Managing Conflict in Condos

Canadian Condominium Institute
South Saskatchewan Chapter
P.O. Box 3784
Regina, SK S4P 3N8
www.cci-southsaskatchewan.ca

Schedule

9:00am – 9:20am	Introductions, Course Overview & Objectives
9:20am – 9:25am	Overview: What is Mediation?
9:25am – 9:30am	Overview: What is Arbitration?
9:30am – 9:35am	Overview: What Does Going to Court Look Like?
9:35am – 9:50am	Communication Challenges in Condos
9:50am – 10:30am	Difficult Discussion Role Play * interactive exercise
10:30am – 10:40am	*Break*
10:40am – 11:10am	Developing Strategies: Proactive Approaches *Push v. Pull Approaches* *Policies*
11:10am – 11:25am	Developing Strategies: Proactive Approaches *Director Education* *Community Education*
11:25am – 11:35am	Developing Strategies: Proactive Approaches *Investing in a Wake Up Call* *Estoppel Certificates and Communication*
11:35am – 12:05pm	Communication Activities * interactive exercises *Active Listening* *Active Understanding*
12:05pm – 12:10pm	Developing Strategies: Recognize the Community *Enforcement* *Human Rights* *Health and Safety*
12:10pm – 12:15pm	Developing Strategies: Recognize the Community *Establishing Shared Expectations* *Interaction Plans*
12:15pm – 12:20pm	Developing Strategies: Recognize the Community *The Role of Property Management* *Empathy*
12:20pm – 12:30pm	Wrap-Up

Contents

Marc Bhalla, Hons. B.A., C.Med, Q.Arb, MCIArb

Marc Bhalla is an experienced mediator and arbitrator who focuses his practice on condominium conflict resolution.

He holds the Chartered Mediator (C.Med) designation of the ADR Institute of Canada – the nation's most senior official designation available to practicing mediators – and draws upon extensive professional and personal experience with condominiums to relate to and assist his clients. Marc also holds both domestic and international arbitration designations.

He has presented at condominium and dispute resolution conferences and seminars throughout the country.

Marc was prominently featured in the Canadian Broadcasting Corporation's popular Vertical City news series and has made a number of media appearances on the radio, television and in many print and online publications.

He has emerged as a leader within the condominium ADR field, as he is passionate about the flexibility the mediation process offers and has a unique ability to "think outside the box".

Marc earned an Honour Bachelor of Arts at the University of Toronto's prestigious Trinity College and holds an Executive Certificate in Conflict Management from the University of Windsor. He served on the Canadian Condominium Institute's National Council, volunteers with the ADR Institute of Ontario and is a member of the Society of Ontario Adjudicators and Regulators (SOAR). Marc is currently working toward a Master of Laws in Dispute Resolution at Osgoode Hall Law School.

Marc Bhalla has been with Elia Associates since 2002.

mbhalla@elia.org **www . Marc On Mediation . ca**

@marcbhalla

INTRODUCTION

Condominium life is, in essence, communal living. Individuals may reside, work, or both in their condominium, with more contact with one another than would otherwise occur. What one does in the privacy of his or her own unit may have a tremendous impact upon his or her neighbours. The old adage, "high fences make good neighbours," has a very different meaning in a condominium environment.

The permutations of the types of condominiums which may exist, the locations of these condominiums, and the socio-economic groups attached to them are boundless. In residential condominiums alone, a condominium can be a high-rise tower, row-housing, semi-detached housing, or single family detached homes – and within these, it could be part of a standard condominium, a common element condominium (where the residences themselves are not part of the condominium), a bare land condominium (where the units consist only of land and it is up to the owners to construct the residences), a phased condominium or a leasehold condominium – all of which give rise to a tremendously diverse range of interests to advance and challenges to overcome when conflicts arise.

Condominium communities are fraught with conflict. From development to the end-use state, conflicts arise and must be addressed.

What makes the condominium community ripe for creative, non-litigious dispute resolution is the need for healthy, on-going relationships among the stakeholders involved.

Past and present dispute resolution ("DR") models for condominiums were very positional in their approach and seemed to give very little weight to advancing the "community" interests within a given condominium. A conflict between a condominium and unit owner necessarily pits neighbour against neighbour. In past and present DR models, if a dispute is resolved quickly, and at little cost to the condominium, it is often viewed as a success; notwithstanding that lingering hard feelings may remain that negatively impact community relations moving forward (such as members of the Board and opposing party(ies) taking active measures to avoid each other).

KNOWLEDGE: Knowledge is power – involves education and communication.

RIGHTS: What you are entitled to at law.

INTERESTS: "Why" something is important to you. Any 3 year old knows that "why" is a very powerful question.

The interests of the condominium corporation and the interests of unit owners should not be at odds. In fact, the interests of the condominium corporation (being the representative body of the unit owners) should align very closely with the interests of all unit owners.

Source: Elia, R.

OVERVIEW

PREPARING FOR CONDOMINIUM MEDIATION

Many condominium owners, board members and managers do not understand the mediation process or how to prepare their case so that they get the best results from mediation.

Sometimes mediation is dismissed by members of the condominium industry as a waste of time and money. But mediation has a success rate of 75 - 80%+, so the chances are good that you will resolve your dispute. On top of this, mediation is usually far quicker and more cost effective than arbitration and litigation. You can set up mediation in days or weeks as opposed to months or even years for arbitration or litigation.

Research also shows that the majority of mediation users are very satisfied with the process. On top of this we must remember that condominiums are communities and mediation is the only process that holds out the possibility for maintaining or even repairing the relationship between the parties. This is crucial to the ongoing day-to-day functioning of the condominium. People are much more likely to accept and comply with a decision that they are part of making than one which is forced on them by an arbitrator or judge.

In certain types of condominium disputes, mediation is required. Mediation is not binding on the parties unless a settlement is reached nor is it about settlement at all costs. The mediator does not impose a settlement on the parties.

Although your lawyer will explain the process to you in much greater detail, mediators essentially help the parties to understand each other's perspectives and discuss options for settlement. Mediators do not decide who is right and who is wrong. Mediators usually start with meeting all the parties in a "joint session" and then tend to meet with parties separately in "caucus".

At a minimum you need to think about the following:

- What is the dispute really about? Are some of the problems caused by misunderstandings? Can they be cleared up by better communication?

- What would you *like* to accomplish at the mediation?

- What do you *need* to achieve from the mediation?

- If you achieved this, what would that mean for you?

- What do you and the other party agree about?

- What do you disagree about?

- What is your best alternative to a negotiated agreement (BATNA)?

- What is your worst alternative to a negotiated agreement (WATNA)?

- What are the realistic options for settlement?

- What will be the consequences for you if this is not resolved?

- What will be the consequences for the other party?

- How would you know if a possible agreement is better than the most likely alternatives?

- When you compare possible agreements with your alternatives, at the very least consider the costs, time and effort required to go further, the effect on your relationships with the other party and other people if you do so and the value of getting the matter settled.

- How comfortable are you with the risk of not reaching an agreement such as going to arbitration or court?

- Thinking about the specific dispute, what kind of outcome can you live with?

- What does the mediator need to know to help you accomplish your goals?

- What does the other side need to know?

- What would you need to be satisfied with the outcome?

- What do you think that the other person needs to feel satisfied? Money, contribution to costs, an apology, a change in behaviour or something else?

- What information or documents such as the Declaration, Plan/Description, By Laws or Rules might be useful to convince the other party to change their mind about the things you disagree about?

- What might cause you to change your position?

- What do you need to do today to achieve this?

- What do you need to say to the other party to help to achieve this?

- What do you need to hear from the other party which would help you achieve this?

- What are your main concerns at this stage?

- What do you think are the other party's main concerns at this stage?

- What do you think that the other party really needs out of this?

• What do you think the other party needs to hear from you to help you both to move on to a satisfactory outcome?

• Do you have to deal with each other in the future? Will reaching a good agreement help your relationship with the other party? What is that worth to you?

It may take time to work through the issues in mediation. If you do not settle all the issues at a mediation session, think about whether to schedule another mediation session. Sometimes people need more information or time to think before they are ready to finally resolve a dispute.

The main point of the above is that you should carefully prepare for mediation. Everyone is busy but do not overlook this important step. You cannot walk into the mediation session without knowing what you are trying to achieve or you will never achieve it. Finally, you should get legal advice from an experienced condominium lawyer as soon as the possibility of a dispute arises. The choice of dispute resolution process is extremely important and should only be made after legal advice about the pros and cons of the various options.

