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CECM

CANADIAN COLLABORATIVE FOR
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# Volume 1
# (August 2020 – July 2021)

# SHADOW OF THE LAW PUBLICATIONS



Volume One



Made in Canada

ISBN 978-0-9958842-2-9 (ebook)

## EDITOR'S NOTE

Welcome to our first volume of the Journal of the Canadian Collaborative for Engagement & Conflict Management (JCECM).

In keeping with our values of collaboration, exemplary service, continuous learning and improvement, and making a difference, we created the Journal in 2020 to fill a gap in the Canadian conflict management sphere – an easily accessible space where people could publish articles that, while founded on sound conflict management theory and research, have immediate value for application by contemporary practitioners.

As the Journal's terms for submission state, our particular interest is in academic papers that offer practical, contemporary, unique, and unusual perspectives.

As we close out our first volume, we thank all our contributors and readers who have helped us in our quest. In our first year, we published two articles on the effects of COVID-19 on conflict management practice, one on creating more meaningful approaches to dealing with Indigenous land disputes and one on mitigating decision-maker bias. While there is still much to be done, we believe we have made good start to creating a space for continuous learning and improvement of our responses to dealing with some of the most important challenges facing us all.

We invite you to continue to provide us with your feedback and your submissions for new academic papers, book reviews, and articles to help us all become better at what we do.

Richard Moore, Editor-in-Chief

## VOLUME EDITORIAL BOARD

The Canadian Collaborative for Engagement & Conflict Management (CECM) would like to thank members of this volume's editorial board for their dedication. This peer-reviewed journal cannot operate without the time volunteered by Editorial Board members to review submissions.



CECM would also like to thank the authors of all submissions to this Journal, both those that were accepted for publication and those that did not make this volume, for their effort, support and talent.

**CONTENTS**

Volume 1
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# CANADA, CONFLICT & COVID-19

Marc Bhalla
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Shadow of the Law Publications



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## Contents

## 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.

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[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 pace 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.

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[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.

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[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]

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[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-JKWG].

[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/pmn/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.

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[15] ADR Institute of Ontario, "How To Fine Online Dispute Resolution Professionals? Ask ADRIO," (March 23, 2020), online: <https://adr-ontario.ca/how-to-find-onlinedisputeresolutionprofessionals-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.

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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 <u>better</u> 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.

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*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.*

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[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].

Volume 1
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# MEDIATION DESIGN IMPLICATIONS OF THE COVID-19 PANDEMIC

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Shadow of the Law Publications



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## Contents

## ABSTRACT

COVID 19 has had a lasting impact on how mediations may be conducted. This paper compares Online Dispute Resolution (ODR) to In Person Mediation (IPM) in a post COVID 19 world. Public health and occupational health and safety guidance is reviewed and integrated with neurophysiological and psychological research on nonverbal communication and human stress. Evidence informed best practices for both ODR and IPM are developed and the paper concludes that ODR is a superior choice until the precautions around COVID 19 are either no longer required or until widely accepted norms around physical presence develop.

## ABOUT THE AUTHOR

Dave Wakely is a Chartered Mediator who offers online and in person mediations. His practice focuses on labour and workplace issues.

Dave also serves as an Advanced Care Paramedic in Peel Region.

During the COVID 19 Emergency, Dave was the labour representative on Peel Paramedics Services' Command Group and Emergency Operations Centre. Dave led the development of Peel's specially equipped COVID 19 High Risk Response Team.

Dave holds a BA in labour studies from York University and recently completed the academic requirements for a Master of Laws in Dispute Resolution from Osgoode Hall Law School.

Previous works have evaluated the utility of online dispute resolution (ODR). When evaluating ODR, it is typically compared to in person mediation (IPM). Since the declaration of a worldwide pandemic and the rise of COVID-19 in countries across the globe in March 2020, the return to what we knew as a typical IPM is in question. Considering the utility of ODR against a normal that can no longer exist is not useful. This paper will compare the design challenges of ODR and the design challenges of what IPM will look like in the post COVID-19 world. I will begin by exploring the design implications of current public health recommendations on IPM. I will then compare ODR and post COVID-19 IPM in three dimensions drawing on neuroscience, and dispute resolution and negotiation literature: the impact of threats to physical safety and stress response, the impact of physical distancing and online parallels and the impact of facial affect and kinesics. Having considered the limits created by the response to the current public health crisis and limits and opportunities inherent in the use of video based ODR, I will propose a group of evidence informed best practices for both video based ODR and post COVID-19 IPM.

## PUBLIC HEALTH BACKGROUND

On December 31, 2019, a cluster of atypical pneumonia was reported in Hubei China. A month later there were 7818 confirmed cases of what would eventually be called COVID-19. March 11, 2020 WHO, the World Health Organization, declared a pandemic.[1] On March 17, Ontario declared a province wide emergency and ordered a shutdown of non-essential services. The next day the Canadian government closed its borders.[2] Public life ground to a halt as malls, schools, courts, parks and virtually all other public spaces were closed. Even gathering in a private dwelling with more than four other people was prohibited by law.[3] Public health authorities and elected leaders briefed the public daily.

Initially those briefings sought to inform the public about epidemiologic data and measures to address the economic and other consequences of the closure. As time progressed, Public Health authorities, led by Dr Tam and Dr Lo with support from a phalanx of regional medical officers of health, changed focus

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[1] World Health Organization, “WHO Timeline – COVID-19” 27 April 2020, online:<https://www.who.int/news-room/detail/27-04-2020-who-timeline---COVID-19> [perma.cc/PWP7-TSLA].

[2] Lauren Vogel, “COVID-19: A timeline of Canada’s first-wave response” 12 June 2020, online: CMAJ <https://cmajnews.com/2020/06/12/coronavirus-1095847/> [perma.cc/SBA5-FNP3].

[3] O Reg 52/20, s. 1.

from reporting case counts and mortality to how to stay safe beyond just staying in your house. Public health recommendations have varied based on the level of disease and the ability of public health to respond in a given area.

At the onset, the emergency orders required many services to switch to alternative delivery methods. The government enacted a regulation suspending limitation periods.[4] Courts adjourned criminal matters,[5] suspended residential evictions,[6] and expanded their virtual hearing capacity.[7] The court also all but mandated virtual mediation in a consolidated notice to the profession: "The Court also calls upon the cooperation of counsel and parties to engage in every effort to resolve matters. For civil proceedings, this includes attendance at mediation – whether prescribed or not – where a mediator is willing to engage in a virtual mediation."[8] As case counts stabilized and much of the economy reopened, the public health measures required to safely reopen have become clearer.

I say clearer because there are a number of competing organizations who are writing the rules. Health care officials, public health officials, elected officials at all three levels of government and the Ministry of Labour and associated health and safety organizations have all provided comment and guidance. Whereas the mediator and lawyers participating in any potential mediation are workers, the guidance outlined herein is the guidance provided by the Ministry of Labour and associated health and safety organizations.[9] There is no standard written for IPM or legal proceedings generally.

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[4] O Reg 72/20, s. 1.
[5] Ontario, SCJ, *Adjourning Criminal Matters*, (Chief Justice Court Order), 15 March 2020, online: <https://www.ontariocourts.ca/scj/by-order-of-chief-justice-morawetz/> [perma.cc/74DW-SMSB].
[6] Ontario, SCJ, *Suspending Residential Evictions*, (Chief Justice Court Order), 19 March 2020, online: <https://www.ontariocourts.ca/scj/chief-justice-court-order-susp-resid-evict/> [perma.cc/PG3A-AN9C].
[7] Ontario, SCJ, *Memo to the Profession*, (Chief Justice Court Order), 27 March 2020, online: <https://www.ontariocourts.ca/scj/notices-and-orders-COVID-19/memo-to-the-profession/> [perma.cc/2S3H-CEL9].
[8] Ontario, SCJ, *Consolidated Notice to the Profession, Litigants, Accused Persons, Public and the Media*, (Chief Justice Court Order), 13 May 2020, online: <https://www.ontariocourts.ca/scj/notices-and-orders-COVID-19/consolidated-notice/> [perma.cc/V5J4-CBH4] s. 1.
[9] For discussion on how organizations with competing mandates cannot be trusted to ensure worker safety see the SAR Commission report online: <http://www.archives.gov.on.ca/en/e_records/sars/report/v2-pdf/Vol2Chp4x.pdf> [perma.cc/ZVD3-RR5P].

IPM is a process where two or more parties, usually with lawyers engage with a third party neutral. In order to do this successfully, often everyone is required to be in a room together for a period of time. Additionally, the various combinations of party-lawyer, lawyer-mediator-lawyer and so forth will meet in rooms and hallways throughout the mediation. Five people is the minimum number of people in a two party IPM where both parties have lawyers. The reality often sees higher number of parties with a need to attend the mediation. So, while there is no COVID-19 health and safety standard on mediation, the interactions are not unlike the physical interactions with adults in a training seminar. Accordingly, that is the standard I will assume IPMs will be held to with modifications where it seems prudent.[10]

Both the Public Services Health and Safety Association and the Infrastructure Health & Safety Association have published standards on classroom health and safety. While the PSHSA standard is broadly applicable to the education sector, the IHSA standard focuses more a single day multi participant training. Accordingly, the IHSA standard has been selected as the most applicable health and safety standard to IPM. The IHSA standard makes recommendations about the things you can do before and during an event to maximize safety. If the recommendations are taken into account while the mediation process is being designed, IPM can be performed in a way that minimizes the risk to the mediator and the participants.

When scheduling the IPM, the mediator needs to communicate with the parties and the venue. The parties need to be canvased to gain an understanding of who will be participating in the mediation; the mediator will need to book rooms based on this information. When scheduling room booking the mediator should also coordinate with the venue in an attempt to schedule a different start and end time. This staggering of start and end times will decrease the chances of crowding at the doors and in the elevators. When communicating with the venue, mediators should ensure the venue is following public health guidance about the addition of signs and physical distance markings is also required.

Prior to the mediation the mediator would need to ensure the parties were aware of the COVID-19 related requirements. The most pressing pre mediation requirement would be the need for all parties to complete a self-screening[11]

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[10] Where I deviate from the published standard due to a dissimilarity, I will explicitly note my departure from the standard and the supporting evidence in a footnote.

[11] The Ontario self-screening is available online <https://COVID-19.ontario.ca/self-assessment/> [perma.cc/U73X-7WBM].

prior to attending. The provincial self-screening tool is designed to give people advice on what to do based on their symptoms, age and medical history. It is not designed to tell people if they are healthy enough to attend a mediation. Accordingly, the premediation instructions for using the tool need to include guidance on what triggers would prevent participation in mediation. As an example, a person without symptoms or exposure but with diabetes would be advised they are at high risk if they contracted COVID-19 and told to consult with a doctor prior to attending any public gathering. A mediator who sends out the screening tool to participants without further guidance the night before an IPM invites trouble. Mediators should use the screen tool to detect people who are at risk of having COVID-19, so direction should be given for a participant to not attend an IPM if the result directs them to get tested as they have symptoms or may have been exposed to COVID-19.

Physical distancing and hand hygiene are key on the day of the IPM. The setup of the mediation room should consider the need for physical distance between the parties, their representatives and the mediator. Use of alcohol based hand wash should be encouraged by signage and the mediator. Food, often present at mediations, does not pose a health hazard. "[T]here have been no cases reported of [food based] transmission with COVID-19."[12] Neither the IHSA or PSHSA standard require masks when physical distance can be maintained. Mediations are typically convened in rented public spaces. While not universal, most Ontario municipalities, including Toronto require the use of masks in all public spaces without regard to the ability to maintain physical distance.[13]

Participant safety is a core function of the mediator. There is no standard for conducting COVID-19 safe mediations; however, the IHSA classroom safety standard meets many of the challenges posed by IPM. Proper mediation planning will ensure that self-screened participants can participate in an environment that allows for as much physical distancing as possible. While masks are not mandated by the IHSA standard, they have become law throughout most of Ontario. Any IPM will likely be conducted with participants and the mediator wearing masks. The prohibition of physical closeness and the

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[12] British Columbia Centre for Disease Control, "Food Safety", BCCDC n.d, online:<http://www.bccdc.ca/health-info/diseases-conditions/covid-19/prevention-risks/food-safety> [perma.cc/QS6B-HM5R].

[13] Don Mitchel, Global News, July 17, 2020, "Coronavirus: Hamilton joins regional municipalities in passing mandatory mask bylaw" online: <https://globalnews.ca/news/7188243/coronavirus-hamilton-passes-mask-bylaw/> [perma.cc/S74A-GJC7].

requirement to cover faces will impact nonverbal communication between the parties.

## NONVERBAL COMMUNICATION

This paper makes the assumption that the key differences between IPM and ODR relate to the physicality of the surroundings and to nonverbal communication. Nonverbal communication can be divided into haptics, kinesics, vocalics, and chronemics. The role of all four elements of nonverbal communication is well established in mono-cultural and cross-cultural negotiations. This section is a foundational discussion on how nonverbal communion triggers psychologic and neurophysiological reactions in people receiving the communication and cues.

### *Haptics*

Haptics is the role of touch in nonverbal communication. Handshakes, back patting, and other touching sends messages to the person being touched and to anyone observing the touch. While few of these touches are appropriate for use during mediation, the use of appropriate and inappropriate touch is a factor in many IPMs. Touch communicates intent, power relations, and triggers the release of oxytocin.

A handshake is often the first deal done. Handshakes are heavily associated with doing deals and often parties to a mediation will even start the mediation with a handshake. Handshakes are a nonverbal cooperation; they require the "participants co-operate so that their hands actually meet."[14] But handshakes can be more than just the first successful negotiation of the day. In the Mid 90's Allen Konopacki found that the act of just shaking hands upon first contact could increase the chances of honesty.[15,16] Touching another party has been found

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[14] Peter Collett, *The Book of Tells: From the Bedroom to the Boardroom: how to Read Other People*. (Toronto: HarperCollins, 2005) at 131.
[15] Adam Bryant, "A Ritual Loses its Grip", *New York Times* (1997 July 6) online: <https://www.nytimes.com/1997/07/06/weekinreview/a-ritual-loses-its-grip.html> [perma.cc/PG3E-Y7KG].
[16] Konopacki left a quarter in a phone booth and then sent a student to ask the phone user if they had seen the quarter. He repeated this with the interaction starting with a handshake and the number of liars was reduced significantly.

to increase their gratitude[17,18] and gratitude has been shown to increase economic cooperation: "gratitude can be seen as an emotional state that decreases the probability of selfish economic action, most likely in the service of fostering trust and stable economic exchange[.]"[19] Touch is a psychologically powerful medium that triggers the release of oxytocin.

Oxytocin is an important neurochemical in the negotiation process. In addition to increasing affiliative behaviour, it has been found to enhance group decision making processes by causing participants to focus on contributing unique information to the discussion.[20] Touch increases social connectivity by triggering gratitude and the release of oxytocin.

*Kinesics*

Kinesics is the study of body movement and gestures. It is the visual information we exchange during communication, things like eye contact, head position and gesticulations. "Visual information tends to be less ambiguous and more focussed than auditory information."[21] How and when we make eye contact sends messages as does how we hold our head, scrunch our nose or raise our eyebrows. For the purpose of discussion, this paper will subdivide kinesics into eye contact, gestures and facial affect. While all three of these fit into kinesics as originally conceived of in the 1960s, our understanding of how they impact communication has grown since then and the interventions of ODR or IPM impact these three areas in markedly different ways.

*Eye contact*

Teachers and presenters are trained to use eye contact to engage with their listeners. In person, we shift our gaze around a room while speaking and the audience responds with increased attention as eye contact is made with

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[17] C. Simão & B. Seibt, "Friendly touch increases gratitude by inducing communal feelings" (2015) 6. Frontiers in psychology, 815.
[18] A. H. Crusco & C. G. Wetzel "The Midas touch: The effects of interpersonal touch on restaurant tipping" (1984) 10:4 Personality and Social Psychology Bulletin, 512.
[19] D. DeSteno, M.Y. Bartlett, J. Baumann, L.A. Williams, & L. Dickens, "Gratitude as moral sentiment: emotion-guided cooperation in economic exchange" (2010) 10:2 Emotion, 289.
[20] T.R. W. Wilde, *et al*, "The Neuropeptide Oxytocin Enhances Information Sharing and Group Decision Making Quality" (2017) 7 Sci. Rep., 40622; doi: <10.1038/srep40622>.
[21] Edward T. Hall, *The hidden dimension*, (Garden City, NY: Doubleday, 1969) at 43.

them.[22] If we stop our gaze for a period of time, they will direct their attention to where we are looking.[23] If we ask a question to the audience, our gaze can select someone to speak and let them know it is their turn. The audience's gaze awareness forms part of their understanding about the message being communicated and of the expected next steps. In group interactions eye contact and gaze awareness are important elements in communication.

*Facial Affect*

The face and its features illustrating the emotional condition of the sender has been long established.[24] Once received, the emotional illustration is used by the receiver to react. Happy emotions like amusement and friendliness are mirrored, while emotional states of hesitancy and uncertainty are, in dyads, responded to with support and friendliness.[25] Kinesics of facial expression improves understanding and can help determine the next steps in a negotiation. Positive emotions can be mirrored to create a relationship and negative emotions can be detected to create a supportive response.

