

# "Mediation and Other Stuff"



**Colm Brannigan**

Mediation and Arbitration Services

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Welcome to my monthly, more or less, newsletter about alternative dispute resolution from an Ontario perspective.

As we enjoy what will likely go down in the books as the warmest summer on record in Ontario, I thought I would comment on a topic that many professionals including mediators "sweat" about, that is, pricing our services.

My brief article on preparing for mediation in a condominium dispute, *10 Years on: Still Preparing after all these years (for Condominium Mediation)* has been published in the latest edition of *Condo News of the Golden Horseshoe* the newsletter of the Canadian Condominium Institute - Golden Horseshoe Chapter. I hope to have this article up on my website shortly but if you would like a copy please e-mail me.

This month's case is an important condominium decision on enforcement of the Declaration and in particular of how the court will view "selective" enforcement of the Declaration by the condominium. Since there are approximately 9,000 condominium corporations in

Ontario and many more in construction, we can expect to see more examples of this type of case in the future.

Finally, I am well into the research for my book on Condo ADR which will be published by Canada Law Book next year and I am looking for examples of condo arbitration decisions to include in it along with the reported case law. If you have any decisions that you can send to me, redacted or otherwise, I would really appreciate you doing so.

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

Colm Brannigan

### **Is it "The Price is Right" or Does it Really Matter?**

Does the price of mediation services have anything to do with the value of those services? One of the most difficult tasks for any professional is to set a price point for their services. In many ways price defines value for most of our clients. We look for niche practices and sometimes forget that price is in itself a niche.

It is difficult to find out what mediators in Ontario are actually charging, since few are prepared to talk about it, but anecdotally it seems that some mediators charge \$100 an hour while others charge \$500 an hour? Daily rates also range from less than \$1,000 to \$7,500 plus.

Even more interestingly it is the mediators at the higher end of the price range who seem to be the busiest! These same comments and observations apply to lawyer's rates which in the GTA run from \$200 an hour to \$1,000 plus.

How do you get it right? Is there a relationship between what you charge and how the value of your services is

perceived?

A recent article in [Why We Love Our Dentists](#), looked at the relationship between the price paid and perceived value. Based on data gathered in the US by behavioral economist Dan Ariely, it seems that people love their dentists more than any of their other medical providers. Why?

The reason appears to be cognitive dissonance which is, "the human tendency to react to conflicting evidence by doubling-down on our initial belief". Although it sounds a bit strange to say the least, the author of the study attributes our irrational love of dentists to the pain they inflict:

The article has other examples of irrational behavior influenced by perceived value and is worth reading.

What does this mean for mediators and lawyers? Since many lawyers and mediators deal with clients when they are in some type "pain", maybe we should rethink how we approach this problem. While this flies in the face of complaints that professionals charge too much, it seems that our clients believe that the value of our services is directly related to the price they pay for it.

In other words, if you are a mediator or lawyer offering the lowest prices for your services, then your clients may believe your services are less valuable than the same advice offered by your higher-priced competition.

From my experiences as a mediator, it has become clear to me that many litigation clients think that the chances of "winning" their case are related to the fees they pay. I am not talking about emotional or financial investment made in the case but more, "my lawyer is better (ie more expensive) than your lawyer"!

This may also hold true for mediators. Although it may be heresy to suggest this, the chances of a successful outcome may be related to the fees charged by the mediator.

One mediator I know commented on this point:

I began my career by thinking I would charge less than other mediators to encourage business. I don't think that worked. And I specifically had some clients tell me that my price was too low and I should raise it (because it raised suspicions that I was not as good as my competitors).

I also wonder if whether lawyers or mediators who offer lower-cost services see themselves as less competent or not as good as their competition?

In any event you should shop around and ask for prices. One of the key elements of revisions to the Rules of the Civil Procedure is proportionality in costs. But remember highest or lowest is not necessarily the best for your case.

What do you think? Is pricing an art or a science? If you have the time, please e-mail me with your comments.

### **Case of the Month**

In Peel Condominium Corporation 108 v. Young, the condominium corporation commenced an Application in the Ontario Superior Court of Justice to enforce its Declaration against a unit owner. The unit owner installed a tankless gas water heater without obtaining the Board's consent. Consent was required under the Declaration because the tank's exhaust vent went through the outside wall of the unit which was part of the common elements and therefore constituted a change to the common elements.

The condominium corporation's position was that this change was a clear contravention of the Declaration. The unit owner countered that there had been "selective" enforcement by the Board and in the past other breaches of the Declaration by unit owners had not led to compliance proceedings.

The court stated:

Once registered, the Declaration has the force of law, at least as far as the unit holders are concerned. It is a sort of Constitution that binds them all, and which the Board of Directors is legally obliged to enforce. There is an interest, in the collective, in having the Declaration enforced, even if some transgressors have been allowed to violate it. In such a situation, the collective's interest in having the Declaration enforced must prevail over the private interest of the respondent.

This case once again tells unit owners how important it is to comply with the condominium corporation's Declaration, Rules and By-laws.

It also warns boards and management companies that they must be careful not to allow selective enforcement for as Justice Gray commented, "The situation would undoubtedly be different if there was massive non-enforcement as was the case in some of the cases involving pets."

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Colm Brannigan, LL.M.(ADR), C.Med., IMI Cert., Med.,  
C.Arb.  
Mediator and Arbitrator

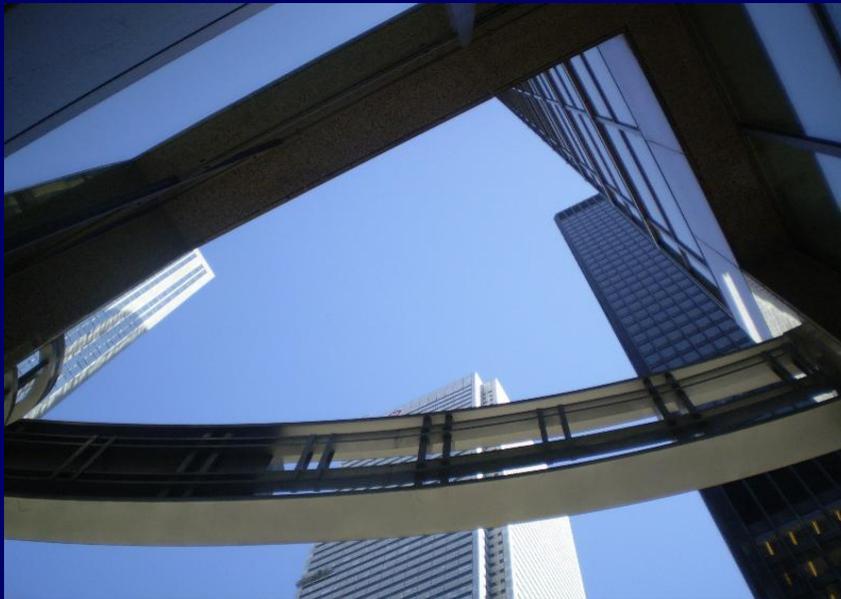
Contact Information:

Phone: 905-840-9882  
Toll Free: 1-877-440-9882  
E-Mail: [colm@mediate.ca](mailto:colm@mediate.ca)

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Colm Brannigan - Mediate.ca Dispute Resolution Services | 4 Burwash Court | Brampton | ON | L6Z 4M3 | Canada