Condominium Disputes & A.D.R.: A Recipe for Confusion?

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1. Introduction

To an interested buyer, a new residential condominium high-rise may appear to be a fresh and innovative way to live. While comfortably seated in a tastefully decorated sales centre, a purchaser may be showered with marketed images of a vibrant lifestyle, elegant decorating and well-appointed amenities. What is not discussed during the calibrated sales-pitch is the underlying fact that condominiums have existed since time immemorial. In fact, the concept of a condominium has accompanied many urban civilizations, with a sophisticated legal code existing in Roman law.[1] Another myth quietly portrayed in the skilled marketing is that the condominium will be devoid of friction, disagreements or conflict. Elegantly dressed neighbours are seen sharing roof-top patios, while others cheerily smile while exercising in the condominium's workout room. Truth be told, condominiums by their very nature share their own version of friction, disagreement or conflict. Recently, the Ontario Superior Court of Justice reinforced this fact, stating that condominium disputes uniquely revolve around predictable flashpoints, of 'people, pets and parking'.[2]

Until recently, irreconcilable condominium disputes requiring the corporation's involvement were resolved through the courts. The traditional path of litigation awaited if an impasse arose. Throughout the 1990s, two Ontario governments toiled to overhaul Ontario's condominium legislation. Commenced with significant consultation conducted under Premier Bob Rae's NDP government, new legislation was crystallized by Premier Mike Harris'

[1] Herskowitz, H. &.Freedman, M. F., *Condominiums in Ontario,* (Ontario Bar Association: 2001) [hereinafter Herskowitz and Freedman] at pg. xiii.

[2] *Metropolitan Toronto Condominium Corp. No. 1385 v. Skyline executive Properties Inc.,* [2004] O.J. No. 3360, [2004] O.T.C. 723, at para. 18.

Progressive Conservative government, resulting in Bill 38[3], eventually becoming the *Condominium Act, 1998,* S.O. 1998, c.19 ("the Act").

Bill 38 brought a watershed of changes to Ontario's condominium legislation. Enhanced consumer protection, four new forms of condominiums and comprehensive building maintenance/analysis, ushered in many new changes to the condominium industry.[4] Bill 38 also introduced the concept of Alternative Dispute Resolution ("A.D.R."), previously beyond the scope of Ontario's condominium legislation. Allowing parties to resolve disputes through mediation, and if necessary arbitration, A.D.R. was cited as being an economical and timely way to resolve condominiums disagreements. It was introduced to help preserve the communal nature of condominium living, by avoiding the confrontational aspects of courtroom disputes.[5]

The Act became effective on May 5th, 2001. After over eight years in effect, it may now be possible to question if the A.D.R. components in the Act have succeeded. Citing case law, this paper will argue that these laudatory goals do not appear to have been realized. Structural deficiencies in the Act have allowed ambitious litigants to avoid A.D.R.'s reach. Furthermore, despite generous interpretation by the courts, they have been reluctant to invoke mediation/arbitration, and those reported cases which did involve A.D.R. proved to be of significant cost to the litigants.

2. Background

In Ontario, a condominium is a legal system combining the private and communal ownership of property. Condominiums, with narrow exceptions, are the combination of units and common elements. Units are owned separately in fee simple, with a traditional deed. The rights of alienation and encumbrance are granted to the owner. Although units in Ontario have traditionally been used for residential purposes, commercial and industrial units also exist. Common elements are owned in common by the unit owners. Each unit is granted an undivided interest in the common elements, which cannot be alienated or encumbered. [6] A condominium is a strict creature of statute, currently governed exclusively in Ontario by the aforementioned

[3] Bill 38, *An Act to revise the law relating to condominium corporations, to amend the Ontario New Home Warranties Plan Act and to make other related amendments,* 2nd Sess., 36th Leg., Ontario, 1998 (assented to 18th December 1998, S.O. 1998, c.19).
[4] Herskowitz and Freedman, *supra* note 1 at pg. xiv.
[5] *Conroy v. Carleton Condominium Corporation No. 169,* [2005] O.J. No. 4600, 143 A.C.W.S. (3d) 640 [hereinafter *Conroy*], at para. 8.
[6] Loeb, A. *The Condominium Act: A User's Manual, 2nd edition* (Toronto:ThomsonCarswell, 2005) [hereinafter Loeb] at pg.1.

