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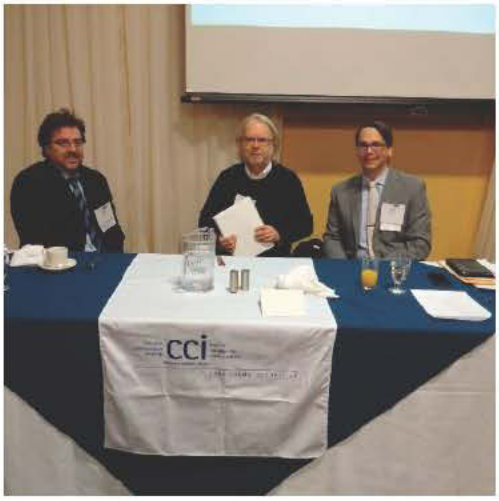
Mediate Better Solutions

Welcome to the winter edition of my newsletter although it is difficult to call the weather we have had so far this year in Southern Ontario "winter".

Since my last newsletter, my ADR practice has expanded again to include Conflict Management Consulting and Coaching in Condominium, Workplace and other organizations.

I have also been designated arbitrator for warranty claims in a large commercial-condominium hotel development, as Tarion does not provide coverage in this type of development.



I recently participated in presenting the Canadian Condominium Institute Golden Horseshoe Chapter's Condo 300 Course on Mediation & Dispute Resolution, Condominium Conflict Management program with Mark Bhalla of Elia Associates Barristers and Solicitors PC and Erik Savas of Simpson Wigle Law LLP. This is an advanced course for condominium owners and board directors and was very well received by the audience.

Photo courtesy of CCI-GHC

The importance of conflict management rather than dispute resolution needs to be emphasized far more in organizational settings, whether condominium corporations,

workplaces, municipalities or otherwise.

This issue has two short pieces, "Why you should mediate" and "Where are the courts going over legal costs in Condo Disputes?" plus a mediation practice tip.

Why should you mediate?

There have been reams of paper wasted on the 101 reasons why parties should consider mediating their disputes as a matter of course. Even with this volume of commentary, I am going to repeat and modify some of these reasons to tell you what I see as the top ten reasons you should mediate.

1. The mediator's primary responsibility is to make sure the parties have a productive conversation, which is more likely to reach a solution than adversarial posturing.
2. Mediation is about interests, what your client needs, rather than positions. Because of this, it is far more likely you will find a solution with the help of the mediator.
3. Mediation is far less costly than arbitration or litigation in terms of the financial and emotional costs and business time wasted. It is a much faster process than civil litigation or arbitration. Mediation can be put together in weeks not months or years.
4. You choose your mediator. Although knowledge and experience of the mediation process is extremely important, most mediators today tend to restrict the areas they work in to those where they have substantive or sector knowledge. This means they do generally not have to be educated by the parties or their lawyers on the nature of the dispute or industry.
5. Disputants get to tell their story. This is far more likely to result in greater satisfaction with the process and results than the highly scripted approach involved in presenting a case in arbitration and litigation.
6. Mediation lets the parties work together towards a mutually satisfactory result. This means that an agreement reached in mediation is likely to be sustainable and as importantly, implemented.
7. Mediation works. It has both a high settlement and participant satisfaction rate. Of course not all mediations result in a settlement at the mediation table. Even if mediation does not result in a full settlement it is likely to help

the parties resolve some of the issues and significantly reduce the cost of arbitration or litigation. In many cases a full resolution is reached with a short time after the mediation as everyone has focused on settlement in preparation for the mediation, often for the first time in the dispute.

8. The reality is that disputes settle before trial in 95% of civil disputes anyway. Mediation helps this happen at an earlier stage before the problem of "sunk" costs becomes an obstacle to resolution. If mediation is unsuccessful the parties have not given up any rights and can still move forward with arbitration or litigation.
9. Mediation is the only dispute resolution process with the potential for maintaining and repairing relationships which is why it is suitable for such a range of disputes.
10. Mediation makes you look reasonable in the eyes of an arbitrator or judge when it comes to the question of court costs. This is so even where you are not required to mediate under the Rules of Court or by specific law such as the Condominium Act.

Where are the courts going with legal costs in condo disputes?

