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Current Practices of Online Dispute Resolution – the Canadian Experience

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Introduction

Canada's courts enjoy a deserved reputation for honesty and fairness, and judges are widely respected. However, many people, from the Chief Justice of Canada on down, express concerns that the traditional court system is expensive and often slow, and that access to justice is a challenge for many people. A number of solutions have been put in place over the years. Specialist tribunals have been created for particular kinds of disputes, sometimes involving a regulatory as well as a dispute-resolution purpose: the Labour Relations Board, the Landlord and Tenant Board, the Securities Commission, among many others. Specialized sections of the courts have been created: the Small Claims Court, the Commercial List. Simplified rules of procedure have been instituted.

Alternative forms of dispute resolution have also grown up: arbitration, mediation, early neutral evaluation – sometimes connected to the courts but often independent. Canada was the first country to implement the United Nations Model Law on International Commercial Arbitration (perhaps because its existing law was so inadequate that the Model Law was needed more there than elsewhere), and it has begun to implement the Model Law on International Commercial Conciliation as well. Mediation and arbitration, together (as 'med-arb') or separately, are widespread in commercial and family disputes.

Because Canada is a large country with a smallish population for its size, it has always emphasized the importance of communications and has developed an expertise in communications technology. The Internet is only the latest version of this technology. For some years in the past decade, Canada ranked first in the world in the proportion of its residents online.

With these backgrounds in alternative dispute resolution and communications, Canada has been fairly comfortable moving dispute resolution online. This paper gives an overview of some Canadian initiatives in this field. No claim is made that these initiatives are unique or even original, but they may be of interest to those who face similar problems in seeking similar goals.

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Initiatives from Quebec

eResolution

An early examples of ODR was the resolution of domain name disputes. Both their subject matter and their nature made them good candidates for resolution online. The domain registrars developed the Uniform Dispute Resolution Policy (UDRP) for that purpose. One of the first three organizations to offer such services was eResolution, a body that grew out of the expertise in information technology and law at the Centre de recherches en droit public (CRDP)¹ at the Université de Montréal (and out of the Cybertribunal project mentioned below). It began with a largely academic roster of arbitrators, but developed into a diverse international group. Many of the arbitrators were in fact shared with the other two major service providers, the World Intellectual Property Organization (WIPO) and the National Arbitration Forum (NAF).²

The economic model for ODR for domain name disputes was promising: mandatory participation by those who wanted to keep their domains in the principal worldwide registers for .com, .org, and .net. A fee was charged to the parties to cover costs. Since participation was online, no travel costs were incurred. Enforcement was easy too: if the complainant lost, no action needed to be taken; if the complainant won, the registrars were readily available to transfer the domain, whether the registrant agreed with the decision or not.

Nevertheless e-Resolution ran into problems. One suggestion is that it was too neutral as a neutral: the complainants did not like its results, in which the registrants won substantially more disputes than with the other two dispute resolution providers. Since the complainants chose the provider, business for e-Resolution was more tentative than for the others (it never had the visibility of the other two providers in any event). However, it shut its virtual doors for other reasons in 2001, after resolving over 500 disputes from around the world.³

That the model was viable is shown by its adoption at about the same time by the new Canadian Internet Registration Authority (CIRA),⁴ established to govern the .ca domain when it was made available to the general public. The Canadian Dispute Resolution Policy closely resembles the UDRP and has operated successfully – under the management of CIRA – for over a decade.⁵

Cybertribunal

eResolution had grown out of a more ambitious project: Cybertribunal,⁶ founded in 1997. That project,

1 The Centre and its activities are described in English (to some extent – many of its publications are in French only) at <http://www.crdp.umontreal.ca/en/>.

2 A history of the UDRP and of e-Resolution appears in Michael Geist, *Fair.com?: An Examination of the Allegations of Systemic Unfairness in the ICANN UDRP*, (2001) available at <http://aix1.uottawa.ca/~geist/geistudrp.pdf>.