The ability for the receiver to mirror the expressions of the sender is an important feedback element. Mirroring "facial expressions, [is] common in social interactions and [is an] important social cognitive mechanisms since they enable the observer to understand not only the goal of an observed motor act, but also the intention behind it"[26] Specialized "[m]irror neurons …discharge both when an individual executes a motor act and when he observes another individual performing the same or a similar motor act."[27]

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[22] A. Senju, & T. Hasegawa, "Direct gaze captures visuospatial attention" (2005) 12:1 Visual cognition, 127.
[23] A. Palanica, & R.J. Itier, "Attention capture by direct gaze is robust to context and task demands" (2012) 36:2 Journal of Nonverbal Behavior, 123 at 123ff.
[24] See generally Charles Darwin. The Expression of the emotions in man and animals. Murray: London 1872.
[25] C. Navarretta, "Mirroring facial expressions and emotions in dyadic conversations". In Nicoletta Calzolari, Khalid Choukri, Thierry Declerck, Sara Goggi, Marko Grobelnik, Bente Maegaard, Joseph Mariani, Helene Mazo, Asuncion Moreno, Jan Odijk,& Stelios Piperidis, eds, *Proceedings of the Tenth International Conference on Language Resources and Evaluation* (Portorož, Slovenia: European Language Resources Association, 2016) 469 at 473.
[26] *Ibid* at 469.
[27] S. Acharya & S. Shukla, "Mirror neurons: Enigma of the metaphysical modular brain" (2012) 3:2 Journal of natural science, biology, and medicine, 118 at 119.

These mirror neurons hold value for both the receiver and the sender. The receiver can use the effect of mirror neurons to understand the intensions of the sender.[28] The sender, who already benefits from being understood, can also utilize the effect of motor neurons to better establish rapport. Dale Carnegie was right when he advised readers to smile. Happy emotions are mirrored more than negative emotions,[29] and people who are emotionally satisfied are more likely to feel as though their interests have been satisfied.[30] Chris Voss, a former FBI hostage negotiator and negotiation trainer, describes mirroring as "a sign that people are bonding, in sync, and establishing the kind of rapport that leads to trust."[31] In Voss's world, the mirror was not genuine, nor did it claim to be, but still enabled the building of rapport in high stress situations. Mirror neurons are powerful allies in negotiations.

*Gestures*

Gestures trigger brains. Observing exactly what areas of the brain are being triggered is possible using functional magnetic resonance imaging (fMRI). In the speaker and the receiver, gestures were shown to trigger the areas of the brain responsible for socialization.[32] Triggering the social areas of the brain increase cooperate behaviors and makes people less competitive. When common gestures were used, they triggered the same area of the brain as the words themselves.[33] Gestures are used both to communicate in combination with speech and in the absence of it.[34] Additionally, gestures activate mirror neurons in the sender and receiver.[35]

Kinesics offer the ability to guide the discussion and foster better relations in the receiver. How a speaker looks at a receiver can let the receiver know when

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[28] *Ibid* at 118.
[29] Navarretta, *supra* note 25 at 472.
[30] Gary Furlong, *The Conflict Resolution Toolbox*. (Mississauga, ON: Wiley, 2005) ch 2
[31] Chris Voss & Tahl Raz. *Never split the difference: Negotiating as if your life depended on it*. (New York, NY: Random House, 2016) at 35.
[32] M. Lotze, et al., "Differential cerebral activation during observation of expressive gestures and motor acts." (2006) 44:10 *Neuropsychologia*, 1787 at 1793.
[33] J. Xu, et al., "Symbolic gestures and spoken language are processed by a common neural system" (2009), 106:49, *Proceedings of the National Academy of Sciences* 20664ff.
[34] Erica A. Cartmill and Susan Goldin-Meadow "Gesture" in D. E. Matsumoto, H. C. Hwang, & M. G. Frank, eds., *APA handbook of nonverbal communication*. (Washington DC: American Psychological Association, 2016) Ch 12.
[35] K. J. Montgomery, N. Isenberg, & J. V. Haxby, (2007). "Communicative hand gestures and object-directed hand movements activated the mirror neuron system" (2007), 2:2, *Social cognitive and affective neuroscience*, 114ff.

they are expected to respond. Happy facial expressions can trigger mirror neurons leading to receiver happiness and negative facial reactions can alert a receiver to the need to adapt their response. Gestures, even in the absence of speech, can lead to understanding.

*Vocalics*

The non-speech sounds we make as well as the way we say the words we do during communication are vocalics. These paralinguistic cues communicate emotion and help the receiver understand the context of the message. While speech is processed in the left hemisphere of the brain, a location usually associated with analytical thinking, vocalics trigger the right hemisphere of the brain and help the receiver understand the emotion in the speech.[36] Vocalics sent by the receiver also send signals to the speaker. Saying "uh-hun" as the speaker is speaking encourages them to continue. Receivers, by decreasing the frequency of affirmative paralinguistic cues or by switching to neutral or negative cues, signal that they are ready for the speaker to stop so the receiver can become the speaker.[37]

*Chronemics*

How people use and perceive time is culturally dependant. Two major views of time emerge: monochronic time and polychronic time. The dominant view in the western world is oriented to monochronic time. Monochromic time is considered linear and things happen at a time. In polychronic cultures time happens but it is the things and relationships that determine the pace. The use of time in monochronic cultures IPM is rarely considered. People show up promptly, take turns speaking, and finish towards the end of the day.

Different cultures deal differently with time. Within a culture and within a conversation the way time is used matters to how conversation happens. Pauses in speech or paraverbal cues, termed psycholinguistic silences, can modify how the receiver is experiencing time.[38] In negotiation training, learners are often advised to use silence to invite a response.[39] When the speaker stops, the time seems to stretch, and the pause becomes uncomfortable. In the right

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[36] Victoria L. Harms & Lorin J. Elias, "Examination of Complementarity in Speech and Emotional Vocalization Perception" (2014) 5 *Psychology*, 864 at 865.
[37] Collett *supra* note 14 146.
[38] T. J. Bruneau, "Communicative silences: Forms and Functions" (1973) 23:1 *Journal of communication*, 17 at 23.
[39] For examples see Voss *supra* note 31 at 72.

context, such a pause, rather than inviting a response, can also serve to help the receiver make sense of what was said and remember the points of the speaker.[40]

Words are only a part of communication. Nonverbal Communication including touch, distance, gestures, facial expression, paralinguistic sounds, and time have a great impact on how communication is received. This impact includes the triggering of mirror neurons and neurotransmitters like oxytocin which can enhance the behaviour essential to negotiating integrative deals. At times, negative messages can also be sent through haptics, proxemics, kinesics, vocalics and chronemics. The processing and impact of these negative messages will be expanded in the following sections.

## PHYSICAL SAFETY AND STRESS RESPONSE

Mediations create a safe space, but in the post COVID-19 world the safety of all public spaces is in question. It is simply beyond the ability of a mediator to guarantee the safety of mediation participants. The stress that results from this uncertainty should be considered when making process choices that involve IPM versus ODR. Beyond being an ethical imperative of mediators, safety is an important element in negotiation. The perception of threat by a party or by the environment can release neurotransmitters that activate the participants SNS and stimulate the fight or flight response.

Consider what the future state would need to look like to conform to health recommendations:[41]

- Pre-meeting Screening
- Spaces large enough to allow for physical distancing of two metres
- Access to hand washing or alcohol-based hand sanitizer

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[40] L. J. MacGregor, M. Corley, & D. I. Donaldson, “Listening to the sound of silence: Disfluent silent pauses in speech have consequences for listeners” (2010) 48:14 *Neuropsychologia*, 3982 at 3991.

[41] While Ontario Health and Safety Associations do not, at the time of publication, have guidelines for mediations the IHSA guidelines for classroom training respond to many of the same hazards and have been used as a proxy. Online: <https://www.ihsa.ca/pdfs/alerts/COVID19/guidance-on-in-class-training-during-covid-19.pdf> [perma.cc/9SQ9-3MAM].

- Posters in room
- Markings on floor to remind participants about physical distancing
- The wearing of masks

Mediation is an unfamiliar process to most disputants. It is an unfamiliar process that takes place in an unfamiliar place and it is being conducted because of a conflict. These are sources of stress in IPM. Added to post COVID-19 IPM is the stress of potentially being exposed to COVID-19. Participants are primed and reminded about the risk of COVID-19 by the omnipresent measures to control the disease. The mediator, adhering to best practices, would send all parties a health questionnaire the day prior to the mediation: a reminder that there is a risk of contracting the disease. When a party arrives, they are greeted by signs mandating a mask and screening them once again for symptoms. Prior to entering the room, they are encouraged to wash their hands because they are in danger if they do not. Once seated in the room, in case they shifted their attention to managing the stress caused by the uncertainty of negotiation, they are faced with posters on the walls and stickers on the floor. Everywhere a party looks they are reminded that a bad deal is only one of the hazards of this mediation.

When physical or psychological safety is threatened, the fight or flight reflex is stimulated. The stress response begins a cascade in the amygdala which stimulates the hypothalamus directly through the autonomic nervous system. The hypothalamus activates the sympathetic nervous system and secretes peptides which stimulates the anterior pituitary. In turn the anterior pituitary releases hormones that stimulates the adrenal cortex. The adrenal cortex then releases cortisol and other glucocorticoids. When the stress cascade is initiated, individuals may lose their ability to participate meaningfully in the mediation.

Mediations require executive function on behalf of the participants. Executive functions are “the mental processes that enable us to plan, focus attention, remember instructions, and juggle multiple tasks successfully.”[42] Focus or cognitive inhibition is the brain’s ability to tune out unrelated information.

[42] Center on the Developing Child at Harvard University, “Executive Function & Self-Regulation” (2020, March 24), online: <https://developingchild.harvard.edu/science/key-concepts/executive-function/> [perma.cc/G42T-NSMZ].

Cognitive inhibition is decreased in stressful conditions.[43] Stress, even experienced acutely for a short period, impacts your ability to recall information in your short- and long-term memory[44] and makes switching from task to task difficult.[45] As ability to focus, store things in working memory and move between items under consideration becomes impaired a successful mediation becomes beyond reach. In extreme cases the stimulation will be so great, it can cause an amygdala hijack.

Amygdala hijack is a phenomenon that occurs when a person is overwhelmed by stress. It is focused on avoiding the stressful stimulus. From an evolutionary perspective there was no survival advantage to thinking slowly and rationally or creatively when faced with a bear. The fight or flight system is so named because it provides a binary choice: fight or flight. For the most part, the fight or flight system is a vestigial system, it is still in charge when it is activated. When a party to a negotiation becomes Amygdala hijacked, they will have trouble considering the possible outcomes and engaging creatively in the process. They will seek to end the negotiation by walking away, making a sub optimal deal or they will dig into a position for fear of losing anything.

In neutral conditions, people value potential losses twice as highly as potential gains.[46] This hyper valuation of potential losses is called loss aversion. In normal conditions, people are as happy about gaining ten dollars as they are sad about losing 5 dollars. Under stress, people become even more focused on avoiding losses then on making gains. Using a fMRI, participants under stress performed a series of games to determine how they valued loss. The fMRI linked increased loss aversion to increased activity in the amygdala.[47] Integrative deals are difficult without objective criteria[48] and objective criteria are impossible to develop with party whose amygdala is multiplying their losses.

In a recent case report from Italy, Doctors observed evidence of amygdala hijack in fMRI imaging when a patient was shown images associated with

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[43] G. S. Shields, M.A. Sazma, & A. P. Yonelinas, “The effects of acute stress on core executive functions: A meta-analysis and comparison with cortisol.” (2016) 68 *Neuroscience & Biobehavioral Reviews*, 651 at 666.

[44] R.S. Stawski, M. J. Sliwinski, & J. M. Smyth, “The effects of an acute psychosocial stressor on episodic memory” (2009) 21:6 *European Journal of Cognitive Psychology*, 897ff.

[45] Shields *supra* note 43 at 666.

[46] Russell Poldrack “What Is Loss Aversion?” (2016, July 01), Online: *Scientific American* <https://www.scientificamerican.com/article/what-is-loss-aversion/> [perma.cc/342F-LRBF].

[47] C. J. Charpentier et al. “Emotion-induced loss aversion and striatal-amygdala coupling in low-anxious individuals” (2016) 11:4 *Social cognitive and affective neuroscience* 569 at 569ff.

[48] Roger Fisher, William Ury, & Bruce Patton, *Getting to yes: Negotiating agreement without giving in*. (Toronto, ON: Penguin, 2011) at 89.

COVID-19.[49] It is an open question as to how people in non-medical scenarios will react to IPM. The answer will likely vary from person to person and vary with time. As people emerge from months of physical isolation wearing masks to IPM, their stress levels will be hard to account for in mediation planning. While amygdala hijackings will be a rare occurrence, every IPM participant and mediator will be impacted by the novel stress of the physical environment in a post COVID-19 world.

In ODR when the mediation is online and when the physical location is familiar to the participants, other sources of stress can be created by the medium. The platform itself can cause stress to novice users. Hardware or software differences can create cognitive load. Even in experienced users, Zoom exhaustion is real[50] and explained by the brain's attempts to meter stimuli when focusing; it can even make problems harder to solve. By default most mediums also present self-images that can serve as an additional source of stress. Beyond the medium, the comfort of home also carries with it the stresses of home. While the virtual world avoids the threat of contracting a deadly virus, it imposes novel stresses on mediation participants that the process needs to be designed to take into account.

In person, when someone is speaking, the speaker and the listeners share a common understanding of what is happening in the room. The listeners focus on the speaker and observe other actors in the room via peripheral vision. As the information received gets more complex and cognitive load increases, the listeners' field of acute vision drops by half to focus on the speaker or the visuals presented.[51] The listeners' peripheral vision becomes less acute. In effect, the brain filters out the peripheral vision which lowers the cognitive load. In a videoconference that displays multiple video feeds simultaneously, like Zoom's gallery view, feeds are provided in the central area of focus, so the brains attempt to direct resources to the complex subject matter is thwarted.

The brain is taking steps to drop the cognitive load by offloading things in the periphery, but the technology is grouping the source of the non-important load,

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[49] Nicola Morelli et al., "The Hidden Face of Fear in the COVID-19 Era: The Amygdala Hijack" (2020) *European neurology*, 1 at 1ff.
[50] Julia Skylar, "'Zoom fatigue' is taxing the brain. Here's why that happens" (2020, April 24), online: National Geographic <https://www.nationalgeographic.com/science/2020/04/coronavirus-zoom-fatigue-is-taxing-the-brain-here-is-why-that-happens/> [perma.cc/XZ2T-NP3P].
[51] L. J. Williams, "Cognitive Load and the Functional Field of View" (1982) 24:6 *Human Factors*, 683.

the listeners and their reactions, to the central area of focus. There is no relief from the excessive cognitive load. This challenge can be addressed by a mediator using education, interjection or interruption. In the opening statement or in the electronic invite, mediators can instruct parties to set the software to display the speaker view. Depending on the software and hardware set up, this limits the view to the speaker and the last one or two people who spoke. This view limits the cognitive load. For participants who want or need to view the group, an additional monitor can be set up to display the galley view. When this monitor is placed outside the area of central focus and cognitive load increases, it will be tuned out. If the mediator perceives the subject matter is placing a cognitive burden on the participants, they can ask the speaker to enable the whiteboard, share their screen taking notes on the idea or in Zoom, use the spotlight function, which pins the video feed selected by the host for all participants. Anyone enabling the whiteboard or sharing screen has the effect of focusing attention on the shared screen. The participants will see a small feed of the speaker and the majority of the focus area will be on the shared document or whiteboard. Like an IPM, sometimes participants will need a break. The mediator should use this strategy with caution as it can disrupt flow. In addition to the stress caused by the medium, being able to monitor one's self with continuous video can put more stress on participants. Self-view has been shown to further increase cognitive load[52] and to increase negative responses to problems encountered during the videoconference.[53] Conversely, when a video conference goes well, participants who had access to their self-view increased their positive responses.[54] Despite the higher highs of self-view, lower lows combine with increased cognitive load to tip the balance against enabling self-view.

The stress response can be triggered by physical or psychological stimuli. The conflict that brought the parties to mediation and the stress of the method of meeting need to be considered when designing and conducting the mediation. Parties under stress lose executive function and value their losses more than their gains. For the foreseeable future IPM, even when safety measures are in place, are likely to offer stimulation to the amygdala and SNS. The stress caused by ODR is at least somewhat attributable to its novelty. Other sources of stress in ODR can be mitigated by the mediator with education, interjection,

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[52] John Storck, Lee Sproull, "Through a Glass Darkly: What Do People Learn in Videoconferences?", (1995 December) 22:2 *Human Communication Research* 197.
[53] J. Wegge, "Communication via videoconference: Emotional and cognitive consequences of affective personality dispositions, seeing one's own picture, and disturbing events" (2006) 21:3 *Human-Computer Interaction*, 273 at 314.
[54] Ibid at 314.

and interruption. Environmental challenges in ODR relate to the home environment. These challenges are difficult to identify prior to the mediation and may be difficult challenges to meet.

## PHYSICAL DISTANCE & ONLINE PARALLELS

### *Haptics*

In a traditional IPM the use of touch helped the process by triggering the release of oxytocin. Oxytocin would counter the sympathetic nervous system's (SNS) response to stress and calm the amygdala. "The response pattern… could be regarded as an antithesis to the well-known fight-flight response."[55] It has been shown to directly lower the level of activity in the amygdala in response to stress.[56,57] In the post COVID-19 world, physical distancing is of paramount importance to stopping the spread of the virus, and physical interaction with non-household members should be discouraged. IPM will no longer be able to rely on haptics to provide the benefit of oxytocin during mediations.

While the use of touch may not be a practical source of oxytocin, other triggers are available. "Vocal cues may be a viable alternative to physical contact"[58] but evidence of vocalization alone being able to trigger oxytocin is limited to vocal communication with *trusted* individuals.[59] Herein lies a paradox, in order to be able to trigger the neurochemical to build trust, one must be trusted. Mediators or representatives should consider how to structure interactions before the mediation to build as much trust as possible prior to the mediation.

