Mediation and Arbitration: Similarities & Differences

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Mediation and arbitration are processes that share similarities, yet have very distinct differences.

In mediation, those involved in a conflict control the outcome. The mediator's role is to help guide the conversation and the exploration of different options in an attempt to find one that may be agreeable to address the dispute.

The mediator's role is not to offer any opinions or impose any outcomes on disputants. Mediation is safe, as nothing can be forced upon those participating in it. Yet, with this safety comes no guarantees of resolution. It is possible for a mediation to conclude without settlement.

Arbitration, on the other hand, guarantees the resolution of the dispute. It does this by taking control of the conflict out of the hands of those directly involved in it and empowering an impartial third party to make a binding decision for them.

Yet, with this guaranteed outcome comes a degree of uncertainty. Similar to court, participants in the arbitration process will have a decision made for them and are not sure of exactly what that will be. However, in contrast to court, there may be some added comfort to be had in the fact that you can often have a say in the selection of your arbitrator. This can provide an opportunity to ensure that your arbitrator can relate to your situation and understand the nuances applicable to it – something that can be important when addressing condominium conflict, in view of the unique factors at play by way of the law and how condos operate.

What mediation and arbitration have in common includes:

- **They are both confidential.** Unlike the public nature of court proceedings, what happens in both processes is private and can be kept that way. Exceptions are generally limited to the appeal of an arbitration award or enforcement proceedings (should one fail to fulfill their settlement commitments or abide by the terms of an arbitrator's award). Confidentiality tends to be valued, as many do not want their business being broadcast publicly, and is often reflected as a term of a mediated settlement as a result.

- **They are both unregulated.** Members of Ontario's condominium community can appreciate the difference between regulated and unregulated professions with the recent introduction of regulation and licencing of condominium property management. One now needs a licence to practice property management in Ontario. With mediation and arbitration, this is not the case.

Just as the Association of Condominium Managers of Ontario (ACMO) offered the Registered Condominium Manager (RCM) designation to help condominium communities identify qualified property managers when the industry was unregulated, the Alternative Dispute Resolution (ADR) Institute of Canada helps those in search of mediators and arbitrators by offering designations that can vouch for an ADR practitioner's training, experience and skill. These designations include confirmation of appropriate insurance coverage and a commitment to abide by a Code of Ethics.

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- **They are both flexible.** Unlike the stringent court system, both mediation and arbitration allow for customization. While this can go so far as to include hybrid processes, it can add conveniences such as by utilizing technology to overcome scheduling hurdles and introducing degrees of informality should such offer comfort to participants. It would be a mistake to think of either mediation or arbitration as taking place in the same way in every instance, as there is opportunity to leverage their flexible nature to cater the process to best suit the particulars of any given dispute.

While many ADR practitioners offer both mediation and arbitration services, it is not uncommon for the two processes to be confused – particularly in terms of the role your mediator or arbitrator plays. One can be both a capable mediator and arbitrator; however, not at the same time.

When a mediation is conducted by someone who also offers arbitration services, it can be tempting to inquire how they would decide the case if they were arbitrating instead of mediating. The problem with this mindset is that someone conducting a mediation is not in a position to consider what needs to be taken into account to make an arbitration award.

Mediation focuses on the interests of the participants. The focus is not on the mediator, but rather on the parties developing a better understanding of one another and exploring potential settlement. While much information can surface about the conflict, the aim is to find an outcome that is mutually agreeable in satisfying the interests of the participants. The focus is not on determining who is right and who is wrong.

Arbitration, on the other hand, is like private court. Think Judge Judy without the cameras. Participants are not focused on one another, but instead on making successful submissions to the arbitrator. They introduce evidence, witnesses, case law and otherwise make their best arguments in support of their position. The arbitrator weighs evidence, considers submissions and makes a decision to bind the parties and end the dispute.

In the course of mediating, a mediator does not receive evidence to weigh or testimony. The focus is instead on the underlying interests of the participants and what may work for each of them in terms of resolving the dispute. While they may speak with the mediator about the strengths and weaknesses of their case, legal arguments are not put to the mediator for a decision as that is not the focus of the mediator's involvement in the matter.

The Hannah Montana Analogy

To further explain the differing roles as between a mediator and arbitrator, and also to highlight how one person can capably play both

roles, I share an analogy to Hannah Montana. This was a highly successful television show featuring Miley Cyrus which ran from 2006 – 2011 and included a series of related merchandise, albums and even a feature film. The show was about a teenager who lived a secret double life. During the day, she was an average student but at night she was a rock star. No one at school knew of her fame and she was able to enjoy "the best of both worlds" in experiencing both stardom and a typical childhood at the same time by keeping the roles apart.

The role of a mediator in mediation can be viewed like that of the ordinary student in the show. Their focus is very different to that of a rock star. The types of skills utilized in each role differ significantly. There truly are different "hats" being worn in participating in one role as opposed to the other.

Time and time again, we have seen the value of both mediation and arbitration in addressing condominium conflict. They both offer efficiencies of process and privacy which allow members of condominium communities to navigate through difficult situations much more comfortably than the costly, uncertain and time consuming court process. The *Condominium Act, 1998* directs certain types of disputes to mediation and arbitration, though increasingly we are finding that condominium conflict is turning to ADR for resolution because it simply makes sense to do so. Understanding the role of your mediator and your arbitrator can help you make the most of the opportunities that ADR processes offer.

Marc Bhalla is a mediator and arbitrator who focuses his practice on condominium conflict management. He holds the Chartered Mediator and Qualified Arbitrator designations of the ADR Institute of Canada and the MCIArb designation of the Chartered Institute of Arbitrators. Marc believes in customizing dispute resolution processes to best suit the unique circumstances of each individual case and offers an expedited electronic documents-only arbitration process explained at www.arbitrate.online. He has been with Elia Associates for over 16 years and leads the firm's CondoMediators.ca and CondoArbitrators.ca practice groups.