

"Mediation and Other Stuff"



Colm Brannigan

Mediate.ca
Dispute Resolution Services

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

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

Colm Brannigan

Only in the UK? Pity! (with apologies to Red Rose Tea)

So what is happening with mediation in Ontario? Is its use increasing or stagnant? We don't really know as there is no data available. In the UK there is astonishing data that shows the number of civil and commercial Mediations has doubled in two years!

The Centre for Effective Dispute Resolution (CEDR) has just published its 4th mediation audit for the UK market which is available online at: www.cedr.com/?location=/news/archive/20100513_347.htm.

The report shows that the mediation market in the UK has continued to grow with approximately 6,000 mainstream commercial and civil cases

mediated in the last year not including workplace mediations.

The value of the cases mediated is £5.1(C\$7.6) billion. The commercial mediation profession this year will save the British Economy around £1.4 (C\$2.09) billion a year in wasted management time, damaged relationships, lost productivity and legal fees. Over the last 20 years this figure comes to savings of £8.8 (C\$13.1) billion. By way of comparison the audit results suggest that the mediation profession total fee income is around £13.5 (C\$20.2) million.

As seems to be the situation here, mediation users in the UK are increasingly appointing individual mediators directly rather than using the services of mediation providers and panels.

The projected size of the current civil and commercial mediation market in the UK is estimated to be around 6000 cases per annum. This represents a doubling of the market over the last two years.

Again, as in Canada, the make up of the market is still "dominated by a select few" mediators. For more comment see Amanda Bucklow's blog post on the topic at: [//blog.amandabucklow.co.uk/2010/05/16/the-uk-mediation-market-civil-and-commercial-mediations-double-in-2-years/](http://blog.amandabucklow.co.uk/2010/05/16/the-uk-mediation-market-civil-and-commercial-mediations-double-in-2-years/)

This data clearly confirms that mediation saves money and has other significant benefits to disputants.

Then why are so few disputes resolved by mediation?

We know that users of mediation are generally far more satisfied by the process compared to litigation, irrespective of results.

Perhaps as mediators we have not done a good enough job marketing ourselves?

If you have any comments about this puzzle, please send them to me at colm@mediate.ca

If you have a dispute and are wondering if it is suitable for mediation please call me at 905.840.9882 to discuss the pros and cons of doing so.

Case of the month: Mediator Immunity

Are mediator's protected by "judicial immunity" in Canada?

Once again, the interesting case law in Ontario seems to be coming from administrative tribunals and thankfully for mediators, the answer seems to be "yes".

Michael Fitzgibbon's blog, "Thoughts from a Management Lawyer"

provides an overview of a recent case before the Ontario Human Rights Tribunal on the topic.

The issue before the Tribunal was whether the doctrine of judicial immunity applied to a mediator.

In *Hazel v. Ainsworth Engineered* available online at:

www.canlii.org/en/on/onhrt/doc/2009/2009hrto2180/2009hrto2180.pdf
the Tribunal determined that the doctrine of judicial immunity applied to protect arbitrators and mediators from human rights claims arising out of the exercise of their decision-making and dispute resolution functions.

The Tribunal noted:

With respect to mediators, I find that immunity extends to protect the mediator from claims arising from the exercise of his or her functions in assisting the parties in reaching a resolution of the dispute, and in facilitating the settlement discussions.

The touchstone for the application of immunity is to ensure independence of the decision-making and dispute resolution process. Immunity applies to those functions that can legitimately be said to be integral to that process, and to the effective exercise of the duties of the arbitrator or mediator.

After referring to the mediation agreement, the Tribunal concluded that the allegations against the mediator arose "out of the exercise of his functions as mediator in facilitating settlement of civil and/or statutory claims," and, as such, "I find that he is covered by immunity".

In the end the application was dismissed against the mediator.

For more on this interesting case visit:

<http://labourlawblog.typepad.com/managementupdates/2010/05/are-mediators-protected-by-judicial-immunity.html>

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

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