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[55] Kerstin Uvnäs-Moberg, (1997). "Physiological and endocrine effects of social contact" (1997) 807:1 *Annals of the New York Academy of Sciences*, 146 at 158.
[56] D. S. Quintana et al. "Low dose intranasal oxytocin delivered with Breath Powered device dampens amygdala response to emotional stimuli: A peripheral effect-controlled within-subjects randomized dose-response fMRI trial" (2016) 69 *Psychoneuroendocrinology*, 180.
[57] G. Domes, et al. "Oxytocin attenuates amygdala responses to emotional faces regardless of valence" (2007) 62:10 *Biological psychiatry* 1187.
[58] L.J. Seltzer, T. E. Ziegler, & S.D. Pollak,(2010). "Social vocalizations can release oxytocin in humans" (2010) 277:1694 *Proceedings of the Royal Society B: Biological Sciences* 2661
[59] L. J. Seltzer, et al. (2012). "Instant messages vs. speech: hormones and why we still need to hear each other" (2012) 33:1 *Evolution and Human Behavior* 42.

*Proxemics*

The distance at which people feel comfortable varies from culture to culture and from interaction type to interaction type.[60] Hall identified the intimate, personal, social and public ranges. In North America, less than 18 inches,[61], 1.5-4 feet,[62] 4-12 feet,[63] and more than 12 feet respectively.[64] When expectations of distance are violated it can create discomfort; violating someone's space expectations can cause stress.[65] Generally speaking, IPM and negotiation takes place in the personal and social range. Mandating physical distance of at least six feet, social and public distances will violate the expectations of more experienced participants. In joint sessions, rooms will need to be large enough to have everyone at least six feet apart. The ability for a client to slip a note to a lawyer or for a lawyer to employ haptics to encourage a client to stop will be absent.

Proxemics is not absent in ODR. Consider how uncomfortable an interaction is when the speaker is too close to their camera. While a close up can draw in the listener and bring focus to facial expressions, an extreme close up, moving our visual field into the intimate space of less than 18 inches, violates our expectations and makes the conversation uncomfortable.

When communicating, people have certain expectations around how close those that they are communicating with will be to them. When these expectations are violated it can cause stress. These expectations are present in both the online and in person environment, but with the advent of physical distancing requirements and the rapid growth of video conferencing, norms have yet to develop around the new normal. Until norms around proximity develop, they may become source of stress for mediation. Being explicit about the expectations around space and camera placement can help prevent this stress.

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[60] Hall supra note 21 at 116.
[61] *Ibid* 116.
[62] *Ibid* 119.
[63] *Ibid* 121-2.
[64] *Ibid* 123.
[65] Judee K. Burgoon (2015). Expectancy Violations Theory. In The International Encyclopedia of Interpersonal Communication (eds C.R. Berger, M.E. Roloff, S.R. Wilson, J.P. Dillard, J. Caughlin and D. Solomon). Online: <https://onlinelibrary.wiley.com/doi/full/10.1002/9781118540190.wbeic102> doi:<10.1002/9781118540190.wbeic102> [perma.cc/CX9B-EW8X].

## AFFECTIVE EXPRESSION & KINESICS

The fMRI study by Charpentier discussed in a previous section used pictures of happy and angry people to induce an emotional state in study participants. The ability of people to perceive emotions in other people's faces is well established and emotional awareness of one's other in negotiation is essential to the negotiation process. Negative facial expressions are processed and reacted to more quickly than neutral or positive expressions.[66]

Masked faces impede the perception of emotions.[67] While this may have a positive impact on the amygdala when faced with a party who is angry under their mask, negotiation needs the parties to understand and attempt to satisfy the emotional state of the participants.[68] Masks serve as a reminder of a psychologically stressful condition (the pandemic) and impede the ability of participants to perceive and react to facial gestures. When possible, priority should be given to processes that allow for the observation of facial cues.
Online video mediation offers an opportunity. In order to control variables for the experiments, all of the above fMRI research on facial affect was done with standardized sets of images. The parts of your brain that react to faces do so even when those faces are two dimensional and presented on a screen. That is the good news for video based ODR.

Gestures help message receivers clarify meaning and build understanding both online and in person.[69,70] Much of the research on the utility of gestures in promoting understanding involved the manipulation of a pre-recorded video.[71] The usual format for such research was to show the receivers a video that

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[66] M. M. Strauss et al. "fMRI of sensitization to angry faces" (2005) 26:2 *Neuroimage* 389 at 389ff.
[67] M. Zotto, & A. J. Pegna, "Processing of masked and unmasked emotional faces under different attentional conditions: an electrophysiological investigation" (2015) 6 *Frontiers in psychology* 1691 at 1691ff.
[68] Furlong *supra* note 30 ch 2.
[69] Melissa Singer, Joshua Radinsky & Susan R. Goldman, "The Role of Gesture in Meaning Construction" (2008) 45:4-5, *Discourse Processes* 365 doi: <10.1080/01638530802145601>
[70] A. Kendon, "Do gestures communicate? A review" (1994) 27:3 *Research on language and social interaction*, 175 at 179.
[71] See for example M. G. Riseborough, -"Physiographic gestures as decoding facilitators: Three experiments exploring a neglected facet of communication." (1981) 5:3 *Journal of Nonverbal Behavior*, 172. And
William Rogers, "The contribution of kinesic illustrators toward the comprehension of verbal behavior within utterances." (1978) 5.1 *Human communication research* 54.

included scripted or spontaneous gestures and then score the receivers' understanding of the message. Gestures increased the receivers' understanding even when the audio was intentionally degraded. Similar studies were performed in person by Berger and Popelka. Gestures were found to double in person accuracy of received speech in challenging conditions.[72] As long as the gestures can be seen, the research suggests that without regard to if it is being seen in person or on a screen, the message has a better chance of being heard and understood by the receiver. Commonly used gestures have been shown to trigger the same areas of the brain as speaking the words associated with the gestures.

## BEST PRACTICES

Given the challenges and opportunities posited by the post COVID-19 world, this section will propose a group of best practises for performing ODR and IPM. These practises are informed by the evidence that preceded this section. At this point there is no direct research on how COVID-19 has impacted parties to a mediation or a negotiation. These practices also make the assumption that the public health and occupational health and safety advice will remain relatively unchanged.

*Online Dispute Resolution*

ODR Recommendation #1: Where bandwidth allows, all participants should have cameras on

Being able to see the mediator and parties during a mediation is beneficial. Facial affect and gestures offer the opportunity to trigger oxytocin release and mirror neurons in the receiver. Both oxytocin release and the stimulation mirror neurons can have positive effects on negotiations.

Beyond the advantage of understanding the emotions behind the words, video based ODR offers another advantage over audio only ODR. In an audio conference call with multiple parties decoding when it is your turn to speak can be challenging and parties can end up speaking over each other. Video conferences participants interrupt each other less and have informal

[72] Kendon *supra* note 70 at 178.

discussions more.[73,74] This natural flow of speech and informal discussion benefits the process.

ODR Recommendation #2: Mediation agreements should specify that cameras will start on.

Mediation is a consensual process. Seeking a clear agreement on how people will participate with the online medium is important because it avoids the surprise of needing to appear on video and the bias introduced by asymmetrical participation. During the mediation, the parties' comfort with being on camera should be monitored by the mediator. If the process is better served by one or more parties shutting of their cameras, the mediator should make space for the mediation to continue with some participants participating without video.

ODR Recommendation #3: Offer a practice session

Since lack of familiarity with the online environment can trigger stress, getting users familiar with the platform ahead of the mediation can help. Additionally, the online practice session will help build familiarity between the mediator and the parties.

ODR Recommendation #4: Use Visuals and exclusive focus on the speaker for complex topics.

Complex topics consume the brain's energy. In an in person encounter the brain would adjust its field of acute vision to take in less information. Even with a significantly narrowed field of acute vision, the gallery of faces would still be visible and causing cognitive load. In ODR there are a number of options to lighten the cognitive load. Individuals can use "pin" to show the speaker in full view. The mediator hosting the meeting can force users to this view by using the spotlight function. Alternatively, the speaker or the mediator can use share screen to review documents or keep notes on the whiteboard, "displaying a variety of images may ease the burden of searching for social information."[75]

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[73] O. Daly-Jones, A. Monk, & L. Watts, "Some advantages of video conferencing over high-quality audio conferencing: fluency and awareness of attentional focus" (1998) 49:1 *International Journal of Human-Computer Studies* 21 at 31.
[74] E. A. Boyle, A. H. Anderson, & A. Newlands, "The effects of visibility on dialogue and performance in a cooperative problem solving task" (1994) 37:1 *Language and speech*, 1 at 16.
[75] Storck *supra* note 52 at 215.

ODR Recommendation #5: Shut off self-view

Narcissus was so intent at looking at himself that he fell into a lake and drowned. Video conference self-view offers participants the chance to relive this classic Greek adventure. People with higher levels of anxiety[76] and novice users will be especially taxed by the presence of self-view. Even in experienced users, self-view can impede problem solving and increase cognitive load. Once participants check their view in frame and their lighting, self-view should be off.

ODR Recommendation #6: Consider schedule and the need for breaks

This ODR recommendation services the needs of the clients and the mediator. "Interactive video users often say that video meetings are more tiring than face-to-face meetings."[77] In an IPM, the mediator has a temporary respite when walking from room to room. In virtual settings the jump from room to room happens instantly. Mediators should consider returning to the main room to collect their thoughts before going into the other party's room. There is a balance to taking breaks. The goal is to time them so the parties regain their energy without losing their momentum. Depending on the topic matter and the stage of negotiation parties and the mediator should consider booking shorter blocks of time for mediations if they find longer sessions unmanageable.

ODR Recommendation #7: Consider camera and window placement

Set up the camera in a way that allows the speaker to look towards it, "the camera should be set up in such way that not only the face but also the rest of the body with part of the surroundings."[78] This allows the viewers to better receive the nonverbal communication appropriately. Even with optimal camera placement parties should expect to lose some of the natural flow of face to face communication.

Where parties place their camera and the windows they are interacting with, impacts how they appear to others on video. Where on the computer screen the user places the active window will change where the subjects look. Eye contact and gaze are important. While hardware has been developed to

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[76] *Ibid* at 212.
[77] *Ibid* at 213.
[78] P. Slovák, "Effect of videoconferencing environments on perception of communication" (2007) 1:1 *Cyberpsychology: Journal of Psychosocial Research on Cyberspace* Online <https://cyberpsychology.eu/article/view/4205/3246> [perma.cc/42EH-VVQF].

replicate the shifting gaze in the virtual environment, it requires each participant to have a video conferencing suite that involves a separate computer and infrared eye tracking camera. As a simpler alternative, Mediators should consider advising people to place the active window near the camera. A party who uses a webcam that sits atop their monitor and who places the video chat full screen will be seen by observers to be looking down. A laptop with a built-in webcam placed on the dinner table may make a participant looked hunched over. A smaller window placed near the camera with the software set to speaker view will allow the speaker to simulate looking directly into the camera in a more natural position.

ODR Recommendation #8: Consider how else you can lower the cognitive load on participants

- **Set display names to visible and ensure the names are correct**[79]
  This will aid in communication and relieve the participants and the mediator from needing to attempt to remember everyone's names.

- **Mute participants upon entry**
  Muting participants upon entry decreases the technical demand on the participants being muted and decreases the cognitive demand on the people who may otherwise need to listen to unintended streaming audio.

- **Have instructions ready to deal with poor connectivity**
  If the quality of a participant's audio or video is poor, other participants are using cognitive energy trying to decode what is being said. Have audio call in instructions ready. In many platforms, connecting the audio after joining via your computer may have a different set ID codes. The instructions should detail how to obtain the call in number and ID code. They should not contain the codes the mediator sees. If they do, parties connecting via the distributed instructions will cut off the mediator's audio.

*In Person Mediation*

For the immediate future, IPM can serve as a source of risk to the participants and measures must be taken to ensure the mediation is conducted in a safe manor. Unfortunately, many of the safety measures that help stop the spread

[79] Storck *supra* note 52 at 215.

of COVID-19 will also serve to remind participants about the threat created by the virus. The result is that to some extent the sympathetic nervous system and the amygdala of the parties and the mediator may be engaged.

Usually a mediator would be able to use both verbal and nonverbal cues to detect and respond to a party who they perceived as feeling threatened. With the requirement for distance and face coverings the mediator needs to be especially attuned to the condition of the participants. When they detect stress, they need to be ready to respond in a way that may not yet form part of their typical repertoire. While moving into personal space or a warm smile may have, in a pre COVID-19 mediation, provided the oxytocin needed to calm the situation these tools are not available today. Most of the recommendations for IPM are recommendations on how to safely plan and conduct the mediation.

IPM Recommendation #1: Be clear about safety expectations

It is part of the mediators work to provide a safe environment. Mediators should set clear expectations around expected safety measures with the participants and the venue. Being clear about how that safety is being ensured may risk reminding people about the inherent risks of such a meeting but having a safety plan should, on the balance, help make participants feel safe. Participants in an IPM that takes place in a private venue may not be legally required to wear masks; however providing clarity around what the expected level of PPE is will allow participants to come prepared and help avoid conflict around PPE.

IPM Recommendation #2: Consider start time

Mediators need to plan for safety. Coordinating the start time of the mediation to not be the same time as other in person mediations or meetings at the same venue will avoid congregation at the doors and elevators. Decreasing the amount of physical closeness with others will improve safety.

IPM Recommendation #3: Book big enough rooms

Getting a list of people attending the mediation is essential prior to booking mediation rooms. Rooms should be booked to allow at least six feet of distance between participants. When booking caucus rooms, do not forget to consider the mediator's need to meet with the parties in their rooms.

IPM Recommendation #4: Encourage self-screening

Participants to a mediation should be encouraged to self-screen for symptoms or potential exposure to COVID-19. If using a third-party tool like the one provided by the government of Ontario, mediators should be aware that the tool provides advice beyond just screening for symptoms and exposure. Mediators should clearly identify the screening outcomes that would preclude participation in an IPM.

IPM Recommendation #5: Consider the experiences of the participants

Moving a workplace mediation online where the parties may be side by side the day before and the day after, may not make sense. Participants stress levels will be based on their prior experiences, so co-workers may not perceive stress caused by COVID-19 and its associated precautions.

IPM Recommendation #5: Have a plan for cancelling

Knowing what will happen if one or more of the participants cannot safely attend will benefit everyone. As a practical matter failing to notify parties about the absence of someone critical to the process may further inflame the process. Plans can include:

- Rebooking for another day
- Moving the entire process online with the same schedule
- Deciding to proceed with the mediation with a modified in person group

The option to forge ahead with a modified group should be exercised with extreme caution as should options that have high cost consequences for the parties. The priority is ensuring that sick people do not feel compelled to attend.

IPM Recommendation #6: Eat and be merry

Sharing of food is common in many mediation venues. Lots of the comforts provided by in person meeting will be limited by the precautions that need to be taken to prevent the spread of COVID-19. Thankfully there is no, COVID-19 related reason to forego communal food. While there is a need to control the volume of people lining up for food, so adequate physical distance can be allowed. The food itself does not create a risk of passing COVID-19.

The nature of these recommendations seeks to maximize the benefits of ODR and limit the risks of IPM. When maximized, the benefits of ODR closely replicate many of the important elements of pre COVID-19 IPM. Post COVID-19 IPM exposes participants to risks, and while steps can be taken to control these risks, the steps can serve as a source of stress that handicaps the mediation process.

## CONCLUSION

Most of the discussion above deals with how the process design choices will impact the participants in the mediation process. For the time being how IPM will occur must change. And it must change in a way that strips it of many of the benefits IPM used to have. While it is possible to conduct an IPM safely, in the short term it is probably a better choice to mediate online. As participants become more accustomed to ODR and the precautions around IPM they will become part of a new sensory world and they will develop different filters and cues.[80] Once that new normal is established the choice may need to be revisited.

Participating in ODR can be fatiguing in ways natural conversation is not. Taking steps to structure the interaction to maximize participants' natural abilities to focus on important information helps address the sources of fatigue. Having an understanding of the psychology and neurophysiology that is causing the fatigue allows the mediator to work throughout to monitor and address cognitive load.

[80] For a discussion of development of culturally significant filters and cues see Hall *supra* note 21 at 2ff.

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# WALKING TOGETHER - INDIGENOUS ADR IN LAND AND RESOURCE DISPUTES

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## Contents

## ABSTRACT

Disputes between Indigenous peoples and the Crown over lands and resources arise from deeper disagreements about the sources of law applicable to those disputes. Constitutionally recognized Aboriginal rights and their common law doctrines—such as the duty to consult—do not reflect the full scope of Indigenous legality and authority. This article explores the value of Alternative Dispute Resolution (ADR) in bridging this divide. It suggests that an appropriate process in this context is one that embraces the legal traditions, values and protocols of the Indigenous party involved. As a flexible and party-driven process outside the boundaries of the common law, Indigenous-led ADR responds to these deeper disagreements and manages conflict through negotiation rather than litigation. In doing so, it advances a broader project of legal and cultural pluralism grounded in respect for difference.

## ABOUT THE AUTHOR

Don Couturier is a judicial law clerk at the Court of Appeal of Alberta and recently completed law school and a Master of Public Administration at Queen's University. In the fall, he will clerk for Justice Kasirer at the Supreme Court of Canada. During law and graduate school Don worked for Indigenous governments at a boutique law firm specializing in Aboriginal law. He previously served as a policy advisor for the Government of the Northwest Territories. Don was born and raised in Yellowknife, Northwest Territories, and draws on his experience working for and alongside Indigenous peoples in offering the comments contained in this article. The views expressed are his alone and were drafted before his work at the courts commenced.