In many ways this is the $64,000.00 question or more precisely the $30,000.00 question for condominium corporations, property managers and condominium lawyers when considering unit owner compliance issues.[1]

Up to a couple of years ago, courts routinely awarded condominium corporations the full cost of legal fess incurred in connection with obtaining compliance. In addition, condominiums had section 135 (5) of the Condominium Act to rely on where judges did not give them the full amount claimed:

> (5) If a corporation obtains an award of damages or costs in an order made against an owner or occupier of a unit, the damages or costs, together with any additional actual costs to the corporation in obtaining the order, shall be added to the common expenses for the unit and the corporation may specify a time for payment by the owner of the unit.

Over the last couple of years however there has been a noticeable shift in how judges have been dealing with this issue. In several cases, condominium corporations that have been "successful" in obtaining the requested compliance orders have only received partial reimbursement for costs and in some situations, the courts have substantially reduced the amount claimed or even refused to order

costs. Courts have also ordered that condominium corporations not enforce any balance of costs not awarded through section 135 (4).

This despite the common perception that a court should award full indemnification costs because it would be "unfair" to the other unit owners to require them to pay for legal costs incurred in bringing a recalcitrant owner into compliance.

If reading recent cases is anything to go by, it is unlikely that the trend is going to change anytime soon. If anything judges are becoming far more critical of cases where it seems to them the real issue is the legal costs incurred.

Condominium corporations that are trying to obtain unit owner compliance with the Act should consider mediation even if not required under the Condominium Act in almost every non-compliance dispute.

If mediation is successful there will be compliance, and even if not successful it will indicate to the court that reasonable steps have been taken to meet the obligation to enforce the requirement of the Condominium Act, the Declaration, By-Laws and Rules and at the same time be mindful of condominiums as communities.

Finally be very careful turning down any invitation from the other side in a dispute to mediate. It may have serious consequences where costs are concerned. It makes good sense to consider mediation as part of the risk management of condominium litigation costs.

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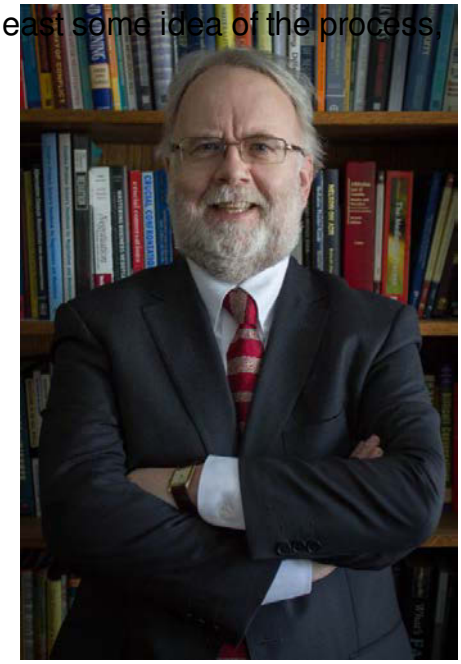
[1] According to the Canadian Lawyers 2015 Legal Fees Survey, the national average estimated cost of a two-day trial was $31,330.00

Mediation Practice Tip: Give Them the Important Documents

You would not prepare for your "day in court" without being fully prepared for trial. But even today, 17 years after mandatory mediation was introduced in the civil justice system, a common complaint among mediators is the number of times where the potential for a collaborative mutually satisfactory outcome is never reached because one or both sides coming to the mediation are not properly prepared.

While most parties now come to mediation with at least some idea of the process, the biggest obstacle to success in many mediations is the failure to exchange relevant or core documentation before the mediation. There really is no reason for this to happen. You need to help focus the parties and assist the mediator by providing the key documents.



If you are reluctant to give the other side information, think about why you are going through mediation in the first place, which is to settle the case. If your documents can be obtained through the discovery process, provide them without discovery. If you are concerned about confidentiality, mark the documents to confirm that they are specifically subject to the confidentiality rules of the process are not to be copied and are to be returned to you at the conclusion of the mediation session.

In many ways, mediation as with negotiation and all dispute resolution processes is about having the necessary information to make an informed decision. To achieve the most potential for success in mediation, exchange all important documents with the other side as part of the process so that all parties have a basis for settlement. While some if not much of this advice may seem naïve to many involved in the litigation process, it will make the mediation much more productive and satisfying for everyone involved if you follow it.

In my next newsletter, I will look at the question of whether arbitrators must follow precedent, whether decisions of other arbitrators or from the Superior Court of Justice? If you have an opinion either way on this topic, please e-mail me about it at colm@mediate.ca so that I can incorporate it (with or without attribution) in my article or notes.

As always if I can be of help in providing information about mediation and arbitration, please contact me.

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