Act, and two attending regulations, being O. Regs. 48/01 & 49/01. Predecessor condominium legislation has existed in Ontario since 1967.[7]

To exist, every condominium in Ontario must have a registered declaration. "The declaration deals with the framework of the condominium; it is the equivalent of its constitution."[8] By-laws follow, which often deal with matters of corporate governance, and conclude with rules, which often dictate how the unit and common elements are to be used on a day-to-day basis.[9] Every condominium is ruled by this hierarchy of the Act, a declaration, by-laws and rules. Condominiums are essentially governed as a micro-democracy. Unit owners elect a board of directors, which is charged with managing the corporation.[10] One such duty, dictated by the Act, is:

> "Ensuring compliance
> s.17(3) The corporation has a duty to take all reasonable steps to ensure that the owners…comply with this Act, the declaration, the by-laws and the rules."[11]

An essential responsibility of any condominium corporation's board, is to demand that the Act and the hierarchy of governing documents are followed. Under historical condominium legislation[12], enforcement was via a court application seeking a judicial order for compliance, commonly referred to as a 'section 49 application'. This was in reference to the operative provision of the then *Condominium Act,* R.S.O. 1990, c.C.26. A.D.R. was not present in the predecessor condominium legislation. Defined as, "[a] term for processes such as arbitration, conciliation, mediation and settlement, designed to settle disputes without formal trials",[13] these concepts were absent from condominium legislation. Until recently, the courts were the only avenue available to a condominium corporation. As mentioned, although condominium legislation has existed in Ontario since 1967, a major retooling of condominium legislation began during the 1990s, via Bill 38.

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[7] Ontario's condominium legislation has included: *Condominium Act,* S.O. 1967, c. 12, *Condominium Act,* S.O. 1978, c.84, *Condominium Act,* R.S.O. 1980, c.84, & *Condominium Act,* R.S.O. 1990, c.C.26.
[8] Loeb, *supra* note 6, at pg.81.
[9] *Ibid.* at pg.163.
[10] *Condominium Act, 1998*, S.O. 1998, c.19, section 27(1)
[11] *Ibid.* section 17.
[12] *Condominium Act,* R.S.O. 1990, c.C.26, section 49.
[13] Dukelow, Daphne A., *The Dictionary of Canadian Law* (Toronto:ThomsonCanada Limited, 1995) [hereinafter Dukelow] at pg. 48.

3. Bill 38

On June 10th, 1998, Bill 38 received its first reading in the Ontario Legislature.[14] Introduced by the Honourable David Tsubouchi, Minister of Consumer and Commercial Relations, the Minister later provided insight into the motivation behind the overhaul. On second reading the Minister stated:

> "I'm pleased to explain the government's rationale for its proposed changes to the Condominium Act. The last time it was amended was in 1979, before the big building boom of the 1980s…The market has grown by leaps and bounds, in some cases faster than the legislative framework could keep up. The act became stale and inflexible, no longer reflecting the reality that was there."[15]

The Minister further stated:

> "As with any legislation, this bill reflects a balance of interests. There's a little something in it for everyone. Builders get more of the flexibility they need to ensure that they can provide much-needed housing…Condominium boards get some clarification of their role in a number of key areas and assistance in some of their management areas…"[16]

In closing, the Minister gave a broad overview of the intent behind Bill 38. He commented:

> "I would also like to point out how this bill conforms to our government's general approach to business, both its own and in the private sector. The consumer ministry has led the evolution to a new and more mature relationship between the Ontario government and the province's business community. We've done that with the move to self-management for mature industries…and now we've done it by creating a more flexible Condominium Act."[17]

Introduced with the variety of legislative changes was the importation of A.D.R. Bill 38 created a dual enforcement regime, drawing upon both the concepts of A.D.R. and traditional litigation. In the eventual Act, the substance of section 49 continued, but it evolved into now section 134 of the Act. Section 134 reads:

> "Compliance order
> 134. (1) Subject to subsection (2), an owner, an occupier of a proposed unit, a corporation, a declarant, a lessor of a leasehold condominium corporation or a mortgagee of a unit may make an application to the Superior Court of Justice for an

[14] Ontario, Legislative Assembly, *Debates (Hansard),* (10th June 1998).
[15] Ontario, Legislative Assembly, *Debates (Hansard),* (28th June 1998), (Hon. D. Tsubouchi).
[16] *Ibid*.
[17] *Ibid*.