Source: Brannigan, C. "10 Years on: Still preparing after all these years (for Condominium Mediation)." *Condo News of the Golden Horseshoe*. Vol. 2 2011: 26-29.

COMMUNICATION CHALLENGES IN THE CONDOMINIUM ENVIRONMENT

DISPUTING PARTIES EXISTING IN COMMUNITY

In the condominium setting, it is common for conflicting parties to remain in community with each other throughout the course of the dispute. This can be awkward and uncomfortable.

For example, we sometimes find condominium residents looking over their shoulders as they collect mail, hesitant to attend community functions and otherwise actively trying to avoid chance encounters with someone they are in dispute with. While this can be quite unpleasant, some degree of interaction is often inevitable.

Source: Bhalla, M.

THE RISKS OF IGNORING THE SITUATION

In the condominium environment, the thought of ignoring an uncomfortable situation can be enticing. Not only would this allow one to avoid the discomfort and awkwardness of facing an issue – it may also seem like the best way to address it.

If the Board of Directors needs to become involved, much time can pass for a matter to be addressed. Business can only be conducted at duly constituted Board meetings, and directors have a great deal to get through at each meeting, which typically take place no more frequently than monthly.

The ever changing nature of condominium communities can allow situations to seemingly resolve themselves with the passage of time. The on-set of winter may bring people indoors, resolving a noise or odour issue resulting from outdoor activity. A troublesome neighbour may move out of the community. A nitpicky complainer may simply give up once they realize that no one else shares their concerns.

However, there are several risks involved in choosing to ignore a situation. These risks are only heightened in the context of a condominium community.

> *Dyke v. Metropolitan Toronto Condo. Corp. 972* – a condominium has a duty to enforce and can face drastic cost consequences if it fails to do so

When people are in community, ignoring the situation does not make the other party disappear. Ill feelings can intensify over time, particularly when forced interaction comes into play, and parties can accumulate great disdain for one another when a situation is not addressed. When you consider that a condominium is someone's home or place of work, it is not pleasant to have such emotions in such a personal setting.

In summary, on one hand there may be legal obligations to address a situation, while on the other there can be risks beyond the law involved in shoving a problem under the rug.

It can be daunting and uncomfortable to address a difficult situation – to acknowledge the existence of a conflict even in the early stages – yet there is an opportunity to save much time, cost and anguish in doing so.

Source: Bhalla, M.

HOW TO HAVE DIFFICULT DISCUSSIONS

It can often be quite helpful to consider what makes a discussion difficult and prepare in advance to ensure that you take the right approach to accomplish the outcome that you desire:

1. ***Consider what makes the situation difficult***. Often, it is not the subject matter itself that invokes a strong reaction; rather, emotions are usually ignited when an underlying value is compromised or challenged. Consider how your message will be heard by the other side – what they may feel you are saying about them and how that may affect them.

   If, for example, honesty is a value that the person holds dearly and you need to address an incident that may question the integrity of his/her actions, consider ways of doing so that can isolate the incident or which otherwise acknowledge the other party's underlying value, thus confirming that you are not challenging them with respect to it. By contrast, name calling or "calling out" the person can ensure that their value is violated, serving to escalate the situation. Causing someone to become defensive does little to encourage conciliatory resolution, which is often the goal in having difficult discussions.

2. ***Plan what you are going to say***. Many times, the selection of the words you use can impact perceptions and reactions. Advanced consideration of how you want to say what you would like to say can help ensure your message is appropriately delivered. If you are not communicating in person, take time to safeguard against your words or intentions being misinterpreted, both now and in the future. If you are communicating in person, keep in mind that verbal cues (such as tone) and non-verbal cues (i.e. body language, eye contact) will factor into how your information is received.

   There are several ways in which you can approach the subject. Particularly when a situation poses a real challenge, taking the time to practice, write down what you plan to say and/or brainstorm different approaches can help you prepare.

3. ***Focus on what is important***. While it may not be appropriate to disregard the past, what has happened cannot be changed. Many people get wrapped up in trying to ensure that their recollection of events is recorded as the "truth" and that they are "right", though it is remarkable how seldom people can agree on exactly what took place. As a mediator, one of the biggest challenges I face to keeping parties on track in examining settlement options surrounds the role of past exchanges. It is often important for parties to "get off their chest" emotions stemming from prior events, yet it is also easy for parties to become focused on clarifying what they perceive to be the other's erroneous recollections. Progress can be made by saying what you need to say, agreeing to disagree about particulars which are no longer significant and concentrating upon moving forward.

In the course of the difficult conversation, do not discount any comments on past events which you feel are important to make; however, do not get stuck in the past. Stay focused on the important aspects of the information you would like to share and use past experiences as leverage for a better outcome. Keep in mind the purpose of having the discussion and what you would like to accomplish.

4. ***Know yourself***. There is only so much you can do to anticipate how the other person is going to react; however, how you react is entirely within your control. Just as you analyze the values of the other, do the same for yourself.

   Why is this conversation uncomfortable for you? How might the other person respond and, with the benefit of time and reflection, how would you like to react? Knowing your buttons, how they can be pushed and how you will carry yourself in such a circumstance may not prevent the conflict from escalating, but such insight can help you stay in control of the situation and ensure that even worst-case scenarios unfold in a desirable way.

5. ***Face the music***. As conflict rarely imposes a deadline for resolution until it escalates into a larger dispute, it is often tempting to put off dealing with the issue. However, running away from your conflicts or ignoring them altogether does little to resolve them. Sometimes you simply need to deal with a situation.

   People often make situations worse by failing to address them early on. If you do not communicate your feelings or brush aside a concern, the issue can grow into something much larger. It may not be easy or pleasant, yet neither is the uncertainty or discomfort that comes from anticipation, letting your imagination consider what could take place or bottling up an issue until the relationship is unsalvageable.

Source: Bhalla, M. "Difficult Discussions." *Condo News of the Golden Horseshoe*. Vol. 2 2014: 24-28.

DEVELOPING STRATEGIES: PROACTIVE APPROACHES

DIRECTOR EDUCATION

The objective of courses of this nature is to provide you with insight to understand the limits of what you know so that you are equipped to ask the right questions. We do not expect you to leave this – or any CCI course – with all of the answers.

By way of example, we do want you to appreciate that as a condominium director, you can protect yourself from attracting personal liability by relying on professional advice.

Director education does not replace such advice – that is not where educated directors save their communities money. In fact, if anything, educated directors may cost their communities more money in terms of the initial engagement of professionals yet, in doing so, save the community the larger, longer term cost of a reactive approach or ill-advised course of action.

When directors are educated as to how to effectively operate a condominium, they understand their role in the process. They let the professionals that they work with do their jobs and avoid a "penny wise, pound foolish" approach by being proactive and appreciating that certain expenses are appropriate in the course of operating a community.

One of the developers of this course met with a newspaper reporter looking to learn more about the condominium industry at the time that this course was being developed. The reporter was very surprised when the course developer told her that warning signs should be raised when a condominium community does not raise its common expenses from year to year, as she had assumed quite the opposite. There are, of course, situations when no increase to common expenses makes sense and a rise thereof warrants concerns; however, as the cost of living increases year to year, it only makes sense for common expenses to as well.

Accordingly, it is logical for questions to be asked of a Board that does not raise common expenses to ensure that corners are not being cut in places that will cost the community *more* over time. While political pressures can encourage a Board to keep increases of common expenses minimal, it remains that you get what you pay for.

Directors equip themselves and their condominium communities to ask the right questions and make the best choices when they are knowledgeable.

Does your condominium corporation budget for director education on an annual basis?

Is there an expectation within the community that the directors stay informed of the latest developments impacting condominium communities across the province?

These may be important considerations when looking to establish long-term, successful communities.

Source: Bhalla, M.

COMMUNITY EDUCATION

When a condominium community at large does not appreciate how a condominium operates or all that is involved in managing the affairs of a community, conflict can easily emerge and quickly escalate.

There are many ways that condominium communities can become educated – newsletters, notices, websites, social media, community gatherings (formal and informal), fireside chats, professionals in attendance at the AGM, guest speakers, etc.

Investing in the education of the larger community and investigation as to what works for your community can assist in the proactive management of conflict, by ensuring that disputes do not arise as a result of misunderstanding or misinformation. Such disputes have been the root of many costly court proceedings.

Different techniques work for different communities, as each condominium community is unique. There is not a "one size fits all" formula, nor is it the case that what was effective for your community 10 years ago remains so today. Similarly, the experience that a resident or condominium owner has in the condominium community may impact the best approach to informing them.

Source: Bhalla, M.

