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Annual National Conference
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LEADING DISPUTE RESOLUTION IN CANADA
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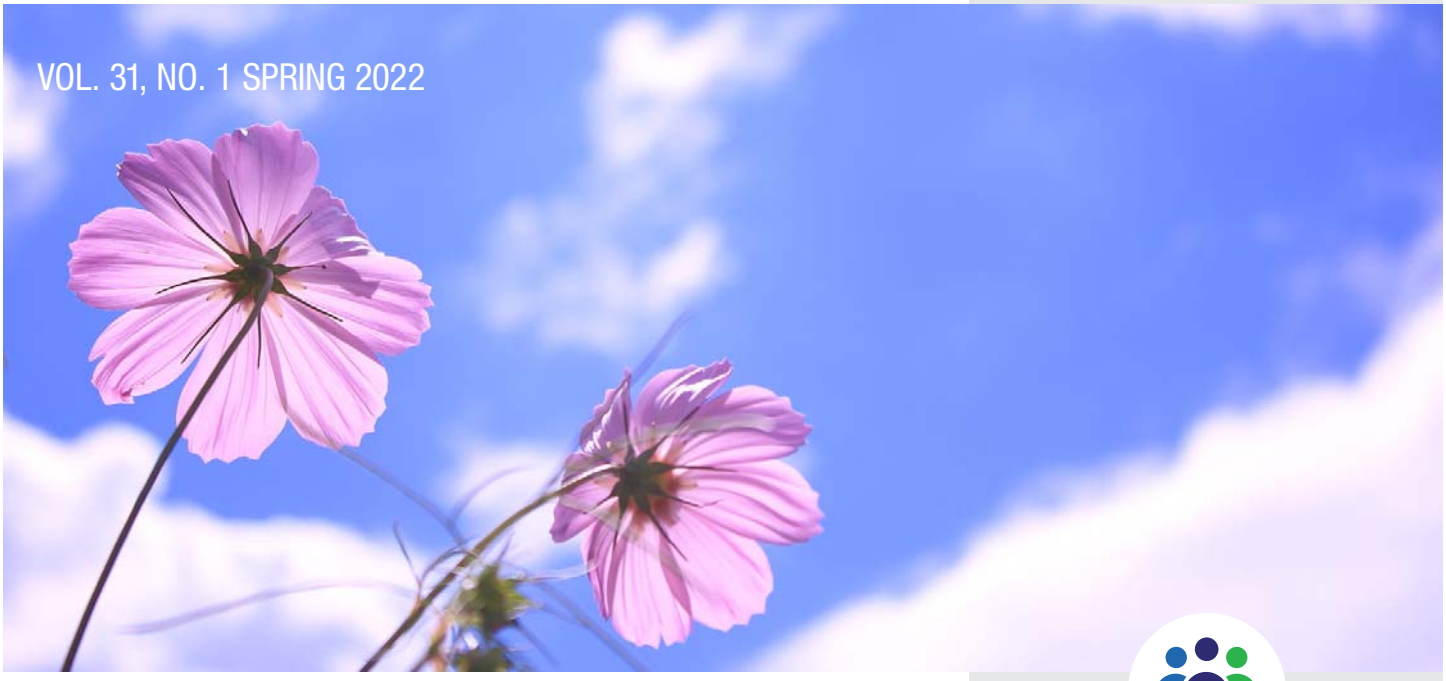

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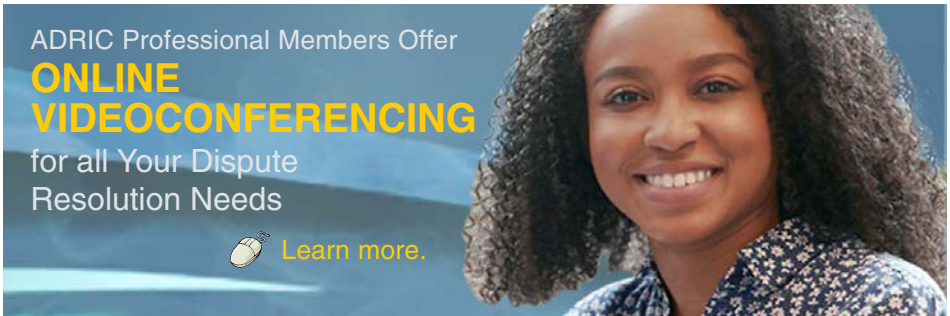

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LEADING DISPUTE RESOLUTION IN CANADA

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Message from the Editor

GENEVIEVE A. CHORNENKI, LL.M.(ADR), C.MED, C.ARB

Genevieve is the author of *Don't Lose Sight* (2021) and co-author of *Bypass Court* (2015). She holds a Certificate in Creative Writing from the University of Toronto and a Publishing Certificate from Ryerson University. She was inaugural chair of the Ontario Bar Association's ADR section and serves on ADRIO's C.Med accreditation committee. www.genevievechornenki.com

Welcome to the spring 2022 issue of the *Canadian Arbitration and Mediation Journal.* In this issue, our contributors chose to write about contemporary issues, both social and professional. Editorial board member **Jennifer Webster** convened a virtual roundtable with ADR practitioners **Dominique Panko** and **Marc Bhalla** to explore what difference technology has made to the mediation process, especially when the pandemic inhibited or prevented in-person sessions. Are asynchronous, virtual mediations a bane or a blessing? Practitioner and trainer **Richard Moore** discusses how conflict management training can increase trust and confidence in the police. The key, he maintains, is having them recognize, accept, and resist the tendencies that research attributes to individuals with "elevated" power. Editorial board member **Shelagh Campbell** introduces readers to Gulliver's Process Theory of Power and shows how **Djina Pavlovic**, **Erin Valois**, and **Titilope Adesina**, students in the Masters of Human Resource Management and Masters of Administration – Leadership programs at the University of Regina, analysed the recent conflict at Rogers Communications Inc. using that theory. **Pat Bragg** reviews *Mediation and Popular Culture* by Jennifer Schulz, which she describes as "a fun, dense, and important read about mediation." **Heather Swartz** reviews my recent book, *Don't Lose Sight: Vanity, Incompetence, and my ill-fated left eye*, which she thought "provoked both professional and personal reflection and insight." And *International Commercial Arbitration: A Comparative Introduction* by Franco Ferrari and Frederich Rosenfeld was reviewed by **Eric Morgan** with additional commentary by **Honourable Barry Leon** who found it to be "a helpful resource to arbitration practitioners in any jurisdiction, including Canada." Visit our new book reviews webpage here.

We hope readers will enjoy and benefit from the material presented here, and we urge everyone to share this issue with colleagues, clients, and friends. Past issues of the journal can also be found on CanLII at https://www.canlii.org/en/commentary/journals/43/.

Thank you to all who made this issue possible: our contributors, the helpful staff at the ADRIC office, our volunteer editorial board, and to you, our readers. Please be in touch. Your feedback, submissions, and pitches are always welcome.

Genevieve A. Chornenki
Editor-in-Chief

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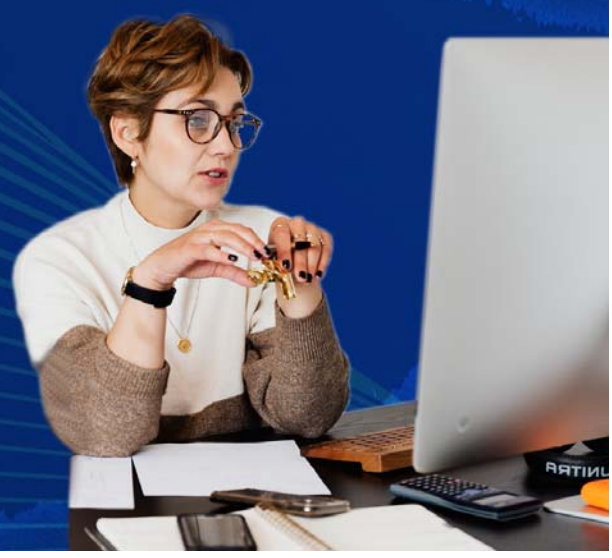
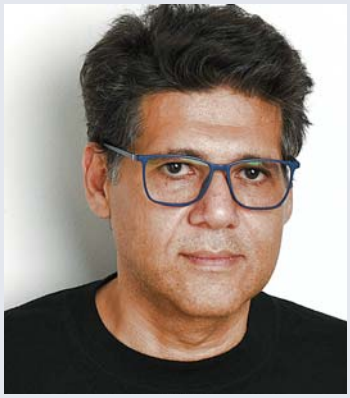


President's Message



ELTON SIMOES, MBA, MDR, IDP-C, C.MED, Q.ARB

Elton Simoes is an accomplished Arbitrator, Mediator, Negotiator, Consultant, Board Director, and Business Executive. He practices arbitration, mediation, and Med-Arb in complex, confidential, time sensitive, commercial disputes. He has lived, worked, and studied in Canada, U.S., Latin America, and Europe. He possesses a strong academic background in Business, Law, Corporate Governance and Dispute Resolution.

