

## **MEDIATION/ARBITRATION STEPS IN RULES ENFORCEMENT – AVOID THEM IF YOU CAN**

Of all the changes made in 2001 with the introduction of the current Condominium Act (the “Act”), the two which in my view have proved the most disappointing are the requirements that the condominium corporation must first mediate and then arbitrate a rules enforcement matter before an application can be made to court under s. 134 of the Act for a compliance order. These two steps, which were intended by the legislature to make the system more accessible and relieve the burden placed upon the courts, have in fact made the whole process much more expensive and time consuming. There are a number of significant drawbacks to having to first mediate, and then arbitrate, a rules dispute. Here are just a few:

- (i) where, for instance, you are enforcing a provision in the declaration, which is treated as a condominium’s constitution, there simply is no room for compromise. Mediation has been described as the process of “getting to yes”, where each side gives a little, but how can this work when the declaration requires mandatory and full compliance with all of its provisions?

- (ii) in addition to having to pay a mediator and/or arbitrator (often along with a court reporter), you now have the logistical problems presented by having to coordinate three different schedules, namely that of the board representative and/or property manager, the unit owner, and the mediator/arbitrator. This will be further complicated where lawyers for the parties are also involved at the mediation/arbitration stage;
- (iii) with all due respect to those who from time to time may serve as mediators and arbitrators of condominium disputes, you can generally get a better result from a judge whose full time job is to make these types of decisions and who has the authority, under s. 134 of the Act, to not only grant the order the corporation is seeking, but to also “grant such other relief as is fair and equitable in the circumstances”.

Therefore, whenever the fact situation in a rules enforcement matter allows you to go straight to court without first mediating or arbitrating the dispute, you should.

### **Three Cases where Mediation and Arbitration are Not Required**

The Act permits the condominium corporation to go straight to court for a compliance order in three situations.

1. Where there has been a breach of the Act. i.e. an unauthorized alteration to the common elements, contrary to s. 98.

2. Where the actions or omissions of a unit owner constitute a dangerous condition or activity that is “likely to damage the property or cause injury to an individual”, as referred to in s. 117 of the Act.
  
3. Where the breach has been committed by the tenant/occupant of the unit.

### **First Steps to be taken by the Property Manager**

In a case where an owner has made an unauthorized alteration to the common elements, this will generally be a breach of a provision in the declaration (and sometimes also a breach of a by-law or a house rule). However, the first letter sent by property management to the owner should only refer to a breach of s. 98 of the Act, giving the owner a reasonable period of time to remove the unauthorized installation and restore the common elements. The letter should go on to advise that if the installation is not removed as requested, the corporation’s legal counsel will be instructed to bring a court application for a compliance order pursuant to s. 134 of the Act, with all costs of the legal proceedings to be recovered from the unit owner as common expenses. In my view, it is a mistake for your enforcement letter to also refer to the owner’s breach as a breach of the condominium’s declaration. If the owner takes the letter to a lawyer, and that lawyer sees in it the words “breach of the declaration”, the lawyer’s first advice to the owner will likely be that the corporation can’t apply to court but must first mediate and arbitrate the dispute.

When you are dealing with a situation where an owner is creating a nuisance, which may also involve threatening behaviour causing other residents to fear for their safety, it is open to the corporation to characterize this threatening behaviour as contravening s. 117 of the Act, as it is

likely to “cause injury to an individual”, namely the other residents. In the 2003 case of *Carleton Condominium Corporation No. 291 v Weeks*, the judge had this to say:

“I am satisfied that if it is proven that the Respondents [i.e. the unit owners] acted in the threatening matter, as alleged, that the alleged conduct would likely cause injury to an individual, namely the occupants of the other units, which would allow the Applicant [i.e. the condominium corporation] to bring this application without first proceeding with the mediation provisions of the Act”.

Therefore, in these circumstances, the first enforcement letter sent by the manager must emphasize the threatening behaviour of the unit owners and the fact that such behaviour has caused other residents to feel threatened and become fearful for their safety. Describing the owner’s conduct in this manner makes it a breach of s. 117, permitting the corporation to advise the owner that if such threatening conduct does not cease immediately, the matter will be turned over to the corporation’s legal counsel to proceed to court without further notice to obtain a compliance order.

The procedure to be followed by the property manager is a little different where the breach has been committed by the tenant or occupant. Section 132(4) of the Act deems every declaration to contain a provision that “the corporation *and the owners* agree to submit a disagreement *between the parties* with respect to the declaration, by-laws or rules to mediation and arbitration ...” (emphasis added). This section only refers to the requirement that the corporation and “owners” must mediate and arbitrate a dispute. There is no reference to tenants and/or occupants of the unit being subject to this requirement.

Therefore, when the breach is being committed by the occupant, as opposed to the unit owner, the first letter from property management must go to the tenant only, with a copy being sent to the owner. The letter must include a paragraph advising that a copy is being sent to the owner to put the owner on notice of the problems being caused by the occupant and further advise that if it is necessary to proceed to court to obtain a compliance order, all costs incurred by the corporation will be recovered as common expenses from the unit owner as provided for by s. 134(5) of the Act which states:


“If a corporation obtains an award of damages or costs in an order made against an owner *or occupier of a unit*, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.” (emphasis added)

In the 2004 case of *Halton Condominium Corporation No. 555 v. Lagacé*, the judge reduced the amount of costs the corporation could recover from the unit owner because it had failed to notify the owner in the initial enforcement letters of the breaches being committed by the tenants and the potential exposure for costs faced by the owner.

## **Summary**

As property manager, in dealing with a rules enforcement matter, you should first ask yourself two questions:

1. Is this the kind of fact situation which allows the corporation to go directly to court for a compliance order, without first proceeding with mediation and/or arbitration?

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2. How should I draft the first enforcement letter which lays the best foundation to allow the corporation to go straight to court?

If you've answered "yes" to the first question, followed with an enforcement letter incorporating the points I've suggested above, the corporation should be able to enforce its rules without having to first mediate and arbitrate.