PEOPLE, PETS AND PARKING:
Effective Strategies for Enforcing Condo Rules in Ontario

Christopher J. Jaglowitz, B.A. (Hons.), LL.B., ACCI
Gardiner Miller Arnold LLP
Barristers & Solicitors
Toronto, Ontario

www.gmalaw.ca
Blog: www.ontariocondolaw.com

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Of the many new features of the *Condominium Act, 1998*,[2] one of the most notable was the introduction of mandatory mediation and arbitration in a large number of commonly-encountered situations and disputes. Section 132(4) created the requirement that disagreements between corporations and owners in respect of the declaration, by-laws or rules be submitted to mediation and, if necessary, to arbitration. In addition, s. 134(2) provides that a party is not entitled to make an application to the Superior Court of Justice for a compliance order until that party has failed to secure compliance using the mediation and arbitration processes.

While the obvious intent of these new sections was to sharply reduce the number of declaration and rule enforcement cases going to court, large numbers of such cases are still being litigated and their outcomes are increasingly less predictable. The result is that condominium corporations are spending progressively greater amounts on legal fees for more uncertain results, directors are facing longer and busier agendas at their meetings, managers are asked to add additional tasks to their jam-packed days and, above all, the unit owners (both the offending ones and those forced to endure the violations) are growing more restless by the day.

This paper will hopefully highlight some of the less obvious but critical considerations in any rule enforcement case, and discuss a number of ways in which to resolve rule enforcement disputes sooner and more economically and, when all else fails, to maximize the odds of achieving a successful outcome in court.

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[1] Senior Associate, Gardiner Miller Arnold LLP, Barristers & Solicitors, Toronto. The author is grateful for the assistance of Andrea C. Krywonis, B.Sc., LL.B., associate at the same firm, in preparing this paper.

[2] S.O. 1998, c. 19 (hereafter "the Act").

Statutory Duties – Who is Responsible to Ensure Compliance?

Everyone must comply! The Act requires that a corporation, its directors, officers and employees, its unit owners and the occupants of the units, and others, "shall comply" with the Act, the declaration, by-laws and rules.[3] A corporation, an owner or a mortgagee of a unit each "have the right" to require unit owners or occupants of units to comply with the Act, declaration, by-laws and rules.[4] The owner of a unit "shall take all reasonable steps to ensure" that the occupier of the owner's unit and all invitees, agents and employees of the owner or occupant comply with the Act, declaration, by-laws and rules.[5] The corporation "has a duty to take all reasonable steps to ensure" compliance by the owners, occupiers of units and certain others.[6] One of those "reasonable steps" may be that a corporation, an owner, a mortgagee and certain others can apply to the court for a compliance order.[7]

At least three important points can be made about this summary of the various duties. First, the notion of taking **"all <u>reasonable</u> steps"** was not expressly contained in previous incarnations of the Act. In the author's opinion, this is a welcome development because the concept of reasonableness, although critically important in condominium life, is all-too-often overlooked in enforcement matters. This new wording makes it clear that the corporation's duty does not include "heroic" efforts or a "compliance at any cost" mentality towards rule enforcement scenarios or when responding to complaints made by other unit owners.

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[3] Section 119(1).

[4] Section 119(3).

[5] Section 119(2).

[6] Section 17(3).

[7] Section 134(1).

A second point is that a corporation has a positive duty to act. Allowing blatant violations to persist for extended periods without taking meaningful steps is a breach of the corporation's duty and brings about a litany of trouble, not least of which is the impression that the corporation has "waived" its right to enforce its rules, and subsequent attempts to enforce those provisions may be challenged as being discriminatory and contrary to past practice. Basically, if a rule is left unenforced for too long, the corporation may be deemed to have "slept on its rights" and could arguably lose them. While it is not entirely certain whether such a defence can prevent a condominium corporation from enforcing its rules, it is certainly a factor that may influence the decision-maker's discretion in a rule enforcement case.

A third important point is that a corporation does not need to take action directly against an offending tenant. It is sufficient for the corporation to require the unit owner to secure the compliance (or eviction) of the tenant and, if the owner fails to do so, the corporation may then take those steps itself and. So long as the unit owner was given reasonable notice and opportunity to take steps against the tenant, the owner may be held responsible for the corporation's costs.[8] As a practical matter, however, the initial notice of a violation and demand for the violation to cease should be addressed to the tenant and copied to the landlord unit owner.

To Enforce or not to Enforce?