As fate would have it, I write these words on the second anniversary of the pandemic. These two years feel like a lifetime. Fortunately, we can feel on our faces the comforting warmth of the light at the end of the tunnel.

But there are always silver linings to any crisis. Amongst these hidden blessings, the pandemic brough us time to undergo a necessary reflection of our values, actions, and commitments.

As it is said in Spanish, "yo soy yo y mi circunstancia": "I am I, and my circumstances. My circumstances afforded me the honour of being ADRIC President and, in this capacity, the pleasure of representing our members and serving our clients.

There are many reasons why I am pleased to serve ADRIC's members in our relentless quest to improve lives by using ADR. We all share this mission. Together, we have accomplished wonderful things.

ADRIC is Canada's pre-eminent professional Dispute Resolution organization. We have been providing leadership in arbitration, mediation, and other ADR processes since 1974. We are over 2400 members strong and growing, with 7 Affiliates across the country. We promote ethical standards and best practices. Our professional ADR designations emphasize peer-reviewed competency.

ADRIC has established state-of-the-art, bilingual, and integrated Rules that apply to Arbitration, Mediation and Med-Arb cases, offering arbitration case-management services that cover filing to closing. It includes ADRIC acting as the appointing authority, the fundholder and the administrator to efficiently support the parties.

We produce two free prestigious electronic publications focussing on Arbitration and Mediation topics and we proudly share those with all practitioners, parties, and counsel.

But this is not all. We all should be proud of why we do what we do. Because if we know the "why", we will find the "how".

We fulfill the very important duty to ferry our clients across often chopped waters, to deliver them from the consequences and anxieties of unresolved disputes to the safe harbour where these uncertainties are left behind, knowing that they have been well considered, addressed, and resolved by competent, neutral, ADR professionals.

We make life better for our clients. We make society better.

There is still a lot to be done. Potential to be unlocked. Doors to be opened. It is, more than ever, time for planning to become work. Time for intentions to materialize into reality.

With renewed energy, ADRIC, standing tall after emerging from the pandemic, is focussed more than ever on building value for its members and clients by focusing on 4 strategic areas:

- **Membership growth.** Keep the organization relevant and financially healthy through membership growth. ADRIC is committed to continuing to be the largest and most relevant ADR organization in Canada.
- **Professional Opportunities.** Pursue, develop, and support initiatives that produce professional opportunities for the ADR System members, either nationally, or in each province, in partnership with and led by ADRIC affiliates. We are a professional organization. Advocating for ADR and supporting our members is in our DNA.
- **Support new practitioners.** Pursue, develop, and support initiatives that give new ADR practitioners access to professional opportunities. Our continued success is a function on how well we treat and integrate the newcomers to our profession. ADRIC has a commitment that extends beyond its current members into the future generations of ADR practitioners.
- **Diversity and Inclusion.** Work towards a more diverse and inclusive profession and governance. It is our goal to walk the path that leads our organization, profession, and professionals to mirror our society in all its beautiful complexities.

I leave you with a warm invitation to build this vision together. Get involved. Join our committees. Help our board and staff to shape our organization. ADRIC exists to serve you.

I will be proud and honoured to work shoulder to shoulder with you.

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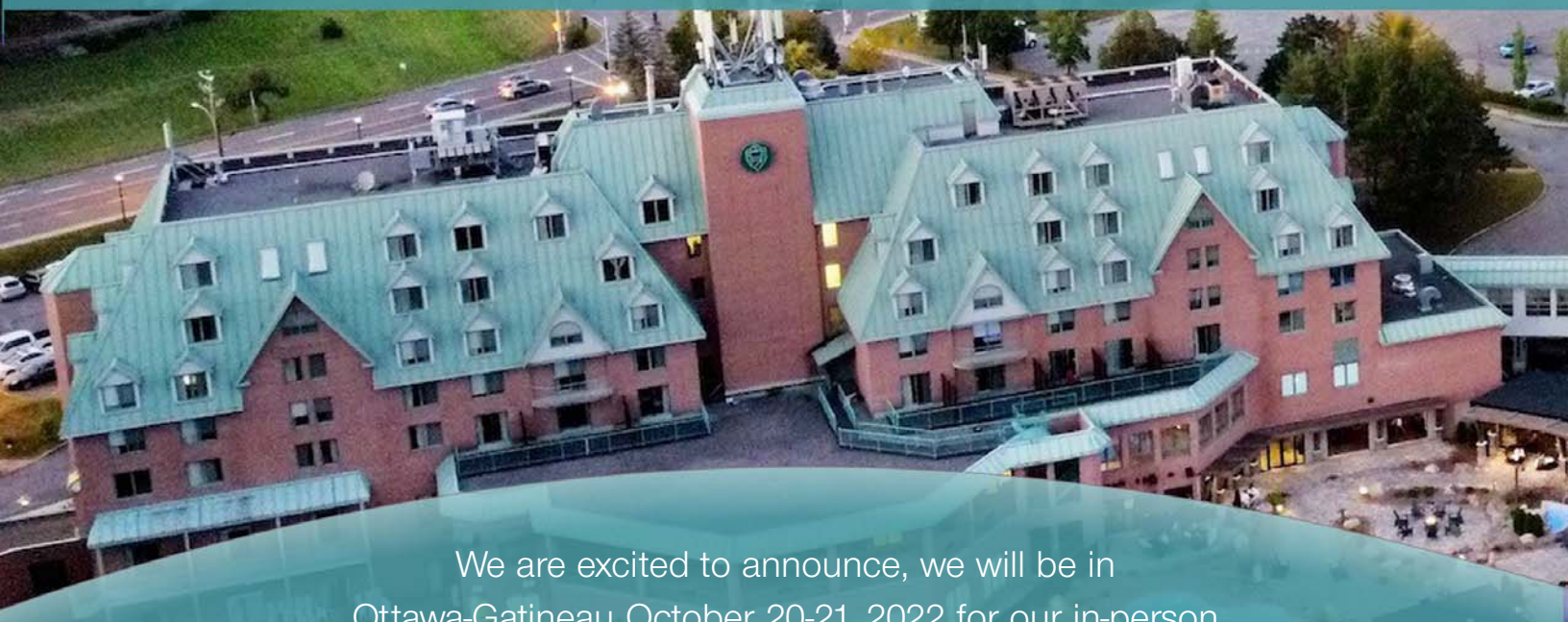

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Listen In:

A virtual conversation with Journal editor Jennifer Webster and fellow mediators Marc Bhalla and Dominique Panko exploring the impact of technology on the mediation process and the people they serve as mediators.

Jennifer: Let's start with introductions. My name is Jennifer Webster, and I have a mediation and arbitration practice based in Toronto with a focus on employment and labour as well as community disputes.

Dominique: Hello! I am Dominique Panko. I am a practising mediator in Saskatoon, Saskatchewan. I work with all kinds of conflict, but I focus on family disputes. Mediating virtually gives both me and my clients flexibility.

Marc: My name is Marc Bhalla. I am a mediator and arbitrator who focuses on condominium, corporate, and community dispute resolution. I live in Toronto and enjoy practising online.

Q: When did it first occur to you that the standard mediation model—a special in-person day for a face-to-face conversation—might not suit all participants? And how receptive were you to alternative models?

Dominique: I'm a Millennial, so, truthfully, a one-size-fits-all mediation model never made sense to me. If you peel mediation back to its essence, it is about the experience of the client. As a mediator, my goal is to help clients with their unique issues without being constrained by what has or hasn't worked for others in the past. I've also grown up with technology and, like most of my clients, have accepted technological change as a regular part of life. As I wrote in a piece published in the Spring 2020 issue of this journal, "The world is changing fast. New parenting apps, new social media, new challenges to parent through (*how old do you have to be to have snapchat?!*)..." Flexibility is simply a necessary ingredient of being a mediator.

Marc: For me, it was in 2015. I had a few frustrating mediations involving scheduling hurdles, expensive travel, and the "special day" not working because important information was missing. In addition, too much of my time was wasted travelling—to and from a mediation or to and from breakout rooms during a mediation. I have always been comfortable with technology and felt I could deliver my services more efficiently online. Then I learned about the introduction of an online tribunal in British Columbia. I immediately took online mediation training and launched my online mediation services on January 1, 2016, with a cartoon of me mediating online from a beach! For the next four years, however, takers were few and far between. I sensed that online options interested disputants more

than their legal representatives. Then March 2020 arrived, and mediating online became the default way of proceeding.

Jennifer: I developed a sense that the mediation model was not working for most participants between 2000 and 2016 when I was working as a mediator for Federal Mediation and Conciliation Service. However, I did not have the flexibility or institutional authority to experiment with other approaches. When I started my own practice in 2016, I incorporated technology into my practice from the outset, principally because I had little administrative support. The pandemic certainly increased my use of technology from March 2020 onward.

Q: Which specific technologies do you use now?

Marc: Dispute resolution is at its best when it is flexible, and the technologies of today allow us to realize this far more richly than ever before. I strive to offer process flexibility so people experiencing conflict use the communication channel they prefer. I primarily use email, Zoom, Teams and Google Meet. I also have an online availability calendar. For planning or communication outside of synchronous meetings, I have observed that many people are more comfortable with text-based communications. That said, there is no one right approach; different people have different preferences.

