

CONDOMINIUM DISPUTE RESOLUTION MODEL FOR ONTARIO

ACMO/CCI DISPUTE RESOLUTION SUB-COMMITTEE
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ACMO/CCI DISPUTE RESOLUTION SUB-COMMITTEE: CONDOMINIUM DISPUTE RESOLUTION MODEL FOR ONTARIO

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1. Foreword:

“The literature makes it clear that the promotion of early, consensual DR processes can be linked to affordability and cost-savings, and to the following additional policy objectives:

- *enhanced access to justice;*
- *greater process satisfaction amongst parties;*
- *enhanced post-dispute relationships;*
- *more durable outcomes (i.e. increased compliance);*
- *more complex remedies;*
- *better allocation of judicial resources (by removing the easily settled cases from the system); and*
- *faster and more streamlined case processing in the courts.*

However, it is important to take into account the possibility of unintended or undesirable consequences arising from the increased use of mediation. These might include:

- *development of a two-tiered system of justice – second-class justice for those who mediate, litigation for those who can afford it;*
- *mediation could increase cost and delay by creating an additional procedural hoop for litigants to jump through;*
- *informal DR processes, lacking procedural safeguards, could be forums for the strong to exploit the weak;*
- *resolution based on idiosyncratic individual values, not legal principles, could dilute the power of the law; and*
- *ADR could result in loss of the court’s voice and diminished evolution of law through precedent.”¹*

Our Purpose: To develop a Dispute Resolution (“DR”) model for post-turnover condominium conflicts and disputes which:

- Reflects and respects the interests of the parties;
- Facilitates access to justice and ensures consumer protection;
- Recognizes and gives deference to statutory and precedential constraints and authority;
- Manages conflict so as to avoid escalation where possible; and
- Resolves disputes in a timely, cost effective, and enforceable manner.

Our Objectives:

- Predictability – recognize the value of legal precedent and consistent DR process;
 - Accessibility – the cost to participate in the procedure should not deter participation;
- and
- Balance – encourage accessibility while recognizing the potential resulting cost of accommodating (or even encouraging) excessive, frivolous disputes.

¹ McHale, M. J., *The Role of Government Policy in Shaping DR Futures in BC*, (July 2003, Ministry of the Attorney General) The First Annual BC Symposium on Conflict Resolution – Investing in DR Futures: Shaping Directions in Policy, Research and Pedagogy.

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Our Constraints:

- Limited Funding; and
- Achievement of Broad Based Education for all.

2. Executive Summary:

In developing a DR model, the goal is not to facilitate advocacy on the part of the condominium corporation, nor is the goal to ensure that one party wins and the other loses. The goal must be to look beyond the traditional understanding of winning and losing as between disputing parties, and embrace a process that will advance the well being of the greater condominium community.

In developing a DR model, consideration should be given to the interests of the various “players” involved. The argument can be made that 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. By extension, the interests of Board members, who, by and large are unit owners, should also align. The condominium is not the developer/Declarant, and should never be considered as such or as having similar interests (Declarant-related conflict is beyond the scope of this paper).

Past and present DR models for condominiums in Ontario 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) might take active measures to avoid each other.

In the pages that follow, a “*made in Ontario*” DR Model is presented (Model #2) which puts forward two (2) main thrusts:

1. Recognition of the importance of managing conflict; and
2. Establishment of a third party, arm’s length “reality check” focusing on communication, education, and if necessary, evaluation on a confidential and non-binding basis.

With respect to conflict management, we must acknowledge there are savings to be gained where the costs, direct and indirect, of a lengthy and drawn out dispute are avoided in favour of a proactive

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investment in the community. This includes: recognizing and promoting the value of education of unit owners, board members, property managers and other “condominium” advisors; regulation/licensing of property managers; recognizing the importance of legal precedents; initiating a system of annual filings for condominiums; permitting the use of fines in limited circumstances and with appropriate safe guards; and equalizing, as between unit owners and condominium corporations, the Best Alternative to a Negotiated Agreement (“BATNA”).

The third party, arm’s length “reality check” involves the appointment of a Condominium Dispute Resolution Officer (“CDRO”) by the owners of each condominium corporation in Ontario. The CDRO is independent from the particular condominium corporation. Appointment would be somewhat arbitrary from a pre-approved roster of CDROs. Where a conflict persists, the CDRO will focus on education, communication, facilitation, and if necessary, evaluation – on a fast, informal and confidential basis. To encourage parties to act reasonably in finding a resolution, the CDRO will, should the conflict not resolve, ultimately be asked to provide a recommendation as to whether the parties should proceed to mediation, to court or to expedited arbitration. Given the position of the CDRO’s preliminarily assessment, the recommendation will have cost consequences if it is not followed.

Two (2) final points to be made with respect to the proposed DR model: first, mediation must be structured so as to permit the parties to move through the mediation process as efficiently and cost effectively as possible. The current practice of condominiums passing a by-law to establish the process is ineffective, and, in cases where the by-law has not been passed, the conflict risks escalating due to lack of structure. Arbitration is part of the DR Model only to the extent that all parties agree to proceed and that it is structure and expedited. Second, in certain circumstances, where time is of the essence in resolving a conflict, a party may proceed directly to court thereby circumventing the CDRO process. The most obvious example would be a breach of Section 117 of the Act (being the existence of a condition or the carrying on of an activity that is likely to damage property or cause injury to an individual).

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3. Introduction:

- **Condominium life and its challenges/constraints**

Condominium life is, in essence, communal living; where individuals reside or work or both, 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, “Good fences make good neighbours,” has a very different meaning in a condominium environment.

One may live in a waterfront high-rise in downtown Toronto or in a townhouse on the outskirts of Sudbury; work in an office tower or low-rise warehouse; vacation in a time-share in Collingwood; or live in an area that is being built up with condominiums. 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 vacant 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.

Condominiums act effectively as a fourth level of government. Unit owners are the electorate. The Board of Directors is the elected government. Property management forms the bureaucracy. The condominium itself is the representative body of all unit owners and is governed by the Board of Directors. As in any democracy, the role of the condominium is to find a balance between the rights of the individual unit owner and the will of the collective majority, all while working within the parameters set out in the Condominium Act and other prevailing laws.

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.

The condominium is not the developer/Declarant, and should never be considered as such or as having similar interests. The developer/Declarant is a for-profit entity whose interests largely cease upon turnover of the condominium to unit owners. The condominium, by contrast, only comes into being shortly before the property is turned over to unit owners and it exists for the purpose of managing the property and assets of the condominium on behalf of the unit owners. The condominium is a not-for-

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profit entity, and its interests continue into the future and parallel those of unit owners. In fact, when considering long-term interests, the argument exists that the interests of the condominium should be given greater deference. Individual unit owners purchase and sell to advance their personal interests, while the condominium must always advance the collective interest of all owners, working within the parameters set out in the Condominium Act and other prevailing laws.

- **The Current Legislation - *Condominium Act, 1998, S.O. 1998 c.19*:**

The *Condominium Act, R.S.O. 1990*, as well as prior versions of the legislation, suggested, but never delivered upon, the dispute resolution model known as “the Bureau,” leaving dispute resolution to be carried out by the relatively fast, effective, albeit sometimes harsh, court application process. The *Condominium Act, 1998, S.O. 1998 c.19* (the “Act”) mandates mediation², but does so without having considered the potential scope of condominium conflicts, how they come about, and what is to be considered in achieving resolution. Most importantly, the Act mandates mediation without providing the parties in conflict with any structure within which to advance the mediation process. The Act permits a condominium corporation only to adopt a mediation structure voluntarily, usually in the form of a by-law. Without such a structure in place, conflicts are often intensified as the parties attempt to negotiate the mediation process to be followed, adding cost and delay to an already divisive situation.

The Act appears to have adopted mediation, and if necessary arbitration, without having considered: (1) the existing mandatory mediation requirements under the Rules of Civil Procedure (where applicable); (2) the speed and cost effectiveness of the court application procedure in certain

² MacFarlane, J., *Dispute Resolution – Readings and Case Studies, 2nd Edition*, (Toronto: Emond Montgomery Publications Limited, 2003) at p. 281-282 – “...mediation aims to produce a voluntary, consensual settlement outcome...The role played by the third-party neutral in mediation makes a critical difference to how the conflict is analyzed and argued...because the third party person in a mediation process is not a decision maker, the discussion must include not only the entitlements asserted by each of the parties, but also an examination of their interests and needs – what lies between the positions they have taken...Mediation emphasises the role of the parties themselves in reaching their own agreed solution...no matter what motivates the parties to settle, the essence of mediation is that any outcome must be voluntary and consensual.”

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circumstances; (3) the cost implications to unit owners; (4) the value of legal precedent; and (5) (it would seem) the varied nature of condominium disputes.³ This, however, is criticism in hindsight.

Contrary to what is at times suggested by certain critics of the current Act, a public consultation process did take place. It was a relatively unrushed process (taking five years in total and more than two years just to reach first reading), and actively sought input from many stakeholders. In the end, passage of Bill 38 received the support of all political parties [See Appendix A].

³ Bugden, Gary F., *Strata and Community Titles in Australia – Issues 1 Current Challenges*, July 31 2005:

Section 8.4 – “...in most jurisdictions strata title legislation is far too complex. It is too detailed and prescriptive and does not recognize the diversity of projects and people who live in them. Recent experience shows that this problem is likely to get worse as governments struggle to address the endless list of issues raised by the various stake holders in the strata industry, not the least being the owners themselves.”

Section 8.11 – “Typically, Governments react to complaints. These complaints emanate from individuals or organizations and are usually directed at local members of Parliament who are keen to be seen to be “doing something” for their constituents. These local members refer the complaints to the relevant Minister who refers them to their privacy advisers. The policy advisers and other bureaucrats work up “solutions” for Government to consider, solutions that usually involve amending the legislation. Some complaints or submissions go directly to the Minister from pressure groups, such as home unit owners associations other industry bodies. Many complaints or submissions are drive by particular “agendas” of associations or industry bodies, rather than a broader motive of the “common good”. These are subjected to the same process.

Section 8.12 – “This is essentially the legislative process in the case of strata titles. The consequences of this process are:

- Inexperienced (or narrowly experienced) policy advisers and bureaucrats decide on the solutions (i.e. the “required” amendments).
- In most cases there is no continuity of personnel involved in this policy making process (i.e. Ministers, policy advisers and bureaucrats change at each round of amendments so that any accumulated knowledge or experience is lost to the next process).
- Public consultation processes-
 - Feed the “noisy minority” and fail to attract the attention of the “silent majority”
 - Have a reputation of being nominal rather than serious attempts to test what is proposed
 - Do not effectively test propositions
- Decisions are not based on any research – they are entirely reactionary.
- Change are compromises rather than the best solutions.”

Section 8.13 – “These processes are leading us to what is undoubtedly the most complex and unworkable system of common interest community regulation in the world. The cycle of amendment after amendment after amendment must be broken. Governments must start to base decisions to amend legislation on solid research and the advice of independent people who know what the implications of proposed changes are. Politicians need to find ways to placate their complaining constituents other than by fueling the process of legislative amendment.

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▪ Application and Focus of this DR Model

“ADR includes, after all, mediators and arbitrators, but also “med-arbs”, “reg-negs” (regulatory negotiators), ombudsmen, judges engineering settlements in conference or conducting summary jury trials, special masters, conciliators, purveyors of mini-trials, and others... They can focus on interest-disputes or rights disputes; they can be paid by the disputants, by third parties, or by programs; they can be professionals or volunteers and the process itself may be voluntary or compulsory.”⁴

While it is important to acknowledge that there are many types of very complicated and difficult disputes that arise within condominiums (such as, Declarant-related construction deficiency claims), for the most part, disputes are a function of, and incidental to, people brought together in an intimate, rule-intensive condominium environment (such as, enforcement of parking rules against residents parking in visitor parking spaces; constant late night noise; failure to “stoop and scoop” after pets; the attachment of satellite dishes in a no-antenna building; *et cetera*). The challenge faced by many Boards of Directors is how to address these community-type conflicts quickly, fairly, substantively and cost-effectively, with a view to maintaining, insofar as possible, ongoing relationships with their neighbours.