order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules…"[18]

Had this been the only addition, then the enforcement provisions of the condominium legislation may not have undergone significant change. Although the right to pursue a compliance order was expanded to more parties, section 134 still envisioned an application avenue to the courts. Applications in Ontario are governed by Rule 14 of the *Rules of Civil Procedure,*[19] and are largely comprehensive motions, avoiding discoveries and trials by only adducing evidence via sworn affidavits. That said, section 134(2) followed with:

"Pre-condition for application
(2) If the mediation and arbitration processes described in section 132 are available, a person is not entitled to apply for an order under subsection (1) until the person has failed to obtain compliance through using those processes."[20]

With one subsection, it appeared that the open doors to the courts had closed. Although traditional litigation continued, section 132 introduced a precondition of A.D.R. The operative portions of section 132(4) read:

"Disagreements between corporation and owners
(4) Every declaration shall be deemed to contain a provision that the corporation and the owners agree to submit a disagreement between the parties with respect to the declaration, by-laws or rules to mediation and arbitration in accordance with clauses (1) (a) and (b) respectively."[21]

Section 132(1)(a) and (b) of the Act created a mediation/arbitration process, demanding that a mediator be chosen by the parties to resolve disputes. If a mediator could not be agreed upon within 60 days, or 30 days have elapsed after a failed mediation, the dispute would then proceed to arbitration, governed by the *Arbitration Act, 1991*.[22] Section 132 also demanded that if disagreements arose pertaining to certain agreements, including shared facility and/or alteration agreements, that mediation & arbitration be utilized.

Needless to state, the introduction of A.D.R. profoundly altered the traditional intervention of the courts in condominium enforcement matters. The provisions were immediately cited as being a timely and restorative method to resolve condominium disputes. In the seminal work of *Condominiums in Ontario,* authors Herskowitz and Freedman stated:

"Mandatory mediation and arbitration to resolve disputes involving condominiums is one of the hallmarks of the New Act. These provisions have been incorporated into the New Act in an effort to achieve a more expeditious and cost-effective method of settling

[18] *Condominium Act, 1998*, S.O. 1998, c.19, section 134
[19] R.R.O. 1990, Reg. 194.
[20] *Condominium Act, 1998*, S.O. 1998, c.19, section 134(2)
[21] *Ibid.*, section 132(4)
[22] *Ibid.*, section 132(1) &(b)

condominium disagreements in an environment where, by its very nature, the parties to the dispute often have ongoing involvement or dealings with each other."[23]

In the instructive loosleaf service, *Condominium Law and Administration,* author Loeb contributed to this new concept, stating:

> "The legislature has determined that these types of disputes should be resolved, wherever possible, within the community itself, and that the courts should no longer be the sole mechanism of resolving disputes involving, for example, an alleged violation of the condominium rules."[24]

Apparently Minister Tsubouchi's comments appeared accurate, as condominium disputes would travel away from courts, leaving the parties to resolve their own disputes via private A.D.R. People, parking and pets disputes, therefore it appeared, would first require A.D.R., before proceeding to court, if at all. However noble such pursuits, commentators offered caution, if not outright concern, with this innovation.

After Bill 38's second reading, it came before the Legislative Assembly of Ontario's Standing Committee on General Government; ("the Committee"). On October 28th, 1998, stakeholder input was afforded. In his submissions before the Committee, condominium solicitor Ron Danks, spoke on behalf of the Canadian Condominium Institute, Golden Horseshoe Chapter. Representing a membership of over 11, 500 condominium units, Mr. Danks applauded the new legislation, and its need for timely implementation. Although Mr. Danks joined in the overall support for A.D.R., his concerns may have been prescient. He stated:

> "Another area that we have some very big concerns about is the clause under subsection 133(4)[25] involving disagreements between corporations and owners. We like the idea of requiring mediation and arbitration."[26]

That said, in a rather illustrative example, Mr. Danks starkly criticized the prospect of utilizing mediation and arbitration for condominium enforcement. He stated:

> "The problem with that is, if somebody is breaching a rule, if they're causing a nuisance…having wild parties every Saturday night…do we have to go through a mediation process and, if that's not successful, through an arbitration process? This in reality can take months and months to complete and costs the corporation and the homeowner quite literally thousands of dollars."[27]

