

The Challenges of Condominium Ownership

First in a series of articles exploring problems applicable to condos and some solutions
#1 Noise Pollution

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Most condominium corporations, owners, renters, management and possibly some contractors have advanced beyond the general population in their understanding of how mediation can and does work for them. Many of you understand mediation as a process overseen by an interested neutral third party which premised on two or more parties in dispute to hear each other out, discuss interests, develop options and potentially arrive at a mutually agreeable solution. There are two types of interest involved. The first kind is generally referred to as substantive and deals with issues that have to do with money, resources or control. The second type deals with the process used to resolve the dispute. Given that all involved parties participate in crafting the solution with the mediator's facilitation. It generally follows that the parties reach a more in depth understanding of the situation that created the conflict. Often this includes the declarations, rules and the by-laws affecting the situation and the personal situations that were in operation and caused the friction. This differs markedly from the adversarial legal process which may offer a result but no insight.

Mediation facilitates an enhanced understanding of the various components leading to the crafting of an acceptable solution, increases the likelihood that the interpersonal relationships will reestablish themselves in a positive framework. This is extremely significant given that the causal issue is related to your living circumstances, a factor that is not readily or easily changeable. For the majority of owners, their condominium is their home base. When conflicts occur most people attempt to resolve them before they fester and negatively affect their neighbors. And in an attempt to diminish any negative aftermath they attempt a course of action that they believe is helpful unfortunately this is not the case.

Benefits from mediation include the potential for reaching a mutually agreeable solution more quickly than using the adversarial system of court which imposes judgments creating a win/ lose result. It is not very practical in the case of condo-owner since it just results in one party simply deemed right and the other wrong. This often leaves one party carrying the burden of the solution which can leave unresolved feelings of unfairness and a sublimation which tends to repeat in different ways. Hence the problem is never truly resolved in the adversarial approach. Often disputes have aspects where each party has valid points worthy of consideration. In contrast mediation can assist the disputing parties to explore the various positions, consider the appropriateness of including these considerations in the settlement. Thus mediation opens the opportunity for considering a broader range of issues while tending to be less costly than the litigation process and extending the range of possible satisfaction to full resolution.

In the event you were not aware this is not a new concept or approach being suggested in fact mediation has been encapsulated in law and forms a part of the dispute resolution continuum albeit as the quasi-legal end of the spectrum. Specifically the Condominium Act, Sec. 132 lays out the provision where parties are required to submit a disagreement between the parties to mediation and/ or arbitration. One then can only wonder why the mediation process is so relatively unfamiliar and under utilized. Although there are numerous answers to this question which are way beyond the scope of of this paper and will be explored in later works it is sufficient to say that one of the biggest reasons for this is that in most cases the system is so heavily burdened that many condos just able to cope with the current issues they are dealing with and do not have the luxury of exploring other approaches.

In recognition of the potential for problems endemic to condominiums all mediation associations in Canada have developed and require adherence to a code of conduct which includes a commitment to the principle of self-determination for all the parties involved in disputes . This means:

- the participants together will determine the settlement applicable to their matter
- the mediator shall remain impartial and independent throughout the process
- the mediator will recuse him/herself in the event of a conflict which guarantees an impartial facilitator
- the mediator will facilitate a **wise** agreement
- the process will be inherently confidential unless all parties agree otherwise or in the event legal issues supersede or there is an actual or potential threat to human life, in matters like these a Mediator's Report is required to identify any limitations to confidentiality during individual sessions.

- Otherwise confidentiality shall be maintained including the storage and disposal of any notes or files.
- The mediator is responsible to ensure that parties understand the mediation process prior to commencement
- mediators are responsible to ensure a quality process, allowing and encouraging respectful participation.

Having graduated from the Advanced Condominium program and as a practicing mediator I've found there are many opportunities to utilize mediation be it in staff/staff, owner/management and tenant/owner relations. A condo-owner, say Frank Jones, has complaints regarding his noisy neighbour who happens to rent from another owner. Frank talked to his neighbour to try and get him to change his behaviour, management has been involved but the noisy behaviour continues. Frank wants to take action. For him the question is...What to do?

The possibility of this occurring is highly likely given that according to statistics many owners rent. Based on an article in Toronto Star "Estimates of investor activity range from 25 to 40 per cent of some buildings." (Tony Wong, June 6, 2008). This means that often neighbours have different commitment to their housing and when problems arise mediation can address these differences to facilitate a mutually agreeable solution.

Back to the question: What should Frank do? Let us explore the options available:

- **Speak to the neighbor**
May solve the current noise but is there a commitment to future noise levels? Eventually neighbour may become less willing to accommodate your requests, seeing you as a complainer. Worst, the neighbour may look for opportunity to retaliate on you...
- **Call the police**
This provides a safe way of dealing with noise. Police provide a 'big stick' to quiet things down and to document the problem. The police generally are concerned with the immediate complaint and future actions are predicated on the assumption that people do not want the police at their door. Often this option will result in an escalation of hostilities between the parties and hence a continuation of other forms of disruptive behavior.
- **Contact the owner**
Helpful when the owner takes your complaints seriously. May encourage the owner to take action with his tenant to correct the problem. As landlord he/she may discuss the situation with their tenant and/ or take action as prescribed under the Tenant Protection Act. That said the owner has to walk a thin line between pleasing the neighbor and losing a source of sometimes crucially necessary income and as a result may lean in favor of the tenant.

