



10 Years on: Still Preparing after all these years (for Condominium Mediation)

Colm Brannigan, M.A., LL.M. (ADR), C.Med., C.Arb., Condominium Mediator and Arbitrator

Mediation has been part of condominium dispute resolution in Ontario for over 10 years since the Condominium Act, 1998 came into force on May 5, 2001. Despite this, many condominium owners, board members and managers do not understand the mediation process or how to prepare their case so that they get the best results from mediation. Sometimes mediation is dismissed by members of the condominium industry as a waste of time and money.

In fact, mediation has a success rate of 75 - 80%+ so the chances are good that you will resolve your dispute. On top of this, mediation is usually far quicker and more cost effective compared to arbitration and litigation. You can set up mediation in days or weeks as opposed to months or even years for arbitration or litigation. The costs of mediation range with the experience and expertise of the mediator but should be in the range between \$1,000 to \$2,000 for a half day and between \$2,000 and \$4,000 for a full day. Many condominium mediations are concluded in a half day.

Research also shows that the majority of mediation users are very satisfied with the process. In a recent survey of 500 large corporations, 88% had used mediation, 81% said that mediation provided "a more satisfactory process" than litigation, 90% viewed mediation as an effective cost-saving measure and 82% said that the main reason to use mediation is that it allowed the parties to resolve disputes themselves.

If large business corporations have willingly adopted mediation as a dispute resolution mechanism then so should condominium corporations. Besides statistics we must remember that condominiums are communities and mediation is the only process that holds out the possibility for maintaining or even repairing the relationship between the parties. This is crucial to the ongoing day to day functioning of the condominium. People are much more likely to accept and comply

with a decision that they are part of making than one which is forced on them by an arbitrator or judge.

Mediation is "a process in which an impartial third party facilitates communication and negotiation and promotes voluntary decision making by the parties to the dispute." In certain types of condominium disputes, mediation is required. Mediation is not binding on the parties unless a settlement is reached nor is it about settlement at all costs. The mediator does not impose a settlement on the parties.

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If mediation fails then arbitration is mandated by the Condominium Act, 1998. Arbitration is a far more costly process in which the arbitrator makes a decision based on the evidence leading to an award which is binding on the parties and can be enforced through a court.

Although your lawyer will explain the process to you in much greater detail,

essentially mediators help the parties to understand each other's perspectives and discuss options for settlement. Mediators do not decide who is right and who is wrong. Mediators usually start with meeting all the parties in a "joint session" and then tend to meet with parties separately in "caucus".

Over the last ten years I have put together a list of questions to help users of mediation to prepare. At a minimum you need to think about the following:

- What is the dispute really about? Are some of the problems caused by misunderstandings? Can they be cleared up by better communication?
 - What would you like to accomplish at the mediation?
 - What do you need to achieve from the mediation?
 - If you achieved this, what would that mean for you?
- What do you and the other party agree about?
 - What do you disagree about?
 - What is your best alternative to a negotiated agreement (BATNA)?
 - What is your worst alternative to a negotiated agreement (WATNA)?
 - What are the realistic options for settlement?
 - What will be the consequences for you if this is not resolved?
 - What will be the consequences for the other party?
 - How would you know if a possible agreement is better than the most likely alternatives?
 - When you compare possible agreements with your alternatives, at the very least consider the costs, time

Continued on page 28 ...

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and effort required to go further, the effect on your relationships with the other party and other people if you do so and the value of getting the matter settled.

- How comfortable are you with the risk of not reaching an agreement such as going to arbitration or court?
- Thinking about the specific dispute, what kind of outcome can you live with?
- What does the mediator need to know to help you accomplish your goals?
- What does the other side need to know?
- What would you need to be satisfied with the outcome?
- What do you think that the other person needs to feel satisfied? Money, contribution to costs, an apology, a change in behaviour or something else?
- What information or documents such as the Declaration, By Laws or Rules might be useful to convince the other party to change their mind about the things you disagree about?
- What might cause you to change your position?

- What do you need to do today to achieve this?
- What do you need to say to the other party to help to achieve this?
- What do you need to hear from the other party which would help you achieve this?
- What are your main concerns at this stage?
- What do you think are the other party's main concerns at this stage?
- What do you think that the other party really needs out of this?
- What do you think the other party needs to hear from you to help you both to move on to a satisfactory outcome?
- Do you have to deal with each other in the future? Will reaching a good agreement help your relationship with the other party? What is that worth to you?

In mediation, you will hear things that you disagree with and you may be asked difficult questions by the mediator and/or the other party and their lawyer which may upset



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you. Do what you can to avoid getting upset and causing the other party to get upset. Keep an open mind and be willing to consider various options for settlement. Although you may think that the other side is wrong or even bad, you are more likely to be successful if you try to understand the other person's views.

It may take time to work through the issues in mediation. If you do not settle all the issues at a mediation session, think about whether to schedule another mediation session. Sometimes people need more information or time to think before they are ready to finally resolve a dispute.

The main point of the above is that you should carefully prepare for mediation. Everyone is busy but do not overlook this important step. You cannot walk into the mediation session without knowing what you are trying to achieve or you will never achieve it.

Finally, you should get legal advice from an experienced condominium lawyer as soon as the possibility of a dispute arises. The choice of dispute resolution process is extremely important and should only be made after legal advice about the pros and cons of the various options.

Case Examples Where Mediation Was Successful:

- Long term dispute (over 20 years) between unit owner and board plus previous board members. One day mediation resulted in a written agreement over outstanding issues including how to deal with problems in the future. Because the parties participated in their agreement, they are more likely to keep it and are doing so.
- Hoarding and repair problem in town house with possible mental health issues. Half day mediation resulted in the condominium board helping the unit owner find assisted living, repairing the unit and selling it. This innovative community based result benefitted everyone involved. A far more satisfactory result than could have been achieved through arbitration or litigation.
- Another long term dispute (over 5 years) concerning allegations of non-repair of apartment unit. Litigation had been commenced and both condominium and unit owner had spent a great deal of money and time in the conflict. One day mediation resulted in

solution where the condominium corporation agreed to purchase the unit from the owner to repair and later sell it. A court could not have ordered this and a trial would have cost an additional \$30,000 plus in legal costs.

Colm Brannigan is a mediator and arbitrator specializing in condominium and commercial dispute resolution. He is the co-author of the CCI Condo 300 course materials on Mediation and Arbitration and a book, "Condo ADR in Canada", which will be published in 2012.

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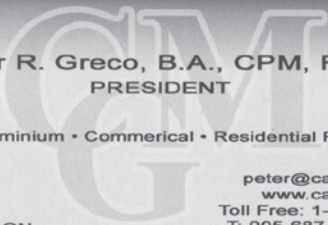


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