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Online Dispute Resolution: It's Time to Rethink the Future, While We Still Can

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“ Technology is changing not only the way we communicate; it is altering the way we disagree and the way we resolve our disputes.... Technology is also changing people’s expectations about how disputes should be resolved.[1] ”

The Internet today has over 4.1 billion users.[2] Personal computers, laptops and tablets are everywhere while mainframe computers have disappeared from public view. At the same time “Smart Phones” are replacing landlines and to a certain extent, tablets as we move into a much more mobile world as far as information communication technology is concerned with more than 60% of Google searches now being from mobile devices.

Alternative Dispute Resolution (ADR) and legal practitioners both use aspects of Online Dispute Resolution (ODR) in their daily practices even if they do not see it as ODR. A rigid distinction between online and offline worlds makes little sense today. Few of us live entirely online, but few live entirely offline either. Most of us are comfortable using technology to communicate electronically. We constantly move back and forth between our online and offline lives.

ODR is a branch of dispute resolution, which uses technology to facilitate the resolution of disputes between parties. It primarily involves negotiation, mediation or arbitration, or a combination of all three.

Despite this acceptance of technology, many in the ADR field recoil at the idea of ODR, in much the same way as lawyers do with concepts of Artificial Intelligence, IBM’s Watson[3] and other so called disruptive technologies.[4] Innovation and technology are part of ADR. But it is up to us whether this will be a “disruptive” force or an innovative opportunity to access and provide additional services to improve and sustain our practices. As noted US ADR expert Jim Melamed has recently stated:

The simple point here is that there remains, even today, a tendency to assume a false dichotomy between “online” and “face-to-face” dispute resolution. Certainly, before the Internet, there was a time when one might reasonably have described all dispute resolution (court, arbitration, mediation) as face-to-face. However, with the advent of the telephone and fax machines, and then e-mail with file attachments, and then the Internet—websites, online intake, online calendaring, secure online document storage, shared editing tools, online voice and video conferencing, online signing, and online satisfaction surveys—today’s reality is that just about every single “face-to-face” dispute-resolution practice and program is increasingly utilizing effective online tools to get the job done. Hence, the real issue is not face-to-face or online, but, rather, for most disputes, how can the technology be best integrated with face-to-face assistance to most capably and affordably get a matter resolved?[5]

A simple ODR process can have both online and face-to-face components such as:

1. Process begins by the parties completing an online intake form.
2. A mixture of telephone calls, e-mails and face-to-face meetings or videoconferences occur.
3. Important documents can be exchanged electronically.
4. Joint sessions might be held in person or on-line.
5. In-between session communication may be through e-mail and/or dedicated chat facilities.
6. The settlement agreement is circulated and signed on-line.

More sophisticated ODR systems support video along with text-based, conversations and software tools such as Solution Explorer from BC’s Civil Resolution Tribunal to help parties explore their options in order to be prepared for resolution of their disputes.[6] Much as there are many different processes under the umbrella of ADR, ODR is not a single technology. There are several Canadian ODR platforms on the market and others in the U.K. and Australia.

The major impetus towards ODR today that is different than in the last ten years is that governments have conferred legitimacy on ODR through the implementation of on-line tribunals to supplement or replace courts. This is part of a global movement to address access to justice through the use of the equivalent of on-line courts.

Canada is in the forefront of this movement and a working model of the future of on-line dispute resolution can be found in the Civil Resolution Tribunal (CRT) in British Columbia[7]. With a jurisdiction that includes resolving both small claims and strata (condominium) disputes, mostly in an on-line environment, this CRT provide a very different experience than traditional tribunals or courts and one that many consumers seem to welcome.

We now have 99% per cent of users accessing the CRT online and 35% plus are doing so outside of traditional court hours. Satisfaction rates with the user experience are high and increasing. In January 2019, the CRT will, despite some controversy and push back, add certain types of insurance disputes to the mix.[8]

In Ontario there is the Condominium Authority Tribunal (CAT)[9] that commenced operations in November 2017. While the CAT has exclusive jurisdiction over many types of condo disputes under the Condominium Act, at the moment it is focusing on records related matters. We can expect that it will expand the range and nature of disputes covered in an incremental fashion over time.