EDUCATING NEW OWNERS & RESIDENTS

Several condominium communities take steps to help new owners or residents learn about the community, including by:

1. ***Estoppel Certificate translation.*** In addition to the required documents to be provided in an Estoppel Certificate package, some condominium communities include an easy to read note that sets out certain highlights. Typically, a disclaimer is included along with a note of encouragement that the reader review the full package; however, such can help ensure that those new to the community (or considering it) are made aware of important elements where there may have been past compliance issues or where observation may lead to misunderstanding (i.e. if several pets are grand-parented in a no-pet condominium).

2. ***Welcome packages.*** Some condominium communities complement Estoppel Certificates with a welcome package for new residents, distributed upon them joining the community. Such can serve as a practical guide that sets out the values of the community and encourages compliance.

3. **Welcome "wagons".** While it may be important to ensure that a new owner/resident is comfortable with such, some condominium communities actively welcome new members to their community by inviting them to meet the Board or property management, sending formal invitations to attend community events that they might not be aware or even through a welcome announcement at the Annual General Meeting. Such can certainly help avoid the ill will that can emerge when one's first encounter with the Board or property management involves a compliance letter or other negative experience.

Source: Bhalla, M.

EDUCATING EXISTING OWNERS

It cannot be assumed that uninformed purchasers will become informed and educated owners only with the passage of time. There are several reasons why an existing owner may not have knowledge of a condominium's governing documents:

1. ***Blissful ignorance.*** The owner was an uninformed purchaser who never did gain insight. Perhaps welcome packages were not circulated when the owner purchased his/her unit or he/she did not bother reading one. Perhaps the owner did not have a thorough Estoppel Certificate review carried out before purchasing nor took the time to become familiar with the condominium's governing documents. For whatever reason, the owner did not see merit in becoming familiar with the parameters of condo ownership and may not have viewed this lack of knowledge as problematic. In a worst-case scenario, the owner is not engaged in the condominium community and has no idea that the declaration, plan/description, by-laws and rules even exist.

2. ***Lifestyle changes.*** The owner's lifestyle has changed such that a provision in the governing documents that was not of concern at the time of purchase is now material. An example of this is a resident unit owner who did not have a pet when he/she purchased. The owner knows that the condominium permits pets but has not bothered to look deeper into the restrictions upon pet ownership as they were not a concern at the time of purchase. Years go by and the owner decides to adopt a pet. After all, they know that pets are allowed in the building…unfortunately, they do not know that a weight restriction applies or that pets are required to be carried upon the common elements. Other examples involve occupancy standards, the evolution of a single purchaser into a unit owner who is married with children or the purchaser who bought a unit to live in deciding to move out and rent it.

3. ***Formed perceptions.*** Having been a member of the community for some time, the existing owner has formed perceptions as to what is permitted and acceptable. They may view the condo docs as theory but feel well acquainted with the practical realities of residing in their unit and comfortable with what they view as the status quo. The owner may or may not realize that the building does not permit pets, but sees another resident with a pet so believes that it is fine to have one. In such an example, the owner may have no idea that the pet that they see is grand-parented, that the resident has negotiated an exit strategy with the Board and is in the process of finding the pet a new home or that the resident legitimately needs the pet for medical reasons.

New owners can sometimes be viewed as untarnished by previous condominium experience and open to better understanding their new chosen lifestyle, such as by way of a welcome package. By contrast, providing a welcome package to an owner who has already resided in the condominium for 5 years could be viewed as an insult and is perhaps less likely to be read even if it is accepted.

So, how can condominium communities educate existing owners?

1. ***Don't assume.*** Just because someone has owned a unit for years does not mean that they know what is contained in the declaration, plan/description, by-laws and rules. While you should not disregard the familiarity that an existing owner has, never assume that the longer someone owns a unit in the community, the better they know the content of the condominium's governing documents.

2. ***Friendly reminders.*** A simple "Did You Know" section in a newsletter or friendly seasonal reminders about key provisions can go a long way in cordially ensuring that everyone is informed. Many condominiums, for example, proactively post seasonal reminders about the rules surrounding hanging wreaths on doors and bringing live trees into units, etc. In this spirit, remind owners and residents from time to time of key provisions within your documents, including what they say surrounding issues where you often experience compliance trouble.

3. ***Review your documents.*** Outdated rules that are never enforced benefit no one and can be a source of confusion and conflict within the condominium community. If owners support the status quo, but the status quo contravenes the declaration, plan/description, by-laws or rules, this could be a sign that your documents need to be updated! While rules are easier to update than by-laws and by-laws are, in turn, easier to update than the declaration, it is possible to amend them all. Many condominiums have updated their by-laws to establish a mediation/arbitration procedure as well as drafting advances and new subject areas now typically incorporated into condominium by-laws. Similarly, Boards can review the rules every few years to ensure that they are still appropriate for the community. This is not to suggest that an owner's disregard of the condominium documents signals that the problem is with the declaration, plan/description, by-laws or rules and not the owner's behaviour, but rather a suggestion that Boards should ensure that their condominium documents reflect the values of the community and recognize that these can evolve over time.

4. ***Two-way communication.*** Two-way communication can go a long way in fostering community. Social gatherings and information/idea exchange sessions provide an opportunity not only for the Board to help educate owners and residents but also for the community to provide input to the Board who can, in turn, ensure that community values and the condominium's governing documents align.

Communication with new and existing owners is certainly important, but it is just as important to consider your approach to both. A new owner may be more eager to learn or at least admit that they have something to learn about the community, while an existing owner may need to be contacted using a different approach that recognizes that he/she is already an established member of the community. Either way, the goal should always be to create a community that is both knowledgeable and engaged.

Source: Bhalla, M. "The Art of Communication - Educating Existing Owners." *Condo News of the Golden Horseshoe*. Vol. 2 2013: 20-22.

Later, we will review the benefits of establishing shared expectation in a community setting. Shared expectation goes along with community education. Consider a concerned resident complaining to property management about a recent Board decision without knowing when the Board will next meet to review the situation. The amount of understanding that people involved in these types of situations have can make a big impact on if a conflict escalates and how the issue ultimately is resolved.

INVESTING IN A WAKE UP CALL

Condominium disputes often become very personal to the participants and result in the disputants becoming entrenched in their respective positions. Accordingly, it is often difficult for the parties involved to see merit in (or the interests driving) the other side's position.

The involvement of someone independent from the condominium and the parties, and who is not personally involved in the dispute, can provide an opportunity for the parties to gain insight into the merits of their own and opposing positions and interests. Options include, but are not limited to: (1) seeking legal opinion or arranging for a legal opinion for the opposing party; seeking an arm's length opinion together with the opposing party; (3) Early Neutral Evaluation ("ENE"); or (4) informal mediation.

With regard to any of these options, an understanding by the 3rd party of the unique nature of condominium disputes can best assist the parties in understanding both their own BATNA and the realistic plausible outcomes to the dispute.

Source: Elia, R.

DEVELOPING STRATEGIES: RECOGNIZE THE COMMUNITY

RECOGNIZING THE ROLE OF CULTURE

"Cultural fluency means recognizing that language shows us particular views of the world. Rather than being a direct representation of reality, language reflects our starting points, assumptions, and ideas about how the world works and our places in it. Remembering this, we keep an open mind to diverse starting points and assumptions. When communicating across linguistic boundaries, it is helpful to use more than one phrase to convey intended meaning and to check for feedback often."

Source: LeBaron, Michelle, Bridging Cultural Conflicts - A New Approach for a Changing World, (San Francisco: Jossey-Bass, 2003) at p.99. Reprinted with permission.

There is a trend in condominium corporations to adopt increasingly detailed rules to govern how residents live and interact. One could say that if everyone used "common sense", there would be no need for any rules at all. The problem, in my view, is not an absence of common sense. Rather, the problem is that what one person may view as "common sense" is not shared amongst all people (often not even amongst a few). In the condominium context, some people feel it makes common sense to grow tomato plants and hang laundry on balconies, while others maintain that it only makes common sense that an exterior uniform appearance is essential. Some people feel it makes common sense to prohibit pets from residing in the building, while others maintain that their pets should be allowed to "do their business" on the balcony to the detriment of anyone or any plants on the balcony below! For others still, rules are only considered at all if they get caught breaking them.

We cannot escape conflict (e.g. recall trying to find a parking space during the holidays). However, while conflict exists all around us, we can learn to work with it to avoid the conflict escalating into a full dispute. It is my position that, in condominium corporations, the owners and residents are best served by dealing with conflict proactively and not waiting for a legal dispute to develop.