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.

During second reading of Bill 38 on June 25, 1998, Mr. Mike Colle (MPP for Oakwood) raised the following question on behalf of a resident of Kingston, Ontario: *First of all, this individual asked whether or not the provision of an arbitration board to settle disputes between owners and the board of directors is in the bill. As he states in his letter, “The government created the act, but leaves its implementation to a board of directors who may have no competence or knowledge in management.”⁵* While this question did not receive any answer or comment, it is worthy of consideration given that condominiums function effectively as a fourth level of government, with the Board as elected representatives of unit owners. Unfortunately, there is no requirement in any other level of government that elected officials have any particular competence or knowledge. Elected representatives rely on the

⁴ Luban, D., *The Quality of Justice*, (66 Denver University law Review, 1989) at pgs. 382-83.

⁵ Mr. Mike Colle (Oakwood) - Bill 38, second reading, June 25, 1998, 36th Parliament, Session 2, Hansard 2030-2040

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knowledge and expertise of the bureaucracy and hired “experts” – or, in the case of condominium corporations, on the wisdom and experience of property management, legal counsel, engineers, *et cetera*.

Given the premise of condominium corporations as being the “fourth level of government”, it must be noted that condominiums lack the tools necessary as a government to carry out certain basic functions pursuant to their ongoing obligations to manage and control the property. For example, if an individual were to park illegally on a public street, that individual would risk receiving a parking ticket and/or having his vehicle towed. The individual can challenge the ticket at a future date; however, the municipality has the immediate remedy of addressing what appears to be an illegally parked vehicle. By contrast, while a condominium corporation can pass rules concerning parking control, a condominium corporation has no similar right remedies in the case of an illegally parked vehicle. Currently, the condominium corporation cannot help but weigh the cost of proceeding by way of mediation and, if necessary, arbitration versus acquiescing a nuisance factor posed by the vehicle.⁶ The exception to this pertains to common expense collections. Common expenses equate to taxes and provide cash flow for the operation of the condominium.

⁶ When the current legislation came into effect in 2001, it remedied the exclusion of commercial condominiums from the “super” priority of the condominium lien; however, for reasons unknown to this sub-committee, it simultaneously re-introduced the problem with respect to common elements condominiums.

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4. Conflict Management - Required parallel provisions to a DR Model

“An ounce of prevention is worth a pound of cure” - Benjamin Franklin

Modern civilized society demands a general respect for the rule of law. Acceptance of this premise is vital given that we are each repeatedly in conflict with our neighbour as we attempt to advance our own personal goals and interests. The goal, therefore, before determining the optional way to resolve a dispute, is to manage such conflict through knowledge, understanding and respect so as to avoid its escalation into greater disputes.

Returning to the example of illegally parked cars, it may seem obvious that parking should not be permitted on major streets during rush hour in order to facilitate the flow of traffic. Notwithstanding this fact, municipalities erect signs reminding drivers not to park their vehicles on certain streets at certain times of the day. This effort of posting signs serves both to educate motorists and to facilitate enforcement, thereby minimizing the risk of illegally parked cars escalating to court battles.

This is not dissimilar to the requirement that drivers be licensed. Part of the licensing process involves education as to the rules of the road, the responsibilities associated with driving and the respect that needs to be extended to other drivers.

Unfortunately, in condominiums, mandatory education prior to purchasing a condominium unit is not required. Nor is mandatory education required of individuals wishing to volunteer their time as board members. Surprisingly, there is not even any mandatory education or accreditation required of those putting themselves forward as professional property managers.

Accepting the purpose of the dispute resolution model described at the beginning of this paper, it appears a meaningless task to develop a dispute resolution process in isolation of the need to manage and, if possible, prevent the undue escalation of day-to-day conflicts.

▪ Recognizing the Role and Importance of Private Sector Endeavors

As stated earlier, the *Condominium Act, R.S.O. 1990* (the “old Act”), as well as prior versions of the legislation, suggested, but never delivered, upon the dispute resolution model known as the Bureau. Under sections 56 and 57 of the old Act, a non-profit corporation was to be set up (the “Bureau”) for the purpose of: (1) advising and assisting the public in condominium matters; (2) assisting in the resolution of disputes between condominium corporations and unit owners and between two or more unit owners and for this purpose appointing review officers and paying their remuneration; (3) disseminating information for the purpose of educating and advising condominium corporations and unit owners concerning

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condominium matters and the financial, operating and management practices of condominium corporations; and (4) assisting in the formulation and conduct of educational courses for property management.⁷ The Bureau was intended to be privately funded with contributions from individual condominium corporations.

While the Bureau itself never came into being, some of the goals of the Bureau have, in limited ways, been satisfied through private sector efforts in recognition of the necessity of having some of these goals achieved. Publications such as the weekly “*Condos*” section in the *Toronto Star* serve to educate the public in condominium matters. Organizations such as the Canadian Condominium Institute (“CCI”) and the Kingston Area Condominium Association (“KACA”) organize a series of courses and resource tools on matters concerning the operation of condominium corporations, which are geared toward unit owners and board members. Other organizations, such as the Association of Condominium Managers of Ontario (“ACMO”), in conjunction with Humber College, have formulated educational courses and a program of accreditation for property managers.

- **BATNA**

“Without an understanding of their best alternative, the parties risk agreeing to a settlement they would be better off declining, or rejecting a solution that they should have accepted. Where one party perceives that they are in a much weaker position than the other, they may conclude that a positional negotiation approach may be the most effective way of levelling the negotiation playing field. However, one should never discount the fact that they have something the other side wants.”

– R. Nelson, *Nelson on ADR*

Under the current Act, the best alternative to a negotiated agreement (“BATNA”) is arguably skewed, unclear and inequitable as between unit owners and condominium corporations.

(Current) Condominium BATNA

When facts are not in dispute, a condominium corporation’s BATNA will likely be a litigated resolution. If the condominium corporation successfully obtains an award for costs or damages, it can secure payment of all additional costs incurred in collecting against the owner’s unit by way of common expenses (section 134(5) of the Act). Proceeding to court provides the condominium corporation with a fairly efficient and cost effective resolution; a precedent is set and a court order allows for relatively easy

⁷ Section 56, 57, Condominium Act, R.S.O. 1990 c.C.26 (repealed) – these sections were to have come into force on a day named by proclamation of the Lieutenant Governor. This never happened.

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enforcement. Particularly as lengthy negotiations can be costly, drawn out and offer no certainty of a resolution, the ability for a condominium corporation to proceed directly to court can be appealing, particularly as condominium corporations do not typically have the same degree of concern as owners in respect of their ability to fund litigation proceedings.

Where there is disagreement between the condominium corporation and an owner with respect to the declaration, by-laws or rules, the Act requires the parties to proceed to mediation and, if necessary, arbitration, before being able to move onto court. In such instances, a condominium corporation's BATNA is not nearly as appealing in light of the cost and time involved in going through the mediation and/or arbitration process. There is less assurance of an expedient or complete resolution to the matter and a threat of significant cost if the matter proceeds to arbitration.

(Current) Unit Owner BATNA

For unit owners, the BATNA differs as the owner will likely bear most or all of the costs of litigation for both parties of the dispute (paying for his or her own costs, together with contributing to the condominium's by way of common expenses). The burden of paying such costs may be taken into consideration and contribute to the toll that the long process of litigation may have on the owner. Note that there is no Section 134(5) equivalent for a unit owner. An owner's BATNA will, of course, vary by situation (for example, a resident owner living in a tight knit condominium community may have a less appealing BATNA than a non-resident owner with few ties to the community beyond investment interest).

In extreme circumstances, a possible BATNA for the owner may be simply to sell his or her unit and move on. However, this option is not possible for a condominium corporation. Much depends on the situation and the nature of the dispute.

Future BATNAs

Logically, BATNAs should be similar as between a condominium corporation and a unit owner. The one exception would relate to the obligation of the condominium corporation to enforce the Act, and its declaration, by-laws and rules. While both the condominium corporation and the unit owners have an obligation to comply, only the condominium corporation has the obligation to take all reasonable steps to enforce.

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For example, there is ample case law supporting the premises that the actions of one unit owner shall not negatively impact the interests of other unit owners. This logic is reflected in the current Section 134(5). However, the benefit of full cost recovery under Section 134(5) of the Act should also be available to unit owners in the event that unit owners are obligated to seek compliance by the condominium corporation, or for either party in the event they are forced to defend a claim. To this end, however, a condominium corporation should not be deterred from carrying out its obligation to enforce in respect of more minor conflicts (such as, illegal parking) for fear of incurring excessive costs. The condominium corporation could find itself in a “Catch-22”: if it fails to enforce, it will find itself in breach of its obligations under the Act; while if it does enforce, it could find itself at odds with the unit owners if costs escalate.

The sub-committee recommends the following:

1. Equalizing BATNAs by expanding the benefit of Section 134(5) of the Act to any successfully party: condominium corporations or unit owners; plaintiffs or defendants – in the superior court or arbitration; and
 2. In recognition of the added obligation on condominium corporations to take reasonable steps of enforcement, permitting condominium corporations to levy fines in accordance with strict guidelines and requirements detailed further in this paper.
- **Regulation/Licensing/Accreditation of Property Managers**

The property manager is often described as the “gate keeper” to a condominium corporation. The Act accepts the premise that board members do not require any special skills or education. The Act goes on to provide that board members will not be held in contravention of their duty of care provided they rely on the opinion of a professional whose profession lends credibility to the opinion. However, in practice, board members often look first to property managers for direction and advice.

Condominium corporations are often marketed as turnkey living environments where all matters of maintenance, repair and general operation are taken care of for owners. Such a vision ignores the fact that board members are often volunteers from within the community. It must also be recognized that condominium corporations are becoming increasingly complex and, as condominiums gain popularity, it appears that the demands placed upon those that manage and control the property increase accordingly.

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Regulation of property management is a key factor in managing conflict. Currently, there is no regulation of property management. Anyone can hold himself or herself out as a professional property manager regardless of education, background, criminal record, *et cetera*.

Unit owners who look to property management for advice and direction need to be able to rely upon a minimal standard of qualification and competence, together with some level of accountability. There must be both accountability on the part of the property manager and protection on the part of the unit owner in the event that a condominium is defrauded or mismanaged.

To this end, the sub-committee recommends the following;

1. Mandatory licensing and accreditation;
2. Mandatory continuing education;
3. Mandatory insurance; and
4. A regulatory body to regularly review the needs of the condominium community and the role of condominium property managers with the ability to carry out spot audits, particularly in terms of the use of condominium monies.

As with other regulated professions, there must exist an opportunity cost or some form of accountability for a property manager and/or property management company that acts in contravention of the established rules of conduct.

In respect to mandatory insurance, there should be an obligation to maintain and file annually proof of coverage in an amount equal to the combined reserve funds of all condominiums managed by the particular company. With recent allegations of fraudulent activity conducted by property managers gaining prominence, mandatory insurance (and a means to verify that same is in place and in good standing) will provide condominiums with a degree of comfort and security in this respect.

Currently, those property managers or companies that invest heavily in education and establishing effective and proactive policies and procedures are forced to compete with those who do not. The result, unfortunately, is an incentive for property managers to lower their standards of practice.

A regulatory body that governs and oversees property managers to ensure that minimal qualification and criteria is met will serve to protect condominiums by imposing accountability and requirements to operate with certain minimal levels of knowledge and qualification. Such regulatory body can maintain a database similar to the directory of lawyers maintained by the Law Society of Upper

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Canada that condominiums can access when hiring a property management company to verify qualification, insurance coverage, *et cetera*.

