"Mediation and Other Stuff"

Colm Brannigan

Mediate.ca
Dispute Resolution Services

May 2011

Welcome to my monthly, more or less, newsletter about alternative dispute resolution from an Ontario perspective.

Last month, I was in a panel discussion on condominium dispute resolution on the topic of "Mediate, Arbitrate or Court?" at the Canadian Condominium Institute - Golden Horseshoe Chapter's Conference in Hamilton. I have uploaded my short paper and PowerPoint to my website .

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

Colm Brannigan

Mediation and Pre-trial Conferences The real difference is in the potential outcome.

Sometimes we have a problem deciding exactly what we mean by mediation and what makes it different from other processes. A quick definition is "facilitated negotiation". Although it is not really a legal

process, mediation is now an established part of the civil justice system in Ontario, so it is surprising how often counsel approach the mediation session in more or less the same way as a pre-trial conference.

A pre-trial conference is a form of neutral evaluation because a judge has authority and power as a result of his or her office. Mediator's must earn the trust of the parties and counsel before they have power. As the materials from a continuing education program on "mediating the litigated case" state "there is a growing demand for professionals who, in addition to being able to evaluate a case, can also facilitate negotiations between adversarial parties to reach innovative solutions". The main difference between a pre-trial conference and mediation in a litigated case is how these solutions are reached. A pre-trial conference is conducted within the boundaries of the law. Mediation is conducted in the "shadow of the law" but can go beyond this to find optimal solutions that meet the parties' needs and interests.

Many of the cases I mediate are well into the litigation process with the majority being post-discovery. Although it would be far more cost effective to mediate earlier in the process for most disputes, by the time discoveries have taken place the parties know the strengths and weaknesses of the case. At this stage, mediation is the best opportunity to resolve the case before more time and money is spent preparing for a trial that will likely never happen.

I have been asked several times why mediate at this point since in Ontario and many other jurisdictions each case has a mandatory pre-trial conference with a judge to try and settle before trial. There are however significant differences between the processes and mediation will more likely lead to an optimal and sustainable settlement than a pre-trial conference.

In both mediation and pre-trials the parties prepare briefs or memoranda. The mediation brief should not just repeat allegations from the pleadings. Nor is it a pre-trial memorandum. Set out the issues in a way that supports your position but do not only rely on your legal position. Adapt your mediation briefs and pre-trial memoranda to get the biggest bang for your buck from the particular process. One size does not fit all. Remember if you want the mediator to actually help you resolve your case, you have to help the mediator as well and this is where to begin.

Mediation can be broken down into four or more stages. First there is an opening which usually includes signing the mediation agreement and/or confidentiality agreement by those non-parties attending the session such as experts etc. This does not happen in the pre-trial conference where the

judge moves into the "legal" merits of the case almost straight away.

The first stage is followed by analysis where each party's position over the strengths and weaknesses of the case become a lengthy discussion between the parties, counsel and the mediator. This also happens at pre-trial but the major difference is that a mediator, even if an expert in the subject matter, will not jump to a resolution phrased in terms of what he or she would do if trying the case, which is what judges often do.

The mediator is there to help the parties find their way out of the case but not tell to them how to do so. This part of mediation will often have the parties weigh their chances of success against the costs of going to trial. Sometimes, the likelihood of collecting any judgment is also part of that discussion. So far mediation is very similar to the pre-trial except for the role of the mediator being much different than that of a judge.

Another significant difference is or should be, in advocacy by counsel. In pre-trial, even though the judge cannot order a settlement, counsel focuses on persuading the judge to more or less try to do this and that is exactly what counsel should do. In mediation, counsel focuses on persuading the other party and their counsel of the merits of his or her client's position not on persuading the mediator.

After case analysis there is a shift towards a discussion of possible resolution or problem solving the issues. The mediator's role at this stage is to help counsel and their clients engage in constructive negotiation including dealing with the natural negative reaction (reactive devaluation) of a party to the other side's proposal and to help facilitate a conversation that keeps negotiation moving along. Eventually, and this is an incremental process, most cases settle.

Finally the agreement is documented through a written settlement agreement which usually includes a full and final settlement of all issues in dispute and discontinuance of court proceeding. Again just like the result in many pre-trials.

So what's the real difference and why should you mediate? Leaving aside the potential costs saving of avoiding trial preparation, the major factor in favour of mediation is that parties are more likely to keep the bargain they make if they participate in actually making it. Even though judges speak directly to the parties, it is generally to encourage or force rather than facilitate a settlement. In mediation, the mediator helps the parties develop the settlement to meet their specific needs rather than just the dictates of the law.

