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**CANADA,
CONFLICT &
COVID-19**

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ABSTRACT

An Ontario mediator and arbitrator reflects on years of observing the dispute resolution field's hesitations surrounding Online Dispute Resolution, COVID-19 offering legitimacy to online processes and the long-term impact of the pandemic requiring many to gain familiarity participating in such options.

ABOUT THE AUTHOR

Marc Bhalla is a mediator, arbitrator and instructor based in Toronto, Canada.

He earned a Master of Laws in Dispute Resolution from Osgoode Hall Law School, an Executive Certificate in Conflict Management from the University of Windsor's Faculty of Law and an undergraduate degree at the University of Toronto's prestigious Trinity College.

Marc is passionate about dispute resolution. He has had over 100 articles published related to the field, including academic contributions to the McGill Journal of Dispute Resolution and the Journal of Arbitration and Mediation.

Marc is accredited as an approved trainer of the ADR Institute of Canada.

He has spoken across Canada. Marc lectures at Osgoode Hall Law School, Queen's University and as a member of the faculty of the Canadian Collaborative for Engagement & Conflict Management.

He holds the Chartered Mediator (C.Med) designation of the ADR Institute of Canada, as well as domestic and international arbitration designations.

BEFORE THE PANDEMIC

On January 1, 2016, I announced that my mediation and arbitration practices were available online. Upon completing Online Dispute Resolution (“ODR”) training at the end of 2015, I started offering my services entirely online or on a hybrid basis (taking place partially online and partially in-person). Over the four years that followed, many of my clients inquired about my online processes. Some engaged my offerings.

In the vast majority of these cases, online options were embraced when they offered a convenience. When gathering in-person was not possible or was problematic. Most notably, my online services were used in situations where parties were a geographic distance apart (such as in different Canadian provinces or when a party was not in the country) or where there was urgency in addressing a matter and scheduling hurdles prevented a traditional, in-person process from coming together. On such occasions, I would offer my services by video conference, audio and/or email. Often, in combination.

One advantage of participating in dispute resolution online is the greater flexibility that it offers over in-person processes. Such flexibility extends beyond *how* parties participate to *when* they participate. My clients would not necessarily have to take part all at the same time. I found that this flexibility could add comforts that are simply not available traditionally – particularly for those participating without legal representation or in varying time zones.

Between January 1, 2016 and mid-March 2020, I perceived my ODR services to be viewed as a novelty. Not part of a typical mediation or arbitration process, but instead an option to be used when in-person proceedings were a challenge. A way to move ahead with measures to address conflict when all else failed. While a handful of my colleagues also embraced ODR, the majority of dispute resolution practitioners I came across were hesitant. They either had doubts about practicing online or a lack of interest in doing so.

In the summer of 2019, I presented a session at the ADR Institute of Ontario’s annual conference titled *Catch Up or Get Left Behind... Arbitrating Online in 2019*.¹ Based on reactions to comments I had made at previous conferences

¹ Marc Bhalla, “Catch Up or Get Left Behind... Arbitrating Online in 2019” (delivered at “Expanding the Pie”, the 34th Annual General Meeting and Conference of the ADR Institute of Ontario, Toronto, June 6, 2019) [unpublished].

about online mediation and arbitration, I did not expect my presentation to be well received – particularly by many of the seasoned and successful arbitrators who were anticipated to be in attendance.

In preparing for my talk and reflecting upon my audience, I concluded that I could not blame them for being hesitant. Many of my colleagues had decades of experience with traditional processes and felt successful in using them. They had little motivation to change. If they did not see anything broken in their service offerings, they would have no reason to fix them. While there are access to justice arguments in favour of ODR, a successful private practitioner had little reason to embrace it in Canada, even only a few short months ago.

BACK TO THE FUTURE

Anticipating my message to be unpopular, I started my presentation with a clip from the film *Back to the Future*.² I played the scene where Marty McFly, of 1985, is at a high school dance in 1955.

As time travellers do, Marty finds himself on stage with an opportunity to perform for the school. With a guitar in hand and a house band backing him up, Marty starts performing the song *Johnny B. Goode*.³

At first, the students enjoyed the song; they started to dance to the music.

Then, the inevitable happened.

Marty could not keep himself out of 1985.

He lay on his back and spun as he played the guitar. He kicked over speakers and engaged in on-stage antics that would be considered relatively standard to the teenagers of 1985 but were disruptive, out of the ordinary and even confusing to the teens of 1955.