It has been suggested that the licensing of property management will result in a shortage of property managers to service the industry. This is likely a short-sighted view of what would occur. Currently, there already appears to exist a shortage of talented and effective property managers. The simple economic model of supply and demand would suggest that the temporary shortage, where supply would not meet demand, would result in an increase in price. The increase of price would encourage more managers to qualify such that the balance would be re-achieved. It can also be hoped that the increase in cost will draw into the industry more talented property managers and, in turn, may weed out those who should currently not be in the profession.

Cost

While it would be anticipated that the regulation and licensing of property managers would require cost being incurred, an annual licensing fee on the part of individual property managers could offset such costs. Also, fees can be charged to those carrying out due diligence prior to hiring a manager by accessing the database to confirm the status of licensed property managers.

▪ **Annual Filings by Condominium Corporations**

Currently, when a unit owner fails to comply with the Act, the condominium corporation has an obligation to effect compliance. To do so, the condominium corporation may rely upon its financial resources, being the cumulative financial resources of all unit owners, including that of the unit owner against whom enforcement measures are being undertaken. The opposite does not hold true when a condominium corporation fails to comply with the Act.

When a condominium corporation, as directed by its Board of Directors, fails to comply with the Act, a unit owner may often face financial challenges in seeking compliance by the condominium corporation. We have already addressed the need for the BATNA for the condominium corporation and the unit owner to be equalized.

Much conflict involving condominium corporations and unit owners pertains to finances. To this end, we would submit that much of this conflict may be managed by requiring condominiums to submit annual filings demonstrating compliance with the Act with respect to finances and identifying those with care and control of the condominium corporation.

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Information Included in an Annual Filing

The sub-committee recommends that all condominiums in Ontario be required to submit a filing on an annual basis that includes:

1. The names of all directors and officers of the corporation;
2. The address for service of the condominium;
3. The name of the professional property manager. Alternatively, if the condominium is self managed, the name of those individuals assuming managerial responsibility;
4. The date of the last Annual General Meeting and confirmation that one was held within six (6) months of the condominium corporation's fiscal year end;
5. A copy of the last Form 15 pertaining to the reserve fund;
6. A copy of the condominium corporation's last audit;
7. A copy of the condominium corporation's most recent budget; and
8. Confirmation of education requirements of directors (discussed below).

The purpose of such a filing will serve to confirm that: (i) Annual General Meetings are held as required; (ii) reserve fund studies are being carried out and funded in accordance with the study; (iii) budgets are being drafted that do not result in repeated and ever increasing operating account deficits; and (iv) if recourse is required, the names of those responsible for the decisions are available. In addition to placing an onus on condominium corporations to address these requisite matters, such filings will also provide a resource for potential purchasers of condominium units in respect of due diligence and understanding what they are buying into and serve to give comfort to unit owners who may be able to make inquiry as to the keeping of such records to ensure compliance with the Act.

Much of this information should be available in a Status Certificate *if* the condominium corporation is being properly managed. If a Status Certificate is deficient, the failure on the part of the condominium corporation will likely not go beyond the "would-be" purchaser. The failure of a condominium corporation to provide a Status Certificate is often indicative of more serious concerns; however, it is conceivable that such concerns are rarely, if ever, addressed in a timely manner. The annual filing may result in both greater awareness and accountability, and will create a more permanent record of what occurred, when it occurred, and who was responsible at the time.

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Regulatory Body

With a view to avoiding any perceived onus on the government to monitor or react to information provided or not provided in respect of required annual condominium filings, the sub-committee recommends utilizing a regulatory body and process similar to that of the Law Society of Upper Canada concerning the required annual filings of lawyers in Ontario. Such regulatory body would issue automated notices with respect to filings and maintain all information provided therein. In the interest of furthering transparency, a condominium corporation's auditor (or the CDRO) can verify that the filing has taken place, and can confirm this within the notes to the audit (in a manner similar to confirm that a reserve fund study has been carried out). The auditor would not be asked to verify the substance of what is filed.

Cost

It is inevitable that such filings will require costs to be incurred in respect to both administration and maintenance of a database of such filings and to carry out periodic reviews and possibly audits. We would submit that an annual filing fee to be paid by the condominium would serve to off-set such costs and propose an annual filing fee formula that ties into the size of the condominium. A minimum fee would apply for all condominiums, that fee to increase on an interval basis based upon the number of units comprising the condominium. Similarly, costs could be recovered when interested parties seek disclosure of what has been submitted in annual filings, as is the case when one obtains a Corporate Profile Report for an Ontario business corporation.

If the goal of managing conflict (and avoiding larger disputes) is achieved, it is hopeful that any cost associated with the annual filing will be seen both as nominal and as a worthwhile investment in the wellbeing of the condominium.

Access to Information

The annual filing will result in a "registry" of condominiums for the province. To this end, and notwithstanding that most or all of this information is available through other means, further discussion will need to take place concerning the balance benefit that access to this information would achieve versus minimize the potential for abuse (for example, any use outside the purposes of the Condominium Act).

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Failure to File

Failing to comply with the annual filing requirement would constitute an offence under section 137 of the Act.

▪ **Ombudsperson**

“I define an internal ombudsman as a neutral or impartial manager within an organization, who may provide informal and confidential assistance to manager and employees in resolving work-related concerns; who may serve as a counsellor, informal go-between and facilitator, formal mediator, informal fact-finder, upward-feedback mechanism, consultant, problem prevention device and change agent; and whose office is located outside ordinary line management structures.”³

In the ideal condominium environment, establishing an ombudsperson within a condominium corporation is logical. To a limited and informal degree, the property manager acts as ombudsperson, acting as a liaison between unit owners and board members. The installation of an ombudsperson is not unheard of in condominium corporations; however, it is certainly very rare in Ontario. Where there has been designation of an ombudsperson in a condominium corporation, the role is often assumed by a director who may have some familiarity with the duties and skills demanded. Even in this instance, the ombudsperson is perceived as an extension of the board or management, and likely viewed with distrust by an owner who may be at odds with the Corporation.

A provincial ombudsperson – or office of – is certainly a goal to work towards; however, same would require extensive organization (and cost). Having an ombudsperson at a provincial level would foster a sense of independence and transparency, and would certainly overcome cost related hurdles that would be faced by smaller condominiums.

To be effective, however, the findings of an ombudsperson must be given a great level of deference – or put otherwise, there must be a downside to ignoring the finding. Annual filings by a condominium are a first step in this regard. It is conceivable that the office of the ombudsperson could take the initiative to add information to the filing if necessary (for example, a rating system), which in turn could add value to the database in carrying out due diligence. Increasing the relevance of the database could, in turn, create a higher level of accountability within an individual condominium.

³ Rowe, M.P., *The Ombudsman’s Role in a Dispute Resolution System*, (1991), 7 Negotiation Journal 353.

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▪ **Mandatory Education of Directors**

Currently, there is no mandatory education required of condominium directors. Despite the understanding that directors often become educated in the course of carrying out their roles and duties, the democratic process is not intended to ensure the election of an incumbent director. Further, the number of willing volunteers to sit as directors on the Board varies by condominium; some communities have a large demand while others a shortage of available potential Board members. The turnover of persons serving as directors creates an environment where it is difficult to assume any minimal level of knowledge and experience in relation to any condominium board.

The sub-committee recommends the following with respect to education of directors:

1. Within one (1) year of being elected to the Board, directors are required to complete educational courses designed for condominium directors and attend continuing education courses within one (1) year following any subsequent re-election(s). CCI currently offers regular courses specifically designed for condominium directors. CCI could be asked to set criteria for equivalency courses offered by others. As it is typical for condominium directors to be elected on a rotational basis, this can be structured in such a manner as to allow for the Board as a whole always to have educational requirements to adhere to (i.e. for a condominium operating on standard three-year rotation, approximately one third of the Board would attend educational courses in any given year);
2. A time limit must exist for such educational courses to be completed in order to gauge compliance;
3. Confirmation of compliance with these educational requirements must be provided annually to the condominium corporation's liability insurer, failing which, the condominium corporation would be required to pay an additional premium to obtain director and officer liability coverage. Alternately, insurers can be encouraged to discount a condominium corporation's liability insurance and/or directors' and officers' liability insurance on receipt of confirmation of compliance;
4. Confirmation would also be recorded in a condominium corporation's annual filing; and
5. Where a condominium is self-managed, all directors should be required to attend condominium related courses on an annual basis.

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Cost

Any costs incurred will be borne by the condominium in paying for the educational courses and/or the increased insurance premium.

▪ **Education of Unit Owners**

It is an often heard complaint that unit owners do not realize what they have bought into when they purchase a condominium unit. With new forms of condominiums gaining prominence, such as the common element condominium, it also occurs that individuals purchasing properties such as POTLs (parcels of tied land) do not realize that the title to their home is attached to an ownership interest in a condominium.

A thorough review of a Status Certificate involving the prospective condominium unit purchaser is often not carried out, likely due to the cost associated with same. Notwithstanding this, it has been suggested within the real estate bar that off-title searches such as the Status Certificate review form the most important aspect of due diligence in the purchase of a condominium unit.

The sub-committee suggests the following:

1. That an educational pamphlet be developed and made available to all real estate lawyers;
2. All real estate lawyers be obligated to review the pamphlet with purchasers of condominium units; and
3. Purchasers of condominium units be required to acknowledge having received the pamphlet and same explained to them by their lawyer.

Currently, real estate lawyers are obligated to follow a similar approach with respect to title insurance and mortgagees also often require similar acknowledgements in respect of standard charge terms.

This procedure should ensure that a minimal level of understanding in respect to condominiums is achieved. It should also serve as a possible reference to the real estate lawyer to draw attention to certain unique aspects that may be relevant in the deal with the hand (for example, a standard unit definition that adopts only the unit boundaries may impact the interest of both the unit owner and his or her mortgage in terms of insurance coverage).

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- ***Early Neutral Evaluator (ENE) / Non-Binding Evaluation***

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 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 both their own and opposing positions and interests. While such an opportunity certainly exists when one retains legal counsel, an understanding of the unique nature of condominium disputes (i.e. the requirement of the condominium corporation to comply with the Act, caselaw, etcetera) can best assist the parties in understanding both their own BATNA and the realistic plausible outcomes to the dispute.

“An evaluator’s primary goal is to change litigants’ assessments of the strength of their adjudication alternatives. Often both sides in a legal dispute honestly believe that they are likely to win in court... People’s judgments are also influenced by their roles in litigation, an effect known as advocacy distortion...Evaluation can thus help disputants overcome the impact of selective perception, advocacy bias and other factors that distort parties’ assessment of the merits...An evaluation can also satisfy psychological needs. It may give litigants the emotional experience of having a day in court, in which they can present their arguments to a neutral person...If bargainers realize that concessions are necessary, but do not want to move from entrenched positions without having a rationale, an opinion can provide the necessary psychological cover...Finally, evaluations can help to resolve internal disagreements within a bargaining team, for instance by assisting a litigator who sees serious risk in a case persuade an unrealistic client of the need to settle.”⁴

While the ENE process or the evaluation process has been criticized, these concerns are marginalized in “lesser” condominium disputes. If negotiations are proceeding, it is unlikely that the ENE process will be considered. However, if negotiations should breakdown, the fact that the ENE process is reliant on “summaries of legal argument and witness statements” is not dissimilar to how the application process works.

“ENE offers the best of all worlds. It requires parties to explore all the appropriate ADR options after the dispute has arisen without trying any party in advance to any inappropriate option. ENE provides a safe harbour within which parties who might not otherwise be amenable to ADR can ponder the possibilities. Uncertainty causes so many lawyers to stick with the well-worn path of litigation. Others may conservatively limit their alternatives to the now

⁴ MacFarlane, J., *Dispute Resolution – Readings and Case Studies, 2nd Edition*, (Toronto: Emond Montgomery Publications Limited, 2003) at pgs. 559-60.

