"Mediation and Other Stuff"

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Dispute Resolution Services

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

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

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Condo ADR - Part 2 - Mediation

My last newsletter was a brief introduction to condominium ADR in general. This newsletter focuses on condominium mediation.

Condominiums are communities and people have no option but to learn to live together. Dealing successfully

with disputes contributes to the overall community. Mediation is especially appropriate for condominium disputes as common interests exist and the disputes are often about the parties' relationship as well as other issues.

The benefits of mediation as a dispute resolution process in condominium as in other disputes, include:

- Choice of mediator;
- Flexible and informality;
- Confidentiality;
- Help with communication;

- Avoiding a "win-lose" approach;
- Preserving relationships and community values which is important in condominium disputes as the parties will usually continue to live beside each other;
- Faster and usually less expensive than litigation;
- The parties reach their own settlement;

Although mediation is a far less expensive process than litigation, it does have significant costs. For the condominium and the unit owner, there are the costs of legal advice and the mediator's fees. These fees vary depending upon the experience of the mediator and the length of the mediation.

Given the unique nature of condominium disputes, it makes sense to choose a mediator with experience in the field.

The Condominium Act requires each party to pay the mediator's fees and expenses. Usually both parties will pay 50% of the fees if there is a resolution. It is not uncommon for a mediator to require one or other party to pay 100% of the mediator's fees if they did not attend a scheduled mediation, or behaved in a way that defeated the purpose of the mediation.

In my next newsletter, I will look at condominium arbitration in more detail. The main point I am making in

this short series, is that condominium dispute resolution is not the same as "ordinary" dispute resolution through the civil litigation process. It requires that counsel, mediators and arbitrators involved be aware of the unique dynamics involved and have specific expertise in the condominium field.

Case of the Month

In an interesting Blog Post, Megan Connolly, a Toronto Estates Practitioner, discusses a topic which lawyers and mediators rarely think about.

Are the costs of an unsuccessful mediation recoverable under legal costs if successful at trial? This is not a problem in mandatory mediations conducted under Rule 24.1 or 75.1 as they clearly are. But what about the costs of mediation that is not part of the mandatory regime?

The costs endorsement in the recent Divisional Court case of Saltsov v. Rolnick deals with the question head on and comes to the conclusion that unless the parties have dealt with this point in their mediation agreement, they are not. The court commented,

> In this case, while there is no formal agreement on costs of the mediation, it appears that the claim by the successful appellants to partial indemnity costs and disbursements related to mediation is not disputed in principle by the respondent Saltsov. However, as noted above, an agreement in principle does not fetter the jurisdiction of this Court to deny a claim for mediation-related costs and disbursements.

Referring to earlier case law from 1993, when mediation was not quite so mainstream, the court adopts Mr. Justice Blair's concerns that "parties may be discouraged from engaging in constructive dispute resolution processes for fear that at the end of the day, if such proceedings do not lead to settlement, costs will be

increased."

The court also mentioned other policy considerations,

> There are other policy reasons why voluntary mediation should not be the subject of costs awards by the Court. Without probing into without prejudice discussions/negotiations, it is neither possible nor desirable to attempt to assess the conduct of either party at mediation. Without probing into without prejudice discussions, it is it is neither possible nor desirable to assess the reasonableness of positions taken by the parties or whether the time spent in attempting to find resolution was reasonable. In short, the mediation process is neither subject to nor amenable to supervision by the Court. Finally, the fees charged by mediators vary greatly and the Court should not place its imprimatur on mediators' fees by treating such fees as bona fide disbursements to be paid by the unsuccessful litigant.

So the bottom line from this case for counsel is that, "if parties wish to agree that, if the mediation does not result in settlement, the successful litigant will be able to claim mediation-related costs and disbursements, then that is an agreement that they may make between themselves before embarking on mediation."

Is this a wise policy decision? Could this discourage the use of mediation outside of the mandatory mediation system? Will parties with strong cases avoid mediation because they want to minimize non-recoverable "legal" costs?

In most cases I mediate, there is usually an agreement that the costs of the mediation be shared equally between the parties. Sometimes to bring about a settlement a party will agree to pay the full costs of mediation. But I have not ever had the issue of costs if the mediation is unsuccessful raised by counsel. Is not doing so potential negligence?

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

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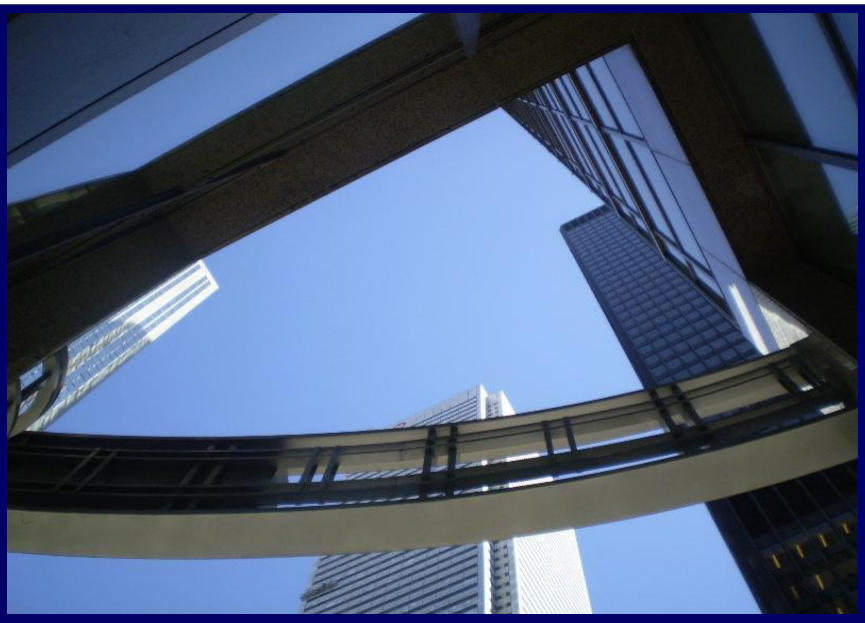

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