Although mediation and arbitration may potentially represent a less adversarial role, time and costs could be expended on a case which may only be a simple lack of a unit owner

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[23] Herskowitz and Freedman, *supra* note 1, at pg. 454.
[24] Loeb, A. *Condominium Law and Administration* (Toronto: ThomsonCarswell, Looseleaf Edition 2007) [hereinafter Loeb Looseleaf], at pg. 22-58.6.
[25] Section 133(4) via a renumbering of Bill 38 became section 132(4) of the *Condominium Act, 1998,* S.O. 1998, c.19, with no substantive change.
[26] Ontario, Legislative Assembly, *Standing Committee on General Government, Committee Transcript,* (28th, October, 1998), at pg. 6.
[27] *Ibid*.

abiding by the corporation's declaration, by-laws or rules. These concerns were echoed by Herskowitz and Freeman. They stated:

> "However…mediation and arbitration is not necessarily the panacea to all condominium-related grievances or disputes, and a strong argument can be made that the summary application procedure under section 49 of the Old Act was an extremely effective, efficient and relatively inexpensive way of enforcing compliance with the provisions of the legislation, the condominium's declaration, by-laws and rules."[28]

Loeb continued in these concerns wondering if the cost and delay would be appropriate for what is tantamount to a prosecutorial process. Loeb queried:

> "There are times when the obligation to mediate and/or arbitrate may put the condominium corporation's resident at risk because of the time delays that can occur if an owner/occupant wants to use the time frames provided for in the legislation to avoid compliance and delay a decision against him or her."[29]

Loeb laid out an instructive hypothetical example of when A.D.R. in the condominium context could prove difficult, it not outrightly counterproductive. If a pet dog was to cause ongoing damage to the common elements, after repeated warnings, a board of directors would be forced to demand its removal from the condominium. Assume that notice given to the owner to remove the dog was ignored. If this is actually a 'disagreement' within the terms of the Act, then mediation/arbitration would be the new path to enforcement. The inability to resolve the matter via mediation would require the condominium to resort to arbitration. Once the arbitral award is secured, if the dog remains, by virtue of section 134 the corporation would then have to seek a court order to enforce the arbitral decision. This process could take many months to complete, while in the interim the dog owner ignores the process. A previous section 49 application, absent appeal rights, would have been heard and disposed of, on the next available motion date. [30]

Included within the Act were also companion enforcement sections. They included the introduction of an oppression remedy[31], imported from Ontario's *Business Corporation Act*[32] and the ability to forestall any unsafe or threatening act.[33] Neither provision made any reference to the mediation/arbitration provisions of the Act. Eventually Bill 38 received third reading on December 17th, 1998, with an enforcement date of May 5th, 2001. Whether or not the hopes or concerns of A.D.R. would be realized, rested with the judiciary.

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[28] Herskowitz and Freedman, *supra* note 1, at pg. 455.
[29] Loeb Looseleaf, *supra* note 24, at pg. 22-59.
[30] Loeb Looseleaf, *supra* note 24, at pg. 22-61.
[31] *Condominium Act, 1998,* S.O. 1998, c.19, section 135.
[32] *Business Corporations Act,* R.S.O. 1990, c.B.19, section 248.
[33] *Condominium Act, 1998,* S.O. 1998, section 117.

4. Case Law Treatment

(i) McKinstry v. York Condominium Corporation No. 47

The first case to substantively consider the mediation/arbitration provisions of the Act, was the Ontario Superior Court of Justice decision in *McKinstry v. York Condominium Corporation No. 47*[34], which may be viewed as a microcosm of both the expectations and concerns with A.D.R. Two unit owners brought an action against their condominium corporation. Their claim revolved around the alleged inconsistent treatment received from the corporation's board of directors. The unit owners wished to renovate their luxury condominium, and hopefully sell for a significant profit. After relying on certain representations and renovating, they were later instructed to restore their unit to the original floor layout, in compliance with the corporation's rules. The case was troubling for the mediation/arbitration provisions, as it was brought not under section 132 (mediation/arbitration), nor the 134 (compliance order). Rather, the unit owners brought their case pursuant to section 135 (oppression remedy) of the Act. The defendant condominium corporation countered that the claim was ineligible to proceed, as the mediation/arbitration procedures had not been sought. In determining these matters, the court carefully analyzed the mediation/arbitration provisions of the Act. The court held:

