

# "Mediation and Other Stuff"



**Colm Brannigan**

**Mediate.ca**  
Dispute Resolution Services

March/2010

**Guímís gach beannacht oraibh, ár gcairde,  
beannachtaí na Féile Pádraig.**

**I wish you, my friends, every blessing this Saint  
Patrick's Day.**

Welcome to the first edition of "Mediation and Other Stuff", my monthly newsletter about alternative dispute resolution from an Ontario perspective.

Each month the newsletter will have two short articles. One will be on a general topic and the second focused on a specific situation or case study. Further information on the topics will be available by you contacting me.

I plan to cover topics such as, "whether to mediate or not", "who should suggest mediation", "choosing your mediator", "do you need a specialist mediator for your dispute", "what to expect in mediation", "confidentiality in mediation" and specific examples or case studies of

different types of disputes including condominium, commercial, employment, technology and other which lend themselves to resolution by mediation or other alternative dispute resolution processes.

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

Colm Brannigan

### **"Why do I need a mediator to help me settle my case?"**

This is a question mediators used to hear a lot. As mediation has become a more accepted part of the litigation process in Ontario, this question is less frequently asked, but still remains a live issue.

Although there are many ways to answer this question, the most useful process-oriented response is that mediation allows counsel to make the shift between "litigation advocate" to "settlement advocate", while still preserving the relationship with their client.

Your client hires you with the expectation that you will win the case. However in most cases, a time comes when it is appropriate to make some compromise to settle the dispute. To settle the dispute the lawyer must shift from a zealous advocate to problem-solver. It is sometimes difficult for your client to appreciate the necessity of your shift in emphasis. By using a mediator, you remain the advocate for the client and the client's case, and the mediator can be the advocate for settlement.

Much like mediation, there are stages to litigation. When a client brings a new case (either plaintiff or defence) to his lawyer, typically, the first thing the lawyer does before accepting representation is conduct a detailed analysis of the strengths and weaknesses of the case. The evaluation usually includes an analysis of the law and facts, the availability and reliability of witnesses, costs and time likely to be expended on the case and the impact of litigation on both the lawyer's practice and on the client's life and business.

After the case starts, lawyers often forget their initial evaluation and jump headfirst into the battle, litigating the case as zealous advocates of their client's position. By time mediation comes around whether under the Rules of Civil Procedure or the consent of the parties, both sides are firmly set in their respective positions and often, although they want to settle, they do not know how to remove themselves from the case they have so painstakingly constructed.

In order for the client to settle, the lawyer must become an advocate for settlement. Part of the job of the mediator is to help the lawyers

and the parties see beyond the legal case they have built. For a dispute to settle, a negotiated settlement must meet the legitimate interests and needs of the parties to the dispute.

The good news for lawyers and clients is that in 80% of cases mediated, settlement is achieved on the day of mediation or shortly afterwards.

For a more complete version of this article, please contact me at [colm@mediate.ca](mailto:colm@mediate.ca)

### **Case of the Month - Mediation Confidentiality**

Mediation is not law, but there are important cases about legal issues in mediation. Many of these cases come from the US and UK but a relatively recent case is from Ontario.

There is a newly reported case from the Divisional Court in Ontario dealing with the issue of settlement/mediator privilege. The case, *Liquor Control Board of Ontario v. Magnotta Winery Corporation* was heard in June 2009 and has just been reported in the Ontario Reports at (2010), 97 O.R. (3d) 665.

The case is one of judicial review of a decision of the Ontario Information and Privacy Commissioner. It stands for the proposition that materials prepared for mediation of court proceedings are exempt from disclosure by both common law settlement privilege and under the Freedom of Information and Protection of Privacy Act.

Although now under appeal to the Court of Appeal, it is a very good overview of the common law privilege and its application to mediation. This case is important and should be read by lawyers and mediators alike.

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

Colm Brannigan, M.A., LL.B., LL.M. (ADR), C.Med., IMI Cert., Med., ADRIO Cert. Arb.

Contact Information:

Phone: 905-840-9882

Skype: colm.brannigan

E-Mail: [colm@mediate.ca](mailto:colm@mediate.ca)

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Colm Brannigan - Mediate.ca Dispute Resolution Services | 4 Burwash Court | Brampton | ON | L6Z 4M3 | Canada