3 Ibid, page 3 note 14. See also K. Benyekhlef, *La résolution en ligne des différends de consommation: un récit autour (et un exemple) du droit postmoderne*, in Pierre Lafond (ed), *L'ACCÈS DES CONSOMMATEURS À LA JUSTICE*, Yvon Blais : Montréal, 2010, 89, 99.

4 Canadian Internet Registration Authority (CIRA) is described at <http://www.cira.ca>.

5 CIRA's dispute resolution policy is available at <http://cira.ca/legal/cdrp/>. About 200 disputes have been resolved to date.

6 An overview can be found in N. Vermeys, *The CRDP'S current and future cyberjustice projects*, Law and Technology Conference 2008, available at http://www.crdp.umontreal.ca/fr/activites/evenements/laboratoire_ang.ppt. A popular description aimed at lawyers is in Lucie Déjardins, *Les internautes auront leur cybertribunal*, (1998) 30 JOURNAL DU

also under the aegis of the CRDP, aimed to provide economical and confidential mediation and arbitration services, in order to promote e-commerce. It operated a software platform that allowed consumer-merchant negotiation and then facilitated dispute resolution. It went beyond the simple exchange of email systems then current. While the services were provided for free during its experimental stage, a more permanent arrangement would have required fees from merchants who wanted to make the service available in order to attract business. Though it was completely voluntary for both parties, and did not have the advantage of institutional links with organizations that produced 'captive' disputes (as Square Trade did for years with eBay), it did attract about fifty disputes. The number was not really sufficient to claim success in principle for the system, but it was at least promising. However, it ceased operations in 1999 for want of funding. The people behind these initiatives did not abandon the field, however. They have spent a lot of time and effort in developing ODR method for the justice system: 'cyberjustice'.⁷

EcoDir

The CRDP was also part of a group that created 'EcoDir', an online mechanism for resolving consumer/business disputes.⁸ One sees the common themes of informality, confidentiality and voluntariness. This process too did not survive into the medium term, for want of financial support rather than for demonstrated defect in its technical or legal operation.

Cyberjustice Laboratory

The current project of the Montreal group is the Cyberjustice Laboratory.⁹ It seeks "to create a research infrastructure in which to develop different software solutions to the many problems currently plaguing the justice system." To do so, it breaks down its research into 'techno-legal' objectives and 'socio-legal' objectives. The former involve 'software modules' that help to automate, in a generic way, the main procedural practices of a justice system. Thus there are to be modules for case management tools, simple and accessible teleconference systems, technologies to improve access for people with disabilities, court document preparation tools, and many others. The 'laboratory' element of the work allows for testing of these technologies before anyone tries to use them in the real world. The other aspect of the 'techno-legal' work is to figure out the extent to which the existing legal rules do permit the use of the technology and how to optimize the technology in the current legal framework.

The 'social-legal' elements will help identify social, psychological and cultural obstacles to the more efficient and effective use of technology in the justice system. Ultimately they will propose changes to

BARREAU No. 14, available at <http://www.barreau.qc.ca/pdf/journal/vol30/no14/cybertribunal.html>. A deeper review is in Éric Caprioli, *Arbitrage et médiation dans le Commerce électronique (L'expérience du « Cybertribunal »)*, 2 REVUE DE L'ARBITRAGE 225 (1999), available at <http://www.caprioli-avocats.com/commerce-electronique-et-internet/44-arbitrage-mediation>. An appraisal in retrospect is found in Benyekhlef, above, note 3, at 97 – 99.

7 An early attempt to synthesize the legal status of cyberjustice, by some of the main participants in these projects, is found in François Sénécal & Karim Benyekhlef, *Groundwork for Assessing the Legal Risks of Cyberjustice*, (2009), 7 Can JI Law and Technology 41, available at http://cjlt.dal.ca/vol7_no1/pdf/senecalbenyekhlef.pdf.

8 EcoDir's own site is no longer functional, but the program is described by one its Belgian partners at http://baseswiki.org/en/Electronic_Consumer_Dispute_Resolution_Belgium. See also Benyekhlef, above note 3, at pp 103 – 106.

9 The project description is available at http://www.laboratoiredecyberjustice.org/en/index_en.html. The leadership has expanded to include other Quebec universities; a demonstration model of a high-tech courtroom is located at McGill University.

the legal framework to permit the best use of the technologies generally.