The first and most basic consideration in any case where a complaint is made or a violation is suspected is to determine whether or not there is actually a breach of the corporation's documents, having regard to the specific wording and, if so, whether the breach is sufficiently serious to warrant some sort of action. The legal doctrine of "*de minimis non curat lex"* [the law is not concerned with trifling things] is a good benchmark to assess most situations and can weed out instances where the

[8] *Carleton Condominium Corp. No. 555 v. Lagace,* [2004] O.J. No. 1480 (S.C.J.)

breach is trivial or more a matter of a perception than an actual violation, or is an isolated incident. Other criteria might include the importance of the rule being violated, the duration of the problem, the potential financial impact of the breach or its impact on the lives of other people, and so forth. The underlying concept of reasonableness must be applied in this inquiry as well. For instance, is it objectively reasonable to take steps to bring an end to the violation or, stated another way, is it unreasonable to do nothing?

The First Step – The Demand

If the violation is sufficiently important to act upon, many situations can and should be quickly and easily resolved with a friendly chat or a short note. If not, then the first demand letter from the board or the manager presents the next best opportunity to find a resolution. The demand letters that are most likely to secure voluntary compliance are written in a courteous, respectful tone and:

a. Clearly set out the specifics of the violation (who, what, when, where), attach supporting documents or photos where practical;

b. Identify and reproduce the relevant provision of the document in question, be it the Act, declaration, by-laws and/or rules;

c. If appropriate, explain the purpose or the importance of the provision at issue;

d. State that the corporation has a duty to take all reasonable steps to ensure compliance with the Act, declaration, by-laws and rules;

e. State specifically what must be done to correct the violation;

f. Give a specific but reasonable deadline by which the corrective action must be taken, failing which further enforcement steps will follow; and

g. Invite the recipient to respond with questions or comments or to request a meeting to discuss the matter.

Even if the demand letter does not immediately generate the desired response, it may open a dialogue that might lead to a quick and inexpensive solution. If not, a carefully prepared letter will probably assist counsel in understanding the facts and identifying the relevant provisions of the documents, which can help educe costs.

The Second Step – Instructing the Lawyer

If voluntary compliance is not secured with one or more letters from the board or management, then counsel should be consulted to provide a preliminary opinion as to the reasonableness of commencing an enforcement case, the various options for proceeding and the cost and likelihood of succeeding in the case.

In order to best understand the situation and to be able to make a good assessment of the situation more quickly, counsel should be given a comprehensive package containing a written synopsis of the facts, the documentary evidence in respect of the violation, including incident reports or logs, copies of the correspondence exchanged (especially the demand letter(s)) and a list of specific concerns or questions that counsel should address.

The Third Step – The Lawyer's Letter

If a good demand letter has been prepared and sent by the board or manager and is then ignored, there is little point in simply instructing the lawyer to prepare and send another demand letter unless that letter contains a submission to mediation, pursuant to s. 132(4) of the Act, assuming that mediation is appropriate for the case. Because s. 132 provides a 60-day period for a mediator to be chosen by the parties, failing which mediation will be deemed to have failed, it is best to commence the mediation process sooner rather than later, so as to keep the case moving forward.

Compared to arbitration or litigation, commencing the mediation process (i.e., selecting a mediator and scheduling a session) is relatively informal, involves no real cost and is easily terminated if a resolution is reached early in the process. While the customary practice at most corporations is for the lawyer to send a demand letter before taking any further steps or submitting the case to mediation, it is the author's opinion that a demand letter containing a submission to mediation is more effective than a demand letter alone in securing compliance or any kind of response.

If the situation involves a tenant, the lawyer's first letter should be to the unit owner, advising of the unit owner`s obligation to take steps to secure the tenant's compliance or eviction and setting out the serious and costly consequences that will result if the owner fails to act. Such letters are often highly effective.

Fourth and Fifth Steps – Mediation and Arbitration

As stated above, mediation and arbitration are mandatory for most disagreements between corporation and owners in respect of the declaration, by-laws or rules, and these processes must be exhausted before applying to Superior Court for a compliance order. Notably, however, s. 132 does not expressly state that disagreements with respect to the Act itself are to be submitted to mediation and arbitration. While it is certainly an option to mediate and arbitrate cases where there is a disagreement over the Act (and it is probably wise to do so in most such cases), it is widely-viewed by the condo law bar that the distinction was made purposefully, so as to allow a corporation to proceed directly to court in certain instances, such as to obtain a court order where dangerous activities are being carried out which might cause injury to persons or damage to property, contrary to section 117.

It is also widely-held that the Act does not strictly require disputes dealing with violations by tenants to be submitted to mediation and arbitration. It is, however, open for a corporation to use those processes where prudent to do so.

