"Mediation and Other Stuff"

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Mediate.ca
Dispute Resolution Services

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Welcome to my newsletter about alternative dispute resolution from an Ontario perspective.

I am happy to announce that because of the increasing demand for my ADR services, I will be opening offices in Toronto and Guelph over the next few months.

If you have a topic that you would like covered, please let me know.

Colm Brannigan

Condo ADR - Part 3 - Arbitration

My last two newsletters were a brief introduction to condominium ADR and then an introduction to condominium mediation. This newsletter focuses on condominium arbitration.

Arbitration is another private dispute resolution process. Arbitration is different than mediation as it is an adjudicative dispute resolution procedure in which the arbitrator, issues an award which is equivalent to a judgment from a court.

In a condominium dispute, arbitration is the process required under section 132(4) of the Condominium Act where mediation has failed. Arbitration is a legal process governed in Ontario by the *Arbitration Act, 1991*, and in the case of condominium arbitration it is also governed by the *Condominium Act, 1998*. Condominium arbitration is not significantly different than any other type of arbitration.

Unlike participants in mediation who design their own settlement with the help of the mediator, participants in arbitration give control of the outcome to the arbitrator. The chief advantage of arbitration compared to mediation is that the parties can be certain that their dispute will be dealt with which is something that cannot be guaranteed by the mediation process.

The arbitration process is similar to a trial in that the parties make opening statements and present evidence to the arbitrator who then makes an award. Parties are usually represented by counsel, although unit owners often do not have legal representation in condominium disputes. This is unfortunate as the result of the arbitration process has significant legal consequences to the parties.

Compared to court, arbitration can usually be completed more quickly. It is generally less formal than court but it is also far harder to overturn an arbitrator's award so it is extremely important to be prepared for the hearing.

Arbitration is a formal structured dispute resolution process, but it is designed to be less formal and more flexible than litigation in court in a number of ways.

Selecting the Arbitrator

Unlike a court where you have no choice but to accept

the judge assigned to your case, in arbitration the parties select the arbitrator. This important decision is usually handled by the lawyers for the condominium corporation and the unit owner.

If the parties cannot agree on the arbitrator, unless there is a bylaw setting out a selection process, the condominium corporation must apply to Superior Court for the appointment of the arbitrator under the Arbitration Act.

All arbitrators, regardless of how they are selected, must be carefully screened to assess their education, experience, and personal qualifications. Disputants must remember that arbitrators' decisions are generally not open to review by the court.

Dispute resolution organizations such as the ADR Institute of Ontario can provide information about potential arbitrators who are members of that organization.

It is important to prepare thoroughly for the arbitration hearing. To this end the lawyers will prepare their client's cases. This can be an expensive process, but preparation is crucial to success.

The Arbitration Hearing

The arbitration hearing can be held in a number of different places including the arbitrator's or counsel's office, or other facility.

The parties need to decide whether to have a transcript of the hearing made by a court reporter. Of course this is a significant cost to the parties and since appeals of arbitration awards are rarely successful, it is probably best not to have a transcript unless the arbitration hearing is very lengthy or the issues are very complex.

Arbitrators tend to conduct the hearing in an informal manner but do not confuse the lack of formality with a lack of seriousness.

The rules of evidence used in court do not generally apply in arbitrations. Arbitrators tend to admit evidence that would not be permitted in a court proceeding. As in a regular court trial, the parties take turns presenting evidence and rebutting the evidence of the other side.

The "burden of proof", which is the standard which a party has to meet in order to prove its allegations and win its case, is, in arbitration as in civil litigation, the "balance of probabilities".

Because of this, each side must keep in mind that the evidence it provides must be sufficient to convince the arbitrator of its position. Of course, their lawyers will have explained all of this to his or her witnesses in the preparation stage.

After all the evidence is presented, the parties or their lawyers usually present closing statements. This is not always required but most lawyers will do so as it is a good opportunity to pull all their facts together and make a final appeal. The arbitrator then considers the evidence and law and issues a written award. In a typical case, this is done within 30 days of the closing of the hearing.

Once you have an arbitration award in a condominium dispute it is binding on the parties.

If one party, quite often the unit owner, decides not to comply with the award, the condominium corporation will have to enforce it by going to court under section 50 of the *Arbitration Act, 1991* and ask for a court order reflecting the award.