...the Laboratory's goal is not to simply transpose into the virtual world procedural rules that were developed in the physical world. Simply putting rules of procedure and evidence online is not sufficient and might not take full advantage of the potential of information and communications technologies. It also might not take into account the psychological, social and cultural contexts that led to adoption of the rules.¹⁰

The work of the Laboratory is firmly multidisciplinary – not only lawyers and computer scientists are involved – and it is widely supported by government, academic and private interests with an interest in the justice system.¹¹ While the broader project is not limited to ODR issues, such issues are central to its concerns. For this reason the CRDP has been given observer status at UNCITRAL's Working Group on Online Dispute Resolution. Two of the principal researchers have a regular column on ODR issues in the main Canadian law blog, *Slaw.ca*.¹²

Initiatives from British Columbia

Aside from the first-rate reflection and innovation in Montreal, much of the action in ODR in Canada these days is found in its Pacific Rim province, British Columbia. The province has a long interest in methods of conflict resolution. The British Columbia International Commercial Arbitration Centre was the first such body in Canada.¹³ (The only other one was in Quebec.) The University of Victoria used to feature an Institute of Dispute Resolution and still offers a graduate degree in that topic.¹⁴ Victoria was also the site of the seventh of the series of international ODR forums held under the auspices of the United Nations. Shortly before the first meeting of the UNCITRAL Working Group on ODR, an international conference was held in Vancouver on ODR and consumers. Many of the issues subsequently on the UNCITRAL table were canvassed at that meeting.¹⁵

One finds ODR activity in British Columbia in the private sector and in the public sector.

Smartsettle

One of the notable private-sector operations is Smartsettle.¹⁶ Smartsettle has proprietary software that helps find common ground in disputes. It sounds similar to that of Cybersettle¹⁷ in the United States, a method of discovering whether what the parties want out of a dispute overlaps and then proposing a

10 See the Cyberjustice Laboratory site at <http://www.laboratoiredecyberjustice.org/en/programme.html>.

11 See the Cyberjustice Laboratory site on 'partners' at <http://www.laboratoiredecyberjustice.org/en/partners.html>.

12 See for example Karim Benyekhlef & Nicolas Vermeys, *A Plea for Court-Sanctioned ODR*, *Slaw.ca* (August 2012), available at <http://www.slaw.ca/2012/08/01/a-plea-for-court-sanctioned-odr/> and Karim Benyekhlef & Nicolas Vermeys, *Do We Need Exclusivity for ODR?*, *Slaw.ca* (March 2012), available at <http://www.slaw.ca/2012/03/26/do-we-need-exclusivity-for-odr/>.

13 The BC International Commercial Arbitration Centre is described at <http://bcicac.com/>. It is one of the two providers of domain name dispute resolution services to CIRA (above, note 5) and thus is itself engaged in ODR.

14 A description of the Master's degree in dispute resolution is available at <http://www.uvic.ca/hsd/publicadmin/programs/graduate/maInDisputeResolution/index.php>.

15 Materials for the Vancouver consumer ODR conference of November 2010 are available at <http://www.odrandconsumers2010.org/>. The final communiqué sums up the main topics discussed. It is available at <http://www.odrandconsumers2010.org/2010/12/07/leigh-rule/>.

16 A description is available at <http://www.smartsettle.com>.

17 A description of Cybersettle is available at <http://www.cybersettle.com/pub/>.

solution in the area of overlap according to its own criteria.¹⁸ The company admits that this system, which it calls Smartsettle One, works best with two parties with a single issue.

However, Smartsettle has gone beyond this. In particular it is active in family disputes, where many issues typically arise and few of them turn on finding the right point on a scale. For these disputes Smartsettle offers 'facilitators' from various professional disciplines, accessed online (or sometimes in person).¹⁹ The company claims that its decision-making software helps to arrive at solutions to these issues as well.

