open to the public and the media as courts generally are. The arbitrator's decision is usually binding on the parties. Compared with a court litigation process, arbitration usually reduces the costs by streamlining the procedures, making efficient use of time and locating in a place convenient for those involved.

Why mediation?

- Usually mediation is less expensive than a court action.
- Mediation is usually a faster process than court action
- The parties involved participate directly in the development of the resolution of the disagreement.
- The relationship between the parties is preserved. Going to court often creates antagonism which continues after the end of the trial.
- The situation can be kept private
- People are more likely to adhere to the settlement after mediation.

As everyone knows who has spent the money to get a court judgment which remains unpaid, what good is the outcome if you can't actually get the person to pay or to do whatever the court has ordered them to do? Experience has shown that parties are very likely to comply with the terms of a mediated settlement. In a collection of studies of small claims court and other civil court mediation processes in Canada and the United States extending back as far as the late 1970's the rates for successful completion of mediation were from 55% to 95%. In all mediation projects where there was data on compliance, the rate of compliance with the settlements ranged from a low of 83% to as much as 100%. It is interesting that the project with 100% compliance was one which had a relatively low completion rate of 60%.

What should our condominium board do?

When is it best to decide about the way you will resolve disagreements? When there is no disagreement!

Conflict is normal -even inevitable - when there is more than one person involved in any situation. Don't wait until there are disagreements which are creating an atmosphere of antagonism within your condominium community, to decide how you will resolve disagreements.

My recommendation to the condominium board which wants to be proactive and effective is to develop by-laws which set out your mediation and arbitration process. You can design rules which fit your setting and provide a timely response when the inevitable dispute happens. You may wish to consult a lawyer experienced in dispute resolution to help develop your by-law.

For mediation the by-law could spell out answers for such issues as mediator selection, timing for each of the steps in getting to a mediation meeting, delivery of notices and who pays. A by-law related to the arbitration process is also highly recommended. It is possible to exclude by agreement most of the provisions of the Arbitration Act, 1991. To what extent your condominium corporation should do this in order to custom fit your situation, streamline and keep the arbitration process cost-effective would be appropriate to discuss with your lawyer.

How do we find a mediator?

Mediation is an unregulated profession. There are no standardized requirements for someone to call themselves a mediator. My suggestion for consumers of mediation services is to do your homework. Would you choose as your doctor a well-meaning person whose qualifications are a 40-hour course or even a whole year of medical school? Detailed help on finding the right mediator is available in the May

1999 issue of Common Ground available by contacting our office or online at www.munnrcs.com.

I have been asked about the possibility of training owners within the condominium to conduct mediations for their fellow owners or to mediate for other condominiums' owners. In addition to the competence and experience of the mediator there is the requirement of impartiality. It is essential that the mediator you use be perceived by the parties to be impartial, that is, to have no stake in the outcome. The possible cost savings of using in-house mediators may be consumed in providing mediation training for them. In addition there may be time spent in unproductive mediation meetings or more frequent use by the condominium corporation of arbitration and court procedures if the mediations are not successful in resolving disagreements.

In order to receive maximum value for your mediation dollars, my recommendation is to do your research and find a competent, experienced mediator who is not an owner or manager within your condominium or a local condominium organization.

With respect to the selection of arbitrators the same advice applies as for mediators. There are also no standardized requirements to be an arbitrator. Again, do your research to find a competent, experienced and impartial professional who will meet your timelines.

It may be possible to contract with a mediator or arbitrator in advance to control costs and to make it easier to know your condominium corporation's financial commitments. For example contracting with the same mediator or arbitrator for all disputes in a year, may save money because the mediator will only once have to read your condominium corporation's mediation and arbitration by-law.

Munn-thly Memo and Tools of the Trade will return in the next issue of Common Ground.

Driving dispute resolution three ways:

Negotiation is like driving your own car. You decide where you're going and how you'll get there.

Mediation is like riding in a chauffeured car. You decide where you're going and someone else looks after getting you there.

Arbitration is like being in a spy movie. A black limousine with dark tinted windows pulls up as you're walking along the sidewalk, the door opens and you get in. For good or for ill, you're going where they're going.

Mark Your Calendar

Upcoming Training Events presented by Kathryn Munn

Dealing with Difficult People: Practical Tips for Women Lawyers

June 21 - Noon to 1:00 p.m.

Ontario Bar Assistance Program
At the Canadian Bar Association - Toronto

Call 416-593-3689 for more information and registration.

Fanshawe College Negotiation in the Workplace

June 14 & 15 - Strathroy Campus

June 19 & 20 - Woodstock Campus

Mediation Training - full 40 hour program

Part 1 - September 13 & 14

Part 2 - October 18 & 19

Part 3 - November 15 & 16

Call 519-246-1412 for more information and registration.

Mediation Level 1

October 31, November 1 & 2

The Management Centre, Lambton College, Sarnia, Ontario

Call (519)542-7751 Ext 505 for more information and registration.

I am pleased to fill requests for presentations about mediation and negotiation at meetings of professional and business groups. Call or e-mail to make the arrangements.

Electronic Common Ground

If you prefer to be on our e-mailing list please send us an e-mail.

Kathryn Munn, LL.B., C.R.C. is a mediator, arbitrator and lawyer. Through her firm Munn Conflict Resolution Services she works exclusively in alternate dispute resolution from a base in London, Ontario. She is a Roster Mediator, Ontario Mandatory Mediation Program - Toronto / Ottawa, a mediator under contract for the Farm Debt Mediation Service of Canada and for government departments.



CONFLICT RESOLUTION SERVICES

2090 Richmond Street

London, Ontario, Canada N5X 4C1

TEL: 519-660-1242 FAX: 519-660-1618

TOLL-FREE: 1-888-216-3202

www.munnrcs.com

E-MAIL: kmunn@munnrcs.com