While there are strong proponents of mediation and arbitration in the legal community, condo lawyers grappled with the new requirement for mediation and arbitration in the early years after Act came into force. There was widespread reluctance to embrace the mediation and arbitration processes because the old process of making an application directly to the court was relatively efficient and generally quite effective, giving little reason to embark upon mediation and arbitration, especially when there were no specific procedures enacted for conducting these new processes. Moreover, mediation and arbitration were entirely unfamiliar to condo directors and managers, and even more so to unit owners at large. For these reasons, many enforcement cases went to Superior Court without any attempt to mediate or arbitrate them, and judges continued to grant compliance orders. One of the prevailing views was that a simple case of non-compliance did not necessarily constitute "a disagreement" and therefore the matter did not fall into the wording of s. 132(4) that mandate mediation and arbitration. In the last few years, however, Superior Court judges have begun to throw out such cases more frequently where mediation and arbitration have not first been exhausted.[9] It is clearly no longer a practical option to proceed to court directly.

Procedural Difficulties in Mediation and Arbitration

Now that mediation and arbitration must be exhausted before seeking compliance orders, the question becomes one of how to move those processes forward. Unfortunately, the Act does not provide a simple procedure to follow[10] in mediation and arbitration, unlike the *Rules of Civil Procedure* that govern lawsuits in Ontario courts. It is therefore important for a corporation to enact a by-law that

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[9] *McKinstry v. YCC 472* (2003), 68 O.R. (3d) 587 (S.C.J.); *MTCC 562 v. Froom*, 2006 CanLII 28087 (Ont. C.A.); *YRCC 890 v. 1185010 Ontario Inc.,* [2007] O.J. No. 4103 (S.C.J.); *MTCC 1143 v. Li Peng,* 2008 CanLII 1951 (Ont. S.C.).

[10] For a good discussion on this point, see Audrey M. Loeb, *Condominium Law and Administration*, 2nd ed., looseleaf (Toronto: Carswell, 1998) at 22§3(d)(i).

establishes a procedure for the resolution of disputes, providing for the exchange of documents, the scheduling of the mediation session or the arbitration hearing, the rules for the presentation of evidence, and so forth. Without such a procedure in place, it becomes difficult to move the matter forward, particularly where the respondent unit owner is unwilling to participate and cooperate in the process.

The most common difficulty arises where mediation is deemed to have failed because the parties have not chosen a mediator within 60 days, as provided in s. 132(1)(a)(ii), and the dispute is submitted to arbitration. Unless the parties agree to appointment of a specific person as an arbitrator, and if the corporation's by-law does not provide a way for one of the parties to unilaterally select and appoint an arbitrator, then the only option is to make an application to Superior Court under the *Arbitration Act, 1991*[11] to obtain an order appointing an arbitrator, which is by any measure, a seemingly absurd requirement and a very good reason to enact a new comprehensive general by-law. Even with the appointment of an arbitrator there are procedural hurdles that must be overcome, but the *Arbitration Act* generally provides the arbitrator with sufficient discretion and authority to move the case to a hearing, after which a binding ruling or "award" will be given. The award can then be enforced or appealed by making an application to the Superior Court.

Improving the Odds of Success

Navigating the procedural void is just one of the hurdles in an enforcement proceeding. If the case cannot be settled through negotiation or mediation, the case must still be won in arbitration or, in some limited situations, in court. While succeeding in arbitration or in court requires a comprehensive plan composed of many different elements, some of the most basic but often overlooked are below.

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[11] S.O. 1991, c. 17, s. 10.

Because arbitration is a quasi-judicial process that in many ways resembles a trial in a courtroom, many of the same principles apply, such as the need for the plaintiff or claimant to put forth sufficient evidence to prove their case on a balance of probabilities. This might often require the testimony of eye-witnesses who actually saw or heard the situation in dispute and who are prepared to give their evidence publically or at least by sworn written statement. Very frequently a complaining unit owner or occupant will make the complaint and ask for action to be taken but will decline to assist in the enforcement proceedings. Alternate forms of evidence must be considered and gathered early in the process. Photographs and videotape might be suitable alternatives if they are reliable and, above all, clear to view or listen to, and provided that the person who took the photos or video is available and can attest to the date, time and circumstances of the recording. Similarly, the corporation's logs or reports made at the time of the incident will be useful evidence, and they should be prepared carefully and contain sufficient detail to be useful at a later time.

The specific relief sought in the proceeding should be considered at an early stage. Just as a good demand letter will contain a statement listing the specific steps that the unit owner must take in order to cease the violation, it is critical that the relief sought in the enforcement proceeding be considered. In the case of sound transmission from one unit to another, is it sufficient to simply ask that the respondent unit owner turn down the television, or might it also be appropriate to ask that carpeting or mats be laid over bare floor? The relief requested can be creative so as to suit the circumstances, but it should be reasonable. While it may be possible that a court might compel a unit owner to sell their unit in a most extreme case, granting such extraordinary relief would be exceedingly rare,[12] particularly if other options are available. A court or arbitrator is likely to give the least intrusive relief which will rectify the situation.