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familiar binding arbitration or facilitative mediation...One way to prudently broaden the horizons is to specify ENE, rather than arbitration or mediation, in commercial agreements. In such a program, the ENE provision would require appointment of a neutral who would:

- (a) evaluate and assist the parties with settlement initiatives;*
- (b) provide an early dose of reality by helping each party better understand how its case plays to a disinterested by knowledgeable observer;*
- (c) offer expert information about the ADR techniques available for resolving the dispute;*
- (d) specify and administer discovery, if appropriate, to better position the case for resolution;*
- (e) assist the parties in developing meaningful factual stipulations, if appropriate.”⁵*

Smaller communities are often concerned with a lack of “expertise” available to condominium corporations, be it legal, engineering, or auditing.

“In choosing a neutral evaluator, the parties will likely place paramount consideration on subject-matter expertise, reputation, and credibility. Familiarity with relevant law, industry practice or technology, and knowledge of how the industry or parties themselves have previously addressed similar issues may all be relevant...The participants’ impression that the evaluator listened carefully to them and understood their perspective increased their satisfaction with the process. The evaluator’s ability to facilitate communication ranked equally with their ability to analyze legal issues. Another highly regarded attribute was the evaluator’s interest in exploring creative solutions.”⁶

“The core of the ENE conference is the expert’s evaluation of factual and legal issues. It is a law-and-evidence-driven process. The core of a mediation is the parties own identification of their interests with the assistance of a non-judgmental neutral, who may or may not have expertise in the dispute’s subject matter. There are, however, many shared aspects: they are confidential, private, and non-binding; the neutral does not have the authority to impose settlement; and the neutral identifies areas of agreement, clarifies areas of disagreement, processes the parties’ information, and facilitates discussions. It is easy to see why many ENE sessions become mediations...At its essence, ENE provides litigants with a confidential meeting between the parties, their lawyers, and an experienced, respected, neutral trial lawyer. The combination of a face-

⁵ Hellmuth, T.H., *Using ENE as a Gatekeeper Dispute Resolution Process*, (1995), 13 Alternatives to the High Costs of Litigation, 99.

⁶ MacFarlane, J., *Dispute Resolution – Readings and Case Studies, 2nd Edition*, (Toronto: Emond Montgomery Publications Limited, 2003) at p. 565.

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to-face meeting and a review in the presence of a senior litigator provides the incentive for a realistic case assessment.”⁷

Use of an ENE may also serve to overcome this challenge. Through modern means of communication, there is no reason why an appropriate “expert” cannot be found to evaluate a given problem. The parties prepare documentation similar to documentation required in a summary application, and the CDRO would then consider and offer an evaluation on it. Through the ENE process, an all-party conference could also be beneficial in order to make further inquiry of the parties and to “...engage in “reality testing” where they act as devil’s advocates, pressing the parties toward more realistic assessments of the situation through hard questioning and pointed hypothetical examples.”⁸

As the evaluation is non-binding upon the parties, the ENE process would satisfy the current requirements in the Act that arbitration not take place until at least 30 days after the mediator determines that the mediation has failed. If the parties were to decide to accept the finding of the evaluator, some form of enforcement mechanism would need to be established in order to ensure compliance with the settlement without having to “re-litigate” the dispute.

▪ **Application of Fines**

The concept of “fines” was much debated among sub-committee members. Those in favor looked at fines as a low-cost self-help solution when dealing with those conflicts which are more minor in nature (such as, illegal parking, stoop and scoop violations, *et cetera*). Those against cited the risk of fines being used in manner which could be oppressive and inconsistently applied towards individual residents.

Ultimately, this sub-committee recommends the use of fines, subject to certain restrictions and limitations. For example:

1. The condominium corporation must issue a minimum of two (2) written warnings to the unit owner, the subject matter of which must go unsatisfied before a condominium corporation is permitted to levy a fine;

⁷ MacFarlane, J., *Dispute Resolution – Readings and Case Studies, 2nd Edition*, (Toronto: Emond Montgomery Publications Limited, 2003) at p. 586.

⁸ MacFarlane, J., *Dispute Resolution – Readings and Case Studies, 2nd Edition*, (Toronto: Emond Montgomery Publications Limited, 2003) at p. 559.

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2. The condominium corporation must satisfy a minimal evidentiary burden (i.e. first hand documented evidence of the violation by board members, officers, property managers, *et cetera*, or other persons involved in the operation of the condominium);
3. Application of fines will be for a limited number of conflicts to be established in the particular condominium corporation's rules such that same can be debated, and, if necessary, voted upon by the community (i.e. each community can to a degree customize the types of violations which may be subject to fines);
4. Maximum fines to be set by Regulation; and
5. The unit owner will be given an opportunity to appeal or challenge the fines; failing which, the fines would become payable as a common expense against the owner's unit.

Drawing upon the concept of the condominium corporation effectively operating as a fourth level of government and recognizing that each community is unique, we look to achieve balance by requiring a condominium corporation to pass rules authorizing fines. In this way, the community can become involved and vote on the issue if it is felt to be necessary.

Mandatory warning letters and appeal rights would protect the interests of the individuals. All written warnings would be required to be issued by regular and registered mail to the address for service of the owner that appears in the condominium corporation's records.

The customizable provisions in respect of fineable offences would be set out in the rules of the condominium corporation. Permitting this degree of customization in respect of fines by each condominium serves to acknowledge the uniqueness of each community and, consequently, to highlight this uniqueness to the general public, raising awareness as to the importance of prospective purchasers and unit owners being familiar with their condominium corporation's declaration, by-laws and rules. It also supports the notion of the condominium corporation as a fourth level of government described above and provides condominium corporations with the "missing" tools necessary to carry out certain basic functions pursuant to their obligations to manage and control the property.

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5. DR Models for consideration and manner of assessment.

In Appendix B to this paper, we have outlined several existing DR models and have assessed the pros and cons of each, these include:

- i. The model under the current *Condominium Act*, 1998, S.O. 1998, c.19
- ii. The hypothetical “Bureau” model
- iii. The proposed Bill 72, Property Owners’ Protection Act model
- iv. The current Nova Scotia model
- v. The current British Columbia model
- vi. The proposed Bill 44 British Columbia model
- vii. The current Tarion model

Weighing and debating the pros and cons of each, and without discounting the obvious, the sub-committee did not feel that any of these models adequately addressed the interest of condominium corporations and unit owners in resolving disputes.

To be effective, the DR model must balance:

1. Accessibility to those who need it;
2. Fairness to those who use it; and
3. Respect by those who rely on it.

Possible further criteria would include the ability to create strong decisions which can be relied upon both for precedential value in future conflicts and with the view to managing future conflicts so as to avoid their escalation.

For example, the current **Nova Scotia model** excels in terms of accessibility, but falls short in other respects. As the Condominium Dispute Resolution Officer acts as an arbitrator in making the decision, there is a missed opportunity to manage and/or diffuse a conflict before it is permitted to escalate. There is no effort made to involve the parties in finding a resolution through education, mediation or conciliation. The cost of entry to participate in a dispute is very low, which may encourage excessive claims being made regardless of merit. Accordingly, the overall cost to manage this model risks becoming excessive. The Condominium Dispute Resolution Officer has the ability to hold a hearing or make a decision based on a written record. A party may appeal based only on an error of law. An error of fact is not appealable. Given that the Condominium Dispute Resolution Officer acts as arbitrator and can impose a binding resolution, it would also be preferable to allow appeals based on fact and law, with a higher standard of review on issues of fact, to ensure that the parties have a venue in which mistakes can be corrected.

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The **proposed British Columbia model** should excel in terms of accessibility. There is also an effort to keep the model simple and informal (for example, by excluding legal counsel) and the publication of decisions should serve as a valuable resource. However, the proposed British Columbia model similarly fails to provide for an appeal on an issue of fact. In view of this, it is conceivable that errors could be made on the findings of fact that would form the basis of the decision with no rights given to the parties to appeal that issue or seek correction. To compound this concern, the parties may not have legal representation present, thereby taking away each party's right to counsel. Similarly, as the cost to participate is minimal, this could result in an over-abundance of unmeritorious claims. In view of the fact that this model is publicly funded, the cost could become excessive.

The Bill 72 - Property Owners' Protection Act model appears largely based on the Bureau model. In advocating the dissemination of the information and provision of training, the model suggests that the government should assume responsibility for payment for a role already undertaken and paid for through the private sector. For example, as explained out earlier, the Canadian Condominium Institute ("CCI") provides educational courses for directors and the Association of Condominium Managers of Ontario ("ACMO") provides educational courses for property managers. Publications such as the *Toronto Star* attempt to provide information to the public at large.

The sub-committee members are particularly wary of the formation of another tribunal. Past experience with tribunals has given rise to concern with respect to bias, inconsistent decision making, inconsistent application of precedents, and the risk of excessive unmeritorious claims being advanced due to lack of opportunity cost, particularly if the government is funding proceedings. Ultimately, it is felt that Bill 72 will serve the short-term interest of the individuals at tremendous cost to condominium communities and the government. Accordingly, the sub-committee members are adamant that a balance must be struck between ensuring that dispute resolution is accessible and ensuring that an opportunity cost is involved

Condominium Act, S.O. 1998, c.19

Many of the pros and cons of the current Ontario model have already been discussed in this paper. The current model can be cost prohibitive which impacts accessibility and results in parties often resorting to court for relief. More important, however, is the fact that it fails in providing any attempt to manage conflict and/or to provide an early neutral valuation of the conflict. From a functional perspective, perhaps the greatest concern pertains to the lack of any procedural steps with respect to the mediation and arbitration process. Arbitration, in its purest sense, offers little predictability with respect to

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the value of legal precedent. Finally, as the mediation/arbitration processes are private in nature, they offer no precedential value towards managing and resolving future conflicts.

In assessing the various models, and in considering conflicts and conflict resolution as same pertain to large urban centers, mid urban centers, rural centers, vacation centers, *et cetera*, the sub-committee has developed the following two (2) models for consideration.

The sub-committee feels that an acceptable balance has been achieved with respect to accessibility, fairness and respectability by those who use and rely on it, while at the same time, managing any potential increase in government cost.

As between the two models presented, our preference is Model #2.

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Model #1 – Tweak the Status Quo

Model #1 should not result in any additional cost to the government with the exception of the conflict management initiatives described earlier in this proposal and the maintenance of a roster of mediators qualified in condominium disputes.

Model #1 fine tunes the current Ontario model in addressing the current model's primary shortcomings:

1. Condominiums will be permitted to establish rules authorizing fines in accordance with strict guidelines;
2. Most disputes will proceed to mandatory mediation. Exceptions will be limited (for example, accusations of violations of Section 117 of the Act – where a condition or activity that is likely to cause injury or damage property proceed directly to court);
3. The mediation process will be structured and clearly defined under the Act;
4. All resolutions, whether through mediation or otherwise, with the exception of those which are court imposed, must comply with the Act and follow legal precedent when presented;
5. A mediated or arbitrated resolution may be presented as evidence in court, but is otherwise private and confidential, serving no precedential value; and
6. If mediation fails, the parties may proceed to court unless all parties agree to proceed by way of arbitration.

The mediation process is mandatory for most disputes and will be structured. Mediation must take place within the confines of the Act. It is to occur within a short time frame unless otherwise agreed to by the parties to the dispute. While it is sometimes the case that one or both parties are not interested in the mediation process, any delay resulting from the mediation process proving unsuccessful should not undermine the overall interest of resolving the dispute expeditiously. The parties can agree to vary the structure and/or timing if this is felt to be beneficial.

Qualified Mediators and Arbitrators

A roster of mediators and arbitrators qualified to address condominium disputes is maintained, and all condominium disputes proceeding to mediation or arbitration must be heard by a member of the roster. Qualification will ensure familiarity in the Act. It is proposed that the roster be maintained by the Provincial Government or a province wide entity such as Canadian Condominium Institute (CCI). The Provincial Government and/or CCI should establish an accreditation process for mediators and arbitrators

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who, in turn, will pay an annual fee to off-set the cost of maintaining the roster and verifying that a qualification standard is met.

