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Do all "disagreements" require resolution by mediation and arbitration? Apparently not!

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The recent judgment of the Court of Appeal in the case of *Nipissing Condominium Corporation No. 4 v. Simard* [2009] ONCA 743 (Docket 20091028) opens the door, if only a little, for certain compliance cases brought by condominium corporations against unit owners to be dealt with by way of court application rather than through mediation and arbitration.

The Legislature's objective under the *Condominium Act, 1998* (the "*Act*") was to direct the resolution of disputes between condominium corporations and unit owners away from the courts and into the private dispute resolution processes of mediation and arbitration. To that end, Section 132(4) of the *Act* requires corporations and unit owners to submit any "disagreement" between the parties with respect to the declaration, by-laws or rules to mediation and arbitration. In turn, Section 134(2) of the *Act* provides that a corporation is not entitled to apply to the court for an order for compliance against a unit owner if the mediation and arbitration processes are available, unless the corporation has failed to obtain compliance through using those processes.

Section 132(4) specifies some exceptions to the mediation and arbitration requirement, namely that disagreements between the corporation and tenants as well as disagreements regarding the *Act* are not required to be submitted to mediation and arbitration. What Section 132(4) does not specify however, is the meaning of the word "disagreement". That leaves open the question of which "disagreements" trigger the mediation and arbitration requirement and which do not.

In the case of *McKinstry v. York Condominium Corp. No. 472* [2003] 15 R.P.R. (4th) 181, 68 O.R. (3d) 557, the Ontario Superior Court adopted a generous interpretation of the word "disagreement", stating that it applies to *"disagreements about the validity, interpretation, application or non-application of the declaration, by-laws and rules"*. This generous interpretation was subsequently adopted by the courts in several other cases and it was not challenged until this case.

The facts of the *Nipissing* case are briefly as follows: Simard owned several residential units in the corporation and rented them to a number of tenants, resulting in several unrelated tenants living in each unit. The corporation's declaration contained a provision stating that the units

could only be occupied as a "one family residence" and further, "one family residence" was defined such that it explicitly excluded roomers and boarders. The corporation proceeded by way of application against both the owner and all the tenants of the owner's units, for: (1) an order against the owner that he comply with Section 83 of the *Act* and provide the corporation with copies of all the leases with respect to his units; and (2) for a declaration against the tenants that they are occupying the units in breach of the declaration, among other things. The owner immediately brought a motion before the court, seeking to dismiss the application on the basis that the corporation had failed to comply with the mandatory mediation and arbitration provisions of the *Act*.

Justice P. H. Howden dismissed the motion on two grounds:

a. that the case involved intertwined issues under both the *Act* and the declaration, involving both the owner and the tenants and that it was therefore appropriate that the entire case be heard by way of application rather than by sectioning off the case so that the case against the tenants would proceed by way of application and the case against the owner would proceed by way of mediation and arbitration; and

b. that he was not bound to fully accept the "generous interpretation" of the word "disagreement" as set out in the *McKinstry* case and that, in his opinion, a dispute that involved only the validity in law of a provision of a declaration, by-law or rule (in this case, the validity of the "one family residence" provision) with otherwise no significant factual disputes, is not a "disagreement" under Section 132(4) of the *Act*.

The unit owner appealed the decision of Justice Howden to the Ontario Court of Appeal. The appeal was dismissed on the basis that Justice Howden had both the jurisdiction and the discretion to decide whether it was appropriate to avoid sectioning off the case and proceed with the entire case in one forum only, by way of application. Unfortunately however, having decided to dismiss the appeal on this basis, the Court of Appeal concluded that it was unnecessary to express any view on the other issue, namely whether the dispute fell under Section 132(4) and was therefore subject to the statutory obligation of mediation and arbitration.

Implications of the Nippissing case

It is disappointing that the Court of Appeal avoided considering the meaning of "disagreement", as it may have not only explicitly endorsed (or rejected) the decision of Justice Howden but also hopefully introduced greater clarity and certainty in this area of the law. That said, the Court of Appeal did confirm that if an application is brought against both a unit owner and a tenant, the court has the jurisdiction to hear the application rather than sectioning off the case and referring the dispute with the unit owner to mediation and arbitration. As well, the Court of Appeal did not reject Justice Howden's interpretation of the word "disagreement", meaning that the door is now open to corporations to proceed by application in cases where the owners dispute only the validity of the provision of the declaration, by-law or rule in question.

The practical implications of this case are as follows:

a. if the corporation needs to enforce compliance with the declaration, by-laws or rules against a tenant, then even if the owner becomes, or needs to be, involved in the dispute, the corporation could proceed against both the owner and the tenant by way of application with a relatively small risk that the application would be dismissed. The Court of Appeal has confirmed that it is in the discretion of the judge hearing the application to

decide whether or not to section off the case and it is generally in the interests of justice that a matter that involves the same facts should not be sectioned and tried in two different forums; and

b. if the corporation needs to enforce compliance with a provision of the declaration, by-laws or rules against an owner and the owner's only dispute involves the legal validity of that particular provision (but the owner is otherwise not questioning the meaning of the provision and there are no significant factual disputes), then the corporation has the option of proceeding by way of application against the owner. There are some risks involved with proceeding by way of application however. Firstly, since Justice Howden's opinion was not endorsed by the Court of Appeal (which would have made the opinion binding on the judges of the Ontario Superior Court), there is a risk that the judge hearing the application may choose not to follow Justice Howden's opinion. Secondly, there is a risk that the owner may attempt to dismiss the application on the ground that there were factual disputes that required resolution by mediation and/or arbitration. This risk could be limited however by the corporation attempting, before proceeding with the application, to have the owner confirm in writing that the only outstanding dispute was with respect to the legal validity of the provision that was breached.

Conclusion

The judgment of the Court of Appeal in the *Nipissing* case does not significantly change the way disputes between the corporation and the owners are dealt with but it does open the door, if only a little, for certain compliance cases to be dealt with by way of court application rather than through mediation and arbitration. This may be only a beginning; hopefully the Court of Appeal will revisit this issue in the near future and provide more clear guidance in this area of the law.