The CAT is a fully online tribunal, that can take disputants on a guided journey through a three stage Negotiation (User Discussion), Assisted Resolution (Mediation) and if needed, Adjudication process for a cost of approximately \$200.00. CAT decisions are also freely available online as a resource for its users.[10]

While the CAT is exclusively for condominium disputes, since more than 1.5 million people in Ontario live in condos, it will become well known and drive consumers towards an expectation of low cost ODR services being available in other fields. That will in turn place significant pressure of ADR practitioners to be able to justify their fees for face-to face mediation.

The European Union has enacted legislation requiring online sellers to provide an online redress system to consumers.[11] This will directly impact corporations that engage in e-commerce. Canadian corporate counsel will likely have to look at on-line systems for both dispute resolution and customer satisfaction purposes especially when the Canada-European Union: Comprehensive Economic and Trade Agreement comes into effect. Again this will have a trickle down impact on consumer expectations of ADR services and costs.

The conflict management and dispute resolution market is ready for something cheaper, easier, or more convenient than what is already out there. Both the CRT and CAT are examples of meeting these needs. Mediators who make better use of online technology will have a competitive advantage as they will be able to offer their services to parties in dispute who simply cannot, afford the costs both financial and time of traditional dispute resolution. ODR will allow ADR professionals to market their services to industries and organizations with large numbers of disputes in a far more efficient and profitable way.

There is real potential in ODR and there are serious challenges to be worked though. In conclusion, another quotation from Jim Melamed sets the stage for the challenge that ODR presents to ADR practitioners:

An ADR professional's ability to offer an informative, valuable

web site, to responsively communicate by e-mail, phone, and textmessages, and to attach drafts for editing, as well as other everyday cyberskills, is now just as critical to mediation success as any face-to-face mediation technique used by a mediator "in the room." Electronic and face-to-face communications are not at odds, but, rather, are cumulative opportunities for ADR professionals to get things moving in a better direction. A mediator's or arbitrator's effective facility with online communication options situates him or her to have the greatest chance of success, be that face-to-face or online success or both.[12]

While there is no "Oz" like person or machine behind the electronic curtain as of yet, we need to learn more about technology and be willing to "race with the machine"[13] to innovate and provide the types of services that our clients need or we will be left behind. After all, ADR was intended to provide

alternatives to the tradition justice system and ODR is taking alternatives to another level.

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[1] Colin Rule, Technology and the Future of Dispute Resolution in Dispute Resolution Magazine, Winter 2015 p. 4

[2] <http://www.internetworldstats.com/stats.htm> as at December 31, 2017 compared to 4 billion users as at November 2015..

[3] <http://www.ibm.com/smarterplanet/us/en/ibmwatson/>

[4] A disruptive technology is one that displaces an established technology and shakes up the industry or a ground-breaking product that creates a completely new industry.

<http://whatis.techtarget.com/definition/disruptive-technology>.

[5] Jim Melamed, Online Dispute Resolution Chapter in the 2019 Oregon Bar Association Handbook on Dispute Resolution. PP. 41-8- 41.9. Available at: <https://www.mediate.com/pdf/ODRforLawyers.pdf>

[6] <https://www.civilresolutionbc.ca/come-try-the-solution-explorer/>

[7] <https://www.civilresolutionbc.ca/>

[8] CRT statistics most current are available at <https://civilresolutionbc.ca/crt-statistics-snapshot-july-2018/>

[9] <https://www.condoauthorityontario.ca/en-US/tribunal/>

[10] <https://www.canlii.org/en/on/oncat/>

[11] Settling consumer disputes online

http://ec.europa.eu/consumers/solving_consumer_disputes/docs/adr-odr.factsheet_web.pdf and

<http://ecommercenews.eu/online-dispute-resolution-platform-doesnt-work/>

[12] Jim Melamed, Online Dispute Resolution Chapter in the 2019 Oregon Bar Association Handbook on Dispute Resolution, p. 41-12 Available at: <https://www.mediate.com/pdf/ODRforLawyers.pdf>

[13] Concept from Erik Brynjolfsson and Andrew McAfee's *Race Against The Machine*, Lexington, Massachusetts, 2011.

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