Jennifer: I am using videoconference on many platforms, teleconference, and text-based communications for mediation.

Dominique: It's all about recognizing the dynamic nature of people's lives and having the patience and ingenuity to accommodate differing levels of comfort. I also have adopted a hybrid model for some meetings, meaning some parts are online and some in person and at different times. I have many files with stakeholders in different locations. If I have one participant who isn't comfortable with technology, and one who can only participate through video conferencing, I can put the less savvy person in my physical office with me while I manage the technology elements myself.

Q: That's quite an array of technological choices. Who gets to decide?

Dominique: Generally this is decided during consultations with the individuals, though I have not seen the format of the mediation be hotly debated. Folks tend to see the need for flexibility, and I do not let the clients negotiate format at this time. If I have a participant who is only comfortable

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attending virtually, I will not compel them to come in person even if another participant is demanding attendance. I take the lead on these conversations, but find that the more I work with a particular organization or group the more quickly they get into a groove when it comes to format, and there very seldomly is a debate on this topic.

Jennifer: I generally take a leadership role in suggesting and recommending different approaches based on the type of dispute and the participants' comfort levels. I also work for three different tribunals that have their own systems, and I adapt each tribunal's system to the people and the issues.

Marc: Like Jennifer, I adapt to what works for the people in each particular situation. My general approach is to see what technologies parties are already comfortable using and to work with them. Before the pandemic, I found those who opted for online choices were enthusiastic about technology and not generally hesitant or combative about which to use. I had not thought about it that way, but suppose I did take a leadership role in tech selection for them then. Since the pandemic, I have definitely noticed that I am looked to for leadership in this respect. I have heard of some mediators running into obstacles with certain organizations refusing to use certain platforms out of privacy/data concerns, but have not experienced that myself. I am not interested in spending loads of time negotiating platform. Disagreements over that are like disagreements over the location of an in-person mediation— if parties truly want to give mediation a try, they will be able to sort those logistical differences out.

Q: How has technology helped in convening and scheduling mediations?

Dominique: Scheduling now is a breeze. Getting hold of clients over the phone or waiting for a response over email while my calendar fills up used to delay a lot of my files. Since people are getting more online, I've introduced a booking system to my website so new and current clients can schedule a time right into my calendar, moving the burden of scheduling from me to my clients to sort out, saving me time and them money. This works especially well for my family files because the parties generally have a good idea of each other's schedules or see each other regularly. They can book, cancel, and move appointments as convenient for them, plus it gives them another opportunity to practise the cooperating skills we work on in co-parent mediations.

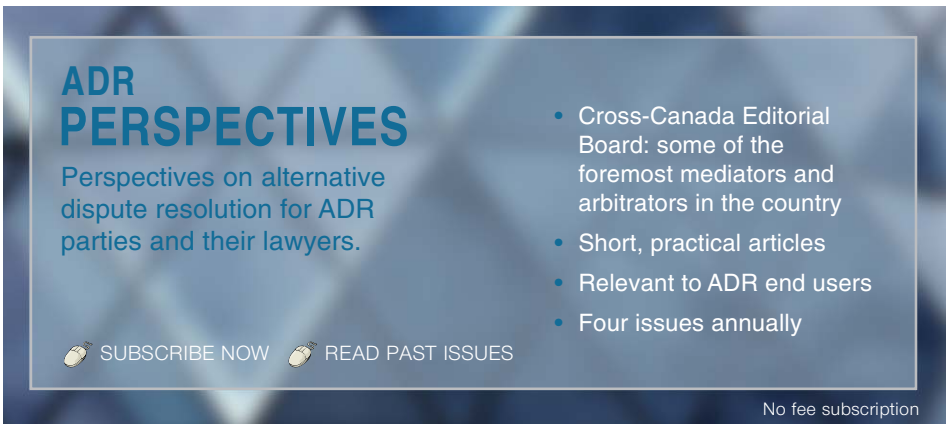
Another tool I love is doodle poll. I use this one to set up collaborative meetings or anything with more than three participants. It's similar to giving three dates to a group, but you can give a whole range of dates or even plug your calendar right in.

Finally, by using video conferencing, my clients can save driving time. That means that my family clients who are teachers or work hours similar to mine and aren't available to come into my office during the day can take their hour lunch break or even their 30-minute coffee break to do their intake meetings with me. We can also meet over nap time or after the kids are in bed for the parents with small children who struggle to get childcare.

Marc: I had often said that scheduling mediation can be the hardest part of the process. People are busy these days. Expecting them to give half a day or a full day to a mediation is a big ask. Mediation with technology makes it easier to break up the process—not suitable for every dispute, but the option is there. It is more feasible to, for example, break up a 3-hour mediation into three one hour meetings. Breaks between process events or asynchronous participation altogether offer advantages such as the opportunity for parties to gather information, seek advice, think through their options and what they would like to say. This can enhance what can be achieved through mediation.

I handle my own availability calendar. There are several modules that make it easy to do for anyone who knows a little html, WordPress or Joomla! to handle on their own. That, along with a good old fashioned Outlook calendar invite with the meeting link included works well for me.

I aim to keep it simple and decided years ago to do away with any thought of conducting more than one mediation a day in my private practice, to ensure I am dedicated to my clients and, definitely, for the preservation of my own mental health. This also prevents scheduling from getting complicated.



Jennifer: Before starting to incorporate the different technologies into my practice, I had almost entirely conducted mediation through synchronous, in-person meetings, and scheduling for those meetings was often very challenging, particularly when participants were located across the country. Now, when we are mediating with different technologies, we are no longer focused on finding a day when all the participants are available. In addition to doodle, I have been using an online calendar for scheduling through MediatorDates for my private practice.

Technology makes scheduling so much easier: I can schedule short individual sessions at times convenient for each participant, and there is more flexibility in each person's calendar when I am only looking for an hour or two of their time and when they are not required to travel for an in-person meeting. I recently conducted a team mediation where I was able to schedule meetings with each individual over a week, and that arrangement gave each person more time to reflect on the conflict and consider how to approach the discussion when we arrived at a joint session.

Q: In your experience, has technology enhanced participation in mediation? If so, how?

Marc: Definitely. Most of my in-person mediations took place at a law office, more for the convenience of the lawyers than for the comfort of disputants, and while the formality of a law office can, at times, be helpful, it is often intimidating. Online mediation allows people to take steps to address conflict more comfortably. They can participate from the comfort of their own home or office. They can keep a pet nearby. I have found that such convenience and familiarity results in increased participation from the people involved in the dispute. When each mediation participant takes part through their own device and from a location that they are already familiar with, the playing field can feel leveled. This does raise some new client management hurdles for legal representatives. For example, if a lawyer and their client are not participating in online mediation from the same location, it can be harder for the lawyer to prevent their client from talking. That certainly puts people back into the mediation process!

My mediation practice often includes disputes involving condominium and corporate entities that are controlled by boards of directors. I have observed that more directors participate in online mediation than in-person mediation, as we overcome the hassle of travel and ease scheduling. It can make it more challenging for me as the mediator in terms of controlling the process and coordinating breakout rooms, but I enjoy such challenges. I once had an online mediation involving more than 20 people going in and out of 5 different breakout rooms, so I was constantly re-arranging who would be grouped together! So long as the capacity and purpose of each person's participation is clear and appropriate, I usually find the more the merrier, especially in dynamics where there will be ongoing relations between all involved.

Jennifer: Because the technology allows for expanded participation, there are more opportunities for participants to be heard, not just by the mediator but by the other people affected by the conflict. I find that my participants and I are learning together how to better manage the technology and the different challenges.

I think, as mediators, we need to first acknowledge that the context is different and meet the participants where they are. So, for instance, when people participate in mediations by teleconference and videoconference, there are always distractions. The online protocols and ground rules are important, and, at the same time, the standard of conduct or internet connectivity is not perfection.

Dominique: I completely agree with Marc: that more people can participate in an online format and the more the merrier! As Jennifer said, it increases the ability of clients to feel heard. I do however find that while online meetings can bring people back into mediation, it can sometimes create a more time consuming process as people have distractions in their own homes, internet connection can be unreliable, and running people through my online etiquette protocols eats into our scheduled meeting time.

Sometimes it's a question of quantity or quality: I want the right people in the room, not necessarily everyone who is available. The more folks we have in a meeting, the more troubleshooting and potentially distracting background things we have going on. This can be really hard for my family clients who bring their lawyers in for each meeting as the price point rockets when our meetings stretch longer than anticipated. I also have noticed both lawyers and clients seem to be less prepared for meetings that are not in person. This is not always the case, but the temptation to check emails or do other things while in meetings can really negatively affect how people show up.

Q: Would you say that managing technology is now a mandatory competency for mediators?