I played the clip to express how I felt making my presentation, anticipating the reaction to my talk to be like the reaction to Marty's performance. As with the evolution of musical performance depicted in the film, I suggested that the evolution of dispute resolution was inevitable. Natural, even.

² *Back to the Future*. Dir. Robert Zemeckis. Universal Pictures, 1985. Film.

³ Chuck Berry, "Johnny B. Goode." *Chuck Berry Is on Top*, 1958.

I highlighted how Marty's hijinks were disruptive to the teens of 1955 just like ODR would be disruptive to those well versed in traditional processes in 2019. (Some in the audience may have felt I was suggesting that they were in their teen years in 1955... some, in fact, could well have been!) It was important to me to explain that different techniques would be needed to conduct dispute resolution processes online, as opposed to in-person. This is the case because interactions are different when they take place online. Research confirms that while there may be a tendency for some to try to replicate in-person exchanges while taking part in ODR processes, exchanges are not the same online.⁴

THE DIFFERENCE WITH ONLINE EXCHANGES

Online exchanges offer unique opportunities that can be leveraged when they are realized. It is harder to notice such opportunities when the focus is on replicating an in-person exchange. One example is that non-verbal cues can be offered differently online than in-person. If a mediator is utilizing video conferencing to conduct an online process, they can be tempted to try to read the body language of the parties presented visually through their screen. This neglects opportunities to take cues in a manner that is not available during in-person mediation, such as by incorporating text communications to check-in.

While my colleagues seemed to humour my presentation at the conference, several laughing at my jokes and offering positive feedback afterwards, my talk appeared to do little to change attitudes. I may have offered something to think about but it did not appear that my session inspired anyone to take action and embrace ODR (so as not to be left behind, as advertised).

It seemed my call for the modernization of Ontario's dispute resolution service offerings would wait. I considered the mentality to be similar to what Marty McFly expressed at the end of the film clip, where the audience stared at him in shock. As a band member takes back the guitar with a confused look on his face, Marty expresses that while they may not have been ready for what he just presented, their kids were going to love it.

⁴ Noam Ebner, "Negotiation via Email," "Negotiation via Text Messaging," and "Negotiation via Videoconferencing," in Honeyman, Christopher and Andrea Schneider, eds, *The Negotiator's Desk Reference, Vol. 1* (St. Paul: DRI Press, 2017), pp. 115-170.

NINE MONTHS LATER...

Fast forward nine months after the ADR Institute of Ontario's 2019 Conference. COVID-19 had started to spread notably throughout Canada. The message provided by multiple levels of government was for people to stay home.⁵ Non-essential services were ordered to shut down, society was encouraged to "*social distance*" and public gatherings were not only discouraged but eventually became a fineable offence to partake in.⁶

It would become literally impossible for previously scheduled mediations and arbitrations to proceed in-person. Even in instances where it might have been plausible for parties to come together, the pandemic introduced an additional level of stress, concern and discomfort with in-person gatherings. This signalled that such should not proceed.

In support of this sentiment, courts would adjourn ongoing cases and stop accepting new cases for all but urgent matters.⁷ With Canada's public justice system at a standstill, a spotlight shone on the proceedings that marched on.

In the Province of Ontario, Canada's first fully online tribunal remained in operation.⁸ While the Condominium Authority Tribunal (the "Tribunal") maintained a limited jurisdiction (a particular type of condominium dispute), it offered an example of how conflict could be addressed without in-person gatherings or related, traditional customs. It demonstrated how modern justice could be served. From start to finish, cases before the Tribunal could be addressed entirely online, even during COVID-19 being widespread in the region.

⁵ Ryan Tumilty, "COVID-19: Trudeau to Canadians: 'Enough is enough. Go home and stay home'", National Post (March 23, 2020), online: <<https://nationalpost.com/news/canada/covid-19-ontario-reports-78-new-cases-the-most-in-one-day-so-far>> [perma.cc/BV9V-M5FZ].

⁶ Joseph Hall, "Toronto police crack down on social distancing with ticket blitz – up to \$1,000" Toronto Star (April 11, 2020), online: <<https://www.thestar.com/news/gta/2020/04/11/toronto-police-crack-down-on-social-distancing-with-ticket-blitz-up-to-1000.html>> [perma.cc/SPG4-YE6M].

⁷ Bernise Carolino, "COVID-19 and the courts: a cross-country roundup," Canadian Lawyer (March 17, 2020), online: <<https://www.canadianlawyermag.com/news/general/covid-19-and-the-courts-a-cross-country-roundup/327611>> [perma.cc/46RA-QV8T].

