# How Will Legislative Change Impact Alternative Dispute Resolution?

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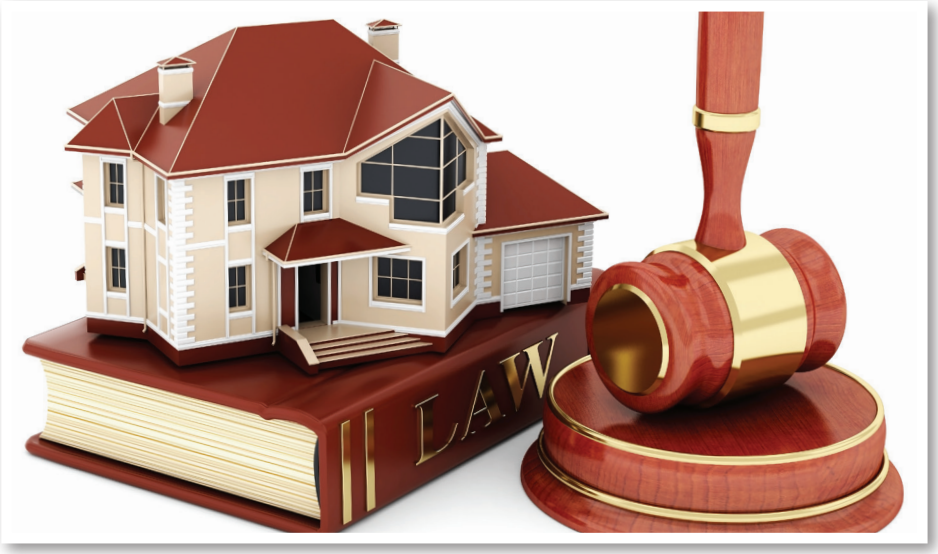


When the *Condominium Act*, 1998 (the "Act") was put together back in the late 1990s[1], it was recognized even then that mediation was a logical fit for addressing condominium conflict. Mediation provided a vehicle and opportunity for those involved in a conflict to work together and themselves try to find an agreeable outcome; thereby also investing in the relationship element of community disputes, allowing for some creativity and offering more sustainable resolutions as opposed to an outcome imposed by a third party who may – or may not - have any understanding of the practical reality of condominium life.

Hence, Section 132 of the Act prescribed mediation as the appropriate medication for issues involving an alleged breach of a condominium's governing documents, shared facilities, a condominium and its declarant, a condominium and its property manager or an agreement between condominium and a unit owner surrounding an addition, alteration or improvement to the common elements and arbitration should mediation not serve to adequately address such a matter. While the types of issues cited are not the only types of condominium conflict that have found their way to mediation over the years, the legislation intended to make mediation mandatory in those scenarios.

### *The Problem? The Act Stopped Short…*

The issue with the implementation of the Act in respect of mediation is that it stopped short. Section 132 set out what types of issues should be mediated but nowhere was any form of guidance provided in terms of how impacted parties should go about mediating. Mediation was mandated with little thought as to how it would play out. This has resulted in the unfortunate reality of parties in conflict having to first agree to a mediation procedure to move forward. Similar challenges exist with arbitration.

As emerging ill will between people engaged in conflict can stand in the way of the initial consensus required in this landscape to proceed with mediation, some condominiums passed by-laws outlining how mediation (and arbitration) should work. Unfortunately, this type of guidance being provided on an individual, if applicable basis, raises obstacles. Even some mediators may not think to ask if such a by-law is in place. It would be much better for everyone to have a consistent process, applicable province-wide as, clearly, it would be easier to spread awareness about something that is consistent to all Ontario condominium communities over something that can vary from community to community.

Before the courts stepped in with a string of decisions over recent years that included taking a look at the path that brought parties to the court room and increasingly penalizing by way of cost recovery if a conciliatory approach was not attempted – even when mediation was not mandatory – the additional hurdle presented by a lack of a consistent, province-wide mediation process was the glaring loophole available to those who simply did not want to mediate. While mediation is, at its best, a flexible process that takes place with willing participants at the table, a lack of direction surrounding it makes it too easy for the mediation opportunity to be neglected, manipulated or overlooked.

### The Hope of a Fix with Legislative Change

There is hope that further Regulations to be released in respect of *Bill 106, Protecting Condominium Owners Act, 2015* ("Bill 106") will provide the much needed guidelines to set out how to go about mediating, including the provision of standardized forms to be used to propose mediation and, ideally, guidance as to how to determine who is actually qualified to facilitate condominium mediation (such as by way of an official designation of the ADR Institute of Canada and actual condominium education)[2]. While we cannot be sure just yet as to how far it will go, the introduction of any guidance will help improve conflict management for Ontario's condominiums and better allow all to seize the opportunities Alternative Dispute Resolution ("ADR") offers over the cost, time and stress involved in going to court.