## WALKING TOGETHER: INDIGENOUS ADR IN LAND AND RESOURCE DISPUTES[1]

Conflict between Indigenous peoples, government and private industry arises often in the context of land and resource management. Whether the issue relates to Aboriginal title, consultation on a proposed project, or other activities implicating Indigenous interests, lands and resources lie at the centre. Historically, this has meant, and continues to mean, struggles to assert who owns the land and how it should be used. With the recognition of Aboriginal rights in the *Constitution Act, 1982*, the Supreme Court of Canada developed legal tests to determine whether such rights exist and have been upheld.[2] While these tests dictate the course of litigation, their underlying assumptions—for example, that Aboriginal title exists as a burden on the underlying radical title of the Crown,[3] or a particular treaty interpretation based on common law principles of contract[4]—do not necessarily reflect how Indigenous peoples view their inherent rights as sovereign peoples. When it comes to resolving conflict outside the courtroom, progress requires a more flexible, nuanced and complete understanding of Indigenous-Crown relations. Trials are time-consuming, costly, and choose winners and losers. Negotiation better serves.

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[1] Don Couturier, BA (Victoria), JD/MPA (Queen's); Judicial Law Clerk, Court of Appeal of Alberta (2020-2021); Judicial Law Clerk for Kasirer J, Supreme Court of Canada (2021-2022). Views expressed are mine alone and have not been influenced by my work at the courts. Commentary derives from my experiences working for and alongside Indigenous peoples both outside and inside government, as well as my experiences growing up in the Northwest Territories, a territory with strong Indigenous governance institutions. In 2018, an earlier version of this paper won the James L. Thistle award from the Canadian Bar Association in the category of Alternative Dispute Resolution.

[2] Among the most notable decisions include *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 285; *R v Van der Peet*, [1996] 2 SCR 507, 137 DLR (4th) 289; *R v Gladstone*, [1996] 2 SCR 723, 137 DLR (4th) 648; *Delgamuukw v British Columbia*, [1997] 2 SCR 1010, 153 DLR (4th) 193; *R v Marshall*, [1999] 2 SCR 465, 177 DLR (4th) 513; *Haida Nation*, 2004 SCC 73; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44; and more recently, *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*, 2017 SCC 40; *Mikisew Cree First Nation v Canada (governor General in Council)*, 2018 SCC 40. See also Kent McNeil, "Extinguishment of Aboriginal Title in Canada: Treaties, Legislation and Judicial Discretion" (Vancouver: *Centre for First Nations Governance* 2002) at 4. This essay was part of a series of research papers commissioned for the Delgamuukw/Gisday'wa National Process.

[3] *Tsilhqot'in Nation*, *supra* note 2 at paras 69-72.

[4] *R v Badger*, [1996] 1 SCR 771 at para 76, 133 DLR (4th) 324. For a different perspective on treaty relationships, see Harold Johnson, *Two Families: Treaties and Government* (Saskatoon: Purich Publishing, 2007).

Alternative Dispute Resolution (ADR) provides promising mechanisms for managing conflict in these areas, but only if designed appropriately. Due to the complex issues, histories and cultural differences defining Indigenous-Crown relations, boiler-plate approaches to ADR will fail. To this end, this paper serves as a primer on common misunderstandings that interrupt negotiations. It sketches several broad components of mutually respectful relationships through dispute resolution. The key themes are as follows. Indigenous-led ADR, as I will refer to it, must be shaped by the legal traditions, values, and processes of the Indigenous group involved. Indigenous-led ADR can advance reconciliation by fostering legal and cultural pluralism based on mutual respect and recognition. Acquiring a self-initiated appreciation for Indigenous cultures is perhaps the most important first step for non-Indigenous parties.[5] Like any dispute resolution process, understanding the perspectives in play shows respect and creates opportunities for collaboration. Armed with understanding, humility, and respect for difference, one better understands the common pitfalls and how to avoid them. I add that I claim no expertise in Indigenous cultures; rather, my comments are intended for non-Indigenous practitioners seeking a greater understanding of the dispute resolution and negotiation context.

To develop these themes, I first provide some historical and legal context on land and resource conflict between Indigenous peoples and the Crown. I then address why mainstream ADR inadequately accounts for this context and develop suggestions for approaching Indigenous-led ADR in a positive way. I conclude with a broader discussion of the importance of involving Indigenous institutions in the design and application of ADR, and offer a vision for the future.

Perhaps more provocatively, I will suggest that a relationship-centred approach solves a chicken-and-egg problem. Indigenous-led ADR not only manages existing conflict, it also prevents conflict to begin with. Much debate in this area concerns what "consultation" requires to satisfy the legal standard. From a dispute resolution practice perspective, this is the wrong question. Where a relationship-centred approach guides, the requirements for consultation take care of themselves. The more pressing question concerns what it takes to instill healthy and mutually respectful relationships. When I refer to Indigenous-led

[5] One of my favourite articles discussing the shortcomings of Canadian legal concepts and law school education in capturing, communicating and teaching Indigenous perspectives on law is Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847. I encourage readers to review this thoughtful scholarship, and especially to access its bibliography, which is a great place to start for those seeking to undertake self-initiated study.

ADR in the lands and resources context, then, consultation and dispute resolution are not mutually exclusive. Rather, consultation is a dispute resolution process itself. For the purposes of this paper, Indigenous-led ADR thus refers to both the resolving of a dispute once headed for litigation (retroactive) *and* the process of consultation itself, which I view as a feature of healthy treaty relationships that helps to avoid conflict in the first place (proactive).

## CONTEXT: EUROPEAN COLONIZATION, INDIGENOUS LAW AND LAND AND RESOURCE CONFLICT

Contemporary struggles for lands and resources are rooted in land dispossession and colonization. This phenomenon is not just historical; conflict continues to simmer as a result of the ongoing preservation of this power structure through economic and cultural domination. Recent disputes over pipeline construction and lobster fisheries are just the latest installments in this centuries-old story.[6] A full analysis of these forces is beyond the scope of this paper, but acknowledging their sources and continued influence is fundamental to understanding both the promise and pitfalls of ADR in this context.

### *A brief, interdisciplinary narrative of Indigenous-Crown land and resource conflict*

Concepts of Indigenous property and tenure usually exclude the right to sell land to outsiders, diminish lands and resources, or otherwise expropriate land for private gain without considering reciprocal obligations. Yet the written texts of many treaties claim an outright surrender of Aboriginal title to the Crown, a feature often disputed by Indigenous signatories to those treaties.[7] Until Aboriginal and treaty rights were affirmed under section 35 of the *Constitution Act, 1982*, the Crown had common law legal authority to extinguish Aboriginal title.[8] During this period, Indigenous peoples experienced a systematic carving out of their traditional territories through government policies and laws aimed

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[6] Chantelle Bellrichard and Jorge Barrera, "What you need to know about the Coastal GasLink Pipeline Conflict", *CBC News*, February 5, 2020, online: https://www.cbc.ca/news/indigenous/wet-suwet-en-coastal-gaslink-pipeline-1.5448363 [perma.cc/6SXY-CR69]; Angela D'Elia Decembrini, "The Marshall Decision and Mi'kmaq Commercial Fishing Rights: An Explainer". *First Peoples Law*, October 8, 2020, online: https://www.firstpeopleslaw.com/public-education/blog/the-marshall-decision-and-mikmaq-commercial-fishing-rights-an-explainer [perma.cc/E6TW-5BXS].
[7] Kent McNeil, *supra* note 2.
[8] *Ibid*.

at dispossession, expropriation and relocation. Indigenous laws were (many would argue are still) subordinated or outright ignored.

After 1982, Canadian courts acknowledged Aboriginal title and established the Crown's duty to consult on activities that engage section 35 rights.[9] But the crucial point is this: because Indigenous laws existed and applied prior to European contact, section 35 is viewed by some as a Eurocentric prescription of Aboriginal rights that fails to reflect the full scope and quality of Indigenous legality.[10] In other words, for many Indigenous peoples, such rights are not defined by the incomplete vision recognized under common law. Rather, Indigenous law gives meaning to these rights, and has since time immemorial, separate and distinct from western recognition.

For this reason, Indigenous peoples often feel that consultation on resource development is inadequate insofar as it relies on what section 35 consultation requires. According to Sarah Morales, this tension stems from a failure to recognize that Indigenous laws are the true source of Aboriginal rights and title, and the unequal bargaining power that results.[11] Instead, the concepts underpinning Free, Prior and Informed Consent (FPIC) better reflects meaningful consultation.[12] FPIC holds that Indigenous peoples have the right to be fully informed and to engage with, and grant or withhold consent to, development projects within their lands that impact their resources and/or ways of life.[13] FPIC is a central feature of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), an instrument of international law

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[9] *Ibid*. See e.g. *Delgamuukw*; *Tsilhqot'in*; *Haida Nation*; *Clyde River*, *supra* note 2.
[10] Minnawaanagogiizhigook (Dawnis Kennedy), "Reconciliation Without Respect? Section 35 and Indigenous Legal Orders" in Law Commission of Canada, ed, *Indigenous Legal Traditions* (Vancouver: UBC Press, 2007) 77; Christine Zuni Cruz, "Law of the Land—Recognition and Resurgence in Indigenous Law and Justice Systems" in Benjamin J Richardson, Shin Imai & Kent McNeil, eds, *Indigenous Peoples and the Law: Comparative and Critical Perspectives* (Oxford, UK: Hart Publishing, 2009) 315; Russel Lawrence Barsh & James Youngblood Henderson, "The Supreme Court's Van der Peet Trilogy: Naive Imperialism and Ropes of Sand" (1997) 42:4 McGill LJ 993;
Hannah Askew et al, "Between Law and Action: Assessing the State of Knowledge on Indigenous Law, UNDRIP and Free, Prior and Informed Consent with Reference to Fresh Water Resources" (Vancouver: Decolonizing Water Project 2017) at 16.
[11] Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult" in Jennifer Goyder, ed, *UNDRIP Implementation: Braiding International, Domestic, and Indigenous Laws – Special Report* (Waterloo: Centre for International Governance Innovation, 2017) at 65.
[12] James (Sa'ke'j) Henderson, *Indigenous Diplomacy and the Rights of Peoples: Achieving UN Recognition* (Saskatoon: Purich Publishing 2008) at 86–87.
[13] Article 32, *United Nations Declaration on the Rights of Indigenous Peoples*.

ratified by countries across the world. Canada has explicitly endorsed UNDRIP, and recently stated that it intends to implement the agreement through mirror legislation that will reflect its principles.[14]

Mutually respectful relationships supply the foundation to FPIC. Since FPIC is premised on the idea that Indigenous peoples remain sovereign and self-determining, it obviously provides one way to approach dispute resolution in a manner sensitive to the historical and contemporary concerns of Indigenous peoples. It has potential to facilitate co-existence between Canadian law and Indigenous legal orders in ways that uphold a legitimate and defensible vision of reconciliation. As things stand, conflict over land and resource simmers somewhere in the gulf between the Canadian legal concept of consultation (section 35) and the expectations of Indigenous peoples located in the doctrine of FPIC.

*Canada's legal landscape allows for dispute settlement grounded in Indigenous law*

Although there are clear tensions between Canadian and Indigenous laws, Canada's legal landscape allows for ADR models that incorporate both Indigenous and western approaches to dispute resolution.[15] For example, the Supreme Court of Canada has confirmed that because the common law did not alter Indigenous law, Indigenous customs and conventions give meaning and content to Aboriginal legal rights.[16] To be sure, there are notable points of incommensurability across legal traditions that render harmonization within

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[14] Canada, "Implementing the United Nations Declaration on the Rights of Indigenous Peoples", Department of Justice Canada, 2020, online: https://www.justice.gc.ca/eng/declaration/un_declaration_EN1.pdf [perma.cc/424H-N5GK]; John Paul Tasker, "Liberal government backs bill that demands full implementation of UN Indigenous rights declaration", *CBC News* (November 21, 2017), online: http://www.cbc.ca/news/politics/wilson-raybould-backs-undrip-bill-1.4412037 [perma.cc/KW9X-F36R].

[15] See my "Judicial Reasoning Across Legal Orders: Lessons from Nunavut" (2020) 45:2 Queen's Law Journal 319, discussing the promises but also incommensurabilities between Canadian and Indigenous laws at 334-342.

[16] John Borrows, "With or Without You: First Nations Law (in Canada)" (1996) 41:1 McGill LJ 629 at 636, citing *Delgamuukw v British Columbia*, [1997] 3 SCR 1010, 153 DLR (4th) 193; *Guerin v The Queen* [1984] 2 SCR 335, 13 DLR (4th) 321; *Calder et al v Attorney General of British Columbia* [1973] SCR 313, 34 DLR (3d) 145. Despite what the Supreme Court has pronounced, many Indigenous commentators would dispute that the common law's articulation of Aboriginal rights and title reflected this proclaimed vision. *Supra* note 10.

Canadian law difficult and perhaps at times undesirable.[17] But this adds to the appeal of Indigenous-led ADR, because as an alternative to court-driven processes, they are flexible and capable of custom design to reflect local realities. They are not constrained by the various principles and presumptions underlying the common law.

Nevertheless, Canadian courts recognize the existence of Indigenous laws. Canadian courts have acknowledged that Indigenous and non-Indigenous legal principles can co-exist without conflict.[18] As recognition of the inherent jurisdiction and authority of Indigenous laws and institutions increases, Indigenous-led ADR will be integral to navigating conflict between Indigenous and non-Indigenous parties. Of course—and I think I have been clear on this point—Indigenous peoples do not need institutional recognition to apply and enforce their laws. My point is that where such recognition comes from a place of sincerity and respect, it creates opportunities for dialogue and signals a societal disposition towards greater pluralism and coexistence. If designed appropriately to uphold and apply Indigenous customs and conventions, Indigenous-led ADR can become a useful and flexible mechanism for harmonizing Indigenous and non-Indigenous perspectives along the fault lines underlying Indigenous-Crown disputes.

*Canada has a moral obligation to respect Indigenous law in dispute settlement*

Canada also has a moral imperative to explore ADR models that capture the spirit of nation-to-nation partnership, mutual recognition and understanding, and the interaction of Indigenous and western legal traditions. This imperative arises from historical, yet evergreen treaty promises between the Crown and Indigenous peoples that pre-date confederation. A clear example is the Two Row Wampum, a 1613 treaty between the Haudenosaunee and Europeans often cited as an ideal framework for modern treaty-making.[19] The Two Row

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[17] See Alan Hanna, "Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape" (2017) 51:1 UBC L Rev 105 at 108.

[18] Borrows, *supra* note 16 at 638, citing *Canadian Pacific ltd. v Paul*, [1988] 2 SCR 654 at 673, 54 DLR (4th) 487 and *Delgamuukw v British Columbia (AG)* (1993), 104 DLR (4thh) 470, 30 BCAC 1 at 532. For an excellent article on the continuity of Indigenous laws within Canadian common law and constitutional law, see Mark D Walters, "The 'Golden Thread' of Continuity: Aboriginal Customs at Common Law and Under the Constitution Act, 1982" (1999) 44 McGill LJ 711. But there may be limits: Couturier, *supra* note 15.

[19] John Borrows, "Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government" in Michael Asch, ed, *Aboriginal and Treaty Rights in Canada* (Vancouver: UBC Press 2000) 155; see generally John Borrows and Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University

Wampum promised mutual respect and non-interference between its Indigenous and European signatories, both in terms of way of life and ability to self-govern. But litigation in lands and resources disputes signals the Crown's unwillingness to negotiate and uphold these promises in modern disputes. Dispute resolution that embraces principles of legal and cultural pluralism, grounded in concepts such as FPIC, can effectively address the sources of these conflict directly, while also strengthening Indigenous institutions and facilitating cross-cultural understanding.[20] This is because modern negotiations and dispute resolution do not occur in a vacuum; they are necessarily informed by the history of treaty making and broken promises, whether or not this is acknowledged by the Crown.

In its current form, the duty to consult does not require agreement. Contested state activities may survive a legal challenge even where opposition continues, provided baseline consultation requirements are met or the justification test set out in *R v Sparrow* in satisfied.[21] This feature of the framework is particularly untenable to some.[22] Shin Imai puts it this way:

> The community feels powerless. It is difficult to trust a process of consultation when they know that no matter what happens, the final decision is not in their hands. It is through recognition of the necessity of consent that Indigenous communities will have power that can be a balance to the superior economic power of the mining company and the superior political power of government.[23]

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of Toronto Press 2006). For an attempt to theorize and provide practical guidance on how historical treaties can inform and overcome roadblocks in modern-day treaty-making, see my "Negotiating the Dehcho: Protecting Dene Ahthít'e Through Modern Treaty-Making (Toronto: Gordon Foundation, 2020), online: https://gordonfoundation.ca/wp-content/uploads/2020/04/Don_Couturier_JGNF_2018-2019.pdf [perma.cc/9WQ3-ZJV2].

[20] Borrows, *supra* note 16 at 655: "First Nations law has an important place in a broad intercultural context".

[21] See e.g., *Coldwater First Nation v Canada (Attorney General)*, 2020 FCA 34. The FCA dismissed the appeal of the Cold Water First Nation, who sought to challenge the government's approval of the Trans Mountain Pipeline Expansion Project. Despite vigorous opposition from several Indigenous nations, the Court held that Canada had met its consultation obligations under the duty to consult. See paras 40, 41, 54. For an example of the application of the *Sparrow* justification test, see *Ahousaht Indian Band and Nation v Canada (Attorney General)*, 2018 BCSC 633.

[22] Shin Imai, "Consult, Consent and Veto: International Norms and Canadian Treaties" (2016) 12:5 Osgoode Hall Law School Legal Studies Research Paper Series, Research Paper No 23 at 17.

[23] *Ibid* at 13.