⁸ Condominium Authority of Ontario, "The Condominium Authority Tribunal" (May 1, 2020), archived online: [perma.cc/G4XT-4X56].

In the Province of British Columbia, the Civil Resolution Tribunal (the “CRT”) offered examples of conflict being addressed online, also while the country took precautions in response to the pandemic.⁹ The CRT had recently been declared a world leader in online courts by Richard Susskind in his late 2019 book *Online Courts and the Future of Justice*.¹⁰

A shift in the general mindset surrounding ODR started to take place around Canada.¹¹ As with other provinces, when Ontario’s courts started to look at re-opening beyond pressing matters, the province looked online. From court filings via the Internet to remote proceedings being contemplated, it was clear that the path ahead would include ODR.^{12,13} In private practice, the sentiment was no different. Mediators and arbitrators concerned about the sustainability of their practices scrambled to get online as though they feared the sky was falling.

Webinars, training and best practice tips started circulating on social media like wildfire as dispute resolution practitioners, legal representatives and parties involved in conflict looked to find a way to address it. On April 29, 2020, the ADR Institute of Canada, the ADR Institute of Ontario and the Family Dispute Resolution Institute of Ontario jointly released informational materials directed at lawyers that reviewed various online options, addressing frequently asked questions about how they worked for mediation and arbitration.¹⁴

⁹ Civil Resolution Tribunal, “Welcome to the Civil Resolution Tribunal” (May 1, 2020), archived online: [perma.cc/7F3C-SF7H].

¹⁰ Susskind, Richard. *Online Courts and the Future of Justice* (United Kingdom: Oxford University Press, 2019) at 168-169.

¹¹ This is the author’s observation, including based upon an abundance of social media activity starting in late March and April 2020 where Canadian dispute resolution practitioners actively circulated high volumes of post embracing ODR.

¹² Christine Dobby, “Remote shifts in Ontario courts are for the better and should become permanent, judicial leaders say,” *The Globe and Mail* (April 28, 2020), online: <<https://www.theglobeandmail.com/business/article-crisis-driven-changes-to-ontario-courts-are-for-the-better-and-should/>> [perma.cc/486H-JKVG].

¹³ Paola Loriggio and Liam Casey, “COVID-19 measures could have lasting impact on Ontario courts: experts,” *National Post* (March 13, 2020) online: <<https://nationalpost.com/pmnn/news-pmn/canada-news-pmn/schlatter-trial-continues-amid-new-covid-19-measures-halting-upcoming-jury-trials>> [perma.cc/4Y4K-XLNV].

¹⁴ The author was involved in editing and drafting these materials.

The ADR Institute of Ontario assembled a roster of dispute resolution practitioners offering services online.¹⁵ Presentations shedding light on how online proceedings worked - including by some who scoffed at the notion of ODR just months prior - were in wide circulation.

ONE STEP FORWARD, TWO STEPS BACK

With the sudden rush to embrace online processes came new fears and concerns. The video conference platform Zoom was being used throughout the continent for a variety of gatherings – from family check-ins to business meetings involving many attempting to work from home. As Zoom already had functionality well suited to dispute resolution (such as the capability to offer breakout rooms in mediation to allow for caucusing), it was widely embraced by the country’s dispute resolution practitioners.¹⁶ Not surprisingly, a lack of experience with these platforms, combined with a rushed attempt to embrace them, led to user errors and the emergence of related security concerns.

This gave rise to much back and forth with new measures being put in place to ease security concerns (such as security settings becoming easier for the inexperienced user to navigate) and new concerns emerging in their place (such as data centre selection options becoming offered, only for them not to allow a Canadian user to de-select the United States of America as a data centre associated with their account).¹⁷ Nonetheless, video conferencing offered a way forward to resolve disputes at an unprecedented time.

¹⁵ ADR Institute of Ontario, “How To Find Online Dispute Resolution Professionals? Ask ADRIO,” (March 23, 2020), online: <<https://adr-ontario.ca/how-to-find-online-disputeresolutionprofessionals-ask-adrio/>> [perma.cc/G6VR-97BF].

¹⁶ Mitchell Rose, “Mediation by Zoom addresses social distancing, shuttered courtrooms,” *The Lawyer’s Daily* (March 31, 2020), online: <<https://www.thelawyersdaily.ca/articles/18393/mediation-by-zoom-addresses-social-distancing-shuttered-courtrooms>> [perma.cc/CJ5E-MUK8].