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[12] *YCC 136 v. Roth*, 2006 CanLII 29286 (Ont. S.C.).

Whether or not the decision-maker grants any relief is an exercise of discretion. Because the corporation will have (hopefully!) conducted the early stages of the rule enforcement proceeding in a demonstrably reasonable manner by commencing the process only when there is good cause, well-documenting the problem and using a good demand letter as described above, it should be relatively simple to persuade the decision-maker that it is appropriate to grant the corporation's request for relief against a non-complying owner. A strong suggestion of a personal vendetta, favouritism or selective or arbitrary rule enforcement on the part of the corporation will quickly slash the chances of succeeding. The entirety of the circumstances must be objectively seen to be reasonable. The perspective of an outsider can often be quite different than that of the parties themselves. For instance, the view held by a board, its manager or a unit owner as to what is important or reasonable or fair in any particular situation may be entirely different than that held by a neutral mediator, arbitrator or judge that hears the case.

Conclusion

This paper only scratches the surface of some of the myriad of issues pertaining to rule enforcement. By focussing on reasonableness and effective communication, both of which are among the most fundamental principles of condominium living, some of the darkness and mystery surrounding mediation and arbitration can hopefully be lifted. These processes should be adopted and refined to develop an efficient and effective dispute-resolution regime which can be utilized by the corporation or its owners in order to solve a problem at a minimal of cost, disruption, or aggravation.

With each mediation session or arbitration hearing they participate in, condominium directors, property managers and owners alike can quickly become more familiar and comfortable with the mediation and arbitration processes and can develop practices and procedures to customize those processes in a way that suits the circumstances of their community and helps foster greater cohesion and goodwill.

CONDOMINIUM ACT, 1998, S.O. 1998, c. 19 (EXCERPTS)

Objects

17. (1) The objects of the corporation are to manage the property and the assets, if any, of the corporation on behalf of the owners.

Duties

(2) The corporation has a duty to control, manage and administer the common elements and the assets of the corporation.

Ensuring compliance

(3) The corporation has a duty to take all reasonable steps to ensure that the owners, the occupiers of units, the lessees of the common elements and the agents and employees of the corporation comply with this Act, the declaration, the by-laws and the rules.

Compliance with Act

119. (1) A corporation, the directors, officers and employees of a corporation, a declarant, the lessor of a leasehold condominium corporation, an owner, an occupier of a unit and a person having an encumbrance against a unit and its appurtenant common interest shall comply with this Act, the declaration, the by-laws and the rules.

Responsibility for occupier

119. (2) An owner shall take all reasonable steps to ensure that an occupier of the owner's unit and all invitees, agents and employees of the owner or occupier comply with this Act, the declaration, the by-laws and the rules.

Right against Owner

119. (3) A corporation, an owner and every person having a registered mortgage against a unit and its appurtenant common interest have the right to require the owners and the occupiers of units to comply with this Act, the declaration, the by-laws and the rules.

Mediation and arbitration

132. (1) Every agreement mentioned in subsection (2) shall be deemed to contain a provision to submit a disagreement between the parties with respect to the agreement to,

(a) mediation by a person selected by the parties unless the parties have previously submitted the disagreement to mediation; and

(b) unless a mediator has obtained a settlement between the parties with respect to the disagreement, arbitration under the *Arbitration Act, 1991*,

(i) 60 days after the parties submit the disagreement to mediation, if the parties have not selected a mediator under clause (a), or

(ii) 30 days after the mediator selected under clause (a) delivers a notice stating that the mediation has failed.

Disagreements between corporation and owners

132. (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.

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 order enforcing compliance with any provision of this Act, the declaration, the by-laws, the rules or an agreement between two or more corporations for the mutual use, provision or maintenance or the cost-sharing of facilities or services of any of the parties to the agreement.

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.

Contents of order

(3) On an application, the court may, subject to subsection (4),

(a) grant the order applied for;

(b) require the persons named in the order to pay,

(i) the damages incurred by the applicant as a result of the acts of non-compliance, and

(ii) the costs incurred by the applicant in obtaining the order; or

(c) grant such other relief as is fair and equitable in the circumstances.

Order terminating lease

(4) The court shall not, under subsection (3), grant an order terminating a lease of a unit for residential purposes unless the court is satisfied that,

(a) the lessee is in contravention of an order that has been made under subsection (3); or

(b) the lessee has received a notice described in subsection 87 (1) and has not paid the amount required by that subsection.

Addition to common expenses

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

Other remedies

136. Unless the Act specifically provides the contrary, nothing in this Act restricts the remedies otherwise available to a person for the failure of another to perform a duty imposed by this Act.

Act Prevails
176. This Act applies despite any agreement to the contrary.