Appealing the Arbitrator's Award

It is very difficult to appeal an arbitrator's decision which makes it in many ways more "final" than a court decision. In most cases, there are only very narrow grounds for appeal.

In effect, parties to condominium arbitration are required to give up their ability to appeal in return for what should be a speedier less expensive, private process.

The Cost of Arbitration

The parties to the arbitration have significant legal costs in preparing and presenting their case in arbitration. The parties also pay for the arbitrator's fees.

The cost of arbitration will definitely be much higher than those of mediation and can be quite high if the dispute is lengthy and complex. There have been cases in Ontario where legal and arbitration costs have been as high as $50,00000.

If costs are awarded in favour of the condominium corporation against a unit owner, they may, in many cases, especially where there is a rule or By-Law dealing with the costs of enforcement, be collected in the same manner as common expenses.

Because of its costs, it is best if parties make their best efforts to resolve their dispute through mediation before it becomes necessary to arbitrate.

Article of the Month

Instead of a case this month, I have decided to finish off my series on condominium ADR by focusing on an interesting and informative article written by Robert Mullin a condominium law expert in Guelph, Ontario.

Rob's article, *Condominium Disputes & A.D.R.: A Recipe for Confusion?* reviews the topics I have covered in far more depth and detail from the perspective of a condominium practitioner and although Rob is a supporter of condominium mediation and arbitration his conclusion that

> ... those cases which have upheld the mandatory ambit of mediation/arbitration have seen disputes resolved with excessive cost, or recalcitrant unit owners unwilling to meaningfully participate, demanding the condominium corporation go to further

lengths to demand enforcement.

is concerning.

Further education of the condominium sector on the benefits of mediation and arbitration is needed. Condominium Boards and their managers need to seek advice from their lawyers on enacting Dispute Resolution By-laws to deal with the gaps in process left by the *Condominium Act, 1998* failing to set out a clear process. Dispute management policies should be considered by every condominium corporation in order to make clear how unit owners and boards can resolve their disputes in such a way as to contribute to the long term health of the community. Good relationships are the key to successful communities for unlike in most disputes, unit owners continue to reside close to each other during and after disputes are resolved. The only dispute mechanism that has any possibility of repairing a relationship is mediation. Whether mandated or not, mediation should, along with arbitration, be part of every condominium's dispute resolution tool box.

For previous editions of this newsletter, please click here.

If you have any questions or comments, please contact me.

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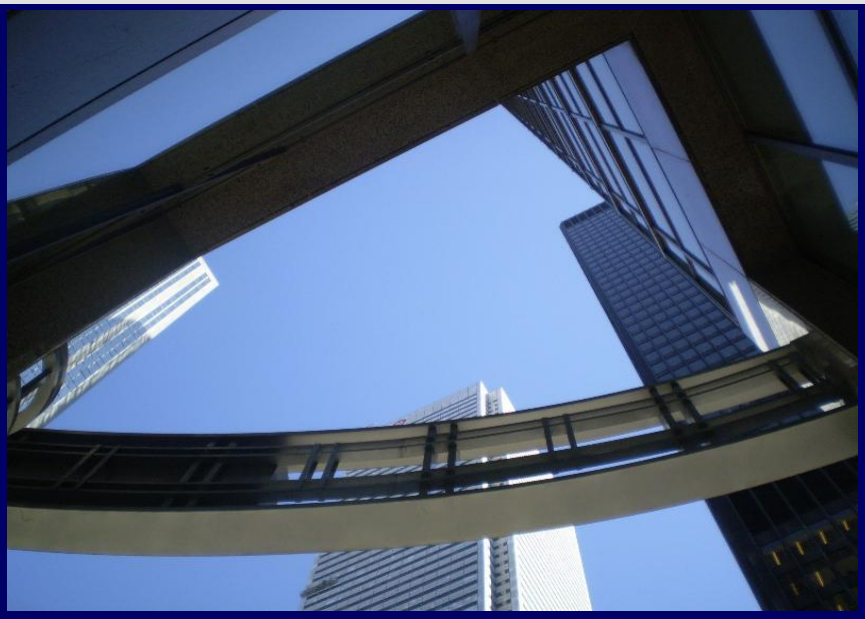

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