In this pursuit of solutions for more complex disputes, Smartsettle offers its 'Smartsettle Infinity' package, which purports to resolve multi-party, multi-issue differences.²⁰ It is hard to tell from the web site whether this product is an ambition or whether it is offered in practice today. Likewise it is hard to tell if Smartsettle Infinity would save the disputants money through anything but the electronic communications that can help avoid travel costs for remote parties.

Mediate BC

The other main private-sector operation in British Columbia is Mediate BC.²¹ As its name suggests, it restricts its activities to mediation. One of its more interesting initiatives was its pilot project to do family mediation at a distance, which involved online technologies.²² "The technologies used in the mediations were the one that best suited the people involved. Technologies available to clients included telephone, email, web conferencing, computer videoconferencing and online platforms dedicated to mediation."²³

At this stage one of the most helpful documents from Mediate BC is *Mediation from a Distance: Suggested Practice Guidelines for Family Mediators*.²⁴ It discusses the various types of information technology (ICT) available and suggests how to decide which is most appropriate for a particular dispute.²⁵ It deals with technical issues like ensuring confidentiality as well as procedural concerns like screening the parties for suitability for mediation when one is dealing at a distance. It then describes how to manage the mediation itself from a distance, when the mediator does not have, for example, the direct appreciation of parties' body language or other cues as to their thoughts or emotions that one takes for granted in person.

18 Smartsettle's description of this process is available at <http://www.smartsettle.com/home/products/smartsettle-one/>.

19 Smartsettle's Family Law Brochure is available at <http://www.smartsettle.com/smart2011/wp-content/uploads/family/familyBrochure.pdf>. The process is described, with an introductory video, at <http://family.smartsettle.com/the-process/>.

20 The 'Infinity' package is described at URL.

21 A description is available at <http://mediatebc.com>.

22 An overview of the distance program is available at <http://mediatebc.com/Mediation-Services/Family-Mediation-Services.aspx>. This page offers links to analysis and evaluation of various elements of the project and will have later in 2012 a link to the formal final evaluation of the project by the government. The project also ran a blog dealing with the issues it encountered and the solutions it attempted. The blog is available at <http://distancemediation.ca/>.

23 Ibid.

24 British Columbia Media Roster Society, June 2010, available at http://mediatebc.com/PDFs/1-2-Mediation-Services/Guidelines_Mediating_Distance.aspx.

25 The blog referred to in note 22 pointed to a longer document on choosing a videoconferencing 'platform' for distance mediations, available at <http://distancemediation.ca/2012/04/02/picking-from-the-peck-of-platforms-videoconferencing-platforms-that-is/>. It evaluates six criteria on which one might make such a choice, not including the cost of the system.

Consumer Mediation Project

Turning to public sector initiatives, the B.C. government recently ran a time-limited project to test the online resolution of consumer disputes.²⁶ The Consumer Protection office screened complaints from consumers to see if they were appropriate for ODR. If so, the consumer was invited to submit the complaint, which the office then sent on to the business. If the business agreed to participate, then both parties were entered into the system, and could communicate with each other through the 'platform'. If progress was not being made, the consumer could request the involvement of a neutral third party to help.²⁷ Since it was a pilot project, there was no cost to either party to participate.

Although the project was scheduled to wind up in the spring of 2012, the web site appears to be active in September. No evaluation is available to date, or any indication of the number of people who took advantage of the system to resolve their disputes, successfully or not.

Small Claims ODR Initiative

In May 2012, the B.C. Legislature adopted the *Civil Resolution Tribunal Act*.²⁸ It creates (when it comes into force in a year or so) a new kind of tribunal to hear 'strata title' (condominium) disputes and disputes within the jurisdiction of the Small Claims Court (involving less than \$25,000) if the parties agree. The disputant uses the BC web site to learn about dispute resolution techniques, to discuss the dispute with the other side, and to try to resolve the dispute themselves with the 'online dispute resolution services' provided by the tribunal's web site.²⁹

Online dispute resolution services are defined as 'dispute resolution services that are provided by way of electronic communication tools and are intended to assist parties in resolving a dispute by agreement without direct assistance from a tribunal officer or person engaged or retained by the tribunal to provide facilitated dispute resolution services.'³⁰

