



THE INVISIBLE PARTICIPANT
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When mediation is “sold” as a dispute resolution process, we are often told that there is nothing to lose. Highlighted is the chance to participate with the parties you are in conflict with and work together to find a resolution. Through creative “outside the box” thinking, additional options appear and it is suggested that the possibilities for resolution are endless. In the world of condominium conflict, this is not the case.

In the context of condominium mediation, there is an additional participant at the table. This participant need not actively take part, say anything or even bother to show up, yet is ever-present and cannot be ignored. The participant is the *Condominium Act, 1998* (the “Act”) – Ontario’s current condominium legislation.

Section 176 of the Act provides that: “*This Act applies despite any agreement to the contrary*”. This means that parties to a condominium conflict cannot disregard the Act; they cannot contract out of it.

This is an important aspect of condominium life for all parties involved in condominium disputes to understand as it means that parameters of resolution are in place. Mediation must take place within the “four corners of the Act”. Examples include an agreement pertaining to an alteration to common elements not being effective until it is registered on title; the deadline by which a Condominium Lien must be registered to secure common expense arrears; and a director failing to remain in office if a lien registered against his/her unit has not been discharged within 90 days of registration. Settlement options that do not take such legislative limits into account are not viable.

Imagine that disputants, in good faith, reach an amicable resolution to their conflict. They jot down their settlement terms, shake hands and leave the mediation feeling it was a successful endeavour. The condominium corporation goes back to its lawyer to formally prepare the settlement agreement and is informed that the resolution does not comply with the Act. What happens next? The incurrence of more cost and time is a virtual guarantee and the parties may find themselves on worse terms than they were on going into the mediation.

I have had the unfortunate experience of witnessing a mediator suggest, as a possible resolution, that a condominium corporation make use of its reserve fund for a purpose other than the major repair or replacement of the common elements and assets of the corporation. No consideration was given to Section 93(2) of the Act - which limits use of reserve fund monies to such purpose – and this risked the parties embracing a settlement option which was a clear violation of the Act.

While the role of the mediator is not to provide legal advice, this example demonstrates how a mediator can inadvertently escalate a conflict simply by having a lack of “condominium knowledge” and the advantage of having a mediator with such knowledge facilitate the process. A knowledgeable condominium mediator can ask appropriate questions to ensure that the parties at the table are aware of the existence of the invisible participant and draw on his/her condominium knowledge to relay where there may be challenges or a need for legal insight, without taking sides.

While not every condominium conflict falls under the mandatory mediation provisions of Section 132 of the Act nor directly involves a condominium corporation, it is important for the presence of the Act to be recognized in the course of addressing all condominium disputes, through mediation or otherwise. After all, the Act is as stubborn and inflexible a party to conflict as there can be.

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Marc actively manages condominium conflict and advocates for mediation in the early stages of condominium disputes. He earned an Honours Bachelor of Arts at the University of Toronto (Trinity College), holds an Executive Certificate in Conflict Management from the University of Windsor Faculty of Law and is a member of the ADR Institute of Ontario, the ADR Institute of Canada, the Toronto & Area Chapter of the Canadian Condominium Institute, the Association of Condominium Managers of Ontario and the Institute of Law Clerks of Ontario.

Marc brings unique insight in mediating condominium conflict through the knowledge and experience he has gained as a condominium director, resident and law clerk. His mediation practice is focused exclusively on condominium disputes.

Marc Bhalla carries professional liability insurance and is a regular contributor of articles to **CONDOCENTRIC.ca**



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