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Condo Alert!

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You can't put the cart before the horse: Mandatory mediation & arbitration before court application

An Nguyen, B.A. (Hons), J.D.

Condo corporations and owners should think twice about proceeding with a court application for a compliance order and/or oppression remedy without first exhausting mediation and arbitration under section 132 of the Condo Act.

In an **August 2021 endorsement,** the court refused to schedule an undefended application hearing where a condo was seeking an oppression remedy because an owner (who had yet to respond to the application) refused to move her car and was hindering the condo's ability to maintain and repair common elements. While the court directed the parties to a case conference to discuss the appropriate route, the court also highlighted that "it is the law and public policy of Ontario that regular disputes about compliance issues between condominium corporations and owner be resolved out of court."

The courts are on high alert on these issues, and it appears that anyone wishing to proceed with a Condo Act application should be ready to answer whether mandatory dispute resolution processes have been attempted or exhausted and possibly expect to be sent back to mediation if not. We were recently in Civil Practice Court to schedule a compliance application (on behalf of the respondents) where the court cautioned the applicant to consider mediation and arbitration under the Condo Act.

For these reasons, it is worth revisiting important principles governing disputes between a condominium corporation and its owners:

- Section 132(4) of the Condo Act provides parties must submit disputes regarding the declaration, by-laws and rules to mediation and arbitration;
- Mediation and arbitration are pre-conditions to declaration, by-law and rule enforcement applications under section 134 of the Condo Act;
- Mediation and arbitration are not required if the disagreement is with respect to non-compliance with the Condo Act. For example, in cases where there have been breaches of section 117, which prohibits any dangerous activity that is likely to damage property or cause injury;

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- The Supreme Court of Canada and the Court of Appeal for Ontario have confirmed that courts have very limited jurisdiction to hear disputes involving condo compliance issues. The court must stay its proceedings in favour of statutory mediation and arbitration under section 132 of the Condo Act in most cases;

- Bringing court proceedings under the oppression remedy of section 135 of the Condo Act to try to bypass the requirement to mediation and arbitrate won't work. The Court of Appeal confirmed that merely calling a claim "oppression" does not take it out of the jurisdiction of an arbitrator or provide entitlement to litigate in court. Courts will scrutinize the crux of the dispute to determine whether a claim is oppressive or a breach of a technical rule;

- Oppression is far more serious and severe form of wrongdoing than a simple breach of a rule, where mediation, arbitration or a compliance application might be more appropriate. The courts are reluctant in finding oppression too readily as it diminishes the distinction between compliance and oppression proceedings and risks violating the strong public policy favouring alternative dispute resolution in condominium cases;

- Section 134(5) of the Condo Act (which permits a condo to add additional actual costs to the common expenses for a unit if successful on a compliance application) doesn't mean that condos should approach their unit owners with a sledgehammer when communal living might be best enhanced by a more conciliatory approach.

Lastly, condo corporations should look to their by-laws for any additional requirements or processes for mediation and arbitration that might make the proceeding quicker and cheaper for both parties. Our precedent dispute resolution by-law anticipates such scenarios and processes including undefended compliance disputes. Ask us about adding this by-law to your governing documents.

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January 1, 2022 - Nuisance-related disputes in the Act and CAT

Andrea Lusk, B.Sc. (Hons), LL.B.

On January 1, 2022, the Condo Act will change to amend s. 117 (the dangerous activities section) to prohibit conditions likely to damage property, cause injury or illness to an individual or which result in the creation or continuation of noise, nuisance, annoyance and disruption.

Hand-in-hand come amended regulations which prescribe that unreasonable odour, smoke, vapour, light and vibration are deemed as nuisances/annoyances or disruptions that fall under the expanded s. 117 and which give the CAT the jurisdiction to deal with nuisance, annoyance and disruption matters and the indemnification of the condo and/or owners in relation to such disputes. It remains to be seen whether serious disruptions may continue down this path, or whether they will continue to require determination by the court.

The CAT already has the jurisdiction to credit back common expenses to owners in certain scenarios where an order is made against a condominium corporation for costs or a penalty. This may be a further nail in the "chargeback for pre-litigation/enforcement costs" coffin that has emerged since 2020's *Amlani* decisions as the CAT has adhered to and adopted the principles set out by the Divisional Court in some of its decisions on indemnification.

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