



WHEN NOT TO MEDIATE
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The idiom “*one man’s trash is another man’s treasure*” serves to set out the various perspectives that people can have. All too often, condominium conflicts escalate as parties make assumptions as to the perspectives of another – such as by assuming that a rule violator is aware of the rule that he/she is breaking, a neighbour is purposely trying to be disruptive or that a Board of Directors does not genuinely care about a resident’s misfortune. Mediation does not focus on right or wrong; rather, mediation focuses upon sharing perspectives and answering the question “why”. It provides the opportunity for clarity and insight into what is guiding the actions of another, which knowledge can then be applied to the situation to save time, money and potentially spare hurt feelings.

In the context of condominium communities, an aggressive and confrontational initial approach to conflict, whether perceived or intentional, can serve to escalate it. When one considers that residential condominium corporations are where people in community live and commercial condominium corporations are where people in community make a living, it can be appreciated that members of such communities value their comfort and can take any violations thereof personally. This does not just apply to the person impacted by the actions of another, it applies to the “offender” as well.

Direct interaction as between impacted parties presents an opportunity for them to better understand each other; however, it is also important to appreciate when it is appropriate to pursue such an opportunity. For example, an emotional confrontation between neighbours may risk agitating and escalating the conflict. While it remains that the appropriateness of mediation cannot be assumed or taken for granted, the formality of the mediation process and presence of a skilled and neutral facilitator can help ensure that the most is made of the opportunity to share perspectives.

In family mediation, pre-screening is a matter of routine to help ensure that coercion, abuse or bad faith would not result in a negative impact upon the parties or the distortion of mediation into something else entirely. In the context of condominium community disputes, ensuring that a conflict is appropriate for mediation is also important. While mediation can be useful to address condominium conflict even when it is not mandatory, circumstances can exist that render it unsuitable.

The case of Natalia Korolekh¹, which gained prominence a few years ago, is an example of one type of circumstance where the appropriateness of mediation warrants consideration. Ms. Korolekh was accused of engaging in dangerous activity in violation of Section 117 of the *Condominium Act, 1998*. There were claims that she intimidated her neighbours with her 70 kilogram Rottweiler and otherwise committed and threatened violent and abusive acts against them. Ms. Korolekh's legal counsel objected to court proceedings, arguing that mediation was mandatory in respect of the dispute. The court found that mediation was not appropriate in view of the circumstances.

I was recently involved in a condominium dispute for which mediation – though not mandatory - was being considered yet did not proceed as a result of the perspective of the unit owner involved. The unit owner took the time to understand the process and how a mediation with the Board of Directors would be structured. The owner appreciated that mediation would provide the opportunity to express her concerns to her Board and how she was impacted by her circumstance – something that she saw great value in. However, the owner was also concerned that the steps she had already taken to attempt to address her issue had the potential of making her unpopular in her community and took comfort in the fact that the property manager and Board were not able to identify her in person (as this particular condominium community was quite large). As the form of mediation proposed – by the owner no less - would require an in-person meeting, the owner had to weigh the mediation opportunity against the comfort of preserving her anonymity for the time being.

This example, in and of itself, serves to highlight the value of understanding a participant's perspective. In initiating the consideration of mediation, one may have assumed that the owner was interested in participating in it. However, an understanding of her perspective revealed hesitations which the owner needed to further contemplate upon becoming more enlightened about the process. Asking the question and taking the time to understand how mediation could apply to a particular dispute is not a commitment to mediate, rather it is a step toward understanding the options and making an informed decision.

Any mediator who suggests that mediation is appropriate for all conflict is mistaken. Circumstances can exist that make mediation unsuitable or even dangerous. Mediation, however, does provide opportunities for parties engaged in conflict to control the process and the outcome. In addition, the courts have made unfavourable cost awards which have impacted condominiums that did not attempt mediation, even when mediation was not mandatory. These are two compelling reasons to consider mediation in respect of every condominium dispute, to understand how it could apply and if it may be fitting.

¹ <http://www.canlii.org/en/on/onsc/doc/2010/2010onsc4448/2010onsc4448.html>

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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.

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