The old adage "high fences make good neighbours" is broken down, or at least transformed, in the communal living environment that is a condominium corporation. In all relationships, conflict exists. In condominium corporations, people of diverse cultures, which could include, but is not limited to, different nationalities, sexual orientation, abilities, professions, and experiences, must figure out how to be "good" neighbours. To get through the conflict, an effective mechanism to resolve conflict should take into account the unique aspects of this environment; including the impact of culture brought to the table by the parties involved.

Particularly in Canada, the cultural diversity within condominium corporations is tremendous. One community may be very multi-national. Another may be dominated by a single nationality. Another may be dominated by two very different nationalities. In older condominiums, there is often a history of shifting amongst dominant ethnic groups to reflect patterns of immigration. The result is often a global community on a micro level within our Canadian framework. Often individuals within a geographic "culture" share identities, meanings and trust. The flip side can also mean that those outside the culture are not understood, are stereotyped and not trusted.

How often have we found ourselves falling back upon cultural generalizations and stereotypes to explain a conflict? How often have we found that as the conflict continues, trust diminishes, meanings become confused and identities clouded?

Learning how to best adapt to cultural influences is not an easy task. It requires that we achieve personal awareness of the experiences and impressions that impact our views and those that others hold of us. It also requires that we be always cognizant of decisions that we make. While it is far easier to react automatically with little concern of the cultural environment that we might find ourselves in, such reactions may prove both improper and counterproductive in resolving the conflict at hand.

In general terms, the idea of what our "culture" is seems so simple, so predictable, so communal: we adopt the culture (and the stereotypes) of our parents or grandparents – whoever it was that originally came to Canada from "away". Looking only slightly beyond the "general terms", there is little that is simple, predictable or communal about culture, particularly regarding its perceived impact on an individual.

While the impact of cultural influences within condominium corporations is both fascinating and readily evident, it is also fraught with the potential for conflict if ignored or if focused on too intensely. There is a need to be aware and cognizant of, as well as the need to adapt to (in some cases), the cultural impact of conflict on the individual and group levels, rather than making assumptions based upon stereotypes or generalizations.

The law adds further challenges by imposing standards of the "prudent person" and "reasonableness". It is difficult to truly understand what a "prudent person" and "reasonableness" means when we have so little "common sense" in common. However, with this said, if a dispute proceeds to court, a court will find a standard which is acceptable within the Canadian context, while trying to acknowledge the experiences contributing to who we are.

Some things to consider:

1. **Be Aware**: Hindsight is invaluable. Without generalizing, try to learn from experience what works to bridge cultural gaps and build trust.

2. **Go Slowly**: Stereotyping is very quick and easy; however, at best, it serves as a marginal starting point for moving forward to understanding different viewpoints. Stereotyping can also reflect closed mindedness, and may widen the breadth of misunderstanding. It is incumbent upon us to learn about our neighbours, to find out what is important to them, what are their concerns, why they act (and react) the way they do, instead of ostracizing them because they may hold different beliefs or values from us.

3. **Show Respect**: Trying to understand where others are starting from, including which generalizations or stereotypes others may hold of you. It may be counter-productive to embarrass or belittle an opposing party in front of his/her peers or cultural group. For example, if someone does not read or speak English, it does not mean that he/she is illiterate or lacks intelligence or is an unreasonable person. It means only that he/she does not yet communicate in English.

4. **Don't be Bullied**: This means:

   a) Be open-minded;

   b) Listen to different perspectives and assess the validity of the same based on one's own judgement;

   c) Appreciate that those "in power" may be pursuing a personal agenda;

   d) Make your own well thought out assessment of any given situation;

   e) Say "no" if necessary; and

   f) Appreciate that understanding a person's position does not mean giving into it.

Source: Elia, R. "Condominium Conflict Resolution: Recognizing the Role of Culture." *The Condovoice*. Vol. 13, No. 1 Fall 2008: 41-43.

ESTABLISHING SHARED EXPECTATIONS

Particularly in a community setting, conflict can appear as a result of different perspectives. The resident who approaches an elevator only to see its occupant frantically pushing the door close button to prevent them from entering may view the gesture as rude and take it personally, perhaps failing to appreciate that the individual is distracted as he is late picking up his child and did not even see his neighbour approaching.

What is considered neighbourly by one person can land completely differently for another. With people of different values, ages, lifestyles, origins, etc. all coming together to form a condominium community, it cannot be a surprise that they bring different outlooks.

Have you ever sent an e-mail to a large company – like Dell, Apple or Rogers? What is the first response you receive? Typically, a generic auto reply-type message that confirms your message has been received and gives you an idea of when you can expect a reply. While the ability of the company to reply within its stated timeline may affect customer relations, the purpose of the automated message is to establish shared expectation. You have comfort in knowing that your message is in queue to be addressed and are given a sense of when you can expect a reply.

Source: Bhalla, M.

INTERACTION PLANS

Particularly if a conflict may be heading to court, much time will pass before a resolution is imposed upon the parties. On many occasions in the condominium setting, ongoing interaction between parties in conflict is inevitable.

Interaction plans can be quite helpful in giving parties in conflict an idea of what to expect and a means of communicating going forward.

Having everyone on the same page on how to receive communication, a reasonable timeline for reply, etc. can go a long way – sometimes it can even "plant a seed" towards the eventual resolution of a conflict.

Source: Bhalla, M.

CONFLICT IN CONDOMINIUMS: VALUE-ADDED?

Value in Conflict?! …Conflict is the struggle that results from incompatible or opposing needs, wants or other demands. As we all know, in everyday life conflict arises in a variety of circumstances: from dealing with the driver who cut you off to deciding with your kids what to have for dinner. In the condominium industry, the non-payment of common expense arrears and noise transmission between units are some of the conflicts near to our hearts. If conflict can be viewed as a means to understanding our own and others' needs and can be resolved, then perhaps we can find value or derive benefit from conflict.

Conflict is generally motivated by opposing or incongruous needs, i.e. one owner's need for a good night's sleep vs. another owner's need to play the piano.

Parties who are in conflict have the opportunity (and sometimes the obligation) to resolve their differences and hopefully find resolution through mediation. Besides being a trend used to resolve disputes, mediation can be a valuable tool to control conflict because it allows the parties, with the assistance of a mediator, to identify their respective interests (i.e. needs, drives, motivations) and develop and implement practical and durable solutions. Mediation disposes with having a third party (i.e. a court) impose a solution – a third party which may or may not (that's the gamble) address the interests of the parties who are involved in the dispute.

A key starting point in a mediation is the identification of the parties' respective interests. Often, this can be done by having the parties relate their stories to each other. This may provide productive insight to one party about another party's interpretation of the facts and his/her emotions. With this information on the table, a mediator can go forward in facilitating a solution. Mediation is a process which belongs to the parties; the mediator is only there to facilitate the resolution. The solution is developed by the parties (as opposed to being imposed by a third party). The parties should, therefore, be able to live and comply with the solution. In a condominium community, this provides value because the relationships are, generally, ongoing.

Neighbours must continue to live with neighbours until such time as they move out. Individual owners must work with the Corporation and vice versa to achieve the statutory and non- statutory objectives of the Corporation, which at the end of the day are for the benefit of each of the individual owners in terms of quality of life and asset value.

Mediation is a fascinating and often cost-effective opportunity to resolve disputes in certain circumstances. While mediation may not be the best option in all circumstances, there is potential value in conflict and its resolution through mediation.

Source: Elia, R. "Conflict In Condominiums: Value-Added?" *The Condovoice*. Vol. 13, No. 2 Winter 2008: 52-53.

USING MEDIATION PROACTIVELY IN CONDOMINIUM DISPUTE RESOLUTION

Condominium disputes are especially suited for mediation because, at their core, they involve relationships. Mediation can be used to its potential in the condominium industry.

To illustrate this fact, we are going to review two real cases. One involved a condominium energy retrofit problem and the second involved a supplier of printed materials to a condominium management company.

CASE 1

In this case, when faced with expensive litigation, the parties decided to attempt mediation before taking the matter further. Counsel for the would-be plaintiff had suggested the idea to the other side. Fortunately, the chief executive of the potential defendant saw merit in that suggestion.

The case first seemed relatively simple. There were only two parties: the condominium and the expert company. The main issue was whether or not the expert had been negligent in providing professional services concerning the benefits of an expensive energy retrofit to the condominium. The amount in dispute was approximately $100,000.00. During the mediation session, it soon became apparent that there could be multiple parties and claims and that it would be a complex and expensive lawsuit with the legal costs disproportionate to the amount in dispute.

