

December
2014

Mediation And Other Stuff

Colm Brannigan

Mediate.ca

Mediate Better Solutions

As this year draws to a close, I would like to wish all of you the best for the holidays:

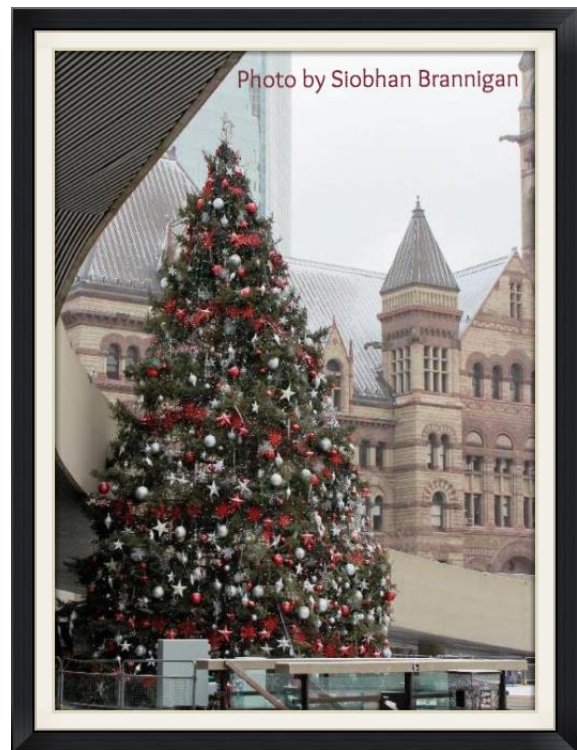
"Nollaig Shona agus Athbhliain faoi Mhaise Daoibh
Happy Christmas and a Happy New Year"

It has been a very good year with my practice expanding by almost 20% and with my move to better-equipped office/mediation space at 2 County Court Boulevard in Brampton; I am looking forward to an even busier year in 2015. By the way, if you book a mediation or arbitration with me, I am happy to offer the use of my meeting facilities at no additional charge.

Over the year I have worked on a variety of mediations and several arbitrations in business, commercial leasing, contracts, construction, employment, family, partnership, professional liability, workplace and an increasing number of condominium disputes. I have also provided conflict management consulting and coaching services to a number of organizations including condominium boards and property managers.

In this newsletter, even though mediation is not a legal process as it is really facilitated negotiation, I am focusing on the law and in particular what is perhaps the most important contracts case to come out of the Supreme Court of Canada in the last 20 plus years.

Because of this case, those involved in contract disputes may want to add risk management to the list of reasons for using ADR and especially mediation in these types of disputes.



I am also commenting on a very recent Ontario Court of Appeal decision on condominium law and status certificates and the incredible legal costs involved in the case.

As always if I can help you with mediation or arbitration, or if you would just like to chat about it, please contact me

Consider Mediation as a Risk Management Strategy.

There have been many case comments about the Supreme Court of Canada's recent decision in [Bhasin v. Hrynew](#) over the last month or so. All seem to be in agreement that the Supreme Court of Canada has fundamentally changed the common law of contract by imposing a duty of honest contractual performance.

In the decision, Mr. Justice Cromwell asked: "Does Canadian common law impose a duty on parties to perform their contractual obligations honestly?" He concluded that it does.

As a result of this finding, there is now a legal duty, which requires parties to be honest with each other in relation to the performance of their contractual obligations.

With this new duty comes the potential for greater scrutiny and oversight by courts. In many contract disputes there are significant issues over performance so this is likely to become a major issue.

In response to this, the issue of mediation should be considered even more carefully in contract disputes. In addition to the usual benefits of mediation such as:

- Mediation can be used for many types of disputes
- Mediation makes good business and practical sense
- Mediation is confidential
- Mediation allows you to manage outcomes
- Mediation saves time and money
- Mediation helps preserve valuable relationships
- Mediation offers unique solutions not available through court
- Mediation settlement rates are high
- Mediation clients are very satisfied with the process
- Mediation agreements can be enforced

mediation is also a very effective means of managing risk, but this use has not been emphasized to the same degree as other more obvious benefits. This may have changed as a result of this decision.

As we are all aware there can be significant disadvantages to litigation. These include:

- Uncertainty
- Imposition of a solution rather than the parties reaching one
- The public nature of the court process having potential to cause embarrassment to the

- parties if certain facts about them are disclosed in the proceedings
- Delay
 - Financial cost

All of these factors are present without adding the Supreme Court's decision to the calculus. Once you do add it, this can tip the scales in favour of mediating contract disputes as a way of managing risk and maintaining confidentiality.

Where there is a possibility that a party might have difficulties in showing that it performed its contractual obligations honestly and with regard to the legitimate interests of the other party, it makes little sense to risk a public court decision which could have serious negative consequences for that party including loss of trust by other customers or clients or the loss of potential business because of adverse publicity.

Taking all of this into account, it now makes even more sense to attempt to resolve contract disputes through mediation parallel with, or instead of, litigation.

If you want to avoid the potential for reputational harm or if you are found to have failed in your duties under any particular contract, then the time to do this is when the contract is signed, not when the dispute arises. When drafting all types of contracts consider including a stepped-up dispute resolution process clause (negotiate - mediate - arbitrate or litigate) to avoid problems if one party does not want to utilize ADR in any potential dispute.

The Importance of Status Certificate in Condominium Cases

Last week the Ontario Court of Appeal issued its 57 page decision in the case of [Orr v. Metropolitan Toronto Condominium Corporation No. 1056](#).

The trial decision in this case was released in 2011 and created much comment and consternation in the condominium and legal communities. This decision will do more of the same.

If you have any interest in condominium law whether as a lawyer, board member, property manager or unit owner this is a must read case.

Not only does this decision hold that a condominium corporation owes a purchaser a duty of care in the preparation of the status certificate, but it also clarifies the purchaser's lawyer's duties in regard to the status certificate and finally also shows the potential for enormous legal costs, which likely exceed \$1,000,000.00.

Could this case have been settled through mediation? Looking at the facts and the limited

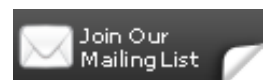


scope of alternatives available, it is unlikely that mediation would have been successful although of course we will never know for sure.

While it is very useful to have guidance from the Court of Appeal, most people in disputes do not want to be the proverbial test case so mediation should at the very least, be considered in every case and in my somewhat biased opinion used far more than it is presently used in Ontario.



Colm Brannigan - Mediate.ca
416 460 6841
2 County Court Blvd. 4th Floor
Brampton, Ontario
L6W 3W8
colm@mediate.ca
<http://www.mediate.ca>



Negotiate - Mediate - Arbitrate

Better Solutions

Copyright © 2014. All Rights Reserved.

[Forward this email](#)



This email was sent to ursula@mediate.ca by colm@mediate.ca | [Update Profile/Email Address](#) | Rapid removal with [SafeUnsubscribe™](#) | [Privacy Policy](#).



Colm Brannigan - Mediate.ca | 2 County Court Blvd. | 4th Floor | Brampton | ON | L6W 3W8 | Canada

