

"Mediation and Other Stuff"



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

Over the summer, I was given the opportunity to co-author materials on the Mediation and Arbitration processes for the Canadian Condominium Institute's Toronto and Area Chapter's "Level 300" Course which is primarily designed for condo owners and board members.

I also recently presented the new materials more or less successfully at the course!

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

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There has been a fair bit about mediation in the news over the last while. The Chief Justice of Ontario, Warren Winkler, has come out

strongly in favour of integrating mandatory mediation into the Province's family justice system ([Toronto Star article](#)). Justice Winkler who is well known as a highly effective judicial mediator had earlier stated in a call to Ontario's judiciary to make more use of judicial mediation in the civil litigation process ([Lawyers Weekly article](#)) that "Mediation must...enhance the trial process, not supplant it."

Leaving aside the question of whether judges mediate, or really provide neutral evaluation, for another day, such focus on mediation is by and large good for dispute resolution professionals.

This month's newsletter is about two recent cases in Ontario. In the first, the Ontario Court of Appeal finally has come out with a strong statement concerning mediation through the use of a costs order while in the second, the Ontario Court of Justice confirmed that condominium owners can face serious consequences if they fail to obey the rules of their particular condominium.

Mediation and Legal Costs

Over the last number of years there have been several strong statements from the courts in the UK starting with [Halsey v The Milton Keynes General NHS Trust](#) in 2004 concerning cost consequences of failing to mediate.

In [Keam v. Caddey](#) the Court of Appeal has finally made a similar statement in what seems to be the first time that a court in Ontario has imposed a costs penalty for a failure to meet a statutory requirement to mediate.

In this case there was a duty under the Insurance Act to mediate and the insurance company was playing "hard-ball" litigation with the plaintiff's but the overall flavour of the case may hold out the possibility that in the appropriate case, the Court of Appeal may penalize a refusal to mediate. This is something that the courts should be doing.

Over 90% of civil and family law cases in Ontario settle before trial often after the expenditure of too much money and energy. As good counsel know, effective and timely use of mediation can bring about more optimal settlements than a rushed last minute at the court house steps type of resolution. This leads to more satisfied clients which should, after all, be the goal of lawyers and other dispute resolution professionals.

Litigation as Appropriate Dispute Resolution

Although I am an extremely strong proponent of mediation and arbitration, this case is an example of a situation where alternative dispute resolution (ADR) would not have been effective. In [Metropolitan Toronto Condominium Corporation No. 747 v. Korolekh](#) the Superior Court of Justice compelled a recalcitrant unit owner to sell the unit where she was unwilling to comply with the *Condominium Act* and the rules of the condominium corporation.

Among other problems, the unit owner had physically assaulted other unit owners, made slurs and threats repeatedly against other unit holders and used her aggressive Rottweiler to intimidate other unit holders. There were other issues but you can look at the case for more details.

Section 117 of the *Condominium Act* prohibits conduct that is "likely to damage the property or cause injury to an individual" and s.134 provides the court with broad powers to enforce compliance with the Act, declaration, the by-laws and rules.

By utilizing this section of the *Act*, the condominium corporation avoided the mandatory mediation and arbitration provisions of section 132 of the *Act*. In my opinion as an experienced mediator and arbitrator, there is no way that either process would have been useful in the circumstances. In this case, litigation was the appropriate dispute resolution mechanism to be used.

This is hopefully a rare situation and there have been few instances where the courts have exercised their powers with such a powerful remedy. But, what comes from this is that condominium owners and their lawyers must be aware that serious non-compliance can have severe consequences.

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

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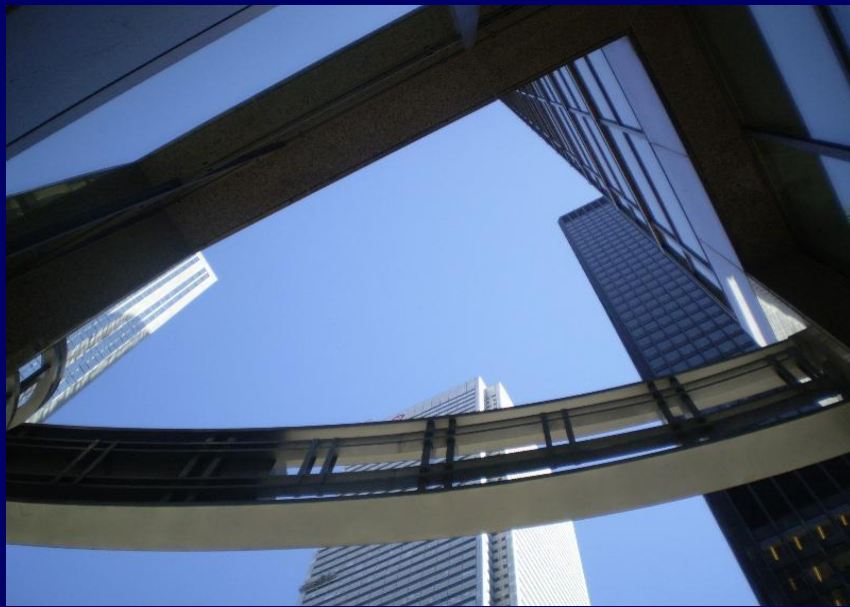
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