Mediation Costs

When a condominium dispute arises, even if proceedings are commenced by a unit owner, the condominium corporation will, at first instance, pay the cost of the mediator. Ultimately, the parties to a dispute are equally responsible for the mediation costs, subject to any resolution surrounding same; however, having the condominium provide or pay these fees initially will avoid delays and facilitate access to the mediation process. The proportion of fees payable by the unit owner, subject to any other resolution pertaining to same, will ultimately be recoverable in the same manner as common expenses.

Mediation Avoidance

Mandatory mediation may only be avoided with the parties proceeding directly to court in limited circumstances (such as, a breach of Section 117 of the Act - being a condition or activity that is likely to damage property or cause injury to an individual).

Failure of Mediation

If mediation fails, the parties can proceed directly to court unless the parties unanimously agree to proceed by way of arbitration.

Arbitration

As with mediation, arbitration must be overseen by a qualified member of the roster maintained by the Provincial Government and/or CCI. Arbitration is not mandatory and will only proceed if all parties are in favor but must abide by certain guidelines:

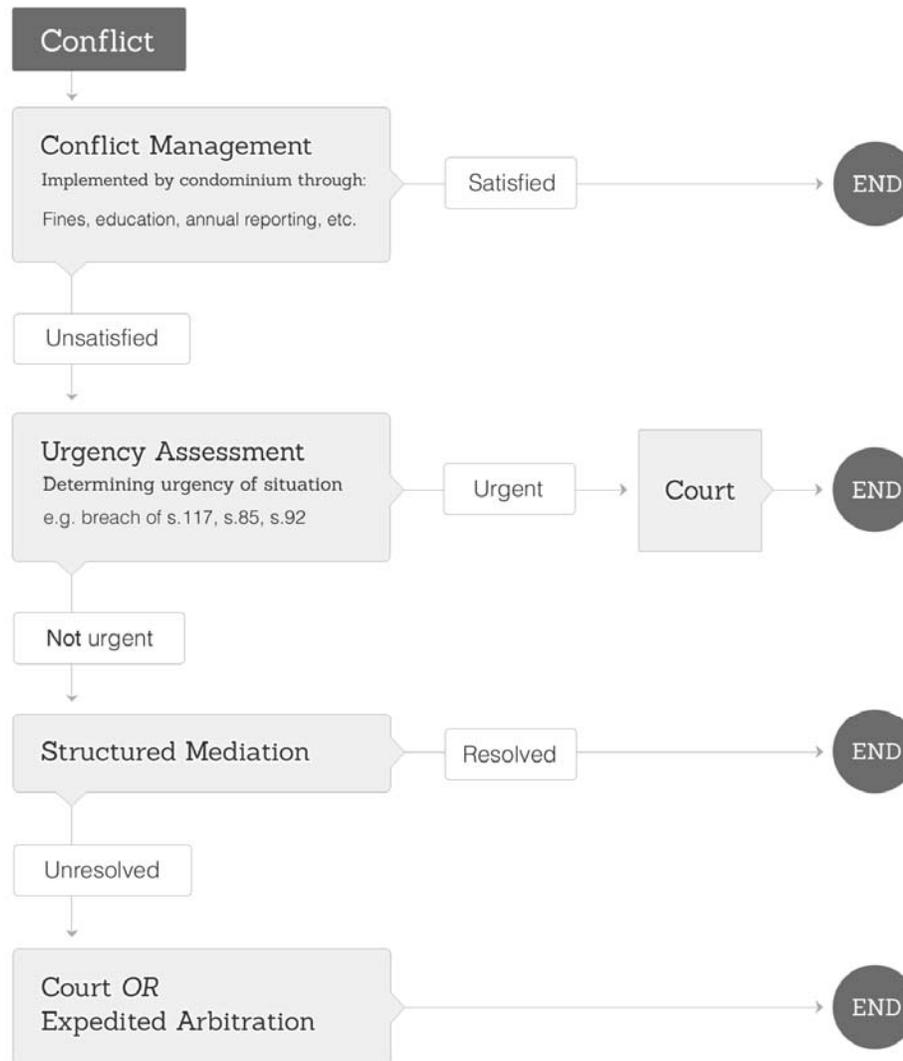
- Arbitration awards must comply with the Act.
- The arbitrator must consider and respect all legal precedents presented, assess their applicability, and directly address all presented legal precedents in the written decision.
- The arbitration award is enforced with the same manner as a court order.
- The arbitration award is not confidential between the parties unless the parties agree to same.
- Arbitration awards may be appealed on the basis of an error in law.

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Indemnity of Costs

Subsection 134(5) of the Act, shall provide for the full indemnity of costs will be maintained and apply to both court and arbitration proceedings. It will serve to provide relief to all successful parties to a dispute, whether the successful party is a condominium corporation or unit owner⁹, plaintiff or defendant.

Schematic of Application – Model #1



⁹ This is imperfect relief for a successful unit owner insofar as the owner must still pay his/her proportionate allocation through common expenses.

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Model #2 - Introduction of the Dispute Resolution Officer

Model #2 adopts similar procedures as those set out in Model #1 with a preamble which recognizes the importance of an early neutral evaluation in providing a “reality check” to the parties and the opportunity of same preventing the escalation of disputes.

Condominium Dispute Resolution Officer

At the annual general meeting, the owners of the condominium corporation appoint a Condominium Dispute Resolution Officer (“CDRO”) in a similar manner to which owners currently appoint an auditor. The CDRO is chosen from a roster (maintained by the Provincial Government or a province wide entity such as CCI) to ensure that they are appropriately qualified, in a similar manner to the roster of mediators and arbitrators set out in Model #1.

To promote neutrality, the condominium corporation will be provided with the “next three names” on the roster from which to choose in appointing the CDRO. The appointment would be for a three (3) year term (so as to avoid impact by political influences), unless terminated earlier by unit owner vote. A three (3) year term should also serve to make the ENE process more efficient understanding that each condominium has a unique Declaration, By-law and Rules. Further, a longer term will allow the CDRO an opportunity to better understand the “culture” of, and have better affinity with, the particular condominium corporation. The CDRO would remain in place until his/her successor is appointed.

The CDRO should, in most cases, be protected from liability by the particular condominium corporation. Options include separate liability insurance, being considered as an officer of the condominium corporation for the purpose of director and officer liability coverage, and an obligation by the condominium corporation to indemnify and hold harmless the CDRO from cost or liability.

The CDRO must have a strong familiarity with the Act and preferably hold an ACCI designation. CCI should be encouraged to create a new designation specifically for condominium CDROs although, initially, it is likely that lawyers or property managers with the ACCI designation or members of the ADR Institute of Ontario with a C. Med. or C. Arb. designation¹⁰ could act in this role.

¹⁰ These are the only national designations recognized by government for ADR and are required to carry E & O insurance; however, these designations do not provide any assurance of condominium knowledge. A specific designation for the mediation/arbitration of condominium disputes is preferred

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Non-Competition/Conflict of Dispute Resolution Officer

The CDRO must be entirely independent of the condominium, the Board of Directors, property management, and any other party involved in the conflict.

Sub-committee members expressed concern that a CDRO could act in a self-serving manner to gain the benefits of additional industry contacts and/or business from the condominium community. To safeguard against this and to maintain neutrality, it is recommended that, upon appointment, every CDRO be required to enter into a standard form of agreement with a condominium corporation that sets out his or her duties of care, neutrality, and disclosure in respect to any potential conflict and include the equivalent of a non-competition/solicitation agreement whereby the CDRO agrees not to act for or contract with the condominium corporation for a minimal period of at least two (2) years after the CDRO appointment ceases.

Early Neutral Evaluation

The CDRO will provide an Early Neutral Evaluation (ENE) on a non-binding and confidential basis to the parties of the dispute – informal and fast! The purpose of the ENE is to act in a timely way in educating the parties as to the requirements of the Act as well as the Declaration, by-laws and rules of the particular condominium, to facilitative communication, and, if thought necessary, to provide an objective evaluation of the merits of the conflict. The CDRO will not advocate or provide legal opinions, and, for the most part, will be protected from liability.

It is expected that the CDRO can operate via teleconference or other Online Dispute Resolution technologies so as to ensure accessibility to areas of the province that may not have access to persons qualified to be a roster CDRO.

Cost

The CDRO will be paid an annual fee upon appointment that is structured in a similar manner as Ontario (and Toronto) Land Transfer Tax in that a base minimum amount will apply that is escalated at

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intervals based on quantity¹¹. In this case, the interval factor is the number of units that comprise the condominium corporation (where as Land Transfer Tax is calculated on the incremental purchase price of the property).

The annual fee will be included in the common expenses of the condominium corporation, recognizing that it is in the interest of the condominium as a whole to manage conflicts and avoid lengthy and costly disputes and a portion of same can be directed by the CDRO to the governing body maintaining the roster to off-set costs. The engagement fee must be high enough so as to minimize conflicts being put forward that are entirely without basis (which is the present situation with regard to the Human Rights Tribunal), but not so high so as to create a barrier to the legitimate use of the CDRO. The engagement fee would be paid by the “moving” party. In order to achieve the correct balance of annual fee and the engagement fee (discussed below) so as to promote the use of the CDRO, a government subsidy¹² to parallel the engagement fee should be considered.

The full cost of an ENE is not intended to be included in the CDROs annual retainer as same would excessively advance the goal of accessibility while creating undue risk by encouraging excessive unmeritorious claims thereby augmenting the cost and effectiveness of the product. Rather there is an opportunity cost to involving the condominium’s CDRO for two (2) hour block of the CDRO’s time by way of a set engagement fee.

CDRO Recommendation

The CDRO will not provide an opinion. If the ENE process fails to resolve the conflict, the CDRO will facilitate the progression of the conflict by guiding the next stage of the process as between mediation (or arbitration if all parties agree) or court and coordinating such steps which currently can serve to complicate, delay or add cost to the resolution of disputes (such as the selection of the mediator or arbitrator from the roster). While the default step would be to mediation, the CDRO may make an assessment of the feasibility of mediation and, if felt in the interest of the parties, recommend the parties

¹¹ Concerns have been raised within the sub-committee that a distinction in the retainer amounts based on the size of condominium may cause potential CDROs to favour larger condominiums over smaller ones. This will need to be assessed over time and adjusted as necessary.

¹² There has been much discussion in the last few years within the condominium community concerning the Fair Tax Campaign. The subsidy would result in the CDRO being compensated at a reasonable hourly rate and, at the same time, work to balance the tax burden/benefit between condominiums and other types of home ownership.

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to proceed directly to court to resolve the dispute. As between themselves, the parties may agree to proceed on the basis of expedited arbitration.

If a party refuses to mediate the dispute after the CDRO recommends same, that party should provide reasons for refusing to mediate. This approach will provide the CDRO and other party(ies) an additional opportunity to overcome any objections. If mediation is still refused, the CDRO shall prepare a brief report on the CDRO's recommendation to mediate, which report should consider such factors as:

1. The nature of the dispute;
2. The preliminary assessment of the dispute;
3. The extent to which other settlement methods have been attempted;
4. Whether greater good can be achieved by creating legal precedent;
5. Whether the costs of mediation would be disproportionately high;
6. Whether any delay in setting up and attending mediation would have been prejudicial to any party; and
7. Whether, in the opinion of the CDRO, mediation had a reasonable prospect of success.

The CDRO will be uniquely positioned to assess, on a preliminary basis, the parties and facts of the conflict vis-à-vis formal mediation.¹³ The CDRO's recommendation may be taken into consideration on the issue of costs if the matter proceeds directly to arbitration or court.

The process for mediation is to be structured with a specific set of rules to be established by Regulation. All means followed to achieve resolution, with the exception of court, must result in compliance with the Condominium Act, 1998 and must follow legal precedent (as presented).

Model #2 - Case Study:

A unit owner withholds payment of common expenses because of the owner's dissatisfaction with the state of repair of the common elements. The Corporation is facing financial hardship as a result of a previously unforeseen, but very costly, roof repair. The unit owner and a Board member have engaged in very public and heated arguments over the common element repairs.

¹³ It has also been suggested that the CDRO may also be able to screen those situations/parties where there may be a risk of violence.

