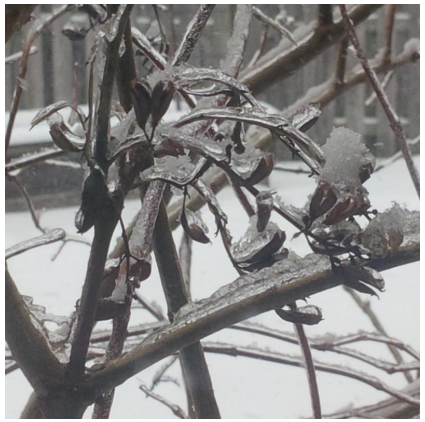
Colm Brannigan

Chartered Mediator and Arbitrator

Colm Brannigan's ADR Notes

As John Snow said in the Game of Thrones, "Winter is coming" and it has come to Ontario with a vengeance.

As part of expanding the scope of my practice and becoming more involved in ADR continuing education and training, I am happy to announce my association with the Canadian Centre for Conflict Management. CCCM is the successor organization to the Mediation Centre of Southeastern Ontario (MCSO), founded in 2001. CCCM will offer training programs, which will meet the ADR Institute of Canada requirements for the Q. Med. Designation and other specialty and advanced training courses.



CCCM will also provide a comprehensive range of professional services in the Mediation, Conflict Resolution and Conflict Management fields. CCCM's web site (www.cc4cm.ca) will soon be online with program and course information, including listings and Professional Profiles of CCCM's associates.

CCCM's Inaugural Program; Recognition and Reconciliation: A Skills Workshop on Indigenous Engagement, Consultation and the Reconciliation of Rights will be held at Queen's University on Saturday and Sunday, June 8 and 9, 2019. Anyone with an interest in this program should contact Professor Ron Price for further information.

I recently spoke on mediation & dispute resolution at the Canadian Condominium Institute - Golden Horseshoe Chapter's Condo 300 course. After making several presentations a year over the last ten years, I am planning to switch focus a bit and intend to develop a condominium mediation and arbitration course for lawyers and ADR professionals working in the field.

As part of my goal of widening the use of innovative ADR processes, I will be speaking at the ADR Institute of Ontario's AGM and Professional Development Program in Toronto on June 6, 2019. My topic will be med-arbitration and how it holds out potential to revitalize the use of ADR. The brochure for this wide-ranging program can be found here.

This newsletter edition has a short article on how we might prepare for more effectively the mediation and arbitration of condominium shared facilities disputes and a second article on various options for using med-arbitration.

I have also included a short practice tip that is a reference to a relative new book on negotiation.

As always, I welcome your feedback and please feel free to forward my newsletter to any of your colleagues.

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BRANNIGAN ADR

How Can We Make Better Use of Time in the Mediation and Arbitration of Condominium Shared Facility Disputes?

It is generally accepted that Shared Facility (SF) disputes between condominium corporations are among the most difficult, time consuming and expensive disputes.

Shared Facility Agreements are sometime less than clear in their terms and the parties bound by them generally had nothing to do with drafting them.

Many Shared Facility Agreements (SFA) contain mediation and arbitration clauses. Even if they do not, section 132 of the Condominium Act, 1998, requires mediation and arbitration. Even the allegation that the actions of one or more of the parties to a SFA were oppressive to other parties to the SFA, it is unlikely to convince a court to stay an arbitration process in favour of litigation.[1]

Over the last few years, I have mediated and arbitrated a significant number of SF disputes and have a few suggestions on how to make more efficient use of the time spent in mediation and arbitration of these disputes:

- Set the mediation date a minimum of one month from retaining the mediator.
- Hold a conference call with all counsel and the mediator within a week of setting the mediation date to discuss process.
- Provide all mediation briefs and supporting materials exchanged at least 10 days before mediation date.
- Information exchange is crucial so make back up documents available for all expenses in dispute at least 10 days before the mediation.
- Consider using a Scott Schedule.
- Use an agreed common documents book containing the SF Agreement(s), Amendments, Declarations and any expert reports instead of duplicating them in the mediation briefs.
- Provide a list of who will be attending the mediation at least 10 days before.

- Hold a 2nd conference call with mediator at least 3 days before mediation.
- Make sure that all parties have quorum and authority to settle at the mediation. If the full board attends have one person as spokesman.
- Commit to settle issues on an individual basis and not link them all together - this facilitates arbitration if it is needed.

SF disputes can often be suitable for a med-arbitration instead of separate mediation and arbitration so at least consider this option when you are considering process issues.[2]

I am compiling a more comprehensive version of this list as a suggested procedural guide for my clients. If you have any comments/suggestions to add, or would like a copy when it is completed, please contact me.