- **Report to the management-super or assistant superintendent**

Imitate a process resulting in an investigation. Response may be a temporary fix, time will tell for how long this issue is resolved. Bear in mind that if the person likes loud music the problem will resurface. In addition to this the party reported may feel slighted by virtue of the fact that the complainant did not try harder to resolve the problem on an individual level. As a result of this up set he/she, as actively sight ways to complain to the management thus lowering the creditably the initial complaint and currying the favor of the management. In some cases this process has gone on for months or even years and resulted in feuds, similar to Capulet's and Montague's in Romeo and Juliet.

- **Report to the board**

If the problem persists it can be brought to the Board by either Frank or the staff person who has been contacted. Given that the Board of Directors and their management have a relationship with the owner this only serves to complicate the process. The Board will initiate another investigation and make a determination therefore increase the time before the solution is found. Meanwhile the person is still suffering. The longer it goes the more protected it becomes, the more vested and angry the parties become and the greater the tenant's landlord, the condo-owner. Boards generally meet 3-4 times a year, landlord tenant tribunal action can take several months and tenants can interpret delays as 'little happening'. Thus the complainant can become more frustrated and the perpetrator can continue his/her action or return to his/her offending behavior.

If the complaint contravenes the by-laws the potential for retaliation and an escalated battle may ensue. The Condominium Act or any of the by-laws generally hold the owner-landlord can be held accountable. The owner-landlord may respectfully wish to have opportunity and time to approach their tenant to attempt resolution before being pressed for non-compliance. Irrespective of the result this situation is complicated by the fact that the tenant is out of direct relationship with the Condominium Act and thus any solution arrived at may be unenforceable or very difficult to implement.

- **Call a lawyer**

Lawyers can sometimes assist with legal remedies. Frank has no legal contract with the noisy tenant which will frustrate the legal process and increase the financial burden. The condo-corp. has legal contract with the condo-owner regarding breach of by-laws but cannot always speak to the landlord/ tenant relationship. Legal remedies are proscribed actions which take time and money to enact. Despite the fact that there is no guarantee that the results will be satisfactory Frank can direct his lawyer to proceed with one or both these rights-based options.

OR

- **Mediate**

This means to try to resolve the matter amicably, efficiently and inexpensively utilizing mediation. This entails bringing in a neutral facilitator who can assess the situation. ***It is one of the most positive moves when parties agree to mediation.*** *It suggests resolution is achievable when parties are willing to work through the process which results in the development of a mutually agreeable solution.* Mediation generally works quicker and is less costly than all other legal remedies. Mediation also has a tendency to leave the parties more amicably satisfied because they have worked together to come to agreement. Mediated agreements have a greater history of longevity when compared with other processes detailed above.

Part of the process is constituted by the mediator's assessment which will determine who should come to the mediation. There are a number of people who have an interest in resolving the issue beyond the two neighbours. The owner-landlord and the condominium corporation (condo-corp.) have interest in such complaints so they can take the next steps to assist resolution. The owner-landlord can access powers under the Tenant Protection Act to stop the offending behaviours. If there has been a breach of condo by-laws the condo-corp. will consider their action options. However, if Frank goes immediately to his condo corporation with his complaint regarding a breach of by-laws, Frank may feel put off and frustrated by their suggestions as they are not the landlord and therefore have no direct jurisdiction regarding the landlord and tenant relationship.

While the condo-corp. does have a relationship with the owner-landlord and they can very well hold him accountable for behavior by his/her tenants which caused breach in the condo's by-laws there is the problem with enforceability. Often to avoid a negative finding the owner-landlord now joins all the other parties with a vested interest. Despite the complaint he/she may otherwise appreciate their tenant and will want the opportunity to speak with them, to try and sort things out. *Clearly without having all these parties at the table it is impossible to create a **meaningful** solution to the problem which is the goal.*

We cannot overstate the significance of having the parties involved in designing their own solution. It helps put the conflict behind them and presents an opportunity for ongoing amicable relations. Acknowledging the mutual responsibilities and obligations between the corporation and their condo-owners, recognizing the condo-owner as a landlord with responsibilities and obligations under the Tenant Protection Act can resolve the tensions as to who needs to take responsibility to address Frank's complaints. The condo-landlord has additional, separate responsibilities outlined in the Condominium Act, 1998 as well as responsibilities specific to their own corporation's by-laws.

Therefore our cursory exploration of the ways to resolve noise complaints suggests that mediation is the most viable approach. It is important to remember condominium directors are owners who sit on the Board and while they want to serve their community by and large they do not arrive fully trained in all areas of responsibilities. Given potential conflicts run the gamete from reserve fund issues to parking spot violations to cooking with propane BBQs and so on. It is our position that such matters could better be resolved in the mediation arena. Especially since many issues are unclear by definition and therefore unpredictable in the legal arena. Mediation can facilitate communication between corporation and owners, owner and owner, corporation and/ or management staff, management staff and owners, corporation's insurance and owner/ renter insurance companies to name some significant stakeholders this demonstrates the complexity of relationships and the potential for conflict in the condominium community. Bare in mind this article has not touched on several areas for instance: Human Rights concerns, duty to accommodate, constructive discrimination and occupancy standards, financial issues, alterations to common elements such as satellite dishes, parking spaces, noise levels or pet concerns.

Mediation can help clarify both issues and responsibilities which assist those legitimately involved come to fully participate in the decision-making. This helps ensure that the issues get resolved in a manner that promotes a healthy condominium community in a cost effective manner.

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