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Current Model – Condominium Act, 1998 Applied:

- Non-payment of common expenses will result in a lien being registered against the owner's unit. All legal costs are secured under the lien. The Act is clear that a conflict with the condominium corporation cannot be used to justify non-payment. The unit owner will likely be required to pay all common expense arrears, all legal costs and late payment interest. Other costs might be involved if the unit owner's bank becomes involved and pays off the lien.
- The unit owner and the Board have probably antagonized each other such that a constructive discussion as to the financial state of the condominium corporation may not be possible, or, if it happens, the unit owner may view all that is said with distrust.
- Result – the conflict escalated unnecessarily. The unit owner was required to pay additional costs associated with the lien. The underlying issues/questions concerning the condominium corporation's finances remain unresolved, which would undermine the overall interests of the community (i.e. political instability, requisition meetings, etcetera...).

Model #2 Applied:

- The condominium has previously appointed its CDRO.
- The unit owner contacts the CDRO for assistance and pays the required fee.
- The CDRO educates the unit owner with regard to common expenses. Hopefully the unit owner begins payment again before the lien is registered and legal costs incurred. This should defuse and resolve this portion of the conflict. Rather than seeing the conflict escalate (as under the current model), the issues have been narrowed through education.
- The CDRO contacts the condominium corporation and sets up a meeting with the Board and the unit owner to discuss the state of repair. The CDRO facilitates the discussion (perhaps by asking the right questions). The discussion leads to the explanation of the unexpected roof repair, costs savings already achieved, etcetera.

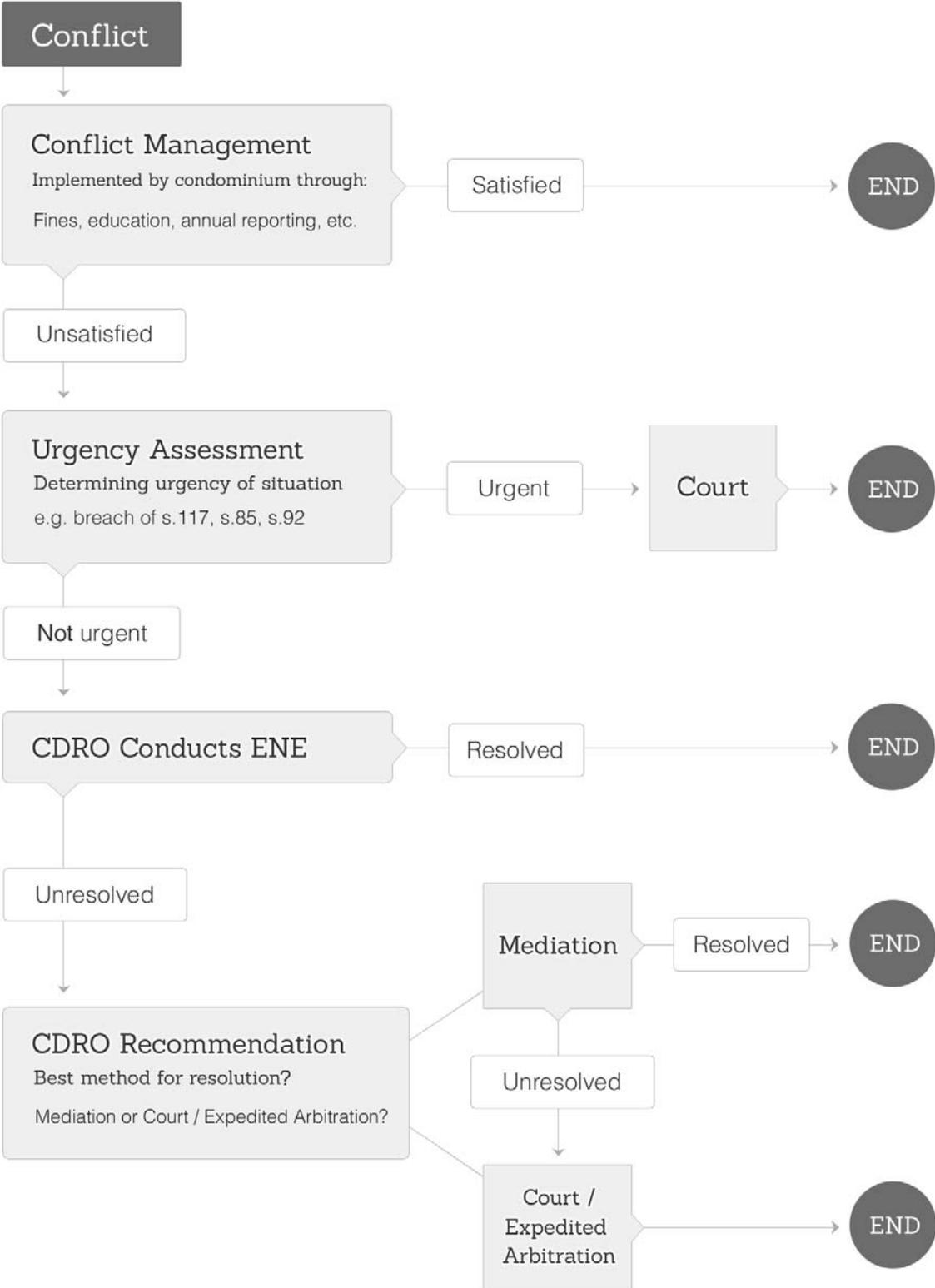
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- The unit owner points out areas in which he sees savings being achieved. These are discussed. Some are discounted. Others are held for further consideration/adoption.
- If all works out, the unit owner better understands the rationale in the Board's position/interests and the Board better understands the rationale in the unit owners position/interests. Both interests, as well as the greater community interest are advanced.
- Going forward:
 - New found trust may exist between the Board and the unit owner if they realize that their interests align in the advancement of the condominium corporation;
 - The Board may take better care to keep unit owners informed as to its financial challenges and limits, and to involve unit owners in making difficult decisions;
 - The unit owner may communicate his/her understanding to other owners who are similarly dissatisfied thereby further defusing the conflict. The owner may develop an interest in condominium governance and seek election to the Board of Directors.

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Schematic of Application – Model #2



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Appendix A – Bill 38 – Consultation Process - April 1996 to May 2001

Contrary to what is suggested by certain critics of the current Act, a public consultation process did take place, it as a relatively unrushed process (taking over two years to reach first reading), and actively sought input from many stakeholders. In the end, passage of Bill 38 received the support of all political parties.

In 1996, while the Act was still in bill form, the Hon. Norman W. Sterling, then Minister of Consumer and Commercial Relations used Bill 38 to experiment with a “new” consensus building process, which he described in the Legislature as follows:

“As you know, in April [1996] I introduced this working draft paper [Bill 38] and it has attracted much attention from all of the stakeholders involved with condominiums. My parliamentary assistant, Jim Flaherty, has been meeting constantly with these people over the past while. It has become apparent to Mr. Flaherty and myself that the May 15 deadline was unrealistic, so on May 17 we announced that we would extend the deadline to June 28 of this year in order for all the groups to have an opportunity to examine this very complex bill and to put forward their constructive suggestions so we can have a very, very good piece of legislation to put forward to the house...

...I do believe the more prudent action is to have further consultations this summer, and we will plan to introduce the legislation this coming September or October. It's interesting that the people who are participating in this process would much rather meet together as stakeholders, talk with each other and try to make compromises within a more or less formal atmosphere than is presently available in the legislative process.

I'm looking forward to seeing how this piece of legislation works out, and with regard to the possibility of following this new avenue with other pieces of legislation so that we can have the best possible legislation in the province, and with a lot of consultation, I hope not only from members of the public, but from members of this Legislature as well, not only on the back bench of the government but also from the opposition”¹⁴

As the Government and both opposition parties recognized the old Act as archaic, there was perhaps a climate that anything would be better than the status quo. However, the dispute resolution sections of Bill 38 in particular, appear to have been accepted, for the most part, as presented in the original working draft, with little or no input sought from, or offered by, the stakeholder groups.

Liberal MPP for Downsview, Ms. Annamarie Castrilli’s comments during the second reading of Bill 38 on the history, the problems, the process, and the perceived result that would come about with Bill 38, are generally representative of most other comments made in the legislature concerning Bill 38:

¹⁴ Hon Norman W. Sterling (Minister of Consumer and Commercial Relations) May 28, 1996, 36th Parliament, Session 2, Hansard 1440.

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"I just want to take a few moments to put this act in context. The Condominium Act was first introduced in 1967...The last amendments to the legislation were in 1979, so you can see that some 20 years have elapsed and the industry has certainly changed. There was an attempt in 1990, when our party introduced some draft legislation, which had some consultation, but, as you will remember, the election of that year put those plans on hold. Then the NDP, in 1992, introduced Bill 81, and it languished on the government agenda and was never passed...

Bill 38 was introduced in draft form in 1996. In marked contrast to what this government has done in previous legislation, it actually sent it out for consultation. It received some 200 submissions, which included everyone from individual owners to developers to condominium corporations to property managers to lawyers to bankers to anybody who had any kind of stake in the condominium industry. I think the issue has had a fair hearing... [my emphasis]

What has happened in the last 30 years, and more specifically in the last 20 years since we've had any major amendments to the condominium legislation, is that the industry has boomed. If you look at the statistics, most recently you will find that we now have some 36,000 condominium corporations registered with the Ministry of Consumer and Commercial Affairs, with some 288,000 residential units and 13,000 commercial units. So there's a real need to address the current reality and what has transpired in the last 20 years.

It is also of interest that during that period of time, from 1967 to the present, there has been a veritable boom as well of condominium litigation. That condominium litigation has arisen because of the ambiguities in the legislation,...They include everything from initial disclosure to purchasers and definition of common elements and ownership of and damage to common elements; the rights of specific condo owners vis-à-vis each other vis-à-vis the corporation vis-à-vis the developer; the rights of the corporations in that same instance; occupancy fees; and the list goes on....

The major provisions in the bill, therefore, are welcome. The industry wants clarity and stability. All the stakeholders require that for peaceful living...

...You want to be careful to strike the right balance. You want the condominium corporation to be able to do certain things, but also recognizing that you cannot ignore the rights of individual owners. We'll wait and see whether this legislation strikes the right balance, but I would say that at a minimum that's something that should be looked at.

In principle, I endorse this legislation, as indeed I think all of the stakeholders do. The consultation process has been admirable in this particular case. I think all the major issues have been flushed. They need to be monitored for the future, but I am happy to support this piece of legislation."¹⁵

¹⁵ Ms. Annamarie Castrilli (Downsview - Liberal) – Bill 38, second reading, June 25, 1998, 36th Parliament, Session 2, Hansard 2050-2100. The partial transcripts of Ms. Castrilli's comments (as a member of the opposition) have been reproduced as a general representation of the nature of the comments raised within the legislature. All parties supported Bill 38. The only contentious issue raised by the opposition pertained to the decision of the Conservative government to send Bill 38 to committee for further hearings, when the consultation process was viewed as already being much more extensive than was the norm. It may be worth revisiting Ms. Castrilli's statistics in light of the construction surge that has take place in recent years, and reflecting further in deficiencies and gaps that have become evident in the new Act since these comments were made seven years ago.

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Appendix B – Overview, Strengths, Weaknesses of comparative DR Models

Model 1 – Ontario Model, Condominium Act, 1998

Ontario's current legislation mandates mediation and, if necessary, arbitration in respect of conflicts that involve a dispute of facts but leaves the structure of same to condominium corporations to set out by way of by-law.

The current legislation allows a party to commence a court proceeding by way of application under section 135, provided that provisions of section 132 (mandatory mediation/arbitration) do not apply. Condominium corporations that successfully obtain an award for costs or damages equipped to secure payment of all additional costs incurred in collecting against the owner's unit by way of common expenses. This provides an advantage to condominium corporations in enforcement proceedings that is not provided to any other litigant in the court process. These provisions ensure that the owner who has committed the "wrong" is left to pay for the costs incurred to secure enforcement – and not the "innocent" unit owners.

