



WHAT IS MEDIATION? BY: MARC BHALLA NOVEMBER 2013

The Condominium Act may make it mandatory; your condominium may have a by-law that speaks to it; and the courts may encourage parties to try it - but what exactly is mediation, anyway?

Just as many condominium residents lack understanding of what a condominium community is or how it works, the same can be said for mediation. Many parties engaged in conflict do not understand what mediation is, how it works or what it can do for them.

The fact that mediation is not a set process to be applied the same way to every conflict can complicate matters as well; it is not the case that every mediation unfolds the same way. There are also different “styles” of mediation that apply to varying degrees and can get intermingled to suit the situation - consider a group of teenagers at a soft drink station, each filling their cup. While one may chose only one drink option, another may choose to combine a couple of different flavours to suit their taste.

While each mediation session is unique, there are some common principles and elements which can help one better understand what mediation is and the opportunities it provides.

1. **Mediation is a private process.** It is confidential and without prejudice. This means that everything said in the course of a mediation session, with limited exception^[1], does not leave the mediation session and that various offers, proposals and disclosures made in the course of a mediation cannot be used against participants outside of the mediation (i.e. in court, if the dispute proceeds to trial).

The idea is to bring the parties together to express and explore in a safe environment; to allow for the sharing of perspectives and the joint consideration of ideas for the purpose of gaining insight and generating options which may offer a more appealing way of resolving the dispute.

2. **Mediation is driven by the parties.** The extent to which the parties have control over how the process unfolds is contingent upon the mediator and – often – the behaviour of the parties; however, a core principle of mediation surrounds parties controlling the outcome. That is, any resolution achieved in the course of a mediation can only be achieved with the agreement of the participants.

Part of what allows for the sharing of information, exchange of ideas and brainstorming of options that take place in the course of mediation is the fact that participants cannot be held to anything against their will. This is where mediation stands out in comparison to arbitration or litigation, as a resolution of the dispute cannot be imposed.

While mediators are usually neutral and withhold opinions or judgements, even in instances where a mediator provides an evaluation of the dispute such is not binding upon the parties as they remain free to address the conflict as they like.

- 3. Mediation offers no guarantees.** While rates of settlement are often utilized to encourage parties to mediate or promote the capabilities of a mediator, as the outcome of a mediation is ultimately controlled by the participants, there can be no certainty going in that a resolution will be reached.

While mediation offers no guarantees, it can add value even when the conflict is not ultimately resolved at mediation. A greater understanding of the perspective of the other side and the chance to narrow issues or establish an interaction plan can go a long way in saving the additional cost and time that will be required to see the matter through to its conclusion.

I adamantly believe – and have told parties in mediations which I have facilitated – that the goal of mediation is not to reach settlement but rather to generate options. It is then up to the parties to consider their options against their other potential courses of action to address the conflict. If all in conflict agree that an option presented is their most appealing choice, settlement is appropriate. That being said, I also believe that mediation “fails” if settlement is reached with a party finding that an option other than settlement is more appealing. For that reason, it is helpful for parties to prepare for mediation by understanding how else they can address the conflict and reflecting upon how appealing such options are. This best equips one to seize the mediation opportunity and make an informed decision as to what is in their best interest.

The concept of mediation can be confusing, in part because it is a flexible process and also because description of the process can seem contradictory – mediation is an informal discussion that takes place in a formal setting; it can save you time and money, yet has the potential to add cost and delay to the resolution of your dispute; it is a party-driven process facilitated by someone who may interrupt you, guide what happens and otherwise control the process, and so on. What is clear, however, is that mediation presents opportunity. It presents an opportunity for those engaged in conflict to have a say in how the dispute is resolved; to save the cost, time and uncertainty of having someone else impose a decision; and the potential to provide insight, understanding and collaboration to think outside the box, examine creative options and improve the ongoing and future interactions. It is up to the parties to seize the opportunity, with the help of the mediator, and to try to make the most of it.

[1] Disclosures of imminent criminal activity or the genuine threat of harm to individuals are typically exempted from confidentiality provisions in mediation agreements out of public interest and to maintain the ethical integrity of participants.

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Marc holds an Executive Certificate in Conflict Management from the University of Windsor's Faculty of Law (Stitt Feld Handy) and earned an Honours Bachelor of Arts at the University of Toronto (Trinity College). He actively manages condominium conflict and advocates for mediation in the early stages of condominium disputes.

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 on condominium disputes.

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