As the literature makes clear, authority over lands and resources was acquired illegitimately through dispossession and colonization, and this injustice is reinforced with every unilaterally designed and implemented project. Understanding where this sense of unfairness comes from is critical. Failure to acknowledge these historical power dynamics also results in litigation, as we saw in the Supreme Court of Canada's decision in *First Nation of Nacho Nyak Dun v Yukon*,[24] wherein the Court held that the Yukon government had breached the honour of the Crown when it disregarded the Na-Cho Nyak-Dun's contributions to the Peel Watershed Regional Land Use Plan.

Some quarters of private industry have begun to recognize that consent-based relationships save money and reduce conflict, even if it requires serious compromise. Industry has strong incentives to obtain the full consent of impacted communities before proceeding with a project.[25] The costs of conflict with Indigenous groups are significant, and can result in serious impacts to companies, including suspensions and project closures, not to mention legal fees. Failure to adequately consult may lead to injunctions and other litigation. In response to *Tsilhqot'in Nation v British Columbia*,[26] which recognized the Tsilhqot'in's Aboriginal title to possess and own titled lands and resources, several industry organizations developed engagement guidelines driven by principles of FPIC.[27] Industry is quickly moving toward a broader concept of consultation—it is not a far stretch to develop complementary ADR mechanisms alongside these procedures.

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[24] 2017 SCC 58.

[25] For a comprehensive collection of scholarship analyzing emerging trends in agreements between Indigenous peoples and private industry, see Ibironke T Odumosu-Ayanu and Dwight Newman, eds, *Indigenous-Industry Agreements, Natural Resources and the Law* (New York: Routledge, 2021). For perspective on the complex gender and social dynamics between extractive industries and Dene communities in the Northwest Territories, see Itoah Scott-Enns, Elexeta Edets'eeda: Strengthening Support for Tłı̨chǫ Mining Families (Toronto: Gordon Foundation, 2015), online: https://gordonfoundation.ca/wp-content/uploads/2017/03/JGNF_2015_Itoah_TlichoMiningFamilies_FINAL.pdf [perma.cc/B8H4-ZDGX].

[26] *Supra* note 2.

[27] Boreal Leadership Council, *Understanding Successful Approaches to Free, Prior and Informed Consent in Canada. Part I* (Victoria: The Firelight Group 2015). See also Ginger Gibson and Ciaran O'Faircheallaigh, *IBA Community Toolkit: Negotiation and Implementation of Impact and Benefit Agreements* (Toronto: Gordon Foundation, 2015), online: https://gordonfoundation.ca/wp-content/uploads/2017/03/IBA_toolkit_web_Sept_2015_low_res_0.pdf [perma.cc/6BGV-TCY5].

## THE WAY BACKWARDS: WHY MAINSTREAM ADR APPROACHES ARE INSUFFICIENT

Can traditional, mainstream approaches to ADR operate effectively in this context? Empirical studies suggest that mainstream models of dispute resolution, particularly facilitative and determinative approaches, may alienate Indigenous parties.[28] According to this research, in an intercultural context, mainstream models may favour more economically powerful participants and inadvertently favour dominant cultural perspectives.[29] Mediators often represent the dominant culture, styles of mediation are considered formalistic, and the process remains firmly embedded in the western legal system, all of which can have an alienating effect.[30] Some dispute resolution scholars, such as Bernhardt and Kelly, have proposed an "Indigenized" western ADR model that incorporates culturally appropriate methods of resolving disputes.[31]

Caution is needed here. ADR can be designed in ways that honour Indigenous institutions and knowledge, but efforts will fail if they offer only token acceptance of Indigenous systems, but the overall process remains unchanged. A distinction between "Indigenized" ADR and Indigenous-led ADR should be drawn. Rather than introducing Indigenous cultural elements to the mainstream process, a more fundamentally different and context-specific model is needed that embeds both Indigenous and non-Indigenous dispute resolution mechanisms into the process itself.[32] This is a difficult task. As Bell observes on the subject, "it remains unclear how best to avoid co-optation of the processes…how these would interact with existing legal mechanisms, and how to operate this system within the limits of Canadian law as it currently exists".[33]

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[28] Sarah Ciftci and Deirdre Howard-Wagner, "Integrating Indigenous Justice into Alternative Dispute Resolution Practices: A Case Study of the Aboriginal Care Circle Program in Nowra" (2012) 16:2 AILR 81 at 83.
[29] *Ibid*.
[30] *Ibid*.
[31] *Ibid*.
[32] I recognize it is much easier to discuss these concepts in the abstract than to find workable and clear solutions applicable in practice. For an example of how "co-governance" models and other institutional shifts might take into account Indigenous laws and governance in a real-world lands and resource management context, see my analysis on the Dehcho process in the Northwest Territories in *Negotiating the Dehcho*, *supra* note 19.
[33] David Kahane and Catherine Bell, "Introduction" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 2.

A one-size-fits all template will not work; the process must be driven by the unique history and concerns of the parties. Nevertheless, some common misunderstandings can complicate the process. As someone without expertise in Indigenous cultures, I cannot, nor should I, suggest specific protocols. The remainder of this paper will instead provide some foundational guidance by outlining some of the most common pitfalls. Most of these misunderstandings can be avoided through an approach grounded in humility, listening, and respect for difference.

*The cultural and political element*

Intercultural competence is critical but often overlooked.[34] Mediators may be trained to approach disputes from the perspective of the dominant culture, using off-the-rack methods designed to encourage efficiency of process, but which "work to embed cultural values in the process that do not fit well to the [Indigenous] context".[35] Michelle LeBaron observes that dominant cultural leadership is marked by jealously guarding your reputation and status, analyzing resources and opportunities, making others aware of their dependence on you, and creating a web of relationships to support power.[36] But leadership qualities valued by Indigenous communities may be different. LeBaron cites the ability to draw on your own personal resources as a source of power, an emphasis on generosity and non-materialistic resources, taking risks needed for the good of the community, being modest and funny, and using humour to deflect anger.[37]

Beyond the interpersonal, deeper cultural differences can interfere. Dominant western approaches follow a general template that involves each side making its case before a neutral third party, who, in the case of evaluative mediation or arbitration, will objectively suggest or decide a just settlement.[38] In mediation, this involves a back-and-forth compromise facilitated by a neutral third party who manages the process towards a negotiated settlement. According to David

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[34] Michelle LeBaron, "Learning New Dances: Finding Effective Ways to Address Intercultural Disputes" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 16.
[35] *Ibid*. See also Jeanne M Brett, "Culture and Negotiation", in *Negotiating Globally: How to Negotiate Deals, Resolve Disputes, and Make Decisions Across Cultural Boundaries* (San Francisco: John Wiley & Sons, 2007) at 25, 30.
[36] *Ibid* at 24.
[37] *Ibid*.
[38] David Kahane, "What is Culture? Generalizing about Aboriginal and Newcomer Perspectives" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 29.

Kahane, these methods have "deep roots in western cultural, legal and philosophical traditions…[and are]…closely tied to political legitimacy".[39] ADR processes become an expression of political legitimacy in themselves, and so must properly account for historical grievances in play.

As Kahane notes, from the point of view of Indigenous struggles for survival, equality and self-determination, "this dominant western account of justice seems deeply corrupt".[40] Kahane critiques what he calls the liberal narrative of justice, stating that "accounts of justice brought by European arrival often explicitly excluded Aboriginal peoples from full membership in the political community within which justice was to prevail; liberals have deemed Indigenous peoples beyond the scope of liberal justice: too savage, insufficiently settled, unreasonable".[41] Culturally driven concepts of justice may further entrench conflict by ignoring how Indigenous perspectives understand justice in the context of land dispossession and colonization.

For Kahane, fairness—and its role in intercultural dispute resolution—is rooted in particular cultural traditions, rather than a transcultural definition of reason, interests and rights.[42] Cultures exist in relation to one another, in contexts shaped by power,[43] which, in the context of Indigenous-Crown relations, implicates the colonial power to coerce, dispossess, rule, and define the scope and content of Aboriginal rights within this framework. In other words, "treating Aboriginal claims as properly resolved within the supposedly neutral procedures of an existing nation state already reiterates historical injustices that ought themselves to be in question".[44] To successfully counter these dynamics, then, ADR strategies can benefit where Indigenous laws and methods of dispute resolution operate alongside and in equal measure to western traditions.

*The spiritual and philosophical element*

Land disputes may be rooted in fundamental divergences between Indigenous and non-Indigenous relationships with the environment. Failure to recognize and navigate these differences may lie at the core of parties' inability to resolve conflict. For example, rich and varied stories, laws and customs often express

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[39] *Ibid*.
[40] *Ibid* at 30.
[41] *Ibid*.
[42] *Ibid* at 31.
[43] *Ibid*.
[44] *Ibid*.

the centrality of land, water and animals to Indigenous peoples.[45] This contrasts with government desire to harness and develop natural resources for economic gain, and of course, the desire of private industry to engage in extractive activities for profit.[46]

Between these visions exists the tension between environmental protection and resource development, or as it is sometimes referred to, "sustainable development". Indigenous and non-Indigenous peoples may have different views about whether sustainable development is attainable, and if so, how environmental protection ought to be balanced against development. Discussing this balance from an Indigenous perspective, Thom Alcoze offers this insight:

> The way in which native traditions have always dealt with this problem is to consider seven generations into the future…native traditions have always maintained an integrated relationship with the land. An intimate relationship with nature's resources, with nature, with the earth.[47]

A different balance emerges within western viewpoints, which may instead place the environment in opposition to humans; something commodifiable for profit,[48] a benefit that can coexist alongside ecological preservation. These competing visions can bedevil negotiations where jurisdiction, authority and resource stewardship are at issue. I am quick to point out that this dichotomy does not necessarily exist in every dispute or negotiation between Indigenous and non-Indigenous groups. Overlaps may surprise negotiators; Indigenous communities may wish to develop their resources provided they have sufficient decision-making autonomy and a share in profits;[49] and non-Indigenous groups

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[45] See the description of the sources of Indigenous law in Chapter 2 of John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press 2010).
[46] Randy Kapashesit and Murray Klippenstein, "Aboriginal Group Rights and Environmental Protection" (1991) 36 McGill LJ 925 at 570. See also David Lertzman & Harry Vredenburg, "Indigenous Peoples, Resource Extraction and Sustainable Development: An Ethical Approach" (2005) 56 Journal of Business Ethics 239.
[47] Thom Alcoze, "Our Common Future: Native Land Use and Sustainable Development" in The Guelph Seminars on Sustainable Development (Guelph: University of Guelph 1990), reproduced in E.L. Hughes, ed, *Environmental Law and Policy* (Toronto: Emond Montgomery, 1993) at 568.
[48] Leroy Little Bear, "Jagged Worldviews Colliding" in Marie Battiste, ed, *Reclaiming Indigenous Voice and Vision* (Vancouver: UBC Press 2000) at 77.
[49] For example, see the discussion in Ginger Gibson, John B Zoe & Terre Satterfield, "Reciprocity in the Canadian Dene Diamond Mining Economy" in Emma Gilberthorpe & Gavin Hilson, eds, *Natural Resource Extraction and Indigenous Livelihoods: Development*

may also seek a balance that favours ecological protection. We must be careful not to essentialize these viewpoints, which can slide along a spectrum. The key point is that this asymmetry may exist to different degrees, and so an ADR process should be alive to this possibility and designed to facilitate dialogue to establish common ground.

In terms of demonstrating respect for different philosophical viewpoints, an effective ADR model should empower, not minimize, Indigenous epistemologies in its discussion framework. Otherwise, a sense of unfairness or subordination may arise; as Elmer Ghostkeeper writes, "capitalism is the main economic paradigm within which we are forced to negotiate and talk with non-Aboriginal people about our land".[50] When this paradigm collides with fundamentally different beliefs about sustainable development, miscommunication and frustration can result, and discussions may break down. Indigenous peoples have long been forced to articulate their perspectives to Europeans and justify their place amongst western intellectual traditions.[51] Mainstream ADR processes are no different. By prioritizing Indigenous philosophies in ADR, Indigenous knowledge becomes justified on its face as an integral component of the process, rather than acting as a hindrance to a successful outcome that favours western goals and values. In part this why, at the outset of this discussion paper, I suggested that self-initiated efforts to read about and understand Indigenous perspectives are perhaps the most crucial step towards such dialogue, as it relieves Indigenous peoples of the burden to explain and justify their viewpoints.

## THE WAY FORWARD: REIMAGINING INDIGENOUS-LED ADR

### *What are the foundations for success?*

As an aspirational model, Indigenous-led ADR can reduce litigation, introduce FPIC into the consultation process, and move us towards nation-to-nation partnership. As Catherine Bell observes, "it is only when Aboriginal jurisdiction and dispute resolution systems are equal in authority and legitimacy to, rather

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*Challenges in an Era of Globalization* (London: Taylor & Francis Group, 2014) (suggesting that the Tłı̨chǫ expect reciprocity from mining companies, which reinforces and sustains their own values and identity).

[50] Elmer Ghostkeeper, "*Weche* Teachings: Aboriginal Wisdom and Dispute Resolution" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 162.

[51] See generally Dale Turner, *This is Not a Peace Pipe: Towards a Critical Indigenous Philosophy* (Toronto: University of Toronto Press 2006).

than alternative or delegated from, non-Indigenous governments and processes that true Aboriginal justice can be obtained".[52]

But significant shifts must occur first. For example, the process must come to terms with its broader colonial interaction in its design and implementation.[53] As a start, this may require apology and acknowledgement of the historical alienation of Indigenous peoples from concepts of justice and ownership.[54] As Jeremy Webber points out, to secure Indigenous participation, "the very structure of dispute settlement may have to be re-negotiated".[55] This might begin with the selection of the mediator. Indigenous communities may have different views about the ideal qualities of a mediator. Personal stature may be less important than wisdom and experience.[56] The terms of the process itself will need to be negotiated, including who participates, how they participate, and how decisions will be made. Ideally, community protocols should be observed. Community involvement is another important feature identified in the literature. A community-based forum for dispute resolution may be quite foreign to those accustomed to traditional ADR processes. Such an approach is entirely different from conflict between two individuals, which speaks to the fundamental distinction between Indigenous deliberative processes and western approaches to dispute resolution. Webber analogizes this process of collective deliberation to a typical community meeting or legislative assembly.[57] Disputes related to lands and resource stewardship implicate the community as a whole, including future generations. A community may not have consensus within itself, and so there must be a mechanism to resolve internal conflict. Without such a mechanism, any agreement reached may not generate lasting consensus that will be accepted by the community in the long-term.

Perhaps most fundamentally, mainstream ADR models may operate under different concepts of time and consensus. In a mainstream process, parties develop discrete and clear agenda items, and work to resolve them as soon as possible. Where an Indigenous-led process is in use, things may progress more

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[52] Catherine Bell, "Indigenous Dispute Resolution Systems within Non-Indigenous Frameworks: Intercultural Dispute Resolution Initiatives in Canada" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 244.
[53] Jeremy Webber, "Commentary: Indigenous Dispute Settlement, Self-Governance, and the Second Generation of Indigenous Rights" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 150.
[54] *Ibid*.
[55] *Ibid*.
[56] *Ibid*.
[57] *Ibid* at 150–51.

slowly. There may be a need to establish a relationship of trust at the outset. This might involve spending time in the community or on the land with community leaders to learn about their way of life, history and culture. Substantive topics may not be directly discussed at this early stage. For those accustomed to mainstream methods and looking to resolve the dispute quickly, this may be a source of frustration. But corners cannot be cut when establishing and fostering a relationship-centred approach; trust and understanding are central. Moreover, the concept of consensus may be fluid, requiring revisitation.[58] This is also unusual for mainstream approaches, which would typically record an agreement and commit the parties to those terms going forward. Although the parties will similarly be expected to commit to and honour promises made, ongoing demonstrations of good faith may be needed to maintain trust.

Finally, the process should be alive to the specific concerns of the community or communities in question, not just perceived Indigenous values in general.[59] Each community, communities or nation may have its own traditions, including unique and varied legal orders, stories, customs, and more, as well as site-specific attachments to certain land formations or bodies of water. Each may have its own set of complex political considerations related to the accepted authority of their hereditary chief versus Band Chief and Council elected under the *Indian Act*. Some view the Chief and Council as the primary decision-makers, some view the hereditary leadership in this way, and a community may disagree about this within its membership. Non-Indigenous parties cannot resolve these internal disagreements, of course, but it is important to be aware of them and recognize how they may influence the discussions taking place.

Suggestions for developing an appropriate framework have included identification of community values and processes, a balance of traditional values with those of modern contemporary ways of life,[60] and adopting an "elicitive approach that is participant led and recognizes process design as a political and functional issue".[61] As I have also suggested, grounding such a process in the principles espoused by UNDRIP, and specifically FPIC in the lands context, is an appropriate structural guideline that will fulfill Canada's political commitments and further the broader project of reconciliation. In New

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[58] Mark Dockstator, UVic Institute for Dispute Resolution, *Making Peace and Sharing Power: A National Gathering on Aboriginal Peoples and Dispute Resolution* (Victoria: University of Victoria, 2007) at 170.
[59] *Ibid*.
[60] Bell, *supra* note 51.
[61] Kahane, *supra* note 38 at 47.

Zealand, the Waitangi Tribunal's role in the dispute resolution of Maori treaty claims is an interesting example to consider.

To briefly illustrate, the Waitangi Tribunal was established to manage the claims of the Maori against the Crown arising from the historical Treaty of Waitangi. Claims received are classified as either historical (past government action), contemporary (current government action) or conceptual (related to "ownership" of natural resources).[62] Dispute resolution is built into the claims process through bicultural and bilingual mediation. Typically, co-mediation is used, where one mediator with general skills is paired with a *kaumatua* (elder) skilled in *tikanga* (traditional Maori practices).[63] There is preference for consensual or interest-based processes rather than positional bargaining.[64] This is a new and evolving area for the Tribunal, and as it develops, scholars are emphasizing that Maori protocol should be observed where possible.[65] Canada has nothing comparable for the moment, but the utility of co-mediation in an intercultural setting is evident, and offers helpful lessons for how an Indigenous-led ADR process might be approached.