> "The Legislature's objective in enacting s. 132 is to enable the resolution of disputes arising within the condominium community through the more informal procedures of mediation and arbitration. To attain this objective, the phrase "with respect to the declaration, by-laws or rules" in s. 132(4), which applies to disagreements between owners and the condominium corporation, should be given a generous interpretation. It applies, in my view, to disagreements about the validity, interpretation, application, or non-application of the declaration, by-laws and rules."[35]

The court, however went further. It considered the concept of damages, apparently expanding the scope of section 132(4). It stated:

> "The first issue is whether s. 132(4) applies where the initiating party wishes to claim damages resulting from the disagreement as well as resolving the dispute. The term "disagreements" in section 132(4) should be interpreted broadly to encompass claims for damages arising from the subject matter of the disagreement…A great many

[34] *McKinstry v. York Condominium Corporation No. 472* [2003] O.J. No. 5006, 68 O.R. (3d) 557 [hereinafter *McKinstry*].
[35] *McKinstry supra* note 34, at para. 19

disagreements about declarations, by-laws and rules will be about responsibility for expenditures or about damage caused by failings or neglect."[36]

Therefore, A.D.R.'s initial treatment appeared in keeping with the overall legislative intent. The court concurred with the mandate to resolve disagreements through more informal means, and gave judicial commentary to expand its scope to damages. That said, the court continued that section 135 did not require the pre-condition of mediation/arbitration. According to the court this was in accord with the legislative intent behind the passage of section 135 which requires its resolution via a court application. Despite the case being a claim for damages, the court concluded that the matter was governed by section 135 and that mediation/arbitration did not apply. Although the claim was dismissed, two very contrary messages emanated from the court. First, that mediation/arbitration was to be broadly employed, with a net expanded to capture damages. However, section 135 avoided the reach of mediation/arbitration, and could be used for claims involving oppressive conduct involving damages.

(ii) Peel Condominium Corp. No. 33 v. Johnson

Two years later Ontario's Superior Court of Justice again considered section 132 of the Act, in *Peel Condominium Corp. No. 33 v. Johnson*[37], which apparently narrowed the application of mediation/arbitration. The plaintiff condominium corporation believed that the defendant unit owner's door was improperly painted brown. The condominium corporation initiated a notice of mediation, pursuant to section 132 of the Act. The unit owner ignored it, leaving the condominium to initiate a notice of arbitration. Prior to arbitration, the unit owner capitulated, and the door was restored to white. When the unit owner failed to pay the condominium's costs of bringing the enforcement, the condominium proceeded to the court for the appointment of an arbitrator to resolve the cost issue. In argument, the condominium corporation argued that the combined wording of sections 132 and 134 demanded that it first seek the provisions of mediation/arbitration for enforcement. The court disagreed, finding that since there was no agreement between the condominium and unit owner for alterations (i.e. the painting of a door), no disagreement had occurred. The court held:

"There is therefore no obligation upon Peel to seek mediation or arbitration before bringing an Application for compliance…[i]f Peel felt compelled to pursue Ms. Johnson…its proper remedy was to apply directly to the court for an Order enforcing compliance with the Act under s. 134(1)."[38]

[36] *McKinstry supra* note 34, at para. 20.
[37] *Peel Condominium Corporation No. 33 v. Johnson* [2005] O.J. No. 2875, 35 R.P.R. (4th) 300.
[38] *Ibid.* at para. 8

Despite the broad and purposive direction from *McKinstry,* an apparent narrowing of mediation/arbitration occurred in *Peel*. The court paid no attention to section 134(4) and the language of a disagreement, and found merely that since no alteration agreement existed, the application of mediation/arbitration did not apply.