Pros:

- *Embraces the notion of a party-controlled resolution*
- *Permits clear violations to proceed directly to court*

Cons:

- *Unequal BATNAs between the parties*
- *Inconsistent process (can vary by condominium)*
- *Costly*
- *Inaccessible – parties often look to court*
- *No "early neutral evaluation" or attempt to resolve conflict in early stages*
- *Arbitration offers no predictability or precedential value*
- *Arbitration is costly and s.134(5) does not apply to arbitration proceedings resulting in a further incentive to go to court where possible.*

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Model 2 – Bureau Model (Hypothetical)

The Ontario Condo Bureau model calls for the creation of a non-profit corporation without share capital (the “Bureau”) for the purpose of being the first stage in settling disputes between condominium corporations and owners, to report annually to the Ministry of Consumer and Business Services. The Bureau by-laws must provide for board representation by condominium owners.

The Bureau’s duties, as described by the 1990 Act, shall include:

- advising and assisting the public in condominium matters.
- assisting in the resolution of disputes between condominium corporations and unit owners and between two or more unit owners and for this purpose appointing review officers and paying their remuneration.
- disseminating information for the purpose of educating and advising condominium corporations and unit owners concerning condominium matters and the financial, operating and management practices of condominium corporations.
- assisting in the formulation and conduct of educational courses for property management [and Board members].

Bureau Model Review Process as per the 1990 Act:

The Bureau shall appoint review officers who shall perform the duties and exercise the powers given to them by the Act, under the supervision of the Bureau.

Upon any dispute between a corporation and an owner or between two or more owners in respect of the Act, declaration, by-laws or rules, any party to the dispute may, prior to the commencement of any court proceeding, refer the matter to the Bureau and notify all parties affected.

Within fourteen days of the referral, the Bureau shall give written notice to all parties of the date, time and place for the consideration of the dispute and designate a review officer.

The Bureau shall be funded exclusively through annual fee contributions by condominium corporations registered in the province.

Pros:

- *Educational component – included in Bureau’s mandate is to disseminate information and assist the public*
- *Accessible*
- *Funded by industry*
- *Knowledgeable party involved in the early stages of the dispute*
- *Potential for party-controlled resolution at the early stages of a dispute*

Cons:

- *Untested*
- *Undefined fee/funding structure*
- *Does not address non-residential units, tenants*
- *Challenge in balancing cost of qualified review officers and keeping costs down*
- *Not mandatory*
- *Not the best response to all scenarios*

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Model 3 – Bill 72, Property Owners’ Protection Act

Bill 72 has introduced proposed changes to the Condominium Act, 1998 that are intended to make condominium dispute resolution more accessible to unit owners and condominium corporations through the establishment of a Review Board.

Bill 72 still includes provision in Section 59(1) (0) to establish procedure with respect to mediation of disputes or disagreements between the corporation and the owners for the purpose of section 126 [expropriation] would like this part of Reserve Board.

Bill 72 revises 134 (1) by deleting “Subject to subsection (2)” at the beginning which means that an owner, an occupier of an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of leasehold condominium corporation or a mortgagee of a unit may continue to make application to Superior Court of Justice for an order enforcing compliance with any provision of the Act, the declaration, the rules, or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost sharing of facilities of any of the parties to the agreement.

Bill 72 – Part IX Enforcement 130 (1) and 130 (2) changes “Superior Court of Justice to Review Board. 130(4) repealed and substituted for:

Contents of Order –

(4) in the order the Review Board

(a) shall require the inspector to make a written report within a specified time to the applicant for the order and to the corporation on the activities that the order requires the inspector to perform; and

(b) may make an order as to the costs of the investigation or audit on any other matter as it deems proper

Bill 72 does include new section |Part V.1 Qualifications of Property Managers:

83.1 – No person shall act under an agreement for the management of a property owned by a condominium corporation unless the person is incorporated as a corporation, an individual employed by that person to act as a manager has the prescribed qualifications...including financial; maintenance, repairs and improvements; enforcement of and compliance with the declaration, by-laws, rules and applicable legislation; and other prescribed legislation

Subsection 94(1) of Act is repealed.

Reserve Fund Study:

The corporation shall conduct periodic studies to determine whether amount of money in the reserve fund and amount of contributions collected by the corporation are adequate to provide for the expected costs, as estimated by the corporation of achieving the purposes mentioned in subsection 93 (2)

The Review Board has particular objects relating to education:

- advising and assisting the public in matters relating to corporations
- disseminating information for the purpose of educating and advising corporations and owners concerning the financial, operating and management practices of the corporation

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- providing training with respect to matters specified in the regulations to those directors of boards who do not receive remuneration in their capacity as directors;
- assisting in formulation and conduct of educational courses for members of boards of corporations

Review Board shall appoint review officers who shall, under the supervision of the review board:

- perform the duties and exercise the powers given to them by the regulations
- perform such other duties as are assigned to them by the review board

A panel appointed by the review board shall mediate or arbitrate in respect of matters in respect of which an application has been made to the review board. An order is final and binding and may be filed with the Superior Court of Justice and enforced as if it were a court order.

Pros:

- *Educational component*
- *Accessible*
- *Opportunity for knowledgeable party to be involved in the early stages of the dispute*
- *Potential for party-controlled resolution at the early stages of a dispute*

Cons:

- *Untested*
- *Undefined fee/funding structure*
- *Who governs the qualification of review officers?*
- *Limited precedential value / predictability of results*
- *Little to no opportunity cost for Applicant*
- *Potential for bias*
- *Limited appeal rights*

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Model 4 – Nova Scotia Model

The disputes are heard by a Condominium Dispute Officer employed by Service Nova Scotia and Municipal Relations.

A condominium unit owner may apply for an order against a condominium corporation if there has been a failure of the condominium corporation to:

- keep accurate records, including financial records, and provide access to these records to an owner if he or she requests them.
- enforce the common element rules of the condominium corporation
- provide members of the condominium corporation with annual financial statements (audited, if there are 10 or more units in corporation).
- table the financial statements (audited, if there are 10 or more units in corporation) at an annual meeting of the condominium corporation board

An authorized representative of a condominium corporation may apply for an order, on behalf of the condominium corporation, against a condominium unit owner if the owner is breaching a by-law regarding:

- the use of units, to prevent unreasonable interference with the use of and enjoyment of the common elements and other units, or
- the use of the condominium common elements.

Other kinds of condominium disputes may be resolved through arbitration.

Anyone applying for a hearing pays a fee of \$114.33 and submits an application which must be served on the respondent.

The respondent must provide a response in writing to both the applicant and the Condominium Dispute Officer otherwise an order can be made without their input.

The Condominium Dispute Officer may choose to hold a hearing in person, or by teleconference or to decide the dispute based on the written submissions of the parties. The Condominium Dispute Officer will issue a written order which may be made an order of the Supreme Court, unless it is appealed.

The order may:

- Direct the condominium corporation to perform its duties under the Act, including providing records or enforcing common element rules
- Set the fees which can be charged for providing records
- Direct the owner to comply with a by-law
- Order a party to pay a penalty of up to \$500
- Order which party or parties should pay all or part of the application fee

Condominium Appeals Officers will be appointed to hear appeals from the decisions of Condominium Dispute Officers. The only reasons for an appeal are that the Condominium Dispute Officer made an error in law or jurisdiction (not fact). The appeal process is not to be a rehearing of the facts in the dispute.

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The applicant on the appeal (the appellant) is responsible for payment of the Condominium Appeals Officer's fees for hearing and deciding the appeal, unless the Condominium Appeals Officer orders the other party to pay all or part of the fees.

The Condominium Appeals Officer may hold a hearing in person or by teleconference or decide the appeal based on the written submissions of the parties, without holding an oral hearing. The order on appeal will:

- confirm, change or overturn the decision of the Condominium Dispute Officer, and
- order which party or parties must pay all or part of the application fee and the Appeals Officer's fees for hearing and deciding the appeal and writing the decision.

Pros

- *Simple process*
- *Fines available*
- *Defined qualifications for Condominium Dispute Officer and Condominium Appeals Officer (Arbitrator)*
- *Includes remedies against tenants (L&T Board)*
- *Short time frames*
- *Cost*
- *Availability of teleconference for hearings*

Cons:

- *Only in effect since September 2011 so no significant data to show if it is working*
- *Fines subject to abuse*
- *Arbitration rather than mediation or court*
- *Requires a high degree of government interest and involvement which may not be present in Ontario*
- *Funding*

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Model 5 – British Columbia Model (Current)

Under the legislation, the corporation may enforce a by-law or rule by imposing a fine, remedy a contravention under section 133 or deny access to a recreational facility. The corporation may not exercise any of these powers unless it: (i) has received a complaint about the contravention; (ii) has given the owner and/or tenant the particulars of the complaint in writing; and (iii) has a reasonable opportunity to answer the complaint including a hearing if requested.

An owner may request a council hearing (the Board), and the council must hold the meeting within four weeks of the request. If the council is to render a decision, it must give the applicant a written decision within one week of the hearing. The corporation must give notice as soon as is feasible in writing of their decision to fine, require a person to pay the costs of remedying the situation, or deny the person the use of a recreational facility.

Under section 133, the corporation may do what is reasonably necessary to remedy a contravention of a by-law or rule including doing work on the strata lot, the common property or common assets and removing objects from the common property or assets. The costs can be obtained from the owner or the tenant.

The corporation cannot begin court or arbitration proceedings for monies owing to the corporation unless it has given the owner or tenant two weeks written notice demanding payment and indicated that action may be taken if payment not received in two weeks. The same applies if the corporation wants to register a lien.

The corporation may refer a matter to arbitration if the dispute involves an owner or tenant and the dispute concerns the interpretation or application of the Act, regulations, by-laws or rules, the common property or assets, the use or enjoyment of the strata lot, money owing including money owed as a result of fine, an action or threatened action by or decision of the corporation or council in relation to an owner or tenant, the exercise of voting rights by a person who holds 50% or more votes including proxies at an annual or special general meeting.

Disputes cannot be referred to arbitration once a court proceeding has been commenced in relation to the same dispute or the court proceedings are stayed. The court is mandated to stay its proceedings unless it is satisfied that there is good reason to continue its proceedings.

Section 179 sets out the procedures for arbitration and how it begins. There are statutory forms which are used to initiate the process. Section 180 requires the arbitrator to notify the parties of the possibilities of a mediated settlement. The arbitrator's decision is final and binding except that a party may make an application for judicial review or appeal the decision to the court on any question of law if all parties consent or the court grants leave to appeal. The decision of the arbitrator is enforced in the same manner as a court decision.

The arbitrator can order a party to do something, refrain from doing something, or order a party to pay money as damages. The arbitrator may also make an order for costs. If the arbitrator's decision does not deal with the issue of costs a party may apply within 30 days for an order respecting costs. If no application is made for an order for costs, then, subject to any agreement to the contrary, each party must bear its own costs and share equally in the fees of the arbitrator.

An owner, tenant, mortgagee or interested person can apply to the court to order the corporation to perform a duty, stop contravening the Act, regulations, by-laws and rules or any order that is necessary to

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give effect to the above. The corporation can apply to court to obtain an order against an owner, tenant or other person to perform a duty he/she is required to do under the Act, by-laws or rules, stop contravening the Act, regulations, by-laws or rules or any other order necessary to give effect to the above.

The equivalent of the oppression remedy and appointment of an administrator require a court application.

Under the Regulations, the maximum amount that a corporation can set out for a fine is \$200 for each contravention of a by-law and \$50.00 for each contravention of a rule. The maximum fine that a corporation may set out as a fine for the rental of residential strata lot in contravention of a by-law that prohibits or limits rentals is \$500.00 for each contravention of the by-law. The maximum frequency that a corporation may set out in the by-laws for the imposition of a fine for a continuing contravention is every 7 days.