Of course, the Waitangi process arose from lengthy historical negotiations and has the benefit of institutional heft and resources. Not all Indigenous-led ADR processes in Canada will meet this standard. Dispute resolution may occur in the context of ongoing, historical treaty obligations, but it may also occur on an ad-hoc basis to navigate proposals between communities and private industry. The features I have identified above, however, seek to identify some commonalities that would be relevant to all of these contexts. Chief among them are commitments to consensus-based decision making and relationship building. Consensus and relationships are the key guideposts to a successful and mutually beneficial resolution process.

*The role of storytelling in Indigenous-led ADR*

Indigenous laws, principles, values and histories are often communicated orally. These stories may not have a textual foundation; instead, they may exist through living memory and teachings across generations. I have emphasized that grounding ADR processes in Indigenous laws and customs can help

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[62] Morris Te Whiti Love, "The Waitangi Tribunal's Role in the Dispute Resolution of Indigenous Treaty Claims" in *Intercultural Dispute Resolution in Aboriginal Contexts* (Vancouver: UBC Press 2004) at 136.
[63] *Ibid* at 142.
[64] *Ibid* at 143.
[65] *Ibid* at 146.

resolve the dispute at hand and strengthen Indigenous institutions. Storytelling is an important aspect of mainstream ADR as well, though of course these stories do not contain principles of law. Often, parties in traditional mediations are as interested in telling their story and being heard as they are in reaching a settlement. Although intercultural dialogue is a distinctive feature here, the concept of storytelling is not entirely foreign to the western model.

Creating space for Indigenous storytelling into the ADR process—to the extent that the Indigenous party would like to do so—achieves the complementary goals of preserving the integrity of Indigenous intellectual traditions, drawing out Indigenous law and legal principles, and serving the basic function of communicating the interests and position of each party. Storytelling therefore offers a powerful way to manage some of the divides arising in an intercultural dispute resolution context. While there are commonalities in this regard, the function and significance of storytelling within Indigenous communities is unique to them, and so to the extent that non-Indigenous parties use storytelling to communicate their position, this cannot be equated with oral histories that weave concepts of identity, law and relationship to the natural world. The overlap rather relates to the design of ADR processes; they exist to facilitate a degree of storytelling, and so this characteristic should be recognized for the opportunities it presents.

## CONCLUSION

I have suggested that in order for dispute resolution to effectively resolve conflict and be seen as legitimate by Indigenous peoples, its processes must be grounded in Indigenous laws and ways of knowing. Since the process is itself a political endeavour, Indigenous-led ADR can serve as a vehicle for reconciliation and legal, philosophical and cultural pluralism. Where such a model is premised on nation-to-nation partnership, it benefits all participants. Non-Indigenous parties can expand their respect for Indigenous cultures and reach mutually beneficial resolutions on equitable terms. For Indigenous peoples, their leadership in designing the process presents an opportunity to assert sovereignty and revitalize and develop governance institutions.

Primarily, an Indigenous-led dispute resolution process can respond more flexibly to conflicting legal perspectives on Indigenous rights and sovereignty. In so doing it can avoid the dissatisfying duty to consult process and the box of judicially recognized section 35 rights, which, as we have seen, is often criticized for failing to capture the substance of Indigenous rights. Efforts in some corners of private industry are already yielding positive results,

demonstrating the utility of a forward-thinking approach to consultation. Recognizing the deficiencies of the duty to consult in relation to their own goals and liabilities, private industry is developing ways of going above and beyond the legal requirements to obtain community consent and participation in projects.[66]

Indigenous-led ADR moves parties closer to a model premised on free, prior and informed consent. Consultation and consent is a free-flowing concept in the dispute resolution process: it is sought prior to a dispute arising, but the sincerity with which it was sought informs and sets the tone for the dispute resolution process itself. A community's willingness to resolve a dispute may hinge on its perception of whether or not the opposing party has made good faith efforts to engage and consult from the very beginning. Indigenous-led ADR therefore requires us to think of dispute resolution as a continuum beginning well before parties are headed for court.

Removed from the traditional court process, Indigenous-led ADR provides the necessary flexibility to weave together Indigenous and non-Indigenous approaches to ADR. This reinforces Indigenous institutions and avoids the difficulty of courts attempting to reconcile common law doctrines that may be at times inconsistent with Indigenous legal principles. The central question then becomes how best to model such a process. I have suggested that, to answer this question, we must be aware of the shortcomings of mainstream ADR models in such contexts and prioritize the role of the community itself in negotiating and setting the terms of any such process.

Indigenous governance has a crucial role to play in intercultural disputes and can help us navigate the paradox of sustainable development. We can learn a great deal about caring for the land from Indigenous knowledge. Unfortunately, critics are often concerned that if we allow Indigenous peoples to set the terms of consultation and dispute resolution, economic productivity will grind to a halt.[67] But it is a false dichotomy to assume that all Indigenous peoples, in all cases, are concerned only with vitiating economic development in their territories. Rather, they are concerned with respect for their sovereignty and jurisdictional authority. Once we learn to walk together on this path, new possibilities will emerge for a shared future.

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[66] Imai, *supra* note 22.

[67] Lorraine Land, "Who's afraid of the big, bad FPIC? The evolving integration of the *United Nations Declaration on the Rights of Indigenous Peoples* into Canadian law and policy", *Northern Public Affairs* (May 2016).

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# CONTEMPORARY CONSIDERATIONS OF DECISION MAKER BIAS

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## Contents

## ABSTRACT

For public justice system adjudicators and private practice arbitrators alike, there is more to do than deliver justice. They must be seen to do so, free from bias or undue influence.

This does not mean that decision makers cannot have their own thoughts or views. In fact, experience in and understanding of the subject matter of a conflict is often seen as qualifying an adjudicator to determine the outcome of a dispute.

This also does not mean that decision makers cannot have their own lives. There is good reason for adjudicators to have social media connections and relationships beyond their role of determining the outcome of a matter.

From a lawyer appearing before a decision maker on video with a cat filter applied to their appearance to a judge's criticism going viral on social media, the line for decision makers to walk to be seen as impartial is far from clear in this day and age. Does a reasonable apprehension of bias exist if opposing counsel follows the adjudicator on Twitter? How about if the decision maker and a party before them jointly spoke on a panel at a conference streamed to a limitless audience? Would discouraging adjudicators from writing articles and otherwise expressing opinions mean that they do not have them?

Public perceptions are increasingly difficult to control in view of the reach of social media and the unpredictability of the Internet in this day and age. This paper contemplates key considerations from both a private and public dispute resolution lens, with the view of upholding the integrity of just and fair outcomes.

## ABOUT THE AUTHOR

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Marc guest lectures at the Faculty of Law at Queen's University and Osgoode Hall Law School. He serves on the faculty of the Canadian Collaborative for Engagement & Conflict Management, where he teaches online dispute resolution and arbitration. Marc is also accredited as a trainer by the ADR Institute of Canada and the Law Society of Ontario.

In 2020, Marc was presented with a STAR Award by the ADR Institute of Ontario for his leadership, dedication and contribution to the dispute resolution field.

For more about Marc, please visit 456dr.ca.

## JUSTICE & BIAS

> *For the due administration of justice, the foundational principles are that justice must be done substantively and procedurally and justice must also be seen to be done.*[1]

Consideration of decision maker bias is complex. Actual bias is difficult to prove and perceptions of what constitutes bias depends on who is forming them. Advantages of involving adjudicators with subject matter expertise come with risks of perceptions they may pre-judge cases similar to those they have assessed in the past. How an adjudicator conducts themself can influence impressions and this extends beyond their conduct in a hearing. Perceptions of bias can be formed from social media activity, the company an adjudicator keeps and situations beyond their control. To provide a fair experience for all who come before them, decision makers must be aware of their actions and the role they have in the formation of views about justice and fairness.[2]

Historic cases such as *R. v Steele*[3]*, Shrager v Basil Dighton Ltd.*[4] and *The King v Sussex Justices, ex parte McCarthy*[5] established that justice must not only be delivered but be seen to have been delivered. Justice Paul Perell explains that "[b]ias is a predisposition to decide in a particular way that closes the judicial mind to being persuaded."[6] It is not appropriate for adjudicators to be influenced by predispositions; decision makers must be open to persuasion. At the same time, it is not appropriate for decision makers to be easily removed or left vulnerable to false accusations. A delicate balance must be struck for the sake of integrity and procedural fairness.

### *Types of Bias*

There is a difference between actual and apprehended bias. Jesse Cooper states that a decision maker's mental attitude must be examined to prove actual bias.[7] Apprehended bias does not focus upon the decision maker's mental

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[1] Paul M. Perell, "The Disqualification of Judges and Judgments on the Grounds of Bias or the Reasonable Apprehension of Bias" (2004) 29 Advoc. Q. 102 at 104. [*Perell*].
[2] This paper will speak to decision makers involved in the public justice system and private dispute resolution.
[3] [1895] 26 OR 540 (HCJ) at 28.
[4] [1924] 1 KB 274 at 284.
[5] [1924] 1 KB 256 at 259.
[6] *Perell*, *supra* note 1 at 105.
[7] Jesse J. Cooper, "Administrative Bias: An Update" (1977) 82 Dick. L. Rev. 671 at 673. [*Cooper*].

state but instead the perceptions that may reasonably be formed in the circumstance.[8] Concerns include the adjudicator having an interest in the decision, a pre-existing relationship with a party that would affect decision-making, an outcome pre-determined or external pressures (such as political pressures) to decide a case in a particular way.[9]

There is potential for a biased adjudicator to not even be aware that they are biased.[10] They may unknowingly make mental shortcuts that are unfair. Gregory Cusimano finds that assumptions made through mental shortcuts are often incorrect and concurs that everyone possesses unconscious bias to some extent.[11] Forms of unconscious bias include confirmation basis (where more consideration is given to confirming existing beliefs than what contradicts them), attribution and affinity bias (the decision maker being favourable to those people and concepts similar to them and their own) and availability bias (embracing what is most immediately familiar).[12] To address this, adjudicators must reflect upon how they come to decisions.[13] In promoting the concept of a bias-free justice system, Michael Franck suggests that awareness alone can help decision makers correct their conduct when certain behaviours risk being, or appearing to be, biased.[14]

A related concern surrounds how a party or their representative experiences the hearing. When a dispute resolution process takes place online, the role of technological literacy can be a factor. An example is the viral incident where a lawyer appeared on video before a judge with a cat filter applied to their appearance. Struggling to remove the filter, the lawyer assured the decision maker that they were not, in fact, a cat.[15] Consider the quality of an Internet connection and how comfort with technology may impact how one presents themselves. Bruce Mann suggests that the technologically unsophisticated user is disadvantaged and expressed concern that wealthy disputants may

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[8] Matthew Groves, “The Rule against Bias” (2009) 39 Hong Kong L.J. 485 at 494. [*Groves*].
[9] *Cooper, supra* note 7 at 674-686.
[10] Kathleen Nalty, “Strategies for Confronting Unconscious Bias” (2016) 45 Colo. Law. 45 at 45. [*Nalty*].
[11] Gregory S. Cusimano, “Implicit Unconscious Bias” (2018) 79 Ala. Law. 418 at 420.
[12] *Nalty, supra* note 10 a 45-46.
[13] *Ibid* at 47.
[14] Michael Franck, “Toward a Bias-Free Justice System” (1990) 69 Mich. B.J. 366 at 366.
[15] Christina Zdanowicz, “Lawyer tells judge 'I'm not a cat' after a Zoom filter mishap in virtual court hearing” CNN (February 10, 2021), online: <https://www.cnn.com/2021/02/09/us/cat-filter-lawyer-zoom-court-trnd/index.html> [perma.cc/95P9-HJTW].

have advantages online.[16] Tools like virtual backgrounds and platform options with minimal equipment requirements can assist in levelling the playing field. Yet, it is incumbent upon decision makers to be aware of the various ways in which their decision making might be influenced and manage this appropriately.

*Decision Maker Empathy*

A significant aspect of bias surrounds the decision maker's ability to empathize with those who come before them. The Right Honourable Lord Justice Robin Jacob believes that judges must have an understanding of the world to be seen to deliver justice.[17] He stated that, "from the point of view of public acceptance of what we do, we must seem to be in touch."[18] An example of this is evident in the decision rendered by Justice Molloy in *R. v. John Doe, 2021 ONSC 1258*, wherein the adjudicator expressed understanding of and connection to those impacted by the case.[19]

Lord Jacob references the legendary tale of a judge in the 1960s unfamiliar with The Beatles to criticize decision makers viewed as out of touch.[20] Relatable, actual experience is needed for adjudicators to empathize with all who come before them.[21] As he surpassed records of The Beatles, a contemporary application of this notion considers an adjudicator's familiarity with Drake.[22] Nevertheless, decision makers may be viewed as biased if they cannot relate to those they interact with.

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[16] Bruce L. Mann, "Smoothing Some Wrinkles in Online Dispute Resolution" (2009) 17 Int'l J. L. & Info. Tech. 83, 112 at 85.
[17] Robin Jacob, "Knowledge of the World and the Act of Judging" (2014) Osgoode Review of Law and Policy 2.1 22-28 at 22. [*Jacob*].
[18] *Jacob, supra* note 17 at 25.
[19] R. v. Minassian, 2021 ONSC 1258.
[20] *Jacob, supra* note 17 at 24. Adjudicators should possess knowledge of the world.
[21] *Ibid* at 28 [emphasis added]. Jacob uses the term "judgitis" to describe an adjudicator's power going to their head. It is difficult for a decision maker to empathize with and relate to those before them if they view themselves as superior or above those they, in truth, serve.
[22] Lisa Respers France, "Drake breaks Beatles historic record", CNN, July 10, 2018, online: <https://www.cnn.com/2018/07/10/entertainment/drake-beatles-record/index.html> [https://perma.cc/CD45-K5VL], Hugh McIntyre, "Drake Passes The Beatles For The Second-Most Top 10 Hits In History," Forbes, June 26, 2019, online: <https://www.forbes.com/sites/hughmcintyre/2019/06/26/drake-passes-the-beatles-for-the-second-most-top-10-hits-in-history/?sh=2782765d7795> [https://perma.cc/3AN3-27AW], Mark Savage, "Drake overtakes Madonna and The Beatles to break US Billboard chart record," BBC News, July 28, 2020, online: <https://www.bbc.com/news/entertainment-arts-53565332> [https://perma.cc/6WZP-4CUH].

*The Importance of Decision Maker Immunity*

Judicial immunity prevents adjudicators from facing civil damages for being found to be biased.[23,24,25] Former Justice of the Supreme Court of the United Kingdom, Lord Dyson, delivered a lecture in March 2018 at the Worshipful Company of Arbitrators in London, England about the appropriate limits of a private dispute resolution arbitrator's immunity.[26] He stated: "So far as I am aware, judges enjoy absolute immunity for any acts or omissions in the exercise of their judicial functions however egregious they may be."[27] Irrespective of jurisdiction, office or whether the adjudicator has a duty to the state or private parties, Lord Dyson suggested that immunity is important to support adjudicator impartiality.[28]

Introducing further consequences for decision makers found to be biased risks encouraging them to be biased. If there were risk of liability on the part of the adjudicator, they might be inclined to decide cases in a manner they feel lessens their prospective exposure to such. For example, consideration might be given to the wealth of parties and their likelihood of pursuing a claim against the decision maker to unduly influence deliberations. There is good reason to limit the consequences of the prospect of a finding of bias against decision makers. To many adjudicators, reputational damage is the harshest penalty of all in any event.

*Questioning Partiality*

> *[W]hat would an informed person, viewing the matter realistically and practically, and having thought the matter through, conclude? Would the person think that it is more likely than not that the decision maker, whether consciously or unconsciously, would decide fairly?*[29]

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[23] Jessica A. Clarke, "Explicit Bias" (2018) 113 Nw. U. L. Rev. 505 at 511, 514 & 516.
[24] *Cooper, supra* note 7 at 686-688.
[25] J.M.G. Sweeney, "Lord O'Brien's Doctrine of Bias" (1972) 7 Irish Jurist (N.S.) 17 at 24.
[26] Full analysis of the extent to which an arbitrator should have judge-like immunity is beyond the scope of this paper.
[27] Right Honourable Lord Dyson, "The Proper Limits of Arbitrators' Immunity" (2018), 84 Arbitration, Issue 3 at 196.
[28] *Ibid*.
[29] *Hunt v The Owners, Strata Plan LMS 2556*, 2018 BCCA 159 (CanLII) at 83, referencing *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 SCR 369.

Perhaps the most important check and balance in maintaining adjudicator impartiality is having a clear way to test it. The test does not require actual bias to be found.[30,31] Established by the Supreme Court of Canada in *Committee for Justice & Liberty v Canada (National Energy Board) et al.,*[32] the test "is not what the court itself thinks, but the court's assessment of how a reasonable person would view the situation."[33] The focus is on the impression others would form.[34]

For the test to be applied, concern about bias must first be raised. While Judith K. Meierhenry suggests that "[a] judge has a duty to disqualify himself when a party could reasonably question the judge's impartiality,"[35] difficulties emerge in considering what constitutes a reasonable concern and how to raise such. A lack of clear process to bring forth a bias allegation can be indicative of systemic bias;[36] yet, challenges extend beyond procedure in both public and private dispute resolution.