(iii) Metropolitan Toronto Condominium Corp. No. 545 v. Stein

In the case of *Metropolitan Toronto Condominium Corp. No. 545 v. Stein*[39], the Ontario Superior Court of Justice considered if mediation/arbitration could be avoided through other provisions in the Act. The applicant condominium corporation had received a report that mould contamination had begun in unit heating and cooling systems; ("hvac"). The defendant unit owner had prevented the condominium corporation from either inspecting or effecting repairs to their hvac system. The condominium corporation brought a section 134 compliance order application, citing a violation of section 117 of the Act, claiming the existence of a 'dangerous situation'. As referenced, section 117 does not include a mandatory mediation/arbitration precondition. The court, responding to arguments raised by the defendant unit owner that section 132's mediation/arbitration governed the dispute, stated:

> "…there may well have been sufficient scope within the provisions of the declaration concerning an owners' obligation to maintain his or her unit, to have this issue mediated and if necessary arbitrated in reliance on the terms of the declaration…"[40]

The court, however, noted that the Corporation had very carefully limited its relief to section 117 of the Act. The court opined on the apparent strategy taken by the Corporation to avoid the mediation/arbitration provisions, stating:

> "I certainly do not want my decision on this threshold issue to be seen as approving of the Corporation's obvious strategy of restricting its relief to a consideration of various provisions of the Act in order to avoid what would otherwise be a clear obligation to proceed to mediation and arbitration."[41]

Although the court did not demand the precondition of the mediation/arbitration provisions, it did not find a dangerous situation in the hvac system, and dismissed the application. Again, this may be looked at as an example of creative counsel finding alternative provisions of the Act to demand enforcement. The existence of section 135 (oppression

[39] *Metropolitan Toronto Condominium Corp. No. 545 v. Stein* (2005) CarswellOnt. 8949,
[40] *Metropolitan Toronto Condominium Corp. No. 545 v. Stein* (2005) CarswellOnt. 8949, at para. 61
[41] *Ibid.* at para. 63

remedy) and 117 (unsafe act), appear as those preferred avenues, using what may be argued as legal loopholes to avoid mediation/arbitration. This careful avoidance of section 132 was also seen in *Carleton Condominium Corp. No. 291 v. Weeks.*[42] The applicant condominium elected to proceed with a section 117 application for the alleged glaring and threatening behaviour of a unit owner, rather than section 132. Although the court ruled that the conduct complained was generally a nuisance, and therefore captured by section 132(4) of the Act, it quixotically ordered a trial of the matter to determine if threatening conduct had in fact occurred.

(iv) Italiano v. Toronto Standard Condominium Corp. No. 1507

In the Ontario Superior Court of Justice case of *Italiano v. Toronto Standard Condominium Corp. No. 1507*[43] the full weight of the mediation/arbitration provisions of the Act were applied. This informal and inexpensive process of mediation/arbitration may be questioned. The unit owner was accused of excessive noise emanating from his unit. The condominium corporation initiated mediation, pursuant to section 132(4) of the Act. The unit owner refused attendance, and the matter was referred to arbitration which suffered a variety of adjournments. Eventually, the arbitrator ruled in favour of the condominium corporation, demanding compliance with the corporation's declaration and rules prohibiting noise. The arbitrator determined costs, with an award in favour of the condominium corporation of $81, 865.07. Legal fees spent by the condominium corporation were $48,919.98, of which $39,000.00 was awarded, while the arbitrator charged fees of $35, 815.19. The unit owner appealed, pursuant to section 45(1) of the *Arbitration Act*, focusing largely on the arbitrator's cost award. The appeal was largely dismissed, permitting only a reduction in the cost award of $4,102.50. Although this case upheld the ambit and process envisaged by section 132(4) of the Act, it was startling as to the costs incurred by the parties, and eventually imposed on the offending unit owner. A final costs award of $77,762.57 runs counter to the claims of ADR's informal and cost effective dispute mechanisms.[44]

(v) Metropolitan Condominium Corp. No. 1143 v. Peng

In the Ontario Superior Court of Justice case of *Metropolitan Condominium Corp. No. 1143 v Peng*[45], the earlier mentioned concerns of Ron Danks and Audrey Loeb may have been realized. Is mediation/arbitration appropriate for a pure enforcement matter, when the unit owner fails to meaningfully participate? A unit owner was accused of allowing excessive noise to emanate from his unit and also harbouring a dog, both contrary to the condominium corporation's rules. The condominium corporation sent eight separate letters to the unit

[42] *Carleton Condominium Corp. No. 291 v. Weeks* [2003] O.J. No. 1204, [2003] O.T.C. 239
[43] *Italiano v. Toronto Standard Condominium Corp. No. 1507* [2008] O.J. No. 2642, 168 A.C.W.S. (3d) 239
[44] *Conroy, supra* note 5, at para. 8
[45] *Metropolitan Condominium Corp. No. 1143 v. Peng* (2008) CarswellOnt 292, 67 R.P.R. (4th) 97 [hereinafter *MCC No. 1143 v. Peng*].