Electronic communications tools are defined as including 'a computer program, or other electronic means, used by way of the internet or otherwise, to initiate an activity or to respond to electronic information, record or activities in whole or in part without review by an individual at the time of the activity or response.'³¹

If unassisted efforts do not succeed, the parties may ask to involve a neutral third party to do mediation – with the payment of fees (the process having been free up to this point). The tribunal office then actively manages the case. If no agreement is possible, the case manager prepares the parties and the case for adjudication. Adjudication will be done by a listed adjudicator selected by the chair of the tribunal, normally based on online submissions only. However, the adjudicator has discretion to hear argument by phone or video. Only rarely will the parties face each other in an oral hearing. Decisions of the adjudicator may be filed and enforced like normal court judgments.

26 Consumer Protection BC, *Protect Yourself: A pilot project to help consumers and businesses resolve disputes online*, available at http://www.consumerprotectionbc.ca/images/odr_pdfs/CPBC_FactSheet.pdf.

27 This process is described at <http://www.consumerprotectionbc.ca/faqs>. A flow chart of processes is available at http://www.consumerprotectionbc.ca/images/odr_pdfs/CPBC_FlowChart.pdf.

28 Statutes of B.C. 2012 c.25, available at http://www.leg.bc.ca/39th4th/3rd_read/gov44-3.htm.

29 Ibid., s. 5.

30 Ibid, s. 1.

31 Ibid.

Section 19 of the Act gives the general tone for the use of technology:

The tribunal may use electronic communication tools in conducting all or part of a tribunal proceeding, and may require or authorize parties or other person to use electronic communication tools provided by the tribunal in relation to tribunal proceedings or other dispute resolution services provided by the tribunal.

Section 25 refers to facilitated dispute resolution:

(2) Facilitated dispute resolution services may be conducted in person, in writing, by telephone, videoconferencing or email, or through use of other electronic communication tools, or by any combination of those means.

The 'case manager' at the facilitated stage may, if the parties agree and if he or she is a member of the tribunal, adjudicate the dispute by the same means.³²

The general rule for tribunal proceedings under the Act is that parties will represent themselves, meaning that they do not have lawyers present. The tribunal may permit lawyers in certain cases, and must do so in disputes involving children or people not capable of self-representation.³³ These provisions have been controversial, especially among lawyers. However, most small claims disputes are too small to justify lawyers' fees in any event, and parties now in Small Claims Court tend to present their own cases. The same may not be true for 'strata title' disputes, though the most serious of those disputes are not referred to the tribunal in any event.³⁴

Other BC initiatives

Public authorities in BC are open to ODR in other areas. Two quick examples:

- ♣ The potential for ODR to help immigrants resolve problems of integration into BC society and culture was explored in detail in a 2010 study.³⁵
- ♣ Online forms may be created by Vancouver residents who want to dispute parking tickets, though to date the hearings to resolve those disputes happen in person.³⁶

Other Canadian initiatives

ADR Chambers: eVideo mediation

32 Ibid., s. 29.

33 Ibid., s. 20. Quebec's Small Claims Court has barred the use of lawyers for decades.

34 The tribunal's jurisdiction and the limits on it are spelled out in the Schedule to the Act. For strata titles, see sections 9 – 11.

35 BC Ministry of Labour, Citizens' Services and Open Government, ONLINE DISPUTE RESOLUTION (ODR) AND NEW IMMIGRANTS: A SCOPING STUDY (2010), available at <http://www.ag.gov.bc.ca/public/ODRNewImmigrants.pdf>.

36 The system is described, and tickets may be disputed, at <http://vancouver.ca/streets-transportation/dispute-your-ticket.aspx>.

The Toronto-based ADR Chambers has been offering mediation and arbitration services, as well as related dispute resolution techniques, for several years. Recently it has begun a video mediation service.³⁷ Essentially the procedure is the same as it would be for a mediation in person, but using readily available software, the parties communicate by computer (though the audio link may be by regular telephone or voice-over-Internet-protocol (VoIP)). Documents can be shared or even drafted in common; the parties may 'meet' separately with the mediator; parties can communicate with just the mediator or with everyone participating.