Judges are trained to adjudicate and mediators are trained to facilitate. While many judges are trained in the mediator process, this is not their professional inclination. They expect their opinions to be followed. Mediators, when they give opinions at the request of the parties, and many do despite the fiction that most do not, are doing just that, giving an opinion and whether or not it is followed is completely up to the parties. There is no doubt that optimal solutions whether business, legal or otherwise are not imposed, they are carefully crafted by the parties. Some cases need adjudication but we know most settle and they can be resolved with far better results by mediation at any stage in the proceedings.

For previous editions of this newsletter, please click here.

Note of the Month

Since October 25, 2010 Ontario has had the Commercial Mediation Act, 2010 (the Act). Under the Act, a mediated settlement of a commercial dispute can be registered with the Superior Court of Justice and treated like a judgment for enforcement purposes. There are also provisions about the appointment of mediators, how the mediation should be conducted and, perhaps most important given the present uncertainty in the law, confidentiality.

Section 8 of the Act also deals with information received in caucus and the mediator may disclose to a party any information that he or she receives from another party unless that other party expressly asks the mediator not to do so.
Section 9 of the Act reads in part as follows:

Admissibility of information

9. (1) Subject to subsections (2) and (3), none of the following information, in any form, is discoverable or admissible in evidence in arbitral, judicial or administrative proceedings:

1. An invitation by a party to mediate a commercial dispute, a party's willingness or refusal to mediate the dispute, information exchanged between the parties before the mediation commences and any agreement to mediate the dispute.

2. A document prepared solely for the purposes of the mediation.

3. Views expressed or suggestions made by a party during the mediation

concerning a possible settlement of the dispute.

4. Statements or admissions made by a party during the mediation.

5. Statements or proposals for settlement made by the mediator.

6. The fact that a party indicated a willingness to accept a proposal for settlement made by the mediator.

7. The fact that a party or the mediator terminated the mediation.

Exceptions

(2) The information referred to in subsection (1) may be admitted in evidence to the extent required,

(a) by law;

(b) for the purposes of carrying out or enforcing a settlement agreement;

(c) by a mediator to respond to a claim of misconduct; or

(d) if all of the parties to the mediation consent and, if the information relates to the mediator, the mediator consents.

The Act applies to the mediation of commercial disputes only unless the parties have agreed not to have the Act apply or the mediation is conducted under the mandatory mediation provisions of the Rules of Civil Procedure.

If you practise commercial mediation as counsel or as a mediator and have not already done so, you should read this Act.

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

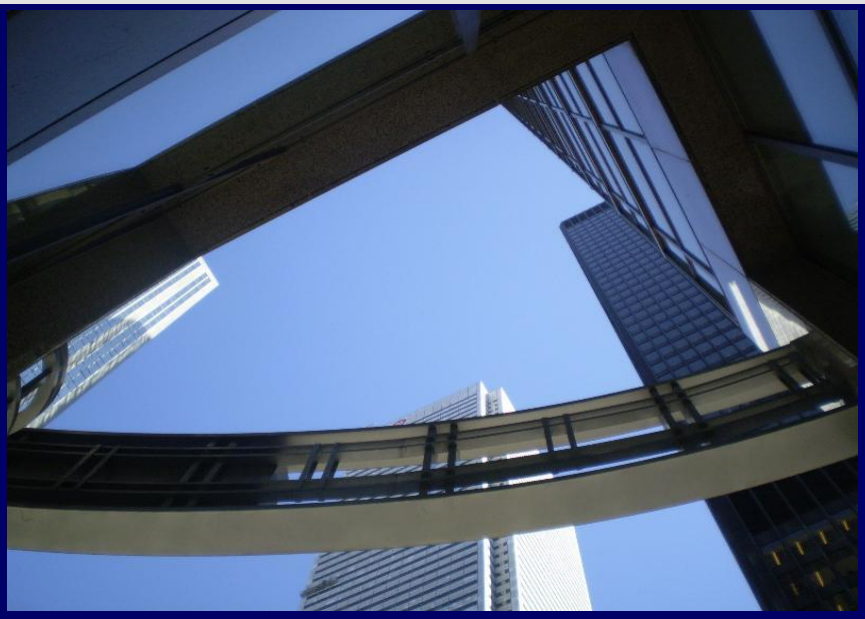
Colm Brannigan, LL.M.(ADR), C.Med., IMI Cert., Med., C.Arb.
Mediator and Arbitrator

Contact Information:

Phone: 905-840-9882
Toll Free: 1-877-440-9882
E-Mail: colm@mediate.ca

Mediate Better Solutions

IMI Certified Mediator



Join Our Mailing List!