owner, including the request to participate in mediation, pursuant to section 132 of the Act. The unit owner failed to respond, and the condominium corporation elected to proceed with a section 134 compliance order. The unit owner resisted the proceeding, claiming the statutory precondition of arbitration. The condominium corporation countered that there was no disagreement between itself and the unit owner, rather, the condominium corporation was seeking to enforce its declaration and rules. The court's ruling should be a warning for any condominium corporation seeking a compliance order. It held that the case revolved around whether the respondent unit owner was responsible for the excessive noise. The court stated:

> "The issues raised are issues involving the interpretation and application of the Corporation's declaration and rules…The issues are clearly, in my view, within the meaning of a disagreement in section 132(4) of the Act. They are precisely the type of issues between a condominium corporation and its unit owner that the legislature intended should be resolved through mediation and arbitration and not by application to this court."[46]

The court furthered that the condominium corporation's response to the failure of Mr. Peng to respond to correspondence was to proceed to arbitration, potentially *in abstentia*, rather than reverting to the compliance order provisions of the Act. Costs in favour of Mr. Peng were awarded against the condominium corporation in the amount of $3,000.00. Although in a similar case of *York Region Condominium Corp. No. 890 v. 1610875 Ontario Ltd.*[47] the Ontario Superior Court of Justice upheld the mandatory provisions of mediation/arbitration, the offending unit owner was also clearly violating the operative provisions of the condominium's declaration, serving hot food from his commercial store. For an enforcement proceeding, the court ruled that section 132 was the venue to resolve the dispute.

(vi) Nipissing Condominium Corp. No. 4 v. Kilfoyl

In the very recent case of *Nipissing Condominium Corp. No. 4 v. Kilfoyl*[48], once again the application of mediation/arbitration was considered. The condominium corporation brought an application pursuant to section 134 of the Act against a unit owner, ostensibly for overcrowding. The condominium argued that occupation of a residential unit had breached the single family provisions of the condominium's declaration and by-law. The unit owner resisted the application, claiming the precondition of section 132(4) had not been met and that single family provisions offended the *Ontario Human Rights Code.* The court ruled against mediation/arbitration stating the case, "…involves a challenge in law with respect to the Declaration, in that it is discriminatory and therefore in violation of the *Ontario Human Rights*

[46] *MCC No. 1143 v. Peng*, *supra* note 45, at para. 16.
[47] *York Region Condominium Corp. No. 890 v. 1610875 Ontario Ltd.* [2007] O.J. No. 4104
[48] *Nipissing Condominium Corp. No. 4 v.Kilfoyl* [2009] O.J. No. 3718

Code."[49] The court was also critical of the respondent raising section 132(4) late in the proceedings. Section 132(4) was considered inapplicable, and the application proceeded under section 134, ultimately upholding the single family provisions of the Act. Again, the court appeared to narrow the scope of mediation/arbitration, claiming that a human rights argument emanating from the declaration obviated section 132.

4. Conclusion

The Legislature's intention of allowing a less expensive and more expeditious method to resolve condominium disputes may be a noble goal. Condominiums, by their very nature, are communal associations, with unique challenges and issues. Unlike arms length third parties, condominium unit owners must continue to live or work together, no matter how the dispute is resolved. The importation of A.D.R. into the Act was intended to resolve disputes through a restorative, inexpensive and expeditious process. Unfortunately, a paradox appears to have been created. A variety of cases have been examined, which avoid the reach of mediation/arbitration, utilizing companion pieces of the Act beyond the ambit of section 132. This avoids the exercise of mediation/arbitration to be resolve disputes outside of the courtroom, with less expense and confrontation. However, those cases which have upheld the mandatory ambit of mediation/arbitration have seen disputes resolved with excessive cost, or recalcitrant unit owners unwilling to meaningfully participate, demanding the condominium corporation go to further lengths to demand enforcement. Given the distant history condominiums come from, it was perhaps ambitious to think all of their shortcomings would be resolved in one bill.

[49] *Nipissing Condominium Corp. No. 4 v.Kilfoyl* [2009] O.J. No. 3718, at paras. 3 & 4.

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