Under the Schedule of Standard by-laws the maximum fine for each contravention of a by-law is \$50.00 and \$10.00 for each contravention of a rule. It also states that a fine may be imposed every 7 days for continued violation. The Standard By-laws also allow for a dispute to be referred to a dispute resolution committee if all parties consent and the dispute involves the Act, the regulations, by-laws or rules. The dispute resolution committee consists of one owner or tenant nominated by the disputing parties and one owner or tenant chosen to chair the committee by the persons nominated. There is no limit of the persons on the committee provided that everyone consents. The purpose of the dispute resolution committee is to attempt to help the disputing parties to voluntarily end the dispute.

Pros:

- *Fines available / steps to prevent abuse / maximum amounts stipulated*
- *Timely resolution (council must hold meeting within 4 weeks of request, render decision in 1 week)*
- *Clear process*
- *Includes remedies against tenants*
- *Informal mediation available*
- *No government funding required as resolution process is privately paid or uses existing infrastructure of the court system*
- *Published decisions which allow precedents to be used to guide future behavior.*

Cons:

- *Fines*
- *Unbalanced powers of parties (condos can fine owners, owners cannot fine condos)*
- *No formal mediation procedures to attempt to resolve disputes before arbitration*
- *Requirement of complaint before proceeding*

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Model 6 – New British Columbia Model (Bill 44)

The Bill which has just passed first reading is intended to establish the Civil Resolution Tribunal. The tribunal will offer people an alternative to court proceedings for resolving disputes that are within the authority of the tribunal.

The Tribunal will be geared to deal with small claims court matters and strata disputes. As described in the Bill, the mandate of the tribunal is to provide dispute resolution services in relation to matters that are within its authority, in a manner that:

- is accessible, speedy, economical, informal and flexible,
- applies principles of law and fairness, and recognizes any relationships between parties to a dispute that will likely continue after the tribunal proceeding is concluded,
- uses electronic communication tools to facilitate resolution of disputes brought to the tribunal, and
- accommodates, so far as the tribunal considers reasonably practicable, the diversity of circumstances of the persons using the services of the tribunal.

In fulfilling its mandate, the role of the tribunal is to encourage the resolution of disputes by agreement between the parties and, if resolution by agreement is not reached, to resolve the dispute by deciding the claims brought to the tribunal by the parties.

A summary of the Bill's contents is as follows:

- The Online dispute resolution service is only available if the other party to the dispute consents to using the service or is ordered by the court or another Act to participate in the process.
- This service applies to small claims court matters as well as strata corporation matters.
- The Strata Property Act is amended to offer this service as an alternative to court as it presently offers arbitration as an alternative. However, it is not made mandatory in the Strata Property Act legislation to use the Tribunal as a forum to resolve disputes.
- The parties cannot commence a court action or other legally binding process in relation to the issue that is to be resolved by the Tribunal; however the parties can agree to withdraw the dispute from the Tribunal at any time prior to the commencement of the hearing.
- The Tribunal's jurisdiction is limited to certain types of disputes in a condominium. The Tribunal will not have any jurisdiction in relation to questions of conflict between the Human Rights Code and another Act. The Tribunal can decline to apply the Human Rights Code to the dispute. Matters that involve interpretation and application of the Act or regulation, by-laws or rules, common property or assets of the corporation, use and enjoyment of the strata lot, money owing including a fine under the Act, by-law or rule can be dealt with at the Tribunal. The Tribunal has no jurisdiction to deal with matters involving the removal of liens, court orders respecting rebuilding of damaged property, appointment of administrator or order vesting authority in a liquidator, amendments to a phased strata plan, orders if owner developer fails to proceed to next phase or compel completion of next phase, order for amendments to schedule of unit entitlement, or application to wind up a corporation. The Tribunal is also restricted from dealing with claims to which Part 5 of the Residential Tenancies Act applies or that the parties have agreed that the Commercial Arbitration Act applies.
- The decisions of the Tribunal are final and binding. A judicial review of the decision is permitted. The standard of review is correctness for all questions except findings of fact, exercise of discretion, and the application of the common law rules of natural justice and procedural fairness. The standard for the exceptions is patently unreasonable, no basis to support factual findings or the findings are unreasonable. The time for filing an application for judicial review is 90 days.

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- The Tribunal has the power to refuse to resolve a claim or dispute.
- The Tribunal proceedings are conducted in two phases. The first phase is case management and the second phase is the Tribunal hearing. The first phase allows for mediation to occur. The case management officer can present non binding verbal evaluation of claims in dispute, present his views on how the Tribunal would likely resolve dispute at hearing and if the parties consent the case management officer can make recommendations on how to resolve the dispute. At the hearing the recommendations may be followed.
- The proceedings are to be conducted with as little formality and technicality and with as much speed as is permitted by the Act, rules and proper consideration of the issues in dispute. Electronic tools can be used to conduct part or all of the proceedings. Dispute resolution services may be conducted in person, in writing, by telephone, video conference or email or other electronic communication tools.
- The parties are required to represent themselves unless they are a minor or are incapacitated (no legal representation allowed unless the Tribunal permits it. Factors to consider are whether the other party is represented or the other party has agreed to allow representation.)
- The Tribunal has the power to dismiss claims that are frivolous and can penalize a party for non compliance with the Act, rules or order of the Tribunal during the case management phase. The Tribunal is empowered to dismiss a claim or refuse to resolve a claim of a noncompliant party.
- The Tribunal has the power to order payment by one party to another of all fees paid under the Act and any reasonable expenses and charges the Tribunal considers directly related to the conduct of the proceeding.
- The Tribunal has the power to order someone to do something, refrain from doing something or require the person to pay money. They can also order what is necessary to prevent or remedy a significantly unfair action, decision or exercise of voting rights. They cannot order the sale or other disposition of strata lots or make orders under the following provisions of the Act: section 33 [*accountability*], section 58 [*court appointed voter*], section 117 [*forced sale of owner's strata lot to collect money owing*], section 208 [*orders respecting requests from leasehold landlords*], section 209 [*leasehold landlord's remedies on leasehold tenant's default*] and section 226 (1) (c) and (d) [*release of security for common facilities*].
- A Tribunal order is enforced in the same manner as a court order
- The Strata Property Act would be amended to include references to the Tribunal. Other sections of the Act would be amended to state that a. An owner cannot make a request for the Tribunal to decide a matter until a council meeting under s. 34.1 is requested and the and the matter is not resolved or the Tribunal waives this requirement

Pros:

- *Accessible – allows parties to be self-represented*
- *Promotes settlement*
- *Clear process*
- *Efficient*
- *Decisions published*
- *Electronic tools allows for efficiency and flexibility which provides for easier access – particularly in remote areas*
- *Clear judicial review process established*

Cons:

- *New - untested*
- *Not mandatory*

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- *Electronic tools – lack of face to face meeting of parties to facilitate amicable resolution, assessment of credibility of testimony*
- *Unrepresented parties*
- *Legal representation prohibited which runs counter to fundamental right to be represented by counsel if you wish*
- *Requires a high degree of government interest and involvement which may not be present in Ontario*
- *Funding*
- *Limited assessment of credibility*

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Model 7 – Tarion Model

The Tarion model common element construction dispute resolution is based upon the application of a predetermined set of Construction Performance Guidelines as it applies to the warranties outlined in the Ontario New Home Warranties Plan Act. Tarion also addresses non-common element disputes which is beyond the scope of this review.

The Tarion model provides for:

- By request of either party (Declarant/Contractor or corporation), a Common Elements meeting to access the merits of either party's concern/issue. This will usually take place after the submission of the Performance Audit report. This initial meeting is informal and non-binding and allows each party to get a sense of how Tarion may react if indeed the claim was to proceed further through the process.
- If there is still disagreement between the corporation and contractor, either can request Conciliation where Tarion will rule on whether the deficiency must be corrected. There is a nominal application fee.
- If the condominium wins and the contractor still fails to undertake the item in dispute, Tarion will pay for its correction and seek remedies with the contractor.
- If the condominium corporation loses the claim, it can request the issue be forwarded to LAT (Licence Arbitration Tribunal) which also involves a pre-hearing. If a contractor loses, it goes to the Builder Arbitration Forum (beyond the scope of this review).

LAT is a quasi-judicial setting where each side has legal and possibly expert witness representation. Evidence is given and the chairman makes a subsequent ruling.

The Tarion model involves the use of knowledgeable individuals in assessing the claim based upon clear knowledge of construction issues and the warranties.

Tarion receives its funding through fees imposed at the time of initial construction aside from fees for commencing a Conciliation (similar to insurance premiums).

There is no formal mediation process in terms of the parties coming to a consensus. Tarion does help in clarifying the warranty and how it may be applied if the process is followed through. So Tarion helps in a party's decision to move the claim higher up the ladder. The costs involved in going all the way to LAT often mean that there may be a move to cash settle the disputes. This is not a likely approach to the normal condo disputes that occur.

With the advent of the Tarion Construction Performance Guidelines, the process has become more black and white in terms of assessing the warrant ability of a claim. Other condominium disputes which are typically more complex in nature and often may not be measured against a set standard (aside from the Condo Act, rules and declaration) may not best be handled through a Tarion-like process.

Pros:

- *Informal initial review by independent party*
- *Funded through industry and its members – insurance premium model*
- *Level of predictability due to Performance Guidelines*
- *Equally accessible to parties of the dispute*
- *Relies on LAT – already established and set-up*

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Cons:

- *Full course of process is costly*
- *No process for formal mediation*
- *No opportunity cost on moving party*

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Appendix C – Makeup of Sub-Committee

Representative Participation of Stakeholders

“Form of Participation: Representative participation is essential for a formal negotiation...In this form of participation, each interest group is represented by one or more individuals who speak on its behalf. Participants in representative negotiation usually become more committed to supporting the process and more willing to continue than people who are not representatives.”¹⁶

In forming a sub-committee to look into the DR model, it was important to have representative participation – to receive input from unit owners, board members, managers, mediators, arbitrators and lawyers, who in turn are representative of large urban communities, mid-urban communities, rural communities, vacation communities, *et cetera*, and to try to cover as much of the province as possible.

The challenge faced in large urban centers is the very large number of talented and knowledgeable individuals who could benefit and contribute to this process, particularly when trying to balance this out against representation from other communities around the province. If participation is not limited, not only would the number of participants become unmanageable, but the input received would risk becoming geographically biased.

Representative Participation was achieved as follows:

Name	Interest	Region
Andrea Thielk	Lawyer	Windsor
Angie Gill	Mediator	Brampton-Ottawa
Armand Conant	Lawyer	Toronto
Barry Scott	Lawyer	London
Bill Norris	Manager	Windsor
Bill Thompson	Manager	Toronto
Catherine Murdock	Manager	Toronto
Colm Brannigan	Mediator	Brampton
Dean McCabe	Manager	Toronto-Hamilton
Debbie Armstrong	Manager	North Bay
Doug Shanks	Lawyer	Thunder Bay
Fern Lafreniere	Owner / Director	North Bay

¹⁶ Carpenter, S.L and W.J.D. Kennedy, *Managing Public Disputes – A Practical Guide for Government, Business, and Citizens’ Groups*, (San Francisco: Jossey-Bass, 2001) at p.103

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Gabriela Shand	Manager	Muskoka
John Oakes	Manager/Owner	Toronto
Ian Waldron	Owner/Director	Toronto
Irena Manoliu	Owner	Kingston
Jennifer Bell	Mediator	Toronto
Jim Davidson	Lawyer	Ottawa
Kim Coulter	Owner/Director (Self-Managed)	Burlington
Laura McKeen	Lawyer	London
Marc Bhalla	Owner	Toronto
Michael LePage	Manager	Brampton
Mo Killu	Manager	Toronto
Dr. Rebecca Leshinsky	Lawyer	Australia
Richard Elia	Lawyer	Toronto-Oakville-Barrie
Sharon Shaver	Manager	Kingston
Sonja Hodis	Lawyer	Barrie
Stan Lawlor	Owner	North Bay
Sue Nichols	Manager	Windsor