An excellent condominium lawyer represented the plaintiff. He suggested mediation to his client and the other side even though his law firm could have made far more money by jumping to litigation. The owner of the defendant company decided to represent the company without counsel present. While often there is an unequal balance where one party is represented by counsel and the other self-represented, in this case the owner of the company was a sophisticated professional and had no problem in presenting his case.

The parties agreed that there were several key documents concerning the contract and freely exchanged them with each other. By doing so, each side had a clearer picture of the problem. Questions about these documents were answered honestly by both sides. An understanding of the circumstances and the misunderstandings which gave rise to the dispute became clear. It also became obvious that there was

potential liability for both sides.

Because mediation is confidential, the parties were prepared to have a frank discussion about the case. Several possible solutions were put forward and in the end, the defendant agreed to compensate the plaintiff through a combination of a nominal cash payment and a substantial credit for future services.

While this may not have been an ideal solution for either party, it capped their costs and losses in a way that was acceptable to them. Because they had not spent thousands of dollars on litigation, they were able to agree on a resolution that likely would not have been acceptable later on in the process.

Through pre-litigation mediation, a valuable relationship was preserved and legal costs kept to a minimum. Another important point is that the case was resolved in a day of mediation instead of the years involved in taking it through the court system.

CASE 2

This more recent case involved two parties who were both represented by lawyers. Again, they decided to work hard with their clients to avoid the excessive cost and time involved in litigation in a dispute where legal fees would likely have been far more than the amount of the dispute.

In this case, a condominium management company had contracted a marketing company to develop and execute a comprehensive web and print based marketing plan. The companies had successful business dealings together going back over 10 years and hoped to preserve, as much as possible, the goodwill from the past.

The concept was worked out without problem, but when the final print materials were delivered, there were significant errors in them. The marketing company pointed at the printer as the source of the problem but admitted that a final proof had not been given to either the condominium management company or the printer. The dispute was over who should be responsible for the $50,000.00 printing costs. The marketing company agreed that it would deal with the printer separately, which made it far more likely that a resolution could be reached.

After a long hard day, they both agreed to compromise, and much like Case 1, part of the resolution included an agreement to work together on future projects. There was also a payment made towards the printing costs by the condominium management company as some of the materials could be used.

In this case, both parties were actually happy with the outcome, as they did not want to take time and money away from their businesses to spend in court.

On thinking about these cases, it is obvious that the parties needed to resolve the disputes at the least possible cost. It was a situation where ongoing relationships were possible and litigation would have destroyed this potential. The parties were also lucky to have very good lawyers who understood their needs and went out to find the most reasonable and cost-effective solution.

While not all cases have the potential for an integrative settlement, it seems that it is worth sitting down with the other party and exploring the options. This is even more practical in the condominium community where there are relationships between the parties. It costs far less to try and work things out than it does to go to arbitration or litigation.

After having the opportunity to mediate several such pre-litigation cases in the last year, we should definitely consider the benefits of this approach to dispute resolution more often.

Source: Brannigan, C. "Using Mediation Proactively in Condominium Dispute Resolution." *Condo News of the Golden Horseshoe*. Vol. 2 2014: 18-20.

WHEN NOT TO MEDIATE

The idiom "*one man's trash is another man's treasure*" sets 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 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, such as when a dangerous condition exists that must be addressed immediately.

In a recent condominium dispute, mediation – though not mandatory - was being considered, yet did not proceed due to 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.

Source: Bhalla, M. "When NOT to Mediate." *Common Elements.* August 2013.

THE FUTURE IS NOW

INVESTING IN RESOLUTION

A key part of the mediation process surrounds the generation and examination of options. Parties brainstorm and aim to draw out a series of possible ways to address the issues – many of which could not have been anticipated without the exchanges and collaborative approach that are incorporated into mediation. In determining whether to pursue any of the options generated, parties in conflict assess such settlement options against the other options available to them to otherwise address the dispute. What is referred to as one's Best Alternative to a Negotiated Agreement - or BATNA – is to be considered against the settlement options presented and the most appealing choice selected. If it is more appealing to otherwise address the conflict, settlement is not appropriate.

Unfortunately, when parties have invested little into conflict resolution, they risk not having a genuine understanding of what their options are or may fail to approach the process in good faith. In such circumstances, parties risk overselling or underselling themselves on the reality of their next course of action if the conflict continues unresolved. On one hand, they may risk assuming that proceeding to court will be easier than it really will be, while on the other hand they may risk being oblivious to certain legal rights or obligations that leave them better situated than they had thought. While the mediator helps generate options, he/she does not provide legal advice and cannot truly assess how appealing each option may be.

For this reason, parties in conflict are wise to conduct some due diligence and educate themselves, even just initially, into their options outside of settlement before proceeding to mediate. This can be done by reflecting on and investigating the following questions:

What will I do to address the dispute if mediation does not result in settlement?

How will I do this?

How much will it cost?

How long will it take?

What are my chances of obtaining my desired result through this course of action?

Who should I speak with to be sure my answers are correct?

What is the other party likely to consider doing to address the issue?

What might I need to better understand to be sure of my answer?

How would I feel if the status quo continues and nothing is done to address the issue?

What am I prepared to do about it?

What elements of this matter are within my control?

How will the choices I make impact things?

How will I feel if this conflict escalates?

What is my worst case scenario?

What is my best case scenario?

Am I being realistic? How can I be sure?

When parties do not invest much into their dispute or into understanding their options, they can miss the reality of the situation. This risks leaving them ill-equipped to make the choice that is best, and the conflict and related costs may be escalated as a result of unrealistic expectations or beliefs. When parties have a good sense of their options going into mediation, they can be comforted by their knowledge and better equipped to determine which settlement options warrant further consideration. They are empowered to make the choice that is best for them with a clearer understanding of what they face moving forward.

The purpose of mediation is not to force compromise. The purpose is for all parties to better understand one another's interests, consider what may be plausible ways to address the conflict and proceed with the course of action that suits their best interests.

The adage "you get what you pay for" rings true on many occasions and the high cost of conflict, including many highly publicized cases in recent years, provides good cause for concern for those involved in disputes; however, the cost of conflict is not an all or nothing proposition. Taking the time and making an initial investment to ensure that you understand the reality of your options can ensure that you make the right decision. This is why mediating early on can be worthwhile.

Source: Bhalla, M. "Investing in Resolution." *CCI Review Windsor-Essex County*. Volume 9, Issue 2. Summer 2016: 12-13.

5 EXAMPLES OF HOW ONLINE DISPUTE RESOLUTION CAN WORK

It is one thing to use the term "Online Dispute Resolution" and explain that it simply means injecting technology, in some fashion, to an Alternative Dispute Resolution process and another entirely to explain, practically, how this can help condominiums. The concept of online mediation has been around for some time; however, those who have yet to take part in an online mediation session often offer questions about how it works and to which situations it can apply.

Consider video conferencing and how it allows for real time interaction that enables people to see and hear one another without having to physically be in the same location. This could allow a non-resident unit owner to more easily participate in mediation or add a layer of comfort/security to empower someone hesitant to take part in a face to face meeting with a means to take that first step toward addressing a concern.

What follows are 5 benefits with additional examples of how online mediation could help address condominium conflict:

1. **Greater Flexibility.** Traditional, in person mediation takes place in the course of a meeting scheduled for a particular duration of time – usually half a day (3-4 hours) or a full day (6-8 hours). This can often pose challenges in respect of scheduling, as it can be difficult for all participants to attend at a particular location at the same time for so long. Online mediation overcomes these challenges and allows for greater scheduling flexibility. Participants need not all travel to the same physical location which also makes it easier to divide the mediation into multiple sessions when desired.

Example: A busy condominium resident is not available during the business day to take part in a mediation session. She appreciates having her weekends to herself and would prefer not to give up an entire evening for a 3 hour mediation after a long day of work. By mediating online, a "half day" mediation is broken up into three, 1 hour long sessions. This makes it much easier for the busy condominium resident to address her conflict without impacting her work life or placing too much of a burden upon her personal time.

2. **Greater Access.** It is often the case that discussions in the course of a mediation turn to considerations that had not previously been anticipated or for which further information is required. Parties will often tentatively agree to an outcome subject to their assumptions about unavailable information proving accurate or to re-connect once they have obtained the information desired. When mediating online, particularly, in the comfort of your own home or office, additional information is more readily accessible. Also, the "Greater Flexibility" example above could be applied to more easily allow parties to reconvene once the additional information needed has been collected (i.e. such could be obtained in between mediation sessions).

Example: In the course of negotiations, participants in an online mediation find themselves disagreeing as to the current state of a damaged carpet for which some repair work had already been carried out.

As one of the participants is taking part from the comfort of her own unit, she is able to use her tablet to take and share pictures of the current state of the carpet during the mediation. This would not have been possible had the mediation taken place in person at the lawyer's office.

3. **Greater Control.** While there is much good that can come about with real time, in person interaction, including the cues which are not as detectable via computer, tablet or smart phone, the injection of technology into the dispute resolution process, in turn, provides advantages that cannot be as easily realized in person. Particularly as people increasingly participate in other elements of their lives online – from shopping to dating to keeping in touch with friends – online mediation can capture what is convenient and apply it to the dispute resolution process.

Example: An unrepresented unit owner is concerned about being able to keep his emotions in check at the outset of mediation as the conflict pertains to something he holds near and dear to his heart. Despite rehearsing what he would like to say in his opening statement, he is concerned that he will lose focus on what he is hoping to accomplish and "shoot himself in the foot" by letting his feelings get the better of him as the process gets underway. By mediating online, the owner is able to pre-record his opening statement and have the recording played at the beginning of the mediation when it is his turn to speak. The difference in presentation as between a live and pre-recorded delivery is marginal with the online platform and does little to impact the process for all participating in it.

4. **Greater Comfort.** When people get together in person, there is certain etiquette expected to promote collective comfort. For example, it is increasingly becoming less socially acceptable to smoke in front of non-smokers, particularly indoors. Food allergies and odour sensitivities are among other considerations that can significantly influence someone's comfort level based upon who they are. Online mediation minimizes the degree of collective comfort needed to get together, allowing each individual participant greater freedom to ensure that they are comfortable taking part in the process.

Example: A smoker smokes during his online mediation session without having to worry about disturbing other participants as they are not impacted by the smoke in the course of interacting via computer screens. No break in the mediation session is needed and the momentum being built through the course of discussions continues uninterrupted.
[Note: This example assumes that the conflict does not pertain to concerns about the smoker smoking!]

5. **Greater Participation.** When mediating in person, consideration is usually given to the number of bodies that will be on each "side" of the table. For example, when a condominium Board of Directors is directly involved in a dispute, it is often encouraged to select only one or two representatives to take part in the process, to ease scheduling challenges and to prevent others participating in the process from feeling outnumbered in the room. This can present difficulties for the Board members who miss out on directly participating in

the process, including when it comes to any post-mediation Board ratification requirements, as the road to resolution can be lost on those who were not along for the ride. Online mediation can allow more people to participate while managing the concerns that discourage increased participation when mediating in person and offer plenty of flexibility surrounding how such can be structured to allow for greatest comfort amongst participants.

Example: A Board of Directors gathers in their Board Room with a computer to participate in online mediation with a unit owner to address a conflict between them. The unit owner, participating elsewhere through the comfort of his own computer, contributes equally to the discussion as the Board, avoiding the discomfort that would have emerged if he was sitting across from many people in person, intimidated by their collective presence.

The actual structure of participation by multiple participants, such as a Board of Directors, in online mediation can vary based upon the preferences of those involved in the process. When there are concerns about the number of screens participating on behalf of each party, people can get together and collectively participate through a single screen. In the example provided, a representative of the Board could be appointed as the primary speaker on behalf of the condominium corporation, with other directors participating by contributing their thoughts during caucus and taking in what the owner says first hand. Alternatively, the person speaking on behalf of the Board could alternate through the course of the mediation, with only one director speaking at a time in front of the camera and microphone. Conversely, online mediation can easily allow multiple people to participate in the process from a variety of locations. The key is flexibility in structure and process through the removal of the challenges posed in coordinating in person gatherings with multiple people.

Online mediation has its limitations and does not apply well to every condominium conflict. However, it can offer a convenient, cost effective and comfortable way for those involved in condominium disputes to more easily and efficiently address them. We can – and should - consider online opportunities today.

Source: Bhalla, M. "5 Examples of How Online Mediation Can Work." *Condo Contact*. Winter 2016: 22-24.

TO INFINITY AND BEYOND

With mediation, the possibilities are endless

Unlike all other formal dispute resolution processes, mediation focuses on the parties - those involved in conflict coming together and working together to find a mutually acceptable outcome. Processes that impose an outcome on disputants do not worry about how acceptable each of the parties might find the result; such processes are adversarial in nature and focused on right and wrong, as opposed to looking forward in a manner that is agreeable. To that end, mediation truly provides a unique opportunity that makes so much sense in the condominium context, where those experiencing conflict often remain in community with one another throughout and beyond the dispute.

That being said, the mediation process is not set in stone. Among its core benefits is the fact that mediation is flexible and can be catered to suit those involved in a dispute. Here are some ways that mediation can be customized to provide comfort and convenience:

Informal Mediation

To go to court, paperwork must be filed and fees paid to formally commence a proceeding. To move ahead with arbitration, an arbitrator must be agreed upon or otherwise determined. While formal mediation typically requires a degree of administration to come together, informal mediation can reduce or alleviate such work. The advantage of informal mediation is that it can take place early on in the course of a conflict, when issues initially emerge and before they boil over.

Sometimes, a condominium's property manager – or a senior manager within the management company – facilitates a meeting in an effort to address a matter before it escalates further. While it can be a challenge for a property manager acting as mediator to present themselves as impartial - bias is deemed to exist as they presumably have an interest in keeping the Board happy and their contract in place - there are occasions where a casual sit down with a property manager can help resolve an emerging dispute.

In other circumstances, the manager may already have enough on their plate, may not have sufficient conflict management training or may have a role in the history of the issue that makes it difficult for them to step into the role of facilitator. Mediators offer informal mediation services. For approximately the same cost as a traditional enforcement letter, a mediator can step in early to help as an unbiased and impartial third party who has a degree of separation from the community.

These sessions tend to be more formal than a casual sit down yet are much less formal, timely and costly than traditional mediation. Many condominium Boards offer to cover the cost of the mediator, particularly in situations of duelling residents, where it is not clear who to enforce against.

Online Mediation

In a world where we increasingly leverage the internet at our fingertips and communicate, shop and even date online (so much so that many of us are surprised, embarrassed or even tune out weekly reports outlining just how much screen time we take in), it is a natural progression for dispute resolution to move online.

It may seem silly to mediate online when members of a condominium community engaged in a dispute are physically located close together, yet mediating online offers convenience and comfort that traditional, in person mediation does not. Often those involved in a conflict feel uncomfortable with the notion of sitting in a room with those they see as the root of the conflict to talk it out.

The degree of separation by way of an online forum can alleviate anxiety and otherwise make it easier to participate. It can also help parties come together if there are hesitations surrounding the behaviour of others, especially to the extent that behaviours may be abusive in nature. This is not to suggest that online mediation removes the possibility of abuse altogether, but rather that the layer of physical separation can offer heightened protection over an in person gathering.

Online mediation in this context can often be facilitated by making use of the technology that feuding parties already use and are comfortable with. As the Canadian Internet Registration Authority reported that 74% of Canadians spent at least 3-4 hours online a day in 2018, the chances are that there is an existing degree of familiarity and comfort with technology amongst those involved in a dispute in your condominium community.

To the extent that you are dealing with one of those rare individuals who have managed to prevent technology from being a part of their lives, the statistics suggest that they are an endangered species as Canadians' use of technology has only increased over the course of the century.

Hybrid Processes

A downside to mediation of any form is that it offers no guarantees of resolution. This is the result of the great advantage mediation offers over other dispute resolution processes by empowering those directly involved in a conflict with control of the outcome.

Hybrid mediation-arbitration processes, known as "med-arb", offer the best of both worlds. Whether the same facilitator switches hats if mediation does not promising or a new facilitator (identified in advance) comes in immediately after mediation to arbitrate, the process is designed from the outset to guarantee closure.

This saves the time of having to identify an arbitrator after mediation takes place and has been known to better encourage those mediating to embrace the opportunity to have a say in the conclusion of their dispute. Someone looming large, ready to impose an outcome can feel more real in this circumstance and encourage settlement considerations over situations when there are many unknowns about arbitration at the mediation stage. Med-arb may not be the right fit in every situation, yet there are certainly occasions where it

makes sense to consider it.

While mediation has been around in the world of condominiums for some time, becoming mandatory for certain types of disputes over 18 years ago, there has been a tendency to view it as a set process. Now more than ever, that is not the case. The way that mediation can be structured is tremendously flexible and this flexibility should be considered to ensure that the opportunities offered through mediation are best leveraged.

Source: Bhalla, M. "To Infinity and Beyond: With Mediation, the Possibilities are Endless." *CM Magazine*. Volume 40, No. 2. Summer 2019: 24-27.

WHAT IS ARBITRATION?

Whenever I am asked to explain arbitration, I start with Judge Judy. Most of us are familiar with the no-nonsense, popular television judge who conducts trial-like proceedings and renders binding decisions upon those who dare to come before her. Arbitration is like Judge Judy, only with the cameras off.

Private Court

Unlike participating in a legal proceeding that takes place in the public realm, arbitration is private. This can be appealing to those who may not want to air their dirty laundry in public.

We find arbitration clauses in service contracts for that very reason. While it may be obvious why those servicing the condominium industry would want to keep the details of their disputes private, this often appeals to condominium corporations as well for reasons that range from avoiding the arbitration award "setting a precedent" within the community, to the comfort of avoiding the negative publicity a community can receive from details of their case being circulated on social media, discussed in blogs and debated at conferences.

Operating "in the shadow of the law" is not the only advantage of arbitration. Let's return to the Judge Judy analogy to explore further…

Choice of Adjudicator

When you go to court, you have no control over which adjudicator is assigned to your case. They may have familiarity with the subject matter of your dispute, but they may not. It is entirely luck of the draw. When you go to Judge Judy, you get Judge Judy.

The ability to select your own adjudicator is a major advantage of arbitration. When it comes to condominium disputes, there is undoubtedly merit in involving someone with understanding of the context of the conflict. The nuances of how condominiums work and how the law applies to them can be complex and difficult to understand for someone who is not familiar - particularly someone who does not have a practical grasp on condominium living to allow for empathy with those experiencing an issue.

That being said, it can be dangerous to consider only subject matter expertise in selecting an arbitrator, as it is important that your arbitrator be ***qualified to arbitrate***. Arbitration is an unregulated profession. Organizations such as the Alternative Dispute Resolution (ADR) Institute of Canada (locally) and the Chartered Institute of Arbitrators (internationally) bestow designations upon arbitrators sufficiently trained, skilled and experienced to arbitrate.

Tip: Arbitration designations offered by the ADR Institute of Canada also require that arbitrators carry insurance. Beyond qualification, it is wise to verify that your arbitrator is insured to arbitrate.

These designations provide assurances as to an arbitrator's credentials and are often included in the criteria for selecting an arbitrator that can be found within agreements or condominium

by-laws outlining the arbitration process.

Even when not expressly required, third-party designations of this nature can offer a neutral measuring stick to confirm an arbitrator's qualification.

Time and Cost Savings

Arbitration is more flexible than court. It can be designed to better suit those involved in a dispute, such as by accommodating schedules and participation preferences. It is not uncommon for arbitration proceedings to take place outside of traditional court hours and platforms, including online, and in ways that reduce rigidity, process delay and complication. Some go so far as to factor arbitrator availability into the selection process for assurance that the matter will conclude on a timely basis.

Tip: If timing is important, seek out an arbitrator who will guarantee the timing of their award delivery and consider including this in the Arbitration Agreement (perhaps even with a financial deterrent for the arbitrator being late). Many arbitrators will share the anticipated timing of their award at the conclusion of the hearing, though without greater incentive this can get delayed if they get busy or if coming to a decision proves to be challenging for them. While it is best to allow your arbitrator to take the time that they need to come to their decision, when timing of closure is significant, it is important for this to be clear from the start.

With respect to costs, some hesitate at the notion that arbitration can be cheaper than going to court. After all, when you go to court, tax payers cover the cost of the adjudicator, hearing space and administration; in contrast, these are all costs borne directly by the parties in arbitration.

The aforementioned process flexibility can allow for arbitration to be more focused and less time consuming, which can serve to reduce costs. The greatest cost savings, however, is not offered through process as much as through outcome.

Arbitration offers closure in a way that courts cannot. Appeal rights can delay finality while arbitration awards tend to be more difficult to appeal, particularly as the parties to an arbitration have chosen their decision maker. Have you ever heard of anyone appealing a Judge Judy decision?

Limited appeal rights can be written into arbitration agreements to significantly narrow the ability to appeal the arbitrator's award. Obtaining a clear sense of closure can be especially valuable for parties facing the stress and uncertainty that comes with conflict, particularly for those that remain in community throughout it, as is so often the case in condominiums.

Additionally, there is the notion that to truly succeed in court, you have to win twice – once with your legal arguments and once again when it comes to cost recovery. Otherwise, a win in court can come at great expense to the winner. It is not uncommon for successful litigants to fail to recover a substantial portion of their legal costs. As arbitrators do not have the same limitations as judges do when it comes to awarding costs, arbitration awards can be more

favourable when it comes to cost recovery. An arbitrator willing to allow for substantial cost recovery can make participating in the process significantly less expensive for the successful party.

What Does the Arbitrator Do, Exactly, and How?

The arbitrator's role is to govern the process. Like Judge Judy, the arbitrator will direct who makes submissions and when, decide what will be accepted as evidence and may ask questions of the participants to better understand the facts and positions being put forward. The arbitrator will then make an award to decide the matter.

Arbitration is a private legal process that empowers a third party to make a binding decision for you. While some arbitrators are lawyers, there is a significant difference between what makes someone a good arbitrator and what makes someone a good lawyer. Thus, a law degree should not be equated to an official arbitration designation.

An arbitrator is a neutral and impartial third party who should enter an arbitration with no pre-conceived notions of the outcome of the case. The arbitrator should start with a blank slate and open mind, taking in the submissions presented to them and weighing such to come to a fair and reasonable conclusion.

An arbitration award is not a legal opinion. A legal opinion involves a lawyer doing the "dirty work" of researching the issues, relevant case law and legislation and offering their view based upon their findings. An arbitration award is a decision made based upon the submissions made to the arbitrator. It involves a very different mindset and approach.

Tip: Not all arbitration awards are alike. Some arbitrators offer little to no reasoning for their decision to keep the cost of their involvement lower and to further limit appeal rights. Others insist on providing their reasoning to offer insights into why they came to their decision, which may also be helpful if the award is appealed. If the type of award provided is important to you, clarify this at the arbitrator selection phase. Different arbitrators have different approaches and some are more flexible than others.

Arbitration exists for those who want their day in court but perhaps do not appreciate the delay, formality and public nature of engaging the formal court system. While arbitration is sometimes required by contract or applicable legislation, it can take place on a voluntary basis, as a choice of the parties to receive the advantages that come with it.

Arbitration has an important place in the course of addressing condominium conflict. It is prescribed by law and is increasingly selected by choice (contractually or otherwise) because it offers closure on a faster, less costly, less rigid and less complicated basis than court.

While my Judge Judy analogy may have helped explain what arbitration is and how it works, it has limits… you should not expect your arbitrator to dress in robes like Judge Judy!

Source: Bhalla, M. "What is Arbitration?" *Condovoice*. Volume 24, Issue No. 4. Summer 2019: 13-15.

THINKING OUTSIDE THE ALTERNATIVE DISPUTE RESOLUTION (ADR) BOX: USING MED-ARB IN CONDO DISPUTES

Until recently, mediation, which is facilitated negotiation where an impartial third-party mediator helps the parties resolve disputes on their own terms, and arbitration in which an impartial third-party arbitrator decides the outcome of the dispute, have been considered to be two separate and distinct processes.

It may be time to rethink this approach and look at combining both into a hybrid process, med-arb. In med-arb, the "mediator-arbitrator" first attempts to help the disputing parties work out a settlement as a mediator, but should the mediation fail, the mediator-arbitrator then becomes an arbitrator and makes a binding decision. This is the crucial and sometimes controversial difference between separate mediation and arbitration processes, as the same person acts as mediator and, if necessary, arbitrator.

Over the last couple of years, I have acted as the mediator-arbitrator in a number of condominium and non-condominium disputes. Drawing from that experience, med-arb may have potential as an efficient, cost effective and fair dispute resolution process especially in condominium disputes.

This article also contains an example of the successful use of med-arb through a case study based on an actual condominium dispute.

One of the most difficult types of condominium disputes to resolve involves shared facilities. They are particularly contentious because they are based on legal agreements which the parties inherit from the developer and have had no part in their creation. There is also no alternative but to resolve the disputes in one way or another, as the parties have no way of separating from each other and as a result have an ongoing relationship. Additionally they often contain multiple areas of conflict and disputes.