Dominique: I do not think every practitioner is capable of managing a virtual meeting, but this is an area we should all strive to have a high level of competence. There is online dispute resolution training available to help

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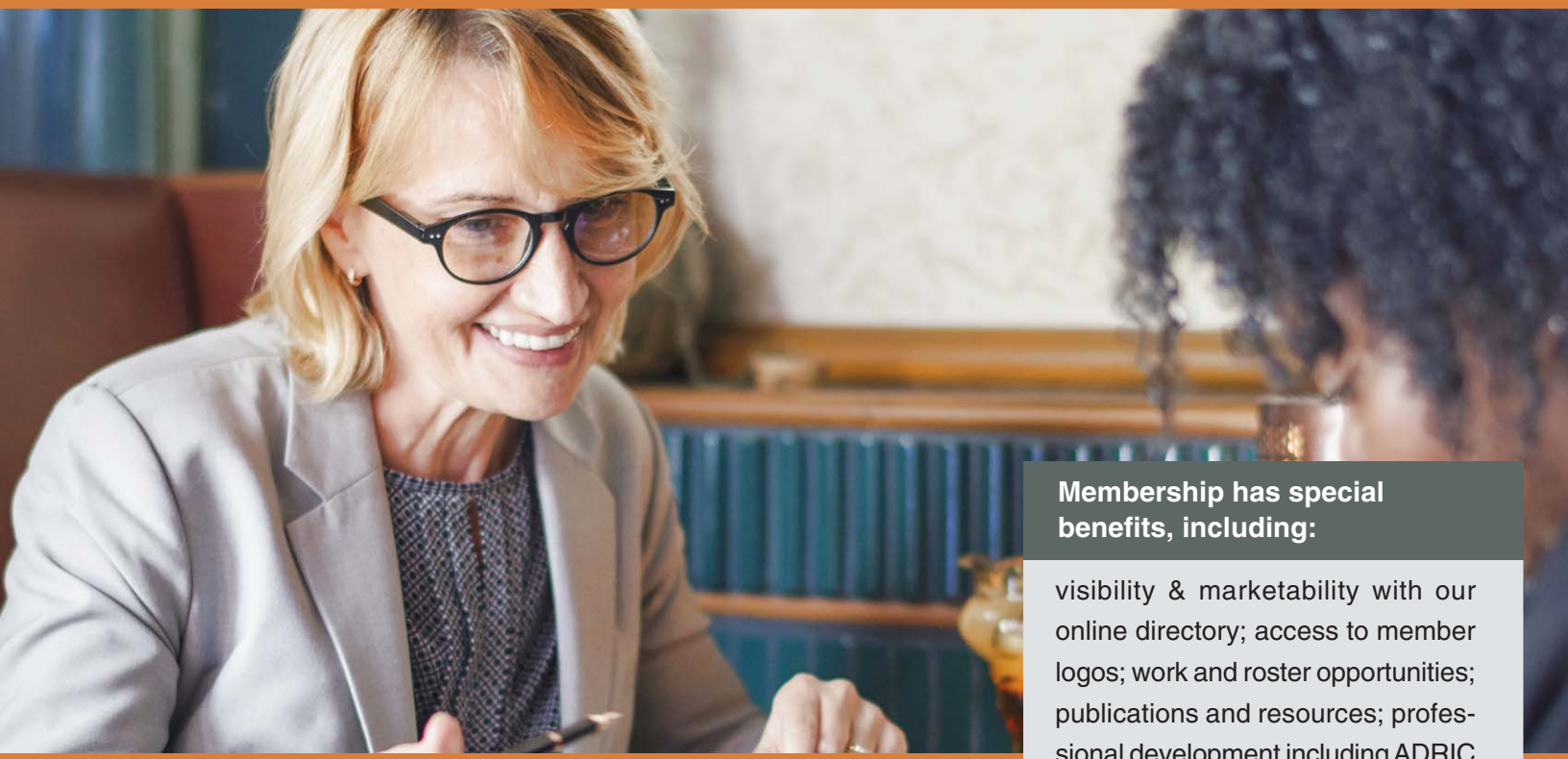

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practitioners develop this skill. If need be, technology coordinators can be contracted out to manage a virtual room, though this service can be expensive.

Jennifer: I agree that we should all improve our comfort and competence in managing virtual meetings. At the same time, these are functions that can be assigned to others if the mediator needs to focus exclusively on the mediation. In my private practice, I manage all aspects of the virtual meetings, but in my tribunal hearings, these functions are managed by administrative or case management staff.

Marc: Managing technology is definitely a mandatory competence these days. If a mediator does not have a base level of competency with technology, I do not believe that they can adequately facilitate online mediation. While support is available and may be tolerated as a work-around during a global pandemic, I do not see it as feasible long-term. Imagine if, during an in-person mediation, the mediator needed someone else to unlock the door to each room as parties moved from joint session to breakout rooms and as the mediator moved between breakout rooms. The process would be neither seamless nor efficient and, in my view, would reflect poorly on the mediator's process leadership.

Q: Have you instituted or modified your ground rules or terms of reference as a result of using technology in mediation?

Dominique: I have started implementing ground rules. I never impose rules on clients in person, if they want to put together some rules of engagement for the meeting, then wonderful, but my standard line has always been that it is for them to define respectful communication. I simply cannot do this with online meetings. I tell clients I need their cameras on, I can't have interruptions because they make it so I can't hear anyone, and I have all my participants verbally confirm they are not recording the meeting and there is no one else in their space who could overhear us.

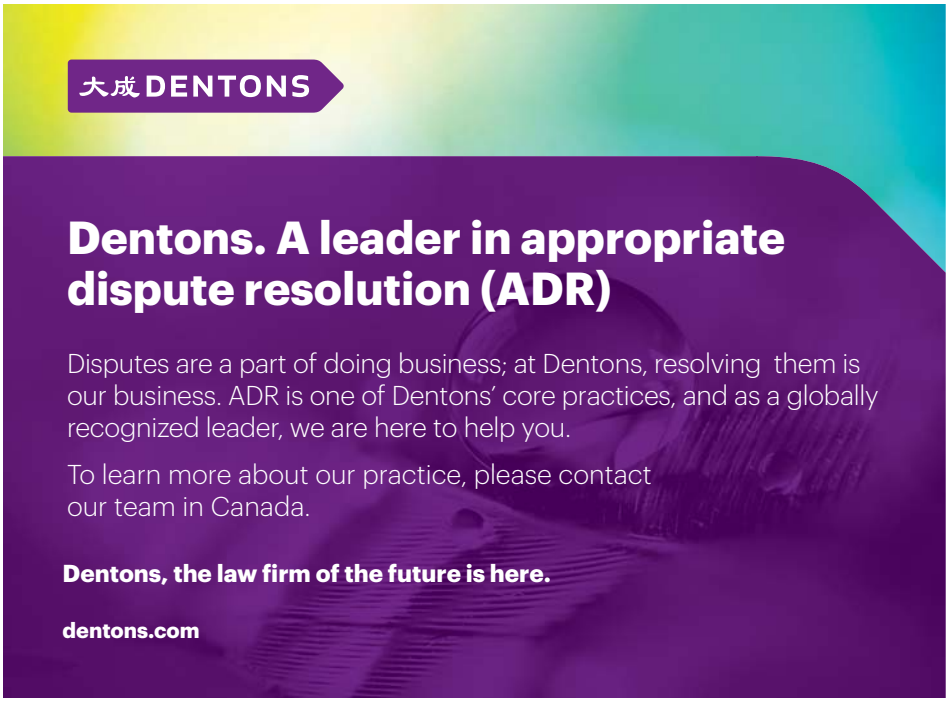
You always need a backup plan for interruptions or connection issues. Generally, connection issues can be dealt with effectively by switching audio to a phone call. Interruptions or distractions often result in the meeting being rescheduled or paused until the issue is resolved, but this should be discussed at the beginning of the meeting.

Because the process is more rigid when I am mediating online, I don't get to see how my clients fight, which is a really crucial aspect of family mediation. To address this, I've been much more conscientious about doing robust screening for high conflict and family violence. I need to spend more time actively listening and clarifying my understanding when using technology to mediate, especially when using text-based communication.

In my agreement to mediate, I have amended some wording to allow for participants to give verbal assent to the agreement and include that our meetings may be any combination of in-person or virtual. This is a small change, but I will likely keep it going forward as it gives me more flexibility in meeting format.

Marc: I have never been one to require too many ground rules. That said, confirming the confidential nature of my process is a key one that I review at the outset of every mediation, whether online or in-person. Otherwise, I tend to take cues from my clients to see what is most comfortable for them. I find that participants providing input on ground rules can be a good way to make them feel a part of the process.

I have always had a clause in my agreement that speaks to using technology in mediation. Essentially, it establishes that the preservation of confidentiality in mediation is a shared responsibility because I do not believe that a mediator alone can ensure a mediation takes place on a confidential basis, in-person or online. My agreement has parties acknowledge the limits and releases me from liability in



the event of mishaps.