Since the ADR Chambers is a private service, the parties pay for all aspects of it. The video mediation costs \$250 (Canadian) a day per remote user within North America, on top of the usual fees. It can be available for more remote parties, at a fee to be determined. To date the service is used only occasionally, perhaps one e-Video mediation every couple of months, which amounts to fewer than one percent of the thousand or so mediations managed by the ADR Chambers every year.³⁸

eQuibbly

The online world has been greatly affected by the rise of social media, whose principal characteristic is interactivity among the users of a particular service or communication channel. A new ODR service (formally launched in late August 2012) based in Toronto offers 'crowd-sourced' mediations, as well as more traditional (though online) arbitrations.³⁹ eQuibbly⁴⁰ allows people to describe their disputes on the site and invites the other side to give their perspective.⁴¹ Then users of the site can say what they think should happen.

The site puts it this way:

As a collective, you trust your friends and neighbors to provide you with accurate and useful information every time you look something up on Wikipedia and TripAdvisor, and to make the appropriate decision when choosing your government, which controls so many aspects of your life. So why not have them help you resolve your disputes?

The resolution of public disputes will not be binding, as the public is standing in the role of a mediator, who does not have the power to bind, only to suggest. Disputes may be conducted privately, with participation from those chosen by the parties. These may be non-binding as well, serving as a kind of neutral evaluation, or binding. If they are binding, they are legally arbitrations subject to the applicable law. One sees this at the eQuibbly site, whose arbitration rules are long and fairly technical, unlike the chatty text on the rest of the site.⁴²

All the services of the site are free. The business model is not clear from the site itself. While crowd-sourcing the mediators is clearly inexpensive, the site itself is well presented, and maintaining and providing access to the disputes and comments uses bandwidth that one normally has to pay for.

37 The eVideo mediation is described at <http://adrchambers.com/ca/mediation/evideo-mediation/>.

38 Private communication with the ADR Chambers, September 10, 2012, on file with the author.

39 While this is a service created by a Canadian, its presentation does not have any Canadian content as such, and the narrative on the video explanations is in an American voice. The service aims at a North American market, at least.

40 The service is described at <http://www.equibbly.com/about>.

41 The processes for all types of dispute resolution are set out (in videos) at http://www.equibbly.com/dispute_process

42 The arbitration rules are available at http://www.equibbly.com/arbitration_rules.

Whether good arbitrators will be willing to work for nothing is not clear. At present it may be that the web site is free, including the communication among the parties and with the arbitrators, but the arbitrators that the parties invite agree to participate only for compensation. In the future, some parts of the service will eventually be offered for money, while the crowd-sourced public disputes will be left as a free ‘attraction’ to the site, and as a service for the disputants who benefit from those discussions.⁴³

At present data are not available as to the use made of the site for private, especially binding, resolutions. There are a number of public disputes available for review on the site.⁴⁴

ADR Institute of Canada

The ADR Institute of Canada is “a national non-profit organization that provides national leadership in the development and promotion of dispute resolution services in Canada and internationally.”⁴⁵ While it does not promote ODR as such, its National Arbitration Rules⁴⁶ permit the parties to deliver documents⁴⁷ and to communicate with each other⁴⁸ by email. Rule 20, under the title “Place of Arbitration”, provides that:

Part or all of the arbitration may be conducted by telephone, e-mail, internet or electronic communication if agreed to by the parties or directed by the Tribunal.

No data are available as to the numbers of arbitrations under the rules that are conducted wholly or in part online, but the rules are clearly no barrier to ODR if the parties are willing.

Part-way to ODR

Some dispute resolution techniques seem part way to full ODR and are worth noting for the lessons they can convey to those designing ODR systems. Two of these will be mentioned here.