Consider that it is typically the adjudicator in question who will address any suggestion that they are biased.[37] Margaret Tarkington has found that "many judges do not appreciate having their impartiality questioned."[38] There is a risk that attempting to disqualify an adjudicator could be perceived by the decision maker as attacking their personal integrity.[39,40] Some decision makers take great offence at the suggestion that they could ever be biased.[41] As a result, repercussion can extend beyond the outcome of the case at hand.

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[30] *Ibid* at 84.
[31] *Perell*, *supra* note 1 at 106.
[32] [1978] 1 SCR 369 at 394.
[33] Geoffrey S. Lester, "Disqualifying Judges for Bias and Reasonable Apprehension of Bias: Some Problems of Practice and Procedure" (2001) 24 Advoc. Q. 326 at 332. [*Lester*].
[34] *Ibid* at 333-334.
[35] Judith K. Meierhenry, "The Due Process Right to an Unbiased Adjudicator in Administrative Proceedings" (1991) 36 S.D. L. Rev. 551 at 568. [*Meierhenry*]. I do not condone the gendered language used in the quote. Judges can identify as male, female, both or neither.
[36] *Lester, supra* note 33 at 336.
[37] *Ibid* at 338.
[38] Margaret Tarkington, "Attorney Speech and the Right to an Impartial Adjudicator" (2011) 30 Rev. Litig. 849 at 850. [*Tarkington*].
[39] *Ibid* at 851.
[40] *Perell, supra* note 1 at 107. In addition to questioning the personal integrity of the adjudicator, an allegation of bias can be seen as challenging the integrity of the entire justice system.
[41] *Tarkington, supra* note 38 at 871.

While further fallout may be obvious if the representative offends an adjudicator who they may appear before again, some courts have threatened sanctions against legal representatives who claim decision maker bias. These threats might permeate with representatives across cases, jurisdictions, platforms and even adjudicators. The sentiment is that it is unreasonable to ever suggest partiality on the part of a decision maker. As a result, adjudicators "effectively insulate their own actions from… legal scrutiny and challenge."[42] By punishing those who threaten their reputation, decision makers deter others from making similar objections.[43] This discourages raising the potential of adjudicator partiality and serves to maintain longstanding systemic bias.

Arguments discouraging challenges of decision maker neutrality suggest it is a matter of public interest. Public confidence is heightened when impartiality is not questioned.[44] It would be a problem if adjudicators were disqualified easily; the integrity of the public justice system could suffer if it was viewed as incapable of offering fair and clear closure.[45] Similar sentiments apply to the confidence parties offer to their arbitrator in private dispute resolution.

*Manipulation Vulnerability*

In the public justice system, parties do not select their adjudicator. An allegation of bias could be used as a tool of manipulation for adjudicator selection.[46] Related concerns extend to provoking the decision maker, creating false bias perceptions and threatening an allegation of partiality. Underlying intentions also apply to private dispute resolution and include goading the adjudicator and unfairly influencing the outcome in one's favour.[47] The impact of and potential for such tactics must be considered and safeguarded against. It is, in part, in the interest of safeguarding against this prospect of manipulation[48] that Graeme Broadbent suggests decision makers "should not simply accede to every objection."[49]

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[42] *Ibid* at 880.
[43] *Ibid* at 850, 863, 872 & 868.
[44] *Ibid* at 868-869.
[45] *Perell, supra* note 1 at 107.
[46] *Ibid* at 107-108.
[47] Michael J. Lefow, "Judicial Disqualification for Bias or Prejudice" (1993) 72 Mich. B.J. 684 at 685, 687.
[48] *Ibid* at 685. Concern that parties will be tempted to "judge shop" if not restrained and the risk such would pose to the independence of the judiciary.
[49] Graeme Broadbent, "Judicial Bias" (2000) 34 Law Tchr. 335 at 340. [*Broadbent*].

Support of establishing a clearer path for raising legitimate partiality concerns comes with much apprehension about the opportunities such would also offer to enable a broad range of ulterior motives. Disingenuous allegations of adjudicator bias can create undue delays, the incurrence of unnecessary cost and provide unwarranted influence over the process that risks undermining both the integrity of such and the very purpose of the decision maker's involvement.

*Duty to Sit*

There have been occasions where Canadian courts have determined that a reasonable apprehension of adjudicator bias did not exist.[50,51] In support of this, Geoffrey Lester shares concern about the undue influence parties would have if they could too easily remove their decision maker.[52] Lester suggests that adjudicators have a "duty to sit where not disqualified."[53] This indicates that justice would not be served if an adjudicator recused themselves due to unfounded bias allegations. However, many decision makers are inclined to recuse themselves at any suggestion that they may not be impartial. This is particularly the case if a concern is expressed at the outset of a proceeding or it otherwise becomes clear that the adjudicator's decision will be appealed regardless of what transpires.

The concept of having a *duty to sit* includes appreciation of the time and cost impact of switching adjudicators that extends to the burden granting meritless claims would place on others waiting to access the backlogged justice system, or arbitrators' full schedules.[54] Holding parties to the high threshold of proving a reasonable apprehension of bias may be especially warranted once resources (in a public justice system context) or costs (in a private dispute resolution context) have already been invested into the decision maker tasked with providing an outcome.

*Responsibility to Raise Partiality Concerns*

In *Blake v Blake*,[55] the Ontario Superior Court of Justice found that a lawyer intentionally did not bring a detrimental case to the judge's attention which was

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[50] *Lester, supra* note 33 at 334-335.
[51] *Perell, supra* note 1 at 111.
[52] *Lester, supra* note 33 at 328.
[53] *Ibid* at 327.
[54] *Ibid*.
[55] 2019 ONSC 4062 (CanLII) [*Blake*].

featured in a blog of the lawyer's small firm. The lack of disclosure resulted in a finding of breach of duty of the lawyer and an award of costs against their client on a substantial indemnity basis.[56] This highlights the professional obligations that lawyers have to share relevant information they are aware of.

The same principle could apply to disclosing information that forms an apprehension of adjudicator bias. Section 11(3) of the *Arbitration Act, 1991* and Rule 3.3.3 of the ADR Institute of Canada's Arbitration Rules require that an arbitrator disclose any knowledge they have around apprehensions of bias; however, a decision maker may not be aware of why one might perceive them to be partial.[57] Principles of natural justice, ethical obligations and a broad interpretation of Chapter 2 of the Law Society of Ontario's Rules of Professional Conduct concerning acting with integrity suggest legal representatives have a duty to raise legitimate concerns about adjudicator partiality.[58,59]

Apprehensions of bias must be raised promptly. Lester explains that "allegations of bias or suspicion of bias can be used … as an excuse for delay, or in an attempt to ensure that a decision is not reached."[60] This relates to the previously expressed concerns about manipulation. It is important for a legitimate partiality apprehension to be raised as soon as it is known, otherwise it could be viewed as having been waived[61] or kept unexpressed inappropriately - for example, as grounds to appeal only in the event an unfavourable decision is rendered.

While the argument exists that "if the judge was in fact unaware of the circumstances giving rise to the reasonable apprehension, the danger is eliminated",[62] it is important to ascertain if an adjudicator is aware of an issue. Neglecting to do so risks assumptions undermining both the reputation of the decision maker and the dispute resolution process overall.

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[56] *Ibid* at 21-26, 36-37.
[57] *Lester, supra* note 33 at 345.
[58] Law Society of Ontario, *Rules of Professional Conduct*, Toronto: Law Society of Ontario, 2018, online: <https://lso.ca/about-lso/legislation-rules/rules-of-professional-conduct> [perma.cc/A5VC-A89Q].
[59] Rule 5.1-2(i), cited in *Blake*, speaks only to raising with the court any binding authority that is on point in respect of a case which is known and not mentioned by the other party.
[60] *Lester, supra* note 33 at 327.
[61] *Cooper, supra* note 7 at 688.
[62] *Lester, supra* note 33 at 341.

To overcome the potential of negative consequences for both raising a bias concern and also for failing to do so, Tarkington suggests that it is "important that disqualification be separated from reputational harm – in the eyes of all involved."[63] Doing so will align the contemplation of adjudicator bias with the public interest of preserving the perceived integrity of the dispute resolution process. Bias considerations raised would then not be viewed as reflective upon the particular adjudicator. So long as they are merited, concerns of bias should be raised without fear of repercussion.[64]

## ADJUDICATOR CONDUCT AT HEARINGS

> *Each party, acting reasonably, is entitled to a sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.*[65]

As introduced earlier through sentiments expressed by the Right Honourable Lord Justice Robin Jacob, the way that a decision maker carries themselves can impact perceptions about their delivery of justice. "[G]iven the reality that litigation under an adversarial system is not a "tea party", a judge's impatience, annoyance, anger, sarcasm, derision, rudeness or sharp remarks,"[66] Perell notes, are not usually sufficient to establish bias. Adjudicators are not required to be polite to maintain perceptions of their neutrality; however, their tone, body language and treatment of participants during a hearing can imply bias.[67] While the threshold for proving a reasonable apprehension of bias is high, decision makers should be cognizant of the cues they offer through their conduct and treat people with kindness and respect.

In Saskatchewan, Justice Danyliuk's response to an improperly filed consent order went viral as a result how the adjudicator chose to express "disappointment".[68] When it was revealed that a court clerk mistakenly rejected

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[63] *Tarkington, supra* note 38 at 876.
[64] *Lester, supra* note 33 at 326.
[65] *Szilard v Szasz,* [1955] SCR 3 at 7. While this case pertained to private arbitration, the same principles apply to the public justice system, and across the gender spectrum.
[66] *Perell, supra* note 1 at 111.
[67] Christine M. Venter, "The Case Against Oral Arguments" (2017) 14 Leg Communications & Rhetoric: JALWD 45 at 48-49. This research focuses on confirmation bias, including the notion that adjudicators decide cases based on written submissions and oral arguments either are without value or serve only to allow decision makers to confirm the decision that they have arrived at. Cues that may be taken as bias may not factor into deliberations.
[68] Dan Zakreski, "'Fetch, Judgey! Get it boy!!!': Language in Sask. Queen's Bench ruling sends ripple through legal circles," CBC News, March 1, 2021, online:

additional submissions that would have offered context and clarify the situation, Danyliuk attempted to walk back criticism that damaged the lawyer's reputation:

> *The wording of my initial fiat — while unintended to be harmful in any way and intended to soften my criticism with humour — has blown up in my face. As noted, I have known him for many years — decades, in fact. He was my student in a class I taught in law school. He is highly capable counsel. He has appeared before me many times, doing high quality work. He enjoys an excellent reputation within the practicing bar and before this Court. I regard him as a valuable member of the profession. He is a very good lawyer and a great guy.*[69]

While the incident serves as a reminder of the reach and unpredictability of the Internet, one can wonder how the decision maker's subsequent endorsement of a party's legal representative would have been received in different circumstances. How would the connections mentioned have impacted perceptions of bias if disclosed at the outset of a hearing? Would it be reasonable to have concern about the lawyer-judge connection if prior interactions between the two were stated in this way by the decision maker? It certainly is not unheard of for such sentiments to create obstacles for the appointment of an arbitrator in a private dispute resolution setting.

*Pre-Existing Knowledge*

In the Supreme Court of Canada case of *R. v S. (R.D.)*,[70] a youth court judge drew upon their own general knowledge of "the well-known racial tension in the local area and police behaviour"[71] while coming to a decision that was appealed. Despite this general knowledge falling beyond the particular

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<https://www.cbc.ca/news/canada/saskatoon/language-queens-bench-ruling-ripples-legal-circles-1.5931836. [perma.cc/X7M6-2VFY]. I question the purpose of this approach. What was being accomplished? The judge was not auditioning for a role alongside Judge Judy. Courts of law are not comedy clubs. The adjudicator may not appreciate all the representative is facing - resorting to embarrassment only stands in the way of empathy.

[69] Courts of Saskatchewan, "A fiat ruling worth reading, issued March 4, 2021" (5 March 2021 at 10:22am), online: *Twitter* <https://twitter.com/SKCourts/status/1367858023230701569>, [perma.cc/9WKZ-DWPX], "Saskatoon judge apologizes to lawyer for colourful language in note from the bench," CBC News, March 5, 2021, online: <https://www.cbc.ca/news/canada/saskatoon/saskatoon-judge-apologizes-viral-ruling-1.5938310> [perma.cc/5V73-37SJ].

[70] [1997] 3 SCR 484 (CanLII).

[71] *Groves, supra* note 8 at 511.

circumstances and facts of the case, the Supreme Court determined that it was not pre-judgment, as alleged,[72] and that "experiences and associated preconceptions… were an entirely permissible influence."[73]

Lester supports this, stating that "[t]he requirement for neutrality does not require judges to discount the very life experiences that may so well qualify them to preside over disputes."[74] As with subject matter expertise and empathy, traits that make a capable decision maker also risk introducing grounds for bias allegations.

## ADJUDICATOR CONDUCT BEYOND HEARINGS

> *Justice is portrayed as blind not because she ignores the facts and circumstances of individual cases but because she shuts her eyes to all considerations extraneous to the particular case.*[75]

Bias perceptions can be formed as a result of prior or existing professional relationships between the adjudicator and those who come before them - including legal representatives whom an adjudicator knows and regularly interacts with, as demonstrated by Danyliuk's comments. Matthew Groves acknowledges, however, that life beyond the bench can justify an adjudicator's connections and relations.[76] When adjudication is one of several roles that a decision maker fulfills professionally, reasonable cause for concern may be reduced through the expansion of plausible reasons for an adjudicator's connections unrelated to a case at hand. Consideration must be given to the motive for and purpose of such associations and interactions - including if they directly influence deliberations of the decision maker in any particular case.

In *Hunt v The Owners, Strata Plan LMS 2556*,[77] private communications between one party's lawyer and the arbitrator served to set aside the arbitrator's decision due to bias perceptions. The British Columbia Court of Appeal acknowledged that such professional relationships are not unheard of and, "[i]n such context, the legal professionals involved must be especially

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[72] *Perell, supra* note 1 at 103.
[73] *Groves, supra* note 8 at 511.
[74] *Lester, supra* note 33 at 329.
[75] *Broadbent, supra* note 49 at 337. Quoting the Court in *Locabail (UK) Ltd. v Bayfield Properties [2000] 1 All E R 65 at 69.*
[76] *Groves, supra* note 8 at 501.
[77] 2018 BCCA 159.

vigilant to maintain appropriate professional distance in order to properly perform their roles."[78] Personal relationships play a role as well. This includes those whom decision makers socialize with – a sentiment captured in a lyric of the aforementioned Drake, as he boasts "I did brunch with the judge we appearin' before"[79] to imply that a prior interaction with an adjudicator would garner favour.

Practically, the timing of an interaction and nature thereof makes a difference. A decision maker discussing an active case privately with one party's legal representative or having a close personal relationship with a party appearing before them is entirely inappropriate; yet, there may be nothing untoward about an adjudicator and legal representative sharing a meal or otherwise encountering one another before they become involved in the same case together. Otherwise, a claim of bias apprehension could be made if a legal representative previously appeared before a particular decision maker or if they both have subject matter expertise and related experience in overlapping circles.

Robert F. Reid considered the notion of appropriate professional distance, questioning the extent of contact beyond a hearing that tribunals should have with those who come before them. There may be a need to temporarily distance relationships during a hearing to avoid appearing biased.[80] "This overriding need for neutrality, in appearance as well as in fact, dictates a standard requiring freedom from even the appearance of bias."[81] This consideration gets complicated when hearings take place on an asynchronous basis, are available for the public to access online or otherwise when keeping appropriate distance requires more than the decision maker not sharing an elevator ride with a party before them as they go for lunch.

Adjudicators who are aware of circumstances that may give rise to perceptions of bias can refuse a case or raise concerns with parties prior to becoming involved. Where circumstances warrant, with private arbitration especially, it could be acceptable for parties to waive potential conflict concerns and pass on the prospect of alleging bias.[82] "[D]isclosure should be made only if the judge

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[78] *Ibid* at 137.
[79] Drake feat. Rick Ross. "Lemon Pepper Freestyle," *Scary Hours 2*. March 9, 2021 at 02:44.
[80] Robert F. Reid, "Bias and the Tribunals" (1970) 20 U. Toronto L.J. 119 at 119 (footnote #3).
[81] *Ibid* at 121.
[82] In an administrative tribunal context, this practice risks being perceived to offer parties a role in adjudicator selection. This approach applies more to private adjudicative processes.

thinks waiver is possible."[83] An adjudicator need not provide a detailed explanation as to why they are not taking on a case. In the public justice context, parties may not even be aware that another adjudicator was ever considered.

Broadbent considered the notion of judicial bias extending beyond the adjudicator themselves, through what is described as *chains of connection* surrounding those with whom a decision maker is linked.[84] The extent and nature of such chains should be kept reasonable to avoid a sentiment of "[m]y best friend's sister's boyfriend's brother's girlfriend heard from this guy who knows this kid who's going with a girl…"[85] from going too far in this respect.

It is important to remember that the "expansion of the media has meant greater publicity for, and public scrutiny of, judicial activities both on and *off* the bench."[86] These considerations expand how perceptions of bias, pre-judgment and conflict can be formed, giving rise for a need to safeguard against leaving decision makers vulnerable to complications surrounding unreasonable bias apprehensions and clarify the types of connections that are appropriate in this age of greater transparency.

Consideration of an adjudicator's relationships are further complicated when one looks online. Susan Nauss Exon found that "the mere fact that a judge maintains a social connection does not create a conflict of interest because many reasons exist for a judge to participate in social media."[87] Yet, Exon notes that "judges "friending" lawyers on social media… could project an appearance that the lawyer in some way may influence the judge."[88] Guidelines that suggest decision makers should participate on social media in a more reserved manner than the general public are sensible in this respect.[89] I suggest this is especially the case on platforms that exist to facilitate personal, rather than professional, relationships – such as Facebook as compared to LinkedIn.