Jennifer: Like Marc, I do not take a lot of steps about ground rules beyond establishing a shared understanding of confidentiality and reviewing the expectations around the technology. I review ground rules at the outset that are fairly similar to the process rules that Dominique mentioned. I expect that participants keep their cameras on unless there is a good reason for not doing so. There is no recording of the session. I ask people to speak slowly and clearly because there can often be an audio lag. I also ask participants not to use the chat function that is available in the videoconference platform, and sometimes I will disable the function so that it is not available to them. Personally, I really miss the visual cues that are available to me during in-person mediations. In videoconferencing we are still only seeing part of the person, and I am finding that I am asking more questions about my understanding to check that I haven't missed something because of a technology barrier.

I rarely use written terms of reference. When I do, however, I have changed the terms for the virtual space to address the expectation that there will be no recording of the meeting and that participants will have privacy when they participate or identify all persons who are in the meeting space with them.

Q: What are your practices for preparation and orientation?

Jennifer: In early 2020, I was regularly offering orientation sessions to participants to ensure that they could connect and understand the functions of the technology. I find that participants rarely need this kind of support now because they have been using videoconference technology in many aspects of their life and their comfort levels have increased.

Marc: Online or in-person, pandemic or pre-pandemic, I have always offered and never insisted on this. There was a bit of a golden period of uptake between March and June 2020, when legal representatives had less experience participating in online mediation. Since then, I have found that this generally is not being embraced as often as it should, probably because of busy schedules. But orientation and preparation go beyond technology, and the value of preparation should be better appreciated.

Dominique: I spend more time preparing my clients to mediate. I have always insisted on doing consultations with my clients. If someone is participating in a mediation I am running, I will have had at least one conversation beforehand either with them or their lawyer, preferably both. We talk a lot about what they need to have a comfortable, distraction-free environment, and talk about if they need an orientation for any technology we will be using. I front-end load a lot of my meetings.

Q: What about minutes of settlement? Has technology changed anything there?

Dominique: I have really embraced collaborative writing tools like teams, google docs, and OneDrive. Those tools help me work with other professionals and my own in-house team, as well as give my clients the ability to edit a "one-draft" style agreement and provide comments or questions.

Jennifer: My practice with respect to the written settlement really has not changed in moving from in-person to virtual mediation. I prefer that the parties write the settlement documents as much as possible, and I only get involved as needed. I have worked with parties where we share the screen and work on a draft together, but it is more common for the parties to reach an agreement in principle and then finalize a document through email versions back and forth.

Marc: This is something I encourage my clients to consider ahead of the mediation. In my practice, the most common approach is for one of the lawyers involved to prepare an initial draft settlement agreement in Word and email it to the other. From there, they typically share a screen and talk through changes. Of course, the relationship between opposing counsel makes all the difference as far as this goes. My approach is to have a plan in place around the practical side of capturing settlement in advance. I also think talking about it in advance brings some hope of resolution to mediation preparation.

Q: Please offer a final insight or learning from your experience with technology in mediation.

Marc: To me, a silver lining of the pandemic is the reduced formality that is expected in this context. Historically, online dispute resolution has been categorized as cold or impersonal relative to in-person processes, but that's not consistent with my experience. By making it acceptable for someone to forget to un-mute or have their cat crash the meeting, we humanize the process and the parties taking part in it. While a certain level of formality is still important and required, the lowering of the bar in this respect is something that I consider to be a great thing! While I will stop short of welcoming distractions in my process, I will say that they are expected and can be accommodated. Of course, this has to be within

reason. Mediation participants have to commit to being present and focused on the task at hand. They also need to eat and make sure their kids are picked up from school.

Jennifer: I have become more aware of different communication and thinking styles through the use of video and teleconference mediation. I think that the technologies have forced me to consciously consider what participants need to be able to fully engage with the process and to explicitly ask what steps they need to take to reflect on the issues being discussed. I am slowing down a bit in my process to create the space for the participants who need reading or thinking time or a break from the screen. I have also learned to better manage my expectations and those of the parties about the mediation experience. This means that I can bring the flexibility of a range of approaches to mediation and work with parties through in-person sessions, virtual sessions, or through text-based communications —and all of it is still mediation.

Dominique: Since expanding my practice into the virtual space, I have become more aware of fatigue and the need for breaks. When we're online, there are often natural breaks. The dog needs to be let out, someone needs to get the mail, we're pausing for lunch and picking up again after.

Now, I've been manufacturing similar opportunities for my clients to get a breath of fresh air, a glass of water, or have a caucus with me or their lawyers. I find this has helped all my clients maintain their creative thinking and break impasses, so I'm thankful for that learning coming out of practising virtually.

Jennifer Webster, B.A., LL.B.

Jennifer Webster has her own practice as a mediator, arbitrator and facilitator with a primary focus on labour, employment and human rights law. As part of her practice, she is appointed to the following tribunals: the Canada Industrial Relations Board, the Transportation Appeal Tribunal of Canada and the Ontario Condominium Authority Tribunal. She was also a member of the Human Rights Tribunal of Ontario from 2017 to 2019.

Dominique Panko, C.Med

Dominique Panko is a Chartered Mediator and Parent Coordinator operating out of Saskatoon, Saskatchewan. She is currently on the board of ADRSK, volunteers with the Under-40 Forum, and is a leader with the Girl Guides of Canada. Dominique practices family, personal injury, and general mediation.

Marc Bhalla, LL.M. (DR), C.Med, C.Arb

Marc Bhalla, LL.M. (DR), C.Med, C.Arb (he/him) [biracial] is a mediator, arbitrator and educator who works online from Toronto. He earned a Master of Laws in Dispute Resolution at Osgoode Hall Law School and holds ADRIC's Chartered Mediator and Arbitrator designations. Please see *www.456dr.ca* for more about Marc.

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Increasing Police Trust and Effectiveness through Conflict Management Training

Conflict management practitioners can contribute to organizational and social change. At the present time, a conversation that would benefit from their objectivity, empathy, and skills is the difficult one about police reform.

RICHARD MOORE LL.B, C.MED, CFM, C.MED-ARB, C.ARB

Richard is an experienced conflict management practitioner and trainer and a former board member of the ADR Institute of Ontario. He is a co-founder of the Canadian Collaborative for Engagement & Conflict Management, and author of a recent book entitled A REALISTC© Framework for Enhancing Communication, Relationship-building & De-escalation Skills.

For many years, I have worked in the police sector, helping to resolve both citizen complaints against police and conflict within policing organizations. I have mediated scores of citizen complaints and analyzed how officers' behaviours can contribute to such complaints. I have developed an appreciation of what citizens expect of their police. I have also reviewed research to understand where traditional police training and culture can be changed to give officers enhanced knowledge and skills to better equip them to meet citizen expectations. As a result of my experience, I am motivated to contribute in a positive way to the conversation about police reform, and I have given much thought to the kind of training that would be effective and beneficial. I appreciate and applaud the fact that additional skills and attitudes have been introduced into police training in the past, but my dispute resolution work strongly suggests a continuing need to update and reinforce such important training.

There have long been cries for police reform by various communities and groups. These cries have grown exponentially and recently skyrocketed due to some disturbing and highly publicized events like the killing of George Floyd in Minneapolis, Minnesota, on May 25, 2020, and the beating of Athabasca Chipewyan First Nation Chief Allan Adam by RCMP officers in Fort McMurray, Alberta, on March 10, 2020. Like other mainstream Canadian institutions, police organizations have now acknowledged systemic racism within their walls. Calls for defunding police are common, and Canadian police services boards are regularly fielding such requests from concerned citizens. Mistrust in the ability of our police to serve and protect us, long an issue with minority groups, is now a common conversation around Canadian dinner tables. Having said this, few people would argue about the fundamental importance of trusted, impartial policing in a free and democratic society.

Police scholars and leaders understand that police must have the trust and confidence of their communities to be most effective in their law enforcement duties. Without trust and confidence, without what is called "police legitimacy," neither law enforcement nor peacekeeping duties can be optimally fulfilled. Indeed, in the United States, the 2015 President's Task Force on 20th Century Policing[1] said that building "trust and legitimacy" with the public was the top priority in American policing. Scholars know that police organizations seldom experience a public crisis because of crime rates. They mainly experience crises because the public no longer trusts them.[2] With loss of public trust comes loss of legitimacy as well as effectiveness. And people mostly judge police effectiveness by the way police treat them in one-on-one encounters.

Research studies[3] have shown that public trust in police and effective law enforcement go hand in hand. For example:

- When citizens see the police as legitimate, they trust police to do what is right for the community and accept the exercise of police power.
- Police have legitimacy when people see them positively, accept and respect their authority, and feel they treat people fairly and respectfully.
- When police do not have legitimacy, people resist their requests. They are more likely to file complaints, are less willing to cooperate in preventing, reporting or investigating crime, are less satisfied with their police encounters, and are less willing to obey the law.