▲ Financial Services Commission of Ontario – automobile insurance disputes

The province of Ontario has a no-fault automobile insurance program, by which those injured in auto accidents get statutory benefits from their own insurers. Disputes between insured people and the insurers must be resolved through mediation (and if that fails, arbitration) conducted by the Financial Services Commission of Ontario (FSCO). These dispute resolution processes have been conducted for some twenty years almost exclusively by telephone.⁴⁹ While phone resolutions are not strictly considered ODR, nothing in the FSCO procedures would prevent moving much of its dispute resolution activity online if it chose to do so. The service is a useful precedent for the efficacy of remote mediation, with a settlement rate of over 75% of the disputes submitted to it.⁵⁰

43 Private communication with Lorne Soskin, principal of eQuibbly, September 10, 2012, on file with the author.

44 A collection of disputes with the public's suggestions is available at <http://www.equibbly.com/disputes>.

45 A description is available at the ADR Institute's web site at <http://www.amic.org/>.

46 The rules are available at http://www.adrcanada.ca/resources/documents/ADRIC_National_Arbitration_Rulesv2008.pdf.

47 Ibid., rule 6.

48 Ibid., rule 8.

49 The dispute resolution procedures are available at <http://www.fSCO.gov.on.ca/en/drs/DRP-Code/Pages/preamble.aspx/>.

50 Ibid., *The Services of the Dispute Resolution Group*, fourth paragraph.

✧ Consumer Information Canada

The government of Canada and the provincial departments responsible for consumer protection have mounted a website for consumer complaints called the Complaint Roadmap.⁵¹ It is a good example of how online resources can help people resolve disputes by enabling them better to represent themselves. The site shows where disputes can be taken, how to understand one's rights in different kinds of dispute, and how to present one's case effectively to merchants both orally and in writing. It provides sample letters of complaint.⁵² It also explains in basic terms the court-based remedies available if the complaints themselves do not work.

No one intervenes for the consumer from this site, but the provision of self-help resources can be part of many ODR solutions, and this site is a good demonstration of the value of that technique.

Some additional Canadian discussion of ODR

Canadians, like many others around the world, are increasingly discussing ODR as a vital element of an informal and even of the formal justice system. Three such discussions are mentioned here as of particular interest, without any claim to completeness.

An Overview

A substantial legal publisher, CCH Canadian, has published an overview article by Colm Brannigan, a very experienced Canadian mediator and arbitrator.⁵³ Mr. Brannigan points out that mediation is the most frequent method of ODR, largely because the legal framework for mediation is so flexible compared to that for arbitration.⁵⁴

Besides the benefits of alternative dispute resolution, of which ODR is clearly a variant – accessibility and convenience, speedy, potential for creativity, fairness, economy, legitimacy and lower strain on the judicial system – ODR has additional merits. Among them are handling disputes over large geographical areas, managing disputes in e-commerce where no alternatives may be available, accessing non-local expertise, universal availability of documentation, synchronous or asynchronous participation (typing may lower the emotional temperature compared to speaking), overcoming socio-economic barriers by removing visual clues to status, and reduction of jurisdictional barriers.⁵⁵

The challenges facing ODR are several, but most come down to two: communication with people who are not present, and technology that may be difficult to use or insecure. Interpersonal communication always presents difficulties of common understanding, including across cultural differences, but with 'faceless' parties and a 'faceless' mediator, these problems can grow. Likewise if parties have different abilities to use the technology required for ODR, the weaker in technology may suffer substantive losses.⁵⁶

51 Consumer Information Canada, *Consumer Roadmap*, available at <http://www.consumerinformation.ca/eic/site/032.nsf/eng/01166.html>.

52 Sample letters of complaint are available at <http://www.consumerinformation.ca/eic/site/032.nsf/eng/01175.html>.

53 Colm Brannigan, *Online Dispute Resolution*, in ALTERNATIVE DISPUTE RESOLUTION PRACTICE MANUAL 6901 - 6953, CCH Canadian Ltd (looseleaf, 2007), available at http://mediate.ca/uploads/CCH_ODR_Chapter.pdf.

54 *Ibid.*, page 6908.

55 *Ibid.*, pages 6911-6912.

56 *Ibid.*, pages 6914-6915.

