"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.

In this newsletter I am starting a multi-part series on mediation and arbitration as means of dispute resolution in the condominium industry.

As an aside, I recently participated in a panel discussion on ADR at Queen's Law School in Kingston. It was fun but what struck me as interesting was that this is an elective course and not a compulsory part of the J.D. program as is the Negotiation course. Surely by now every law school sees Negotiation and other ADR skills as an important part of every lawyer's toolbox?

And finally, congratulations to my classmate and good friend Paul Henderson on his appointment as a Justice of the Ontario Superior Court of Justice (Family Court Branch) in London, Ontario.

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

Colm Brannigan

Condo ADR - Part 1 - Introduction

Condominium ownership is becoming much more common all over North America. Nowhere is that more obvious than in the Greater Toronto Area where the changing skyline clearly confirms the fact that condominiums account for one of every three home sales.

Condo buyers range from first time home owners to experienced "downsizers" with a large range of sophistication and knowledge about condominiums. Many purchasers often lack information about the day to day realities of living in a condominium environment and as important how to deal with the inevitable conflicts that arise over time in what is, after all, a community in its own right.

There is constant pressure on real-estate lawyers to keep fees low. As a result often the declaration, bylaws and rules of the specific condominium corporation are not reviewed in any real detail with the purchasers. One experienced real estate lawyer recently estimated that to properly review the documents in connection with the purchase of a new condominium would cost between $3,000.00 and $5,000.00. Simply put, clients will not pay even remotely close to this amount as they see one real estate deal as the same as any other and want the lowest fees possible even in $1,000,000.00 purchases.

Because of this, most condo owners, and indeed many lawyers, are unaware of the impact of various rules and regulations on condominium ownership. They are also surprised to discover that alternative dispute resolution is mandated to deal with many disputes between unit owners and the condominium corporation.

Section 132 of The *Condominium Act, 1998* requires that the parties begin dispute resolution with mediation. If the mediation is not successful then arbitration must take place. If a party does not comply with the arbitrator's award then a court order to enforce it must be obtained. Unfortunately, the *Act* does not set out the procedure to be followed but many condominium corporations have passed specific rules to deal with this oversight and the allocation of expenses connected with mediation and arbitration.

It is also important that lawyers advising clients over participation, or indeed non-participation in dispute resolution regarding compliance matters, be aware that condominium corporations can collect their legal and other costs associated with compliance by treating them as common expenses attributed to the unit and enforcing payment through the placement of a lien against the unit.

Although there is some confusion in the case law over whether

certain categories of disputes fall under the section 132 or whether disputants can avoid the section and go straight to court, there is no doubt that a wide range of disputes must be mediated and/or arbitrated. Many fall into the categories of "people, pets or parking" problems! More recent disputes have included issues over satellite dishes, hot tubs and decks.
Many types of other condominium disputes are not part of the mandatory mediation and arbitration requirements although a condominium corporation may also use mediation or arbitration to deal with matters not covered by the *Act* by including provisions in contracts with its suppliers, or other condominiums that require mediation and/or arbitration of disputes instead of going to court.

In my next newsletter, I will look at condominium mediation in more detail. The main point I would like to make 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

There has been quite a lot of discussion about confidentiality in mediation over the last couple of years.

Despite all the commentary about the recent Supreme Court of Canada case of R. v. National Post, 2010 SCC 16, [2010] 1 S.C.R. 477, I really don't think that the law has changed very much, if at all since Slavutych v. Baker, [1976] 1 S.C.R. 254, and a paper I wrote on mediator liability back in 1998.

Although it is difficult to believe that any mediator would "guarantee" absolute confidentiality to a participant, apparently it is not unknown.

What must be remembered is that unless there is a statutory or regulatory provision, mediators cannot guarantee the confidentiality of disclosure made in a mediation session.

Unlike with lawyers and their clients, there is no such thing as "mediator-client" privilege.

The courts have affirmed that the test for confidentiality privilege is still based on a *case by case* analysis. What this means is that both lawyers and mediators must make it clear to their clients, and confirm it through a written mediation agreement, that although mediation is generally considered a confidential process, it is always open to disclosure by court order or where required by law, such as under *Ontario Child & Family Services Act*, where family mediators, along with all other professionals except lawyers, have a legal duty to report suspected child abuse.

This warning should be strengthened by a clause in the mediation agreement that at no time will any party call the mediator as a witness to testify in court or seek access to any documents prepared for or in connection with the mediation.

Although the above will not guarantee confidentiality, in most cases mediation will be confidential as there is a strong public policy argument in its favour. But "most" does not mean "all."

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

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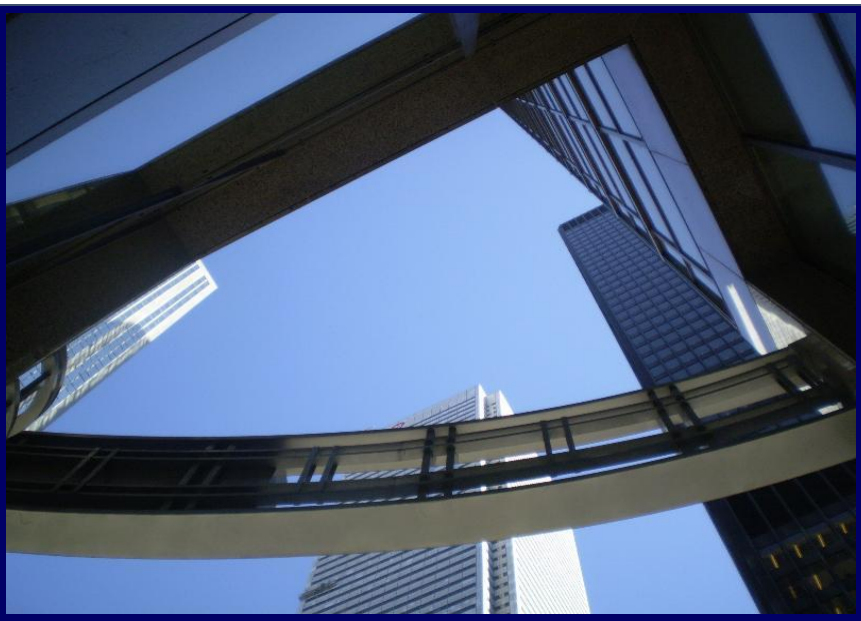

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