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[1]For example see Metropolitan Toronto Condominium Corporation No. 965 v. Metropolitan Toronto Condominium Corporation Nos. 1031 and 1056 2014 ONSC 5362 (CanLII) in which the court stated that it is at least arguable that an SF dispute between the parties where there were allegations of oppression is arbitral and that a stay of proceedings should not be ordered.
[2]My recent short article on Med-Arb in Condo Disputes is at p. 39 in the Fall 2018 edition of CCI-Toronto's Condo Voice and available at: https://ccitoronto.org/uploads/pdfs/CCI-T-Condovoice-Fall2018.pdf

Med-arbitration Options: Which Do You Prefer?

I am in the process of writing an article on Med-arbitration for the Ontario Bar Association ADR Section Newsletter, and as part of researching that article I would appreciate your help.

Med-arb, or as it is becoming more commonly known as Med-arbitration, is a stand-alone ADR process that combines the flexibility of mediation with the finality of arbitration.

In the Med/Arbitration process the parties design and commit to their own specific ADR process when the dispute first arises. This takes away a major criticism of mediation, which is a lack of a guaranteed outcome.

It allows parties to use an arbitrator that they have built up trust with in the mediation and can result in a significant cost and time saving for the parties when compared to the later selection of a separate arbitrator should mediation fail.

Med-arbitration remains controversial in Ontario outside of family and labour disputes. It is time to change that. Perhaps the criticized aspect of med-arbitration is that the mediator hears information in private caucus that the non-caucusing party cannot respond to, because he or she has not heard it.

We need to remember that information is not evidence and as noted by others who have written about med-arbitration, concerns hearing improper evidence reflect doubts about the med-arbitrator's ability to disregard that evidence, rather than a flaw in the process itself. So that just means you must use great care in selecting the med-arbitrator.

Actual case experience confirms that parties seem more motivated to settle in the shadow of arbitration since the parties chose med-arbitration because they wanted a definite outcome. This is clearly a positive aspect of the process.

Some critics suggest that parties and their lawyers are unlikely to share facts with the mediator that might reflect negatively on them, in view of his or her potential role as an arbitrator. But you can also argue that they may actually be more open in med-arbitration, because they do not want to be uncooperative with the potential arbitrator.

The main criticism of med-arbitration is the use of the same person as both the mediator and arbitrator. Yet this is one of the efficiencies of the

process and seems to have a high success rate.

Med-arbitration is not the right process for every dispute. But it is an option, that can be especially useful where the relationship between the parties is worth trying to preserve, or the parties have no option but to have an ongoing relationship, and a speedy resolution is needed.

There are alternatives available and I would like to explore three different options for med-arbitration, which of course will vary from case to case:

Option 1 Same person as mediator and if needed, arbitrator.

Option 2 One person as the mediator and if needed, a second person as the arbitrator.

Option 3 Same person as mediator and if needed, arbitrator, with an opt-out provision so that if a party (or the mediator) is uncomfortable with the mediator continuing after the mediation for whatever reason, a second person, who has already been retained, acts as arbitrator.

Options 1 and 2 are quite common in North America while option 3 comes from Australia.

While I will go into more detail on each option in my later article, I would appreciate it if you could drop me an e-mail telling me which option you think has the most potential to promote the use of med-arbitration?

Although welcome, no detailed explanation is needed for your choice so even just the option number would be of great help.

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Never Split the Difference

Google "negotiation" and you will get 532,000,000 hits. There is a lot out there to read about negotiation, but much of it is repetitive and no one has the time to go through a needle in the haystack search for something really worth reading.

Even though it first came out in 1981, Getting to Yes is still the keystone of principled or interest based negotiation. Although it has stood the test of time well, it is a bit on the basic side and more importantly, it sees negotiation as a rational process when many times, as we all know from experience, rationality is often absent from the scene in negotiations and mediations.

There is a vast amount of literature on negotiation ranging from academic texts focused on "pareto optimal" outcomes, and maybe not quite so readable as we would like, to somewhat narcissistic and Trump like, "I am the best negotiator" fables. But there is also good practical material out there if you can find it.

At Christmas I was given a copy of Never Split the Difference: Negotiating As If Your Life Depended On It by Chris Voss with Tahl Raz) which was published in 2016. It can be easily found on Amazon.

It is by far the best and most useful book on negotiation that I have read in years.

The author, a former hostage negotiator, addresses emotion in negotiation in a very effective and practical way. Put this book together with Getting to Yes and you have a guide that will definitely help you be a much more effective negotiator.

If I can be of help in providing information about mediation, arbitration, med-arbitration or training, please contact me.

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