As a result, technology can be considered a 'fourth party' in ODR.”One of the biggest challenges in building and running an online dispute resolution process is to balance and integrate the human and the automated dimensions.”⁵⁷ “The ideal ODR process include online and offline interactions that take advantage of the strength of each.”⁵⁸

Borrowing from principles of good practice in consumer e-commerce and guidelines from ODR studies around the world, the author sets out a number of best practices: impartiality, transparency, availability, affordability, effectiveness, due process, voluntary participation and competent supervision. Effectiveness in turn is measured by speed and timeliness of the process, the competence of the neutrals, the accessibility and ease of use, the meting of language and cultural challenges, the scalability of the application, its coordination with other ODR processes, its security, and the methods used to ensure compliance and enforceability.⁵⁹

A Virtual Day in Court

The Canadian Centre for Court Technology⁶⁰ has been exploring ODR. It recently sponsored a video panel discussion on the use of ODR in the court process, with three Canadian experts. The video is worth watching.⁶¹ In addition, the site offers slide decks for two of the speakers. Those for David Merner were prepared by Darin Thompson, who is a member of the Canadian delegation to the UNCITRAL Working Group on ODR.⁶² They canvass payment and enforcement options and list a number of risks in setting up an ODR program: bad technology, low uptake by disputants, low settlement rate, low user satisfaction, system abuses, technical problems and overly expensive start-up or maintenance costs.

The slides also review the many areas in which the public uses online services for important parts of their lives: online banking and bank machines, email, income tax filing, smart phones, online commerce including mobile commerce, and social networking. They mention student uses in particular, tomorrow's 'public' for dispute resolution. The slides conclude by asking the very pointed question whether the public will 'want' ODR, or whether they will 'expect' it. The suggestion is clearly that despite the risks and challenges, ODR in some form is inevitable.

Environmental Impact

A final advantage of ODR worth mentioning is that it can save a great deal of resources, both in avoiding travel and in reducing the amount of paper documentation required in the process. This aspect has been canvassed in a recent article called “ODR: the next green giant”.⁶³

57 Ibid., page 6916.

58 Ibid., page 6917.

59 Ibid., page 6917-6918.

60 The Centre's work is described at <http://ccct-cctj.ca/>.

61 The video discussion is available at <http://ccct-cctj.ca/resources/multimedia/video-recordings-inaugural-forum/a-virtual-day-in-court-online-dispute-resolution/>.

62 The slides may be downloaded and viewed in PDF at the same page as the video discussion.

63 Noam Ebner & Colleen Getz, *ODR: the Next Green Giant*, 29 CONFLICT RESOLUTION QUARTERLY 283 (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1993192.

Conclusion

This article has reviewed several of the initiatives of Canadians in building online dispute resolution systems. It is not surprising that the issues that they have encountered are many of those raised in the context of the UNCITRAL Working Group on ODR: costs (who pays, and how?), fairness (will the dispute resolvers favour the people who pay?), and enforcement (must the winner go to court after all?). As technology becomes cheaper and more widespread, innovative applications of off-the-shelf technology will permit new methods of resolving disputes, as we have seen with the eVideo mediations and eQuibbly. Likewise as the range of activities grows for which information technology is the first recourse for most people, the expectations that dispute resolution will follow a similar path will continue to increase.

One already finds and will continue to find ODR at work both inside and outside the formal court-based dispute resolution system. Taxpayer funding may turn out to be an important support for the growth of good technology and popular acceptance, though one does not expect national court systems to lead innovation. It is likely, however, that the main barrier to incorporating ODR into court processes is human resistance rather than any technological or legal challenge. Progress will depend on 'change management' strategies as much as or more than on technical questions.

“If the ODR process is binding upon the participants, then the process must meet more demanding procedural standards.”⁶⁴ This is an important note of caution, a reminder not to be carried away by the enthusiasm for technology or for 'results'. A dispute resolution system, whether online or offline and whether binding or non-binding, does not only resolve disputes. It must remain as well essentially part of a justice system, formal or informal, and its results must ultimately be judged by their justness, not merely by their efficiency.

⁶⁴ Brannigan, *Online Dispute Resolution*, above note 53, page 6920. Compare the arbitration rules of eQuibbly with its non-binding procedures, as described above at the text at note 42.