- Weak legitimacy on the part of police runs the risk of more violence—between citizens and the police, by citizens against police, and by police against citizens.
- The most important factor affecting an individual's willingness to cooperate with police is whether police are perceived as having been fair in how they have used their authority—in other words "procedural justice."
- People judge whether they have been given "procedural justice" (often referred to as "natural justice" in Canada and the UK) by four criteria: whether the officer treated them with fairness, respect, trustworthiness, and gave them a voice in the decision-making process.
- Being treated fairly and respectfully is especially important for residents of poor inner-city communities who are more likely to see police as too aggressive in their tactics when interacting with them but not responsive enough when it comes to helping them with crime in their neighborhoods.
- Procedural justice is important to every individual, no matter their race, ethnicity, gender, income, age, education, ideology, and/or politics.
- If an individual thinks they were treated unfairly, they will conclude that they were racially profiled during an interaction with police.
- Negative, unsupportive reactions from police to victims of sexual assault can affect the victims' psychological recovery and lower the chance of future disclosure or reporting to authorities. People will give officers bad performance ratings when officers take control of their decisions, blame them for their victimization, distract them from what happened, and show egocentric behaviour. People positively rate officers who provide instrumental, emotional, and informational support.
- Officers trained in procedural justice receive better ratings from victims of crime than officers who were not so trained.

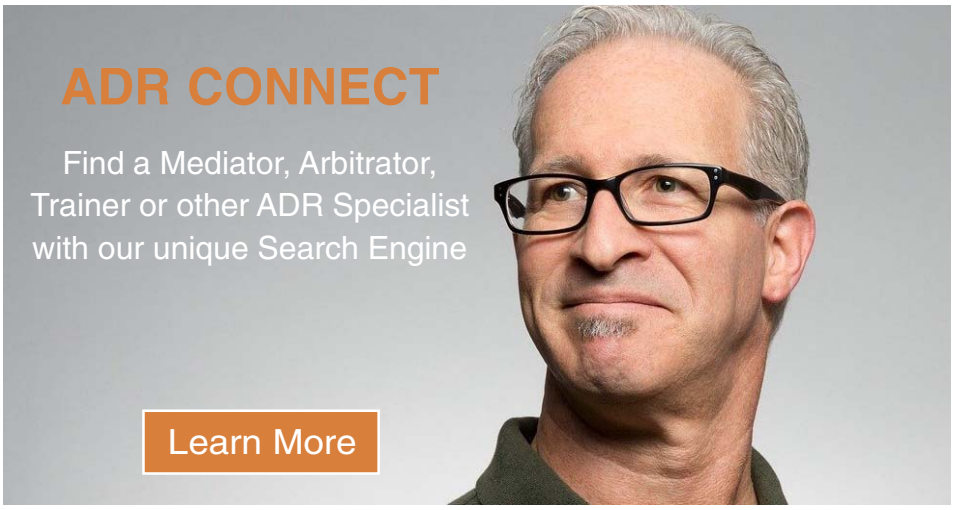
But not only citizens are hurting; police are hurting too. Working as a police officer or within policing organizations is tough, stressful, and demanding. It is not unusual to find that in any given detachment or police service between 25%–35% of officers are away from their normal duties due to stress-related health matters. Often it seems to be a no-win situation. Citizens are crying out for change, and academics are advocating for new approaches, but there is a scarcity of effective, positive, and supportive education and training material to help everyone get to a better place. This is where conflict management comes in—a multidisciplinary field that serves constituencies by integrating knowledge from different disciplines and adapting it to their contexts. Police reform is challenging and multi-pronged, and conflict management practitioners must be part of the process.

Much of what conflict management practitioners know and do has direct applicability to enhancing police reform and efficiency. As noted above, maintaining, or establishing trust and confidence between communities and police is the most important factor in enhancing police legitimacy and efficiency. And trust and confidence depend on how people believe they have been treated in their individual interactions with police.

Conflict management practitioners also concern themselves with the dynamics of power, a relevant consideration in police-citizen interactions. Power—in this case the capacity to direct or influence others—can impact how people feel, perceive threats and rewards, attend to information, and behave in social situations.[4]

Police officers typically have (or are perceived to have) "elevated power" over the citizens with whom they interact, whereas citizens typically have (or perceive themselves as having) "reduced power." For example, police can stop, question, detain, or arrest citizens who do not enjoy reciprocal abilities. When police officers understand this power differential, they can better manage situations and thereby create safer and more stable outcomes for both citizens and themselves. And "understanding" means recognizing, accepting, and checking the tendencies that social science research has identified in individuals with elevated power. Such individuals may be more likely to:

- be optimistic when they assess risk (e.g., they have a high belief that they will win and a lower belief that they will lose) as well as when they make



decisions (e.g., they can be overconfident)
- see citizens as a means to their own ends
- dehumanize citizens, engage in distant and cold decision-making, and sacrifice citizens' welfare
- prioritize their self-interest above that of others
- rely more heavily on mental shortcuts or rules of thumb (heuristics) to help them solve problems and make judgments quickly and efficiently, with the result that they risk making mistakes based on narrow perspectives and stereotyping
- be more focused on their own view rather than adjusting to the perspectives of others. This makes them more vulnerabl-e to underestimating how long tasks will take because their planning ignores relevant information
- have unconscious bias (e.g., be more positive towards white faces and negative towards black faces) in implicit association tests
- hold onto initial judgments and discount the advice of others
- be more prone to risky behaviour
- be more prone to aggression when they feel incompetent, and
- judge the moral wrongdoing of others more strictly than their own.

And at the same time, citizens with reduced power are more likely to:
- feel negative moods and emotions
- pay more attention to threats and the prospect of punishments
- pay more attention to the intentions, attitudes, and actions of others, and
- be more inhibited around others.

Unless the power differential between police officers and citizens is sensitively handled, officers' behaviours can increase the chance of injury to themselves and citizens, and lead to reduced citizen satisfaction and cooperation in the moment and in the future.

In addition to understanding the dynamics of trust and power, police in multicultural Canada need to understand how culture and lived experiences impacts people's expectations for protection and safety, how different approaches to conflict can be handled, and how to mitigate against unconscious biases— all topics that can be taught.

Conflict management practitioners also appreciate that good communication skills help prevent and manage conflict. Police training could certainly be enhanced in this area. Much effort and resources are put into Use of Force training, and such training is certainly a requirement for effective law enforcement, but equal effort should be put into enhanced communication skills training.

Research shows that police culture over-estimates the chances of an officer being injured or killed on duty. Much attention is paid to the "Officer Safety First" mantra which has made Use of Force models important in officer training for decades. These models emphasize the use of commands to establish police presence and authority based on the belief that an officer should be ahead of the situation and dictate its course. While the Use of Force models used in Canada differ from those used in the United States, all such models have the same intention: to control the situation by actions of the officer that are designed to change the behaviour of citizens and make them conform with to officer's demands. "Control" means using or threatening to use force.

A major problem with over reliance on the Use of Force model for training both new and seasoned officers is its focus on control. Better results will come from training officers to use a more engaging style of communication and then rewarding them for doing so. Training for engagement puts less emphasis on control and more emphasis on discussion, negotiation, understanding, and empathy. It lessens emphasis on the "harder" communication methods applied in the Use of Force models, such as clear and deliberate verbal commands, and increases emphasis on the "softer," perhaps better described as "human," communication methods appropriate to the situation such as tone of voice, body language, two-way conversational engagement, searching for better understanding, slowing down the conversations, and showing empathy. These communication methods will gen-

erally better de-escalate volatile situations and influence citizens to cooperate.

During any given tour of duty, situational demands on officers can shift in a heartbeat. One minute they are on a nightmarish notification of death call, the next they are asked to deal with a citizen complaining about the neighbour's grass clippings on their driveway. One minute they are returning a lost child, the next they are attending a potential suicide situation. It is no wonder misunderstandings arise and imperfect responses occur. Officers need more comprehensive training on how to quickly recompose themselves after one call so they can be at the top of their game and "in the moment" at the next call. Teaching methods of resilience should be highlighted. This is necessary in today's fast-paced and demanding environment but runs counter to traditional "suck it up" police culture.

Meaningful and transformational change in the police and security sector will take time. It requires systemic change at the organizational level including such things as new approaches to recruitment and performance evaluation, continuous training, and more robust healthy workplace support. From an individual officer's perspective, training is needed on understanding the effects of a "power over" attitude and the "command and control" model of communication and an appreciation of a more socially realistic, empathetic, inclusive conversational style of communication. This will take us all down a better path. We will move from a place of escalated emotions, low trust, and high resistance to a place of increased understanding, trust, respect, and cooperation. It will enhance the individual health of officers, reduce the risk of harm, create better community relationships, enhance people's feeling of safety and security, and increase police effectiveness.

This is the work for and duty of conflict management practitioners. We need to bring our objectiveness, our understanding, our empathy, and our skills to this polarized and important conversation.

1 https://cops.usdoj.gov/RIC/Publications/cops-p341-pub.pdf
2 See, for instance, "Measuring procedural justice and legitimacy at the local level: The police-community interaction survey"—Journal of Experimental Criminology, January 2015, Rosenbaum et al
3 "De-Escalation in Police-Citizen Encounters: A Mixed Methods Study of a Misunderstood Police Strategy" by Natalie Todak. A Dissertation in Partial Fulfillment of the Requirements of a Doctor of Philosophy 2017 Arizona State University.
4 See Kelner, D., Gruenfeld, D.H. & Anderson, C. (2003) Power, approach, and inhibition. *Psychological Review, 1110(2), 265*-284, and Cho, M., & Keltner, D. (2019) Power, approach, and inhibition: empirical advances of a theory. *Current Opinion in Psychology 2020*, 33:196-200

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Making Sense of Conflict—The Role of Theory

All dispute resolution practitioners hypothesize and conjecture about conflict.

