



IS THERE ANYTHING TO MEDIATE?
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When the role of mediation in condominium disputes is debated, a question often posed is: Is there anything to mediate?

Often, the issue is viewed as “win/lose” and not something that can be imagined as “win/win”.

Let’s take the example of a condominium resident who is not picking up after his/her pet. This is behaviour that many feel cannot be defended. Mediation is not about defending one’s actions but rather about sharing perspectives. Taking the opportunity to understand why the resident is not complying may open the door to potential solutions on a more timely, cost effective and long-term basis than declaring the pet a nuisance and/or otherwise taking litigious enforcement steps. It may well be that the issue needs to go to court to be resolved; however, a conciliatory approach may reveal alternative issues and solutions not previously considered. For example, it could be that the placement of the garbage bin makes compliance difficult for the resident, particularly on cold days, and the re-location of the receptacle is all that is needed.

Applying first a conciliatory approach to conflict may prevent its escalation. It may seem contradictory that in the condominium environment where people co-exist in close community there is so often a lack of interaction or communication between people, yet sometimes the answer can be as simple as posting instructions in the garbage room in a language that a routine offender can understand.

Disputes often escalate due to a lack of education, misunderstanding or emotion. The recent case of *Harvey v. Elgin Condominium Corp. No. 3* is a great example. *Harvey v. Elgin Condominium Corp. No. 3* involved a self-represented unit owner who turned his misguided interpretations of the *Condominium Act, 1998* (the “Act”) into a 3 day trial.

When Mr. Harvey received a notice of special assessment for remedial work being carried out at his condominium in respect of leakage and related damage –work that he did not support - he discussed the situation with a neighbour. Mr. Harvey and his neighbour (neither of whom were lawyers) then formed certain opinions about the application of the Act to the situation. These opinions served to guide Mr. Harvey’s actions going forward. Such actions included Mr. Harvey alleging that the remedial work was a “substantial change” carried out without the required unit owner consent (Section 97(4) of

the Act) and Mr. Harvey withholding payment of common expenses out of protest.

Mr. Harvey failed to take into account Section 97(1) of the Act – which provides that repairs after damage “*shall be deemed not to be an addition, alteration or improvement*” and under which the court agreed the remedial work applied – or Section 84(3) which does not allow a unit owner to cease making payment of common expenses out of protest. What is perhaps most unfortunate is that the misinterpretation was not of the application of the condominium corporation’s unique declaration, by-laws or rules which vary from condominium to condominium but of legislation that is common and applies across the province.

In its judgment in respect of the Harvey case, the court states that “*...many of Mr. Harvey's formal complaints and claims effectively collapse at the outset as a result of his failure to lead any evidence capable of supporting them*”. While only hindsight and direct involvement in the interactions between the parties can allow one to truly assess how or even if the Harvey matter could have unfolded differently, the case certainly highlights how condominium conflict can quickly and expensively escalate. In view of this, attempting first to address condominium disputes with a conciliatory approach is worthwhile. Rather than looking at a dispute that seems clear cut and asking what there is to mediate, perhaps a more appropriate question is: Is there anything to litigate?

Even if one is intent on having their day in court, this may be a question that merits reflection.

Harvey v. Elgin Condominium Corp. No. 3 is available at
<http://www.canlii.org/en/on/onsc/doc/2013/2013onsc1273/2013onsc1273.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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