

Perils of Refusing to Mediate

Section [132\(4\) of the Condominium Act](#) (the “Act”) provides that every declaration shall be deemed to contain a provision that the corporation and owners agree to submit a disagreement with respect to the declaration, by-laws or rules to mediation and arbitration. Although section 132(4) of the Act does not require that disputes with respect to the Act itself be submitted to mediation and arbitration, based on a recent court ruling, the decision not to utilize arbitration/mediation should not be made without careful consideration.

The case of [Toronto Standard Condominium Corporation No. 1508 v. Stasynga](#) involved a common element condominium. Each of the owners of the parcels of tied lands (the “POTLs”) owned a freehold interest in their homes and adjacent backyards. The common elements of the condominium consisted of a walkway located at the perimeter of the housing development (and enclosed by a fence) and also in between some of the separate POTLs. Visually, the common elements walkway appeared to be an indistinguishable part of each owner’s separate parcel of land. A number of owners planted trees and shrubs and installed patios and stones in their backyards and on the common elements walkway, in contravention of [section 98 of the Act](#). It appears that the owners erroneously believed that they were entitled to use and deal with that part of the common elements walkway abutting their property as if it was an extension of their backyard. Non-compliance issues frequently arise when owners do not fully understand the obligations imposed on them by the Act and the condominium documents.

In 2007, the Corporation wrote to fifteen owners requesting that all landscaping elements be removed from the common elements walkway, twelve of whom complied. Several years later, as three of the owners had still not complied, the Corporation called a special meeting pursuant to [section 97 of the Act](#) to authorize those changes that had been made to the common elements. However, as the Corporation did not receive the requisite approval from 66 2/3% of the owners, the changes were not approved. (It is interesting to note that the Board treated this as a substantial change even though there were no costs to the Corporation relating to the changes.) The defaulting owners were given an additional one-year grace period to comply. This was followed by several more demand letters from the Corporation, with the Corporation eventually commencing an application for compliance under section 134. After the commencement of the application, the owners attempted to mediate, but the Corporation refused.

The owners claimed that the Corporation’s application should not be granted because it was commenced after the expiry of the limitation period and that the Corporation had, over the years, acquiesced to the changes. The court did not accept the owners’ claim that the Corporation was barred from commencing the application because it had commenced more than two years after knowing about the non-compliant common elements. The court determined that the Corporation was entitled at any time to enforce compliance with the Act, even if it failed to do so for some period of time and distinguished this case from other cases that dealt with a delay in enforcement of the condominium documents, not the Act. The court further refused to accept the argument of the owners that the Corporation acquiesced to the landscaping and had slept on its rights and

therefore, was now barred. It was noted that the owners had received multiple notices from the Corporation, but still did not comply.

The court also clearly stated that no mediation or arbitration is required with respect to a violation of the Act. However, the court concluded that although mediation was not mandatory, it could have resolved the conflict in a much more cost-effective manner than the court application and that the Corporation had unnecessarily wasted time and expense by insisting on bringing this court application. Although the court ultimately found in favour of the Corporation and required that the non-compliant landscaping be removed, it determined that the Corporation would be only entitled to a partial indemnity of its legal costs reduced by twenty percent because the Corporation had refused to mediate. The court said that the Board's decision, while legally correct, showed poor judgment. Unfortunately, that portion of the legal costs not reimbursed by the non-compliant owners would ultimately be borne by all of the Condominium owners, including the compliant owners. As a result of this decision, Board members should make *bona fide* efforts to resolve all disputes, including those involving non-compliance with the Act, through mediation and arbitration before resorting to the courts.