As neutral intervenors, they use a variety of concepts to understand disputes and to invent constructive ways to prevent, manage, or resolve them. Practitioners' ideas may be idiosyncratic and personal in nature. Alternatively (or in addition), they may rely on published theories and frameworks developed by academics, philosophers, or other professional thinkers.

This section showcases how a published theory can be used to analyze and understand a specific, contemporary conflict. Here, students in the Masters of Human Resource Management and Masters of Administration – Leadership programs at the University of Regina offer their analysis of the conflict involving Canadian communications and media giant, Rogers Communications. Their initial analysis was made while the conflict was pending. Their afterthoughts were added once the overt conflict came to an end in the courts and more published information became available.

SHELAGH CAMPBELL, PHD

Shelagh Campbell is Associate Professor of Conflict Resolution and Business Ethics at the University of Regina where she teaches in the Hill and Levene Schools of Business. Prior to a career in academia, Dr. Campbell worked in Human Resource Management and maintained a 20 year arbitration practice with the Canadian Motor Vehicle Arbitration Plan (CAMVAP).

DJINA PAVLOVIC, MHRM, BAH

Djina obtained her Master of Human Resource Management degree at the Kenneth Levene Graduate School of Business at the University of Regina. Prior to receiving her master's, she completed a Bachelor of Arts Honours in Political Studies at Queen's University. Djina currently works as a Human Resources Advisor in Vancouver, BC.

ERIN VALOIS

Erin VaErin Valois is the National Director of Digital Strategy at Postmedia, working with newsrooms on transformation and content development. She holds a Bachelor of Journalism from Ryerson University and is working towards her Masters of Administration in Leadership at the University of Regina.

TITILOPE ADESINA B.SC, MBA, MA, CAMS, PHRI, PMP

A graduate of Leadership from the University of Regina. She is the recruitment coordinator at Employment Network. She previously served as the regional coordinator in the Transaction Services Division of GTBank, Nigeria. She has extensive experience dealing with workplace conflict and negotiations.

I. The Conflict:

Readers likely know that Rogers Communications Incorporation (RCI) is a Canadian media and communications company controlled by the Rogers family. Edward Rogers ("Edward") has 97% control of the Rogers Control Trust, which oversees the RCI Board of Directors. An attempt by Edward to remove Joe Natale, the Chief Executive Officer (CEO), based on the declining performance of the organization, pitched him against his family members and other members of the board (Decloet, 2021a).

The Rogers family saga is a longstanding intergroup conflict that recently boiled over into the public sphere in September 2021 with the attempt to remove Natale, as the company moved to take over rival Shaw Communications Inc. Edward's mother and sisters, who are also directors, disagreed with the move and were supported by five members of the board. This group tried to block Natale's firing. Edward responded by removing several dissenting members from the board, which then triggered his family to oust Edward as chair (Evans, 2021).

At first the Rogers clan tried to find a compromise without the courts, but the back-and-forth of this power struggle came to an end in November 2021 when a B.C. Supreme Court ruling reinstated Rogers as the chair and allowed him to move forward with his plans to replace board members.

II. The Theory:

Gulliver's Process Theory of Power (1979) is a framework for understanding how existing resources, the use of resources, and outcomes are linked together to dictate power balances within groups. Ellis (2005) takes this theory one step further by suggesting that external factors can also be connected directly to outcomes.

The Rogers family feud is an example of intergroup conflict. It lends itself well to analysis using Gulliver's theory, which considers the outcome of conflict to be a function of the *effective* use of the resources in the conflict. The theory proposes that the disputants' values, norms, interests, and perspectives influence how these resources are used. It takes into consideration the available resources specific to the conflict and traces their use to achieve desired outcomes. The theory also addresses the direct and indirect impact of external factors on the outcome of the conflict (Ellis and Anderson, 2005). Mobilization of resources is key in process theory of power. Attaining power resources or mobilizing already acquired and available power resources compounds the expectation of success and motivates further change (Refslund and Arnholtz, 2021; Schmalz et al, 2018).

What follows are three analyses of the Rogers conflict based on Gulliver's theory. The analyses were made while the conflict was outstanding, and the writers have since added their afterthoughts based on what they subsequently learned.

III. Student Analyses:

DJINA PAVLOVIC'S ANALYSIS:

Djina Pavlovic is a part time Master's student and full time Human Resources advisor with a provincial government.

i. Introduction

—The greater the resource possessed or controlled by an individual, the greater the power of the individual.

This analysis focuses on the intergroup conflict between Edward Rogers and his supporters, the Board of Directors, and his family (Coleman et al., 2014). It examines the organizational conflict through the lens of the process theory of power and argues that Edward was able to override the board's vote to dismiss him, appoint himself back to board chair, fire five board members, and hire five others of his pick due to his use of the significant resource power that he possesses in the organization.

ii. Resource Theory of Power & Analysis

Ellis and Anderson (2005) suggest that resources and outcomes are often correlated in the exercise of power. Evans (2021) states that "[Rogers] was able to overthrow the board because of the company's dual-class share structure. More than 97 percent of Rogers shares with voting rights attached to them are held in a family trust—a trust that's chaired by Edward." Edward was able to leverage his resource power as a chair using trust votes to disregard the company's board decision and regain his position as chair. If Edward did not have 97 percent shares with voting rights, he would not have been able to exercise this resource to override the board decision.

Hesse-Biber and Williamson (1984) explain that when the resource theory of power was formulated, it was strongly influenced by work on marital inequality. Their work examines power and resource theory in families. The Rogers case is an interesting application of this theory as the case is so clearly a family dispute in addition to a corporate one. Although family stakeholders within the Rogers business have significant say in the direction of the organization, they did not have much leverage because Edward secured nearly all the family trust rights and votes. Edward's sister and mother had influence in this conflict initially, yet Edward was able to regain his position through the resource power he possessed (Evans, 2021).

In this specific conflict, Edward mobilized his power as head of the voting trust and not only used this available resource to regain his position as chair but also to fire five members from the board and to appoint five others of his liking (Evans, 2021). The fact that Edward was able to mobilize his readily available resources highlights the contribution of those resources to his success in the situation.

Korpi (1985) suggests that resource power "sheds light on the role of social structure in transmitting the consequence of power." News coverage indicated that Edward's family members strongly opposed his use of shareholder power to regain his position and fire board members specifically because it "represents a black eye for good governance and shareholder rights and sets a dangerous new precedent for Canada's capital markets" (Evans, 2021). His family argues that the power that Edward exercised might create a precedent that allows other independent directors of public companies to be removed abruptly by one single powerful individual (Evans, 2021).

iii. Conclusion

Edward's actions, mobilization, and utilization of significant resource power in the form of family trust votes gave him the ability to control the outcome of this conflict so that he could regain his position as chair, fire board members with differing views, and hand-pick new board members privately. His resource power was also legitimized by the courts, highlighting how significant his resource power was compared to other company stakeholders, including board members and his family. On the other hand, it could be argued that coercive power rather than resource power was the most significant reason for Edward's success. There could also be additional information that is not revealed through media outlets that may suggest other factors were at play.

iv. Aftermath & Conclusions

Applying the process theory of power to real-life situations allows us to uncover what may have been the driving personal and political factors in certain business decisions. It helps us understand why particular events happen, helps us recognize if and how there may have been coercive power applied, and allows us to understand what actions might be creating a precedent and what societal implications this will have. A possible implication identified when analyzing this dispute through the resource theory of power is that the power that Edward exercised could have a societal impact; it could set a negative precedent for corporate governance and the negative use of resource power by top corporate executives.

Using power theory to dissect certain political and businesses situations and decisions can help one navigate one's own personal decisions. For example, a job seeker might hesitate to apply for a position knowing that coercive power is used at the executive level, or a board member may resign from their appointment if they determine a similar dynamic at the board level.

ERIN VALOIS ANALYSIS:

Erin Valois is a part time Master's student and full-time journalist with Postmedia.

i. Analysis

It is clear Edward Rogers held a major advantage over other family members due to his superior access to resources, his ability to use those resources, and key links between external factors, resources, and outcomes. The other Rogers family members controlled some aspects of the conflict due to their own power within the organization, but the factors within Edward's sphere outweighed those of his opponents.

