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WHAT HAPPENS AFTER THE MEDIATION ENDS?

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A condominium mediation ends in one of two ways: 1) the dispute is resolved, or 2) a notice of failed mediation is prepared by the mediator. In the former, the parties finalize their dispute with terms of settlement. In the latter, the parties submit their dispute to arbitration for a final resolution. Regardless of the outcome, the board often has a number of questions about the next steps. Below are short answers to the most common questions that arise after mediation.

"We've reached a settlement. What's the next step?"

Since it is fairly rare for the full board to attend mediation any settlement reached at mediation is usually subject to ratification by the board at the next board meeting. Assuming for a moment that it is ratified by the board, the next step is usually to draft formal minutes of settlement to be executed by all of the parties. The minutes of settlement are then binding on the parties. If one of the parties fails to comply with the minutes of the settlement, the other party can apply to the courts to have the minutes of settlement enforced.

"We've reached a settlement, but we don't like it. Can we get out of it?"

The answer is normally no, but there are a few exceptions. For instance, if the parties realize after mediation that the settlement did not address an issue, they can negotiate an amendment to the minutes of settlement or enter into separate minutes of settlement to address the issue that was left out of the minutes of settlement. However, the condominium's board should be careful to ensure it satisfies all of the terms of the settlement as the directors could be held personally liable for any costs incurred by the owner in enforcing the minutes of settlement if they fail to satisfy the terms of the settlement.[1] The board should seek the advice of the condominium's lawyer to determine if they can avoid the settlement or modify it.

"What's arbitration?"

Arbitration is a dispute resolution process whereby a neutral third party assists the parties in resolving their dispute. Generally the parties are afforded an opportunity to present evidence and to make submissions on the law. The arbitrator, unlike a mediator, will then render a decision. The decision, called an "award", is binding on the parties and is enforceable in the same manner as a court order. Unlike condominium mediations, which have no defined process unless they are set out in a condominium's by-laws, arbitrations in Ontario must be conducted according to the *Arbitration Act, 1991.*[2] That said, the parties may agree to opt out of many of its provisions so the arbitration process remains fairly flexible. The arbitration process for condominium disputes usually varies depending upon the nature of the dispute, the arbitrator, the parties, and the condominium's arbitration by-law (if one exists).

"When is our dispute eligible for arbitration?"

Pursuant to section 132(1)(b) of the *Condominium Act, 1998,* a condominium dispute is to be submitted to arbitration in two circumstances:

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[1] *Boily v. Carleton Condominium Corporation No. 145*, [2012] ONSC 1324 (S.C.J.).
[2] *Arbitration Act, 1991,* S.O. 1991, c.17.

1) if the parties have not selected a mediator, 60 days after the parties submitted their disagreement to mediation; or
2) if the parties have selected a mediator, 30 days after the mediator delivers a notice of failed mediation.

If the parties resolve the dispute at mediation, arbitration becomes unnecessary.

"What if the owner refuses to participate in arbitration?"

On occasion an owner will refuse to participate in arbitration. If the owner refuses to participate in arbitration, the condominium can apply to the court for an order appointing an arbitrator.[3] The condominium cannot skip arbitration simply because the owner refuses to participate in the process.[4] Once the arbitrator is appointed by the court, the arbitration process continues in the absence of the owner. Any award made by the arbitrator is binding on the owner, even if he or she does not attend. If the owner refuses to comply with an arbitrator's award the condominium can apply to the court for an order converting the award into a court order. If the owner fails to comply with the court order he or she could be found in contempt of court by a judge and subject to imprisonment until he or she complies with the court order.

"Can we disclose the results to the owners?"

Many boards and property managers face the difficult task of answering questions from owners about mediations and arbitrations involving other owners. Unfortunately, the condominium cannot release information about a mediation or any settlement reached to the other owners. There are two main reasons. First, section 55(4) of the *Condominium Act, 1998,* excludes records relating to a specific unit or owner from the records that may be examined by an owner. This section has been interpreted to exclude the disclosure of information contained within any record. Second, most mediation agreements contain confidentiality clauses that require the parties to keep the matters confidential unless disclosure is required by law.

It must be noted that paragraph 19 of the status certificate requires a condominium to describe any proceeding before a court, arbitration or administrative tribunal.[5] As a result, once the dispute reaches arbitration it must be disclosed in any status certificates prepared for the condominium. While a brief statement about the arbitration must be included in paragraph 19, the condominium should be careful not to disclose more than is necessary. In addition, there may be circumstances where the dispute should be disclosed in the status certificate even if it is only at the mediation stage. For example, if a status certificate is requested for a unit and the condominium is involved in mediation with that particular unit the matter may be eligible for disclosure in the status certificate to ensure the potential purchaser is aware of the dispute. If there is any doubt as to what should or shouldn't be disclosed in the status certificate, the condominium's solicitor should be contacted for an opinion.

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[3] Section 10 of the *Arbitration Act, 1991,* S.O. 1991, c.17.

[4] See e.g. *Mereshensky v. Metropolitan Toronto Condominium Corp. No. 879,* [2010] ON 2183 (S.C.J.); *Metropolitan Toronto Condominium Corporation No. 1143 v. Peng,* [2008] O.J. No. 244 (S.C.J.). For the contrary position see *York Condominium Corporation No. 26 v. Ramadani*, [2011] ONSC 6726 (S.C.J.).

[5] See also section 76 of the *Condominium Act, 1998,* S.O. 1998, c.19.