### The Promise of Early Education

Last year, British Columbia launched the Civil Resolution Tribunal, Canada's first ever online tribunal. This launch came after much testing and fine tuning of a system aimed at aiding the province's condos (known as "stratas" out west). While the tribunal aimed to provide greater access to justice, including by rendering decisions to address certain types of disputes, perhaps its greatest value came via the system's Solutions Explorer.

Delivering upon response to a 2015 survey that revealed 94% of British Columbians wanted to have a say in shaping their resolution, 87% wanted a "do it yourself" system and 81% would use an online civil justice process that was user-friendly and available 24/7[3], the So-lutions Explorer offers anyone in British Columbia encountering a condo issue instant and easy access to information. One can simply visit the website, work through an interactive survey and gain access to key information surrounding the subject matter of their concern. The Condominium Authority of Ontario ("CAO") developed via Bill 106 is expected to develop a similar type of system that would assist Ontarians experiencing condo troubles. This represents the po-tential of streamlined, proactive conflict management for all involved in condominiums in Ontario that would be easily accessible and affordable.

Here is an example of how an online system of this nature could work…

Joe is unhappy with the decisions that his condominium Board has been making and feels like money is being wasted. The Board and

management are slow to reply to his requests for information, which has only served to further frustrate him. On top of this, Joe finds that he rarely makes use of his condominium's amenities and considers it unfair to be expected to continue to contribute. So, he decides to stop paying his common expenses. He figures that will show his Board that he is serious and force them to take his concerns seriously.

As Joe further contemplates what he views to be a genius strategy, he visits Ontario's form of Solutions Explorer to see if others have ever faced a similar circumstance. Answering a series of questions online leads Joe to a page on the site that reviews common expense obligations of unit owners. Here, he learns about the case of *Harvey v. Elgin Condominium Corp. No. 3*, a case where a self-represented unit owner's misguided "homemade" interpretation of the law resulted in a 3 day trial as, amongst other things, Mr. Harvey did not appear to realize that Section 84(3) of the Act does not allow a condominium unit owner to withhold payment of common expenses out of protest. Joe realizes that his plan cannot work, as he is not allowed to hold-back payment of common expenses. However, he also comes across a template letter that he uses to send his Board and property manager a request for Board meeting minutes to allow him to better understand decisions that he felt were resulting in wasted money. The tone of this letter is very different to the tone of what Joe has been sending his Board and management; it explains how Joe is entitled to the information he is now requesting and offers a realistic potential consequence for his condominium corporation should it fail to provide him with the records he has requested within the prescribed timeline to do so.

In this example, Joe is able to collect information and guidance from a neutral, outside source, empowering him with knowledge before he embarked upon a misguided path. The scenario embraces many Alternative Dispute Resolution principles by allowing Joe to be better informed about the reality of the situation that he faces and the options available to him. He is in a better position to consider his alternatives based upon how his Board replies and negotiate accordingly. Joe is able to avoid the long, expensive and stressful court process that Mr. Harvey experienced and position himself to make use of better methods available to address his concerns.

### Guidance

While we await the release of Regulations to shed further light on the Condominium Authority Tribunal (the "Tribunal") created under Bill 106, we know now that the Tribunal will be empowered to refer disputes to Alternative Dispute Resolution processes. What this

means is that the Tribunal can be expected to step in to direct matters to the process best suited – "fitting the forum to the fuss".

The Tribunal is also expected to start off with a limited subject area in which it will focus. While it may risk viewing condominium disputes overly simply (i.e. rarely is a mediation about a single issue, but rather several layers of conflict that have escalated over time and repeated unsatisfactory encounters), the concept here is to proactively manage emerging conflict by quickly rendering decisions and establishing precedents to guide others in respect to the types of common questions that arise in the condominium setting. In turn, offering clarity and greater insights to the province's condominium community overall, raising the bar on education and empowering everyone with a better understanding of rights, obligations and the appropriate path to dealing with their issues.

The answer to the question of how, exactly, the legislative changes will impact ADR in Ontario is unclear at this time. While there is hope that further details will be revealed with the next round of draft Regulation releases, all indications are that we can expect Ontario's condominium communities to be better positioned to benefit from the opportunities ADR provides to allow conflict to be addressed in a faster, cheaper and better matter than through the province's backlogged court system. ■

*Marc Bhalla is a leading mediator in Ontario who focuses his practice on condominium conflict management. He holds the Chartered Mediator (C.Med) designation of the ADR Institute of Canada – the most senior designation available to practising mediators in Canada. Marc leads Elia Associates' CONDOMEDIATORS.ca team and manages MarcOnMediation.ca, a site about his semi-annual newsletter.*

[1] *First reading of what was Bill 38 was released in May 1996.*

[2] *Currently, there is no ACCI designation available to mediators or other ADR professionals who concentrate their practice on condominium conflict resolution.*

[3] *The results of this 2015 Survey were shared by Shannon Salter, Chair of British Columbia's Civil Resolution Tribunal, in the course of planning and presenting a session that we were involved in at the 2016 ACMO/CCI-T Condominium Conference in Toronto.*