The dispute between two sides of the family and their corresponding allies is playing out between these organizational subgroups. In Edwards's case power combined with an aggressive dispute style unbalanced the

organizational environment and allowed him to avoid compromise in favour of winning at all costs; relationship damage was the result (Bjorkquist, 2011). The frameworks of Gulliver (1979) and Ellis (Ellis and Anderson, 2005) provide a lens with which to examine the resources and related processes used in the conflict. Edward was able to use his resources to persuade part of the family trust to support his cause, and, ultimately, the B.C. Supreme Court reinstated him as board chair. He accomplished this by drawing upon: the succession power bestowed on him by his father, the late Ted Rogers, which granted him important political capital within the company; his role as chair of the family trust, which gave him access to legitimacy and information; a variety of powerful third-party allies for support, like Toronto mayor John Tory; the financial means to pay hefty legal fees associated with this type of corporate governance challenge; and a complicated dual-share system that Edward used to overrule threats to his decision-making power (Gamage et al., 2021).

The resources available to his mother and sisters are not as numerous or as powerful as Edward's, but one important resource— public image—explains how the conflict was prolonged to its ultimate finish in court; the family was seen in a better light in the media than was Edward. They also had the public backing of CEO Natale who said he would not continue with the company if Edward remained in charge (Deveau et al., 2021). Natale's presence was seen as a stabilizer during takeover discussions, and the family used him as a resource to curry favour with shareholders. The women were able to use the media to cast them in a sympathetic light as the conflict escalated, and they garnered public support after a series of tweets from Martha Rogers, one of the sisters.

In addition to the imbalance in resources between Edward and his opposing family members, his position as board chair added legitimacy to his power and brought network and information power as well (Ewert et al., 2019).

There is also a clear connection between Edward's access to power from external factors and the outcome that he achieved against the wishes of his family. The dual-shares structure and the inadequacy of federal regulation in this realm meant his reinstatement as chair was a foregone conclusion regardless of the resources held by his opponents. The pressure of the impending Shaw takeover was another external factor, and Edward's reluctance to follow social norms—shown in the allegations by his mother that Edward lied to her to get buy-in for the Natale firing—helped him engineer a successful win-lose outcome under time pressure in his quest to have full control over Rogers Communications (Dobby, 2021).

ii. Aftermath

The Rogers fight faded from the headlines once Edward Rogers officially made interim CEO Tony Staffieri permanent, but the original conflict is still rumbling beneath the surface. Staffieri was Rogers's chief financial officer until September 29, 2021, when he exited the company after Edward's first attempt to oust Natale failed (Posadzki and Willis, 2021). Staffieri's recent appointment is a clear indicator of how quickly the balance of power between feuding groups can shift, depending on allocation and usage of power resources: Natale initially held a lot of internal advantages, including the support of the rest of the Rogers family, so he was able to control the former CFO's trajectory. Yet, a few short months later, Natale is out of the company and Staffieri is on top.

The battle of the billionaires is not eliciting empathy from the public, and there is a chance this dispute could change corporate governance laws in Canada to prevent a single party from having the sole power to make major decisions without necessary support from the board (Hansen, 2021). If there is a push to change policy, the resource power of Edward could be stifled significantly, shifting the balance of power to his mother and sisters in future conflicts where they could make use of media support and public sentiment to oppose a perceived dictatorship of the current chair.

It was valuable to deconstruct the Rogers family feud through the lens of Gulliver's Process Theory because it helped highlight the foundational issue causing chaos at one of Canada's largest companies. One can easily get lost in the scintillating personal details of the conflict, such as the accidental butt-dial reported by The Globe and Mail that pushed the fight over the edge, but those minor anecdotes were simply clues to how power was shifting between the two factions, leading to Edward's victory.

Using theory in a real-world example takes away a lot of the mystery tied to these deep conflicts, allowing us to better understand the core problems at play. Applying these frameworks to actual disputes creates the opportunity for a more productive environment aimed at resolution as it can strip away the mayhem and level the playing field with context.

TITILOPE ADESINA'S ANALYSIS:

Titilope Adesina has recently completed her Master's program and has 25 years of experience in the banking sector.

i. Analysis

According to Moore, as cited by Laffier et al. (2019, p. 27), the Rogers Communications Incorporation Board of Direc-

tors is embroiled in a structural conflict as well as an interest conflict. There is a power imbalance in the board, and members have conflicting interests over the best choice for CEO. The conflict exists at the interpersonal level between Edward and other family members, and at the intergroup level between the group of directors led by Edward and the group of directors led by the other family members (Coleman et al., 2014).

The resource imbalance created by Edward's legitimate and procedural power was widened by other forms of power such as association (support from Mayor John Tory) and expert power from legal counsel (Mayer, 2012, pp. 74-75). The strength of the resources available to Edward informed his position-based approach to the conflict that excluded the interest of the other parties. According to Laffier et al. (2019, p. 139), such an approach prompted the opposing family members, whose power was essentially moral and social in nature, to adopt a competing position. The adoption of positions by all disputants resulted in an escalation of the conflict, foreclosing the possibility of a mutually beneficial outcome (Laffier et al., 2019, p. 139).

According to Greer & Bendersky (2013), having the higher power resource in a conflict does not guarantee the desired outcome. Disputants with lower power can enhance the potency of their resources if they understand how to use them effectively. The group led by the matriarch of the Rogers family stood a chance of influencing the outcome of the conflict if it were to have used its resources effectively. However, by opting to use its power in a confrontational matter, driven by negative emotions, this weaker group lost the opportunity to strengthen its resources and ultimately impeded their influence over the outcome. In cases of power imbalance, evidence shows that negative emotions induce actions that result in outcomes that favour the disputant with the higher power and not the lower power group in the conflict (Greer & Bendersky, 2013).

Wasynczu & Kaftan (2014) suggest that attempts at coercion (whether successful or not) can provoke a competitive response, and this is what happened in the Rogers dispute. The opposition by the family group triggered Edward's adoption of a competitive strategy. That strategy further reduced the possibility of reaching a mutually beneficial outcome that would repair the damaged relationships in the conflict. By reconstituting the board and going to court, Edward leaned fully on his legitimate power, expert power, and procedural power to compel the others to accept his position. In addition, the adoption of a right-based approach gave him a better chance of influencing the outcome of the conflict, judging by the potency of his resources (Ellis & Anderson, 2005).

According to Mayer (2012), the disputants would have been better off enhancing their power resources by adopting persuasions and negotiations instead of threats and manipulations. In addition, persuasion and negotiation would have appealed to the conflicting parties' values and beliefs and created trust needed to share information and explore trade-offs necessary for conflict de-escalation (Wasynczuk & Kaftan, 2014).

While the family members fought, the stock market, an external factor, reacted promptly with a continuous decline in the company's stock price (Bharti, 2021). The external factors may have had an indirect impact on the outcome of the conflict, as these probably influenced Edward's turn to the courts for a quick resolution (Ellis & Anderson, 2005, p. 149). Another influencing factor may have been the possibility of a regulatory inquiry. After the court ruling, the market indirectly influenced the outcome of the conflict when Edward decided to retain the current CEO and refrain from making significant changes to the organization's leadership to communicate stability.

The power resource imbalance, external factors, and the parties' choice to use a competitive approach contributed to the win-lose outcome of the conflict. The disputants might have achieved a win-win outcome if they had focused on interests, values, and the future relationship of the actors in the dispute. While the disputing parties appear to have reached their intended outcome, namely Edward's chairmanship and Joe Natale's retention as CEO, the result was a lose-lose situation. The board of directors is splintered, and the company's image appears to be worse off. Moreover, given the existing organizational structure which concentrates authority on a single individual, investors' faith in the organization's leadership will continue to be fragile (Bharti, 2021).

ii. Aftermath and Conclusions

The Rogers feud began as a ploy to remove the CEO and erupted into a conflict in a court of law. Although the parties had unequal resources, attempts to use coercive power deepened the power imbalance, escalating the conflict. Edward leveraged his more potent resources to influence an outcome in his favour. Activities at the stock market also seemed to have influenced the choice of the court for settlement. As expected, the approach resulted in a win-lose outcome, which put the future relations of the board members in jeopardy.

Theories provide a framework with which real-life situations can be understood and diagnosed. Knowing how to apply a theory helps streamline the gathering of information required to diagnose and proffer solutions to complex real-life issues. Using a framework makes it easier to classify the core issues in a given situation and better

understand the contributory factors and their impact on cases. In addition, a theory helps to give an overview of the problems without getting entangled in the emotions and biases that come with using old knowledge or human intuition in any given life situation. Theories do not necessarily have to be applied by subject matter experts alone. Any person who understands the various aspects of the theory can implement the framework for successful analysis.

Edward broke his promise to retain the current CEO after about two weeks when he appointed a new CEO, Tony Staffieri, thereby establishing his interest above that of the other party (Saligrama & Aich, 2022). Now that he is clearly in power with the CEO he prefers, it would be insightful to perform a deeper analysis on his personal conflict style, as it is clear his win-at-all-costs approach was a major factor in this conflict. Melinda Hixon-Rogers said in December that her first priority was to compromise with her brother, but his influence with the board ran too deep, and her attempts at finding a shared solution were rebuffed. However, she admitted the family is on speaking terms again (Decloet, 2021b). While it is not clear whether Edward will abandon his forceful, yet victorious, conflict management approach to find an opportunity for cooperation based on Melinda's apparent olive branch, her positive comments about working together in the aftