

“You can pay me now or you can pay me a lot lot lot more later”

If you went back and reviewed the many articles that I have written for this publication, you may notice a common theme or bias towards alternative dispute resolution and the concept of compromise. The concept of owners and condominium corporations resolving their issues and keeping matters outside of the courtroom and focusing on settling their disputes through the mediation process.

If for no other reason, the value of resolving disputes outside of the judicial process and in forums like mediation, allows those involved in the dispute who are usually your neighbours in the condominium community to settle a matter in a friendlier environment than a courtroom. However, a second reason, and now more compelling than ever reason to utilize and take advantage of the mediation process is the issue of legal fees and this has never been made clearer than in a recent Ontario decision.

I am referring to the *“Italiano v. Toronto Standard Condominium Corp. No. 1507”* decision. Mr. Italiano was the owner of a residential condominium in this corporation. He purchased the unit in October of 2006 and moved in in November of 2006. Prior to moving in, he received permission from the board to install laminate hardwood flooring in his home. Shortly after moving in, Mr. Italiano received complaints from owners beside him and below regarding the noise coming from his suite. The condominium corporation issued two letters to Mr. Italiano, which were delivered to security, but for some reason, were never delivered directly to his suite. In January, 2007, a third letter was sent and Mr. Italiano requested a meeting with the property management company to see if this matter could be resolved. Between January and April, 2007, security attended at Mr. Italiano’s unit a number of times to respond to complaints from the next door neighbour’s suite complaining about loud noise coming from the unit. In February, 2007, the matter was referred to legal counsel. A letter was sent by the unit owner’s counsel requesting that a sound transmission test be conducted because it was their position that there were deficiencies in the materials used in the installation of the walls between this unit and the neighbour’s unit. The condominium corporation denied this request.

This matter was referred to mediation in May of 2007. Mr. Italiano did not attend due to advice given to him by legal counsel. The mediation was not re-scheduled and an arbitration was scheduled for July, 2007. On July 30, 2007, Mr. Italiano attended arbitration and asked for an adjournment because he was unrepresented by counsel. He was granted an adjournment and was ordered to pay \$4,000.00 in costs, which were subsequently paid by Mr. Italiano. The arbitration was re-scheduled for August, 2007 and Mr. Italiano was represented by counsel at that point in time. Mr. Italiano was willing to consent to a compliance order only if the Corporation agreed to the walls being sound tested. The condominium corporation rejected this request and insisted that the arbitration proceed. In September, 2007, the arbitrator ordered that an independent acoustical expert report to him about the sound issue and the expert was paid for by Mr. Italiano in the amount of \$2,100.00. The acoustics report delivered on November, 2007 concluded that the sound transmission did comply with the building code.

The remainder of the arbitration hearing was completed over a day and a half ending on December 12, 2007 and January 3, 2008. The arbitrator found in favour of the condominium corporation as against Mr. Italiano. The arbitrator delivered detailed reasons with respect to his evaluation and his credibility of Mr. Italiano and the credibility of the condominium corporation with respect to the evidence they gave. The arbitrator ordered that Mr. Italiano breached the declaration and that he must comply with the declaration and the rules. In addition, he must pay the applicant's costs on a substantial indemnity basis and the full costs of the arbitration.

This is where the fun begins. At this stage in the proceeding, the condominium corporation is allowed to submit their request for costs. Usually this means they put forward the amount of fees that the condominium corporation paid to their lawyers. TSCC 1507 claimed costs for the arbitration in the amount of \$62,948.43. This is not a typo.

It gets better. In addition to this, Mr. Italiano had to pay the fees of the arbitrator which was \$35,815.19. The arbitrator reviewed what the corporation's lawyer's claim for their

costs and ordered that Mr. Italiano pay \$39,000.00 of those legal fees. The arbitrator received \$35,015.19 for a total payment owing by Mr. Italiano of \$81,865.07. Mr. Italiano appealed the arbitrator's decision and lost once again. The appeal court reviewed the arbitrator's decision and determined that the costs were appropriate. The rest of the appeal dealt with other significant legal issues which will be dealt with in my next article.

To rub salt in the wound, since Mr. Italiano lost the appeal he must now pay the costs of this appeal as well, which has yet to be determined.

To recap, following a simple noise dispute, Mr. Italiano was ordered to pay over \$81,000.00 of legal and arbitration fees which will be recovered through the registration of a condominium lien against his unit if it is not paid.

Unfortunately, there is no explanation in the decision as to why Mr. Italiano's original counsel advised him not to attend the mediation, which caused him to incur \$4,000.00 for the adjournment and subsequently forced the Condominium Corporation to go to arbitration. Since the purpose of the mediation was an attempt to resolve this issue, in a NON BINDING environment, it is unclear as to why his counsel would not allow him to attend or advised him not to attend. This makes absolutely no sense. If he attended the mediation and the matter was resolved, there would have been no need to proceed to arbitration and no enormous cost award. In addition, the relief obtained by the condominium corporation at the end of the day was simply a compliance order that Mr. Italiano simply has to tone down the noise and comply with the Declaration. This may have been achieved by the placement of area rugs. Mediation is the perfect place to float these types of resolutions or compromises. Since it is non-binding, everyone can speak freely and not have to worry that they will be forced to accept any thing they don't want to. It is not clear whether mediation would have resolved the issue, but to refuse mediation and proceed to arbitration now have to pay \$81,000.00 in fees is beyond belief.

No matter how right Mr. Italiano thought he was, surely he cannot sit back and think it was worth over \$81,000.00 to fight this. When I first started practicing law, my mentor and condominium law guru Harry Herskowitz, first said to me, "If you want to fight on principle, you better have the principal to do it." This is a perfect example as to what happens when somebody sits back, digs their heels in and refuses to comply or compromise. Many times, owners do not take a condominium's threat seriously when the corporation threatens to start a proceeding to enforce compliance with the Declaration, by-laws or rules. The important thing to keep in mind here is that the condominium corporation had no choice but to proceed to mediation. They were faced with the complaints from the other unit owners about the noise that was emanating from Mr. Italiano's suite. They cannot sit back and do nothing. They have a statutory obligation to ensure that the declaration, rules and bylaws are complied with and they also owe this duty to the other unit owners. It is not only their duty to enforce the declaration, but it is also their duty to the other unit owners that this declaration be enforced and complied with. Once Mr. Italiano refused to comply, or started being difficult, the condominium corporation was handcuffed and had no choice but to take the next step. Even after the launching of the mediation, the matter could have been resolved. If all the condominium corporation was seeking was a compliance order, surely Mr. Italiano could have come to some resolution or degree of compromise at the mediation to satisfy the concerns of the neighbours to alleviate the noise. Unfortunately, Mr. Italiano thought that it was necessary to fight this matter. Once the condominium corporation's solicitors were instructed to proceed to arbitration, they had to prepare for arbitration which meant they had to prepare witnesses, legal arguments and incur substantial amounts of time in doing so. At the end of the day, Mr. Italiano is paying over \$81,000.00 because he felt he was right and his home was his castle and he did not have to comply with the declaration.

Both owners and condominium corporations should learn a lesson from this case. If there is a dispute that must be dealt with, all parties should take one step back, take a deep breath and ask themselves can this be resolved through mediation and compromise?

Surely, there are \$81,000.00 worth of reasons why the answer should be in the affirmative.