¹⁷ Miles Kenyon, “FAQ on Zoom Security Issues,” *The Citizen Lab* (April 8, 2020), online: <<https://citizenlab.ca/2020/04/faq-on-zoom-security-issues/>> [perma.cc/MZN7-UASQ]. What the author refers to as the “Zoom Security Roller Coaster” included a number of different concerns emerging about Zoom during Canada’s efforts to curtail the COVID-19 pandemic. Terms such as “zoom-bombing” became popular, as encryption concerns and user error contributed to breaches of security. While Zoom itself would address certain concerns, it seemed as though new concerns continually emerged as prior concerns were resolved. While

Zoom was not the only video conferencing platform utilized and ODR is much more than simply video conferencing. Yet, Canadian society's increased use of online communication tools during the pandemic had a ripple effect that included ODR being embraced by Canada's dispute resolution community in ways that it had never been before.

WE HAVE NOW EXPERIENCED THE FUTURE

Many Canadians involved in the justice system and private dispute resolution now believe that ODR is the future, if not the present. The COVID-19 pandemic has people speaking of "*The New Normal*" and resolving disputes online is part of this new landscape. While the CRT's jurisdiction already had expanded from strata (condominium) disputes to motor vehicle injury, small claims and conflicts involving societies and cooperative associations,¹⁸ the legitimacy of ODR in Canada has not come from online, administrative tribunals alone. Legitimacy has also come from responses to a global pandemic which included Canadians looking online to go on with their lives, including to address their disputes. This has resulted in those involved in the dispute resolution field to experience ODR for themselves, rather than merely speculate from the sidelines.

COVID-19 has forced many Canadian dispute resolution practitioners to "*take the plunge*" into ODR. On many occasions, this has resulted in the realization that the initial step of doing so is the biggest hurdle of all. Once actively involved in addressing conflict online, parties, legal representatives and neutrals are realizing the benefits the online environment offers in respect of comfort and flexibility. While they turned to online platforms out of necessity, as a way to move forward at a time where all others paths ahead were closed, they have now experienced the reality of ODR and better understand the role it can play in addressing conflict.¹⁹ ODR can allow for conflict to be addressed in a more progressive manner than traditional in-person processes are capable of.

this did not prevent the author from embracing Zoom for ODR, it did make Zoom security a popular topic in Canada's dispute resolution field.

¹⁸ Civil Resolution Tribunal, "CRT Jurisdiction," online: <<https://civilresolutionbc.ca/resources/crt-jurisdiction/>> [perma.cc/8PZT-6GZZ].

¹⁹ This is an observation of the author.

At the time of writing, the timing of Canada's recovery from the pandemic is unknown. (There remain concerns of second and third waves of COVID-19.) Canadians have been slowly resuming operations. Many eagerly anticipated the re-opening of restaurants, hair salons and public parks, and await the country's justice system resumption of full operations. While limits on the number of people gathering are anticipated to last several more months at least,²⁰ it remains that finding a way to address disputes is highly desired - particularly as backlogged courts are only further backlogged due to their pandemic-related closures.

There will almost certainly be a return to in-person mediation and arbitration. The question that remains to be answered is the extent to which ODR will be utilized once restrictions are lifted. ODR may not be best suited to every type of dispute, yet Canadians have now seen what it can do and realize that it is actually a better option in many cases. To some, ODR has become the preferred platform to resolve disputes on all occasions.

So many members of Canadian society utilize the Internet for much of their lives, from shopping to dating to keeping in touch with friends and loved ones. Even before the COVID-19 pandemic, online communications were the primary communication methods of multiple younger generations of Canadians. ODR can now be considered beyond circumstances where parties are separated by geographic distance or face impossible scheduling obstacles. Now that the country has been exposed to ODR - and certainly as Canada's public justice system continues to embrace and expand its deployment of online systems - it appears that the COVID-19 pandemic gave the country the kick that it needed to start to embrace "*the future*". In 2020. Finally.

Marc Bhalla is a member of the Condominium Authority Tribunal and presents this article in his personal capacity only. He does not speak for the Condominium Authority Tribunal or the Condominium Authority of Ontario. Marc's opinions are his alone. This article shares Marc's personal observations and beliefs, drawing upon his private mediation and arbitration practice of issues beyond the jurisdiction of the Condominium Authority Tribunal.

²⁰ Bianca Bharti, "Where we stand in Canada: Reopenings by province and territory from coronavirus lockdown," National Post (April 29, 2020), online: <<https://nationalpost.com/news/canada/reopening-canada-provinces-ontario-quebec-saskatchewan-alberta>> [perma.cc/6MY4-TCJY].