Mediation seems like the ideal alternative dispute resolution process for these types of disputes because it can repair damaged relationships and set out a path forward. Unfortunately, there is no guarantee of settlement through the mediation process. Because of this, parties make try to avoid mediation and proceed to arbitration. Sometimes one or more aspects of the dispute can be resolved through mediation but others cannot. As a result, the parties have to continue on to arbitration, which is both expensive and time-consuming.

But it is possible to combine both the mediation and arbitration processes into one fair, cost-effective and efficient process that guarantees an outcome. This is med-arb.

In our case study, two condominium corporations were at odds over financial and operational issues concerning the management of their shared facilities. Both parties were concerned that the legal and other costs involved in moving forward through mediation and arbitration would be disproportional to the dispute. At one stage attempts to mediate were suggested by one party but not accepted by the other. There did not seem to be a way of getting the parties to talk

to each other about resolving the dispute.

The lawyers for the condominium corporations decided to look at alternatives to the usual way of resolving the dispute. Although the parties were unable to arrange an initial mediation and had moved towards arbitration, they wanted a process that would be effective in resolving this particular dispute and were open to using a hybrid approach combining the best of both worlds.

In consultation with their clients, the lawyers opted for med-arb. A date was set for a full-day mediation with the understanding that the parties and their lawyers would work together to narrow the issues before the mediation. Any issues outstanding at that time would be mediated and if needed, arbitrated.

Several conference calls took place between the lawyers and mediator-arbitrator and the process was developed to meet the specific needs of the dispute. The original number of issues was reduced by the time of the mediation hearing. During the mediation those remaining issues were further reduced. When the parties then reached an impasse over the remaining single issue, it was, as set out in the written agreement signed before the med-arb began, to be arbitrated.

After considering this option, the parties made a final attempt to settle the single outstanding item and did so successfully. As a result, there was no need to proceed with the arbitration. This case resolved due to the efforts of the parties and their counsel at a cost far below that of going through a traditional mediation and arbitration process.

In some cases it will be necessary to proceed with the arbitration phase of the process but in over 80% of cases that involve med-arb, the parties settle in mediation.

While uncommon in condominium disputes until recently, med-arb has been used for decades in labour and family disputes. It is not for every type of dispute but when used properly can save condominium corporations and unit owners both money and time in resolving disputes. The med-arb process empowers the parties to maintain control. This can allow the parties to preserve the relationship and enhances the potential for long-term commitment to the outcomes they reach in mediation. Med-arb facilitates communication between the parties by providing a collaborative non-adversarial environment for those discussions in its mediation phase.

An understanding of the med-arb process, especially around the transition from mediation into arbitration, is extremely important. Many are concerned that the mediator may use information received during the mediation phase in the arbitration process. But “information is not evidence” and the arbitrator has a duty to base his/her award on evidence.

Counsel for the condominium corporation and other parties can work with the mediator-arbitrator to make sure this transition is properly handled. The Agreement to Mediate/Arbitrate must be carefully and clearly written so that everyone involved understands the process and believes that it is fair.

To put this into a "real world" perspective, here is a sample of comments about the med-arb process from both counsels in the shared facilities dispute.

> Since we clarified and/or narrowed issues during the preparatory phase, it was easier to work with my client and focus on and generate solutions. In other words, less time was spent preparing the strength of our position and more on developing mutually beneficial solutions….
>
> … (med-arb) Provides an authentic first step towards building a sense of community again since the process minimizes the focus on the adversarial process….
>
> The recovery of costs for the moving party may be limited by the amount of pre-mediation/arbitration participation. This might be mitigated by less involvement with counsel, however it is not clear to me if this will work either since counsel were involved as a result of the parties not being able to work cooperatively.
>
> Not all issues may be ideal for this format. Although there were several issues on the table, the originating problem was relatively discrete and well-suited to mediation….
>
> The med/arb process was extraordinarily helpful in resolving the issues between the two Corporations….
>
> The med/arb process was the perfect solution for this personality-based dispute.… it brought both parties to the table where they could each contemplate where they were willing to give and where they were able to take.
>
> The incentive of knowing that the decision could ultimately be taken out of the parties hands was priceless. It was quite clear that the parties were highly motivated by the fact that if they could not agree on certain issues that they would be determined by an arbitrator that could rule against either of their positions entirely. Without the arbitration incentive, the parties had previously demonstrated that there was a genuine inability to sit down and meaningfully find a resolution.
>
> At the conclusion of the med-arb, the parties arrived at an agreement on every issue but costs…. each party was adamant that their view on costs was correct. However, knowing that costs would be decided by the arbitrator allowed the parties to focus on the actual dispute.

This example shows how an innovative and efficient process can be very effective in the right case. A properly designed and implemented process can lead to a fair, cost efficient and speedy resolution of disputes that are very important to the parties but do not justify the expense of using separate mediation and arbitration processes.

While great care must be used in designing this process to make sure that both parties feel that they have been provided with the right to hear and respond to any allegations made by the other

parties, in many cases this is relatively easy to do with the active participation of counsel with the mediator-arbitrator in the design process.

In conclusion, we must start being more innovative in thinking about matching specific dispute resolution processes to condominium disputes instead of defaulting to what we have become familiar with and going no further.

A final additional benefit of this process is, as both lawyers said:

> With the right opposing counsel, positive and productive discussions are possible which benefit their respective parties….
>
> … I saw great value in the cooperation that took place between counsels as a result of the med/arb process. Once the med/arb approach was proposed, the discussions between counsels shifted from an adversarial nature to a collegial one.… Instead of focusing on why each one of our clients was correct in their positions, the med-arb process forced us to consider the reasonableness of the other's positions in a way that allowed for very frank conversations with our clients about what a meaningful resolution could look like.

This case provides a good example of how lawyers can work as problem solvers even in an adversarial dispute. I suspect that is exactly what most, if not all condominium corporations and unit owners hope for from their legal counsel.

No single dispute resolution process, whether alternative or not, fits all disputes. While the med-arb process may not be suitable for every condominium dispute, it is worth considering as a powerful and effective option.

I would like to thank both Joy Mathews and Luis Hernandez, counsel in the case study, for their comments on the process, and allowing me to use those comments in this article.

Source: Brannigan, C. "Using Med-Arb in Condo Disputes." *Condovoice*. Volume 24, Issue 1. Fall 2018: 39-42.

NOTES

NOTES

NOTES

NOTES

PREPARING FOR AN AWKWARD CONVERSATION WORKSHEET

Sometimes, we can be tempted to ignore a situation or avoid a conversation because the thought of addressing it is uncomfortable. Yet, it can often be the case that the issue only becomes worse the longer that it remains unaddressed. This worksheet is designed to help you prepare to address an uncomfortable situation.

1. **What is it that you would like to accomplish in addressing the situation?**

Please do not focus on the actions of others (i.e. I want my neighbour to stop being so noisy) and instead on what a positive outcome means for you (i.e. I would like to sleep soundly). Keep what is important to you in mind as you raise your concern to stay focused.

2. **What makes you hesitant to bring up your concern with those involved in it?**

It can be just as tempting to ignore what makes the situation uncomfortable as it can be to avoid taking action to address it. Honour what makes the situation difficult for you. Share this if/when appropriate.

3. **What about the situation may be difficult for others involved in it?**

Rather than embracing an "if I was you" approach, simply try to relate to what may make the situation hard for others. While you may not fully know what it is like for others, trying to understand their perspective and showing empathy can often go a long way toward establishing shared understanding.

PREPARING FOR AN AWKWARD CONVERSATION WORKSHEET

4. **How can you approach the situation in a way that will make it easier for others involved to help address it?**

Often, the way that we present a problem impacts how others respond to it (i.e. telling someone that they have no regard for others and lousy taste in music may not be the best way to have them turn down their stereo). Apply what you know about the others involved, appreciate what you do not know and think about how you may best position yourself to accomplish your goal in the course of addressing the situation.

5. **What is the worst reaction that you can anticipate and how will you respond to it?**

While you cannot control the actions of others, you can control how you react. Reflecting in advance on your "buttons" and how you will conduct yourself if they are pushed can help ensure that even in a worst case scenario, you put yourself in a better position having raised the issue.

6. **What one little thing can be done to slightly improve the situation?**

Think about a small step that will not resolve the problem entirely but instead make it a little bit better.

It can help to practice having an awkward conversation with a friend or in front of a mirror. Trying out different approaches in terms of how you present the problem can help you become more comfortable having the uncomfortable conversation as well as ensure that you select the right choice of words. Reward yourself after the discussion for overcoming your hesitation and trying to improve the situation!