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[83] *Lester, supra* note 33 at 337.
[84] *Broadbent, supra* note 49 at 336.
[85] *Ferris Bueller's Day Off*. Dir. John Hughes. Paramount Pictures, 1986. Film at 06:18. This exaggerates looking into chains of connection with unreasonable apprehensions of bias. As implied in the film, such may distort reality.
[86] *Broadbent, supra* note 49 at 336 [emphasis added].
[87] Susan Nauss Exon, "Ethics and Online Dispute Resolution: From Evolution to Revolution" (2017) 32 Ohio St. J. on Disp. Resol. 609 at 641. [*Exon*].
[88] *Ibid*.
[89] *Ibid*.

Interactions on social media alone, however, are usually not enough to create a reasonable apprehension of bias. In the case of *Toronto Standard Condominium Corporation No. 1466 v. Weinstein*, the Ontario Superior Court of Justice found that an arbitrator liking tweets circulated by a law firm appearing before them did not suffice to constitute bias. The court agreed with the arbitrator that "merely having online connections or making comments on social media, do not imply the level of relationship enough to imply bias."[90] The breadth of an adjudicator's social media connections may also be a factor. Consider the perception that could be formed if a lawyer appearing before an adjudicator is one of only twenty connections as compared to one of a thousand connections the adjudicator has on a social media platform.

There is good reason for a decision maker to be more reserved on social media than an ordinary user.[91] However, their role as an adjudicator does not ordinarily warrant preventing the decision maker from having an online presence at all. Former Dean of Osgoode Hall Law School, Justice Lorne Sossin, has demonstrated this by continuing to be active on Twitter after ascending to the bench.[92]

*Subject Matter Expertise*

There can be great benefit in involving an arbitrator who specializes in the area of law applicable to the dispute.[93,94] An advantage of administrative tribunals – with a more focused jurisdiction than the courts – is the benefit of adjudicators offering subject matter expertise. Yet, such expertise can also complicate considerations of partiality. If a decision maker expresses views about issues related to their area of knowledge, they risk the formation of perceptions that they will pre-judge cases involving those issues.[95]

Meierhenry notes that "[d]isqualification based on an adjudicator's pre-judgment usually hinges upon a public statement or expressed opinion."[96] Yet, Broadbent expresses that "[i]t would be unfortunate if the judgment were to inhibit valuable judicial contributions to debates on matters of law and policy."[97]

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[90] 2021 ONSC 1306 (CanLII) at 25.
[91] *Exon, supra* note 87 at 643.
[92] https://twitter.com/lornesossin (@lornesossin) [perma.cc/XU3G-XQYF].
[93] *Broadbent, supra* note 49 at 344.
[94] Subject matter expertise can extend beyond the practice of law in a particular field.
[95] *Broadbent, supra* note 49 at 343-344.
[96] *Meierhenry, supra* note 35 at 555.
[97] *Broadbent, supra* note 49 at 344.

Accordingly, decision makers should be free to share their valuable insights and expertise by speaking at conferences and contributing articles of interest to their field without being accused of bias for having views. This embraces the same sentiment as that related to social media activity in terms of judicial contributions being appropriately guarded; yet, supports the notion that adjudicators should not be prevented from participating at all. Decision makers keeping opinions to themselves would not stop them from having related bias in any event. Thus, in addition to enlightening their audience, judicial and quasi-judicial participation in debates and presentations offers greater transparency.

The solution to concerns of adjudicator bias is not for decision makers to just keep their opinions to themselves. Still, a decision maker should be guarded in their commentary. While contributions of this nature help establish one as an expert in their field and lend support to confirming capability and qualification, adjudicators have good reason to exercise caution. Especially while actively adjudicating, adjudicators must give thought to how they present their views - so as not to give off the impression that they have a closed mind.[98,99]

Ultimately, an adjudicator is unlikely to be disqualified for having rendered prior decisions or public opinions on similar matters to those which are before them.[100] A decision maker is not expected to be a *tabula rasa*.[101] Such would be indicative of a "lack of qualification, not lack of bias."[102] An adjudicator can possess thoughts and understanding; they must be open to persuasion by the facts, the law and the arguments made in the case at hand.[103]

Subject matter expertise, particularly coupled with the notion of *active adjudication*,[104] can promote adjudicator empathy. This supports decision

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[98] *Ibid* at 343-344.

[99] There is a distinction between commentary shared prior to an adjudicator being empowered to impose a decision and that expressed while sitting as the decision maker of an issue.

[100] *Cooper, supra* note 7 at 677.

[101] *Meierhenry, supra* note 35 at 556. Quoting the Court in *Laird v Tatum, 408 (1972) U.S. 1 at 835.* An adjudicator should not be a "blank slate", they should be qualified to decide the case.

[102] *Ibid.*

[103] *Ibid* at 557.

[104] Michelle Flaherty, "Best Practices in Active Adjudication" *Ottawa Faculty of Law Working Paper Series* No. 2015-23 (July 17, 2015), online: https://ssrn.com/abstract=2631175. The concept of offering active adjudication in a more inquisitorial form of hearing includes applying the knowledge adjudicators have to each case before them. This could help address

makers being inquisitorial, to allow for a fair proceeding and just result. The adjudicator's subject matter expertise may combat biases that emerge when there is a lack of understanding, pertaining to procedure and otherwise, in support of justice and fairness.

## A SUPREME COURT VIEW

For context surrounding the threshold of what constitutes a reasonable apprehension of decision maker bias, the prior involvement of an adjudicator in a matter before them was addressed by the Supreme Court of Canada in *Wewaykum Indian Band v Canada*.[105,106,107]

An apprehension of bias allegation was made as Justice Binnie was involved in claims before the Supreme Court prior to sitting at the nation's highest court. When assessed, the prior involvement was considered to be "supervisory and administrative and insufficient to cause a reasonable person to have an apprehension of bias."[108] Justice Binnie did not recall being previously involved in the matter and this "was accepted as a relevant factor in determining whether a reasonable person would conclude that the adjudicator had a conscious or unconscious bias."[109]

If a decision maker's direct prior involvement in a matter did not suffice to create a reasonable apprehension of bias, it would seem a stretch for an adjudicator having common circles, engaging in social interactions, also earning their living through other endeavours, speaking at conferences or being present on social media – unrelated to a case – to constitute such. This is not to disregard legitimate concerns about apprehension of bias, it serves to clarify that a high threshold must be met for an apprehension of bias to be reasonable. So long as a decision maker is cognizant of these considerations and conducts themselves fittingly, they are likely capable of behaving appropriately.

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potential systemic bias, such as that which ties a party's chances of success to the amount of legal costs they can afford to spend on their case.

[105] 2003 SCC 45.

[106] In this spirit of this paper, I feel inclined to disclose that my undergraduate studies at Trinity College overlapped those of Justice Binnie's daughter, Allie. While we had *chains of connection* and attended the same social gatherings in the mid-1990's, in no way do I feel that this impacts how I have presented the cited case or influenced my research deliberations in the course of writing this paper. Any suggestion that this connection would have done so offers what I consider to be an example of an unreasonable apprehension of bias.

[107] *Wewaykum Indian Band v Canada*, 2002 SCC 79.

[108] *Perell, supra* note 1 at 115.

[109] *Ibid*.

## CONCLUSION

> *[T]he point at which desirable experience becomes unacceptable baggage remains unsettled.*[110]

While the threshold to prove a reasonable apprehension of bias is high, decision makers are wise to be aware of the potential impact of their actions during and beyond hearings, both in-person and online, to preserve and promote perceptions of justice being done. It is important to recognize the impact of social media and that the reach of the Internet can give rise to perceptions of adjudicator bias. Decision makers must manage these contemporary considerations and maintain appropriate distance in the course of hearing, deliberating upon and deciding a case. This is not to suggest that adjudicators are not allowed to give presentations, write articles, maintain a social media presence or have lunch. It means that they must participate in such activities on a more guarded basis than those who are not involved in decision-making, aware of how such may impact perceptions of partiality. To that end, timing is crucial.

Decision makers should be less sensitive to receiving legitimate expressions of concern surrounding their partiality than many have been historically. Particularly as it can be considered a duty of a legal representative to raise any apprehension of bias that they are aware of, the mere act of expressing a concern should not be considered forbidden or to automatically come with risk of repercussion. It should not be considered to be a poor reflection on a decision maker for an apprehension to be raised – allowing for legitimate concerns to be considered maintains the integrity of dispute resolution processes and the decision makers governing them.

The challenge of addressing the historical stigma of expressing a concern of adjudicator partiality is that it comes with greater opportunities for manipulation. False claims of decision maker bias can be made in bad faith, in a number of ways, and serve to both stand in the way of justice for the case at hand and threaten the integrity of the entire dispute resolution process generally – frustrating endeavours to correct systemic bias and preventing the offering of a fair process to all. Still, it must be remembered that a high threshold exists to actually constitute a reasonable apprehension of bias.

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[110] *Groves, supra* note 8 at 510.

Consideration must be given to the circumstances and who the decision maker serves. In the public justice system, there is a duty to the public-at-large that does not exist in the same manner in private dispute resolution. Ultimately, a decision maker has a duty to sit when a reasonable apprehension of bias does not actually exist; however, the adjudicator's role in determining this - and the increased transparency offered in this day and age - make the management of perceptions surrounding the delivery of just and fair outcomes complex and challenging.

Conflict concerns must be assessed practically, realistically and in the interest of equipping adjudicators to fulfill their role appropriately – without being left vulnerable to tactics of manipulation that risk bringing them into disrepute or sitting where they should not sit. As demonstrated by the various adjudicators cited in this paper, decision makers offer valuable contribution and insight into matters of interest; it is simply that they must contribute appropriately to ensure that they deliver justice and are seen to do so, open to persuasion in the course of rendering decisions.

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# THE ART OF ROLE PLAY IN DISPUTE RESOLUTION TRAINING BOOK REVIEW

Colin Rule
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Shadow of the Law Publications



Volume One



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## Contents

## ABSTRACT

A legend of Online Dispute Resolution reviews Marc Bhalla's book on the use of role play exercises in dispute resolution training.

## ABOUT THE AUTHOR

Colin Rule is President and CEO of Mediate.com. In 2011 Colin co-founded Modria.com, an Online Dispute Resolution (ODR) provider based in Silicon Valley, which was acquired by Tyler Technologies in 2017. From 2017 to 2020 Colin served as Vice President of ODR at Tyler. From 2003 to 2011 Colin was Director of Online Dispute Resolution for eBay and PayPal. He has worked in the dispute resolution field for more than 25 years as a mediator, trainer, and consultant. He is currently Co-Chair of the Advisory Board of the National Center for Technology and Dispute Resolution at UMass-Amherst and a Non-Resident Fellow at the Gould Center for Conflict Resolution at Stanford Law School.

Colin co-founded Online Resolution, one of the first online dispute resolution (ODR) providers, in 1999 and served as its CEO and President. In 2002 Colin co-founded the Online Public Disputes Project which applied ODR to multiparty, public disputes. Colin also worked for several years with the National Institute for Dispute Resolution (now ACR) in Washington, D.C. and the Consensus Building Institute in Cambridge, MA.

Colin has presented and trained around the world for organizations including the Singapore Mediation Center, the Federal Mediation and Conciliation Service, the International Association of Court Administrators, the International Chamber of Commerce, and the CPR Institute for Dispute Resolution. He has also lectured and taught at UMass-Amherst, Harvard, Yale, Stanford, Pepperdine, Southern Methodist University, and Santa Clara University.

Colin is the author of *Online Dispute Resolution for Business*, published by Jossey-Bass in September 2002, and co-author of *The New Handshake: Online Dispute Resolution and the Future of Consumer Protection*, published by the ABA in 2017, as well as many dozens of articles in ADR journals and publications. He serves on the boards of the Consensus Building Institute and the PeaceTech Lab at the United States Institute of Peace. Colin received the *Frank Sander Award* from the American Bar Association in 2019 and the *Mary Parker Follett Award* from the Association for Conflict Resolution in 2013. He holds a Master's degree from Harvard University's Kennedy School of Government in conflict resolution and technology, a graduate certificate in dispute resolution from UMass-Boston, a B.A. from Haverford College, and he served as a Peace Corps volunteer in Eritrea from 1995-1997.

## BOOK REVIEW

Marc Bhalla, *The Art of Role Play in Dispute Resolution Training: A Practical Guide for Instructors with Insights for Students* (Canada: Shadow of the Law Publications, 2020).

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I remember the role play from my first mediation training back in the late 1980s. I can recall sitting in the middle of a ring of chairs with two other volunteers, feeling nervous and self-conscious. I remember being worried I would mess up, and challenged by the material, and eventually (once it was over) quite proud of myself. It was exciting to take the concepts the trainer had given us and to try to put them into actual use. But I also think I remember that role play because I enjoyed it. Sure, it was interesting to talk about mediation in the abstract and to learn best practices and tips from experienced mediators, but nothing replaces the visceral experience of getting dropped into a simulation and trying out new skills first hand. That role play made an impression that's still with me, thirty years later.

That's one of the reasons why I was interested to check out the new book The Art of Roleplay in Dispute Resolution Training: a Practical Guide for Instructors with Insights for Students by Marc Bhalla (160 pages, Shadow of the Law Publications, 2020). Marc Bhalla is an experienced mediator, arbitrator, and trainer based in Toronto, Canada. He did his graduate work in dispute resolution at Osgoode Law School and the University of Windsor, and over the years he has published more than 100 articles in dispute resolution. He is an in-demand trainer across Canada, particularly in the area of condominium dispute resolution (to wit: he is the only dispute resolution practitioner to be honored with the distinguished service award by the Canadian Condominium Institute).

As soon as I opened the book it was obvious from the first page that the author is a big fan of roleplays. As he says in the Introduction, "There is something about experiencing what it is like to have a different perspective that is not only enjoyable but also enormously enlightening." There is a reason why negotiation classes are often the most oversubscribed and highly rated classes in law schools: role plays. Role plays introduce students to realistic situations, enabling them to find space for exploration, creativity, and integrative problem solving. Plus, when done well, they're a heck of a lot of fun.

The book is organized into two parts. Part One talks about the structure of a roleplay, how to prepare and ensure the participants are comfortable, and how to create a safe environment for participants to really engage with a role. The author details some memorable experiences from his use of real plays and even eloquently lays out the arguments against using role plays (e.g. overuse and artificiality). He talks about role play disasters he experienced, such as ethical lines crossed, a lack of cultural fluency, or surprise role plays that didn't work out the way the instructor intended. Then he focuses on practical advice around how to develop and run effective role plays that are relatable and understandable, creating effective groupings, and enabling participants to bow out of an exercise if they so prefer. He provides a set of presentation keys for instructors with advice about how to distribute roleplay instructions, setting up the room, scheduling an appropriate amount of time, and helping participants make a role play their own. He then also covers how to debrief role plays for maximum effect, including time for feedback and reflection, using good questions to get at the substance while making sure that everyone enjoyed the exercise.

Part Two presents the actual scenarios, including role plays called The Tickets, The Icebreaker, The Contract, The Intervention, The Business Deal, and Complicated. Each roleplay is followed up with an analysis section that helps to deepen learnings from the preceding scenario.

The included role play fact patterns are very well thought through, with confidential instructions for both mediators and participants. The role plays also do not depend upon knowledge of or experience with the law for participants to get any benefit.

The author explains that effective role plays provide the 3 R's: they resonate with students, they are perceived as realistic, and they are considered relevant. The author also has a section on conducting role plays virtually, which is increasingly necessitated these days by the global pandemic.

It is very clear that the author has extensive experience in using role plays as a teaching tool, and this book enables others to benefit from the author's hard-earned wisdom, increasing the likelihood that role plays will be effective and enjoyable. I'd also note that I usually skip over the endnotes in a book, but this one has an extensive set of endnotes that offer not only citations and further reading, but also interesting (and entertaining) additional observations and anecdotes that further help to contextualize the practice tips shared.

You can present theoretical information in a lecture format all you like, but when students are put into the real world scenario of a role play they have a chance to experience the challenge of turning knowledge into action themselves. The benefits of experiential education are well documented, and only practice can introduce a student to the improvisational nature of real world mediation. Debriefing role plays can also reinforce and expand upon the takeaways from the experience, helping to deepen the learning and make a stronger impression. As the author puts it, “I believe that enjoyment is key for a role play to be an effective educational tool. When students enjoy taking part in exercises, they're more likely to retain what they learn.”

It is also true that role plays are a great way to meet your fellow trainees. I’ve seen rooms full of silent strangers open up and start laughing as a result of a good role play. I’ve even had classes where participants will continue negotiating in their roles even after the role play is over and the debrief completed -- they’re still trying to figure out the best resolution even after we’ve broken for lunch and moved on to the next topic.

Mediation trainers and educators will find this book to be very valuable because it offers a wide variety of scenarios that have been well thought through and optimized for exposing participants to key skills of mediation. I personally have spent long hours over a keyboard the night before a training endeavouring to craft a fact pattern that will be engaging but not too difficult, challenging but not impossible, and provocative but not upsetting. It is great to have a book filled with tested scenarios at the ready so you don’t have to craft them yourself without knowing how they’ll go over with actual participants.

I recommend this book to any trainers who are looking to optimize the use of role plays in their mediation trainings. It is the most thorough volume I have encountered that addresses all the key considerations, including potential challenges and pitfalls, while offering practical feedback (grounded in actual experience) for ensuring your role plays will be successful.

Attribution
This book review originally appeared on Mediate.com: https://www.mediate.com//articles/roleplayreview.cfm [perma.cc/Q8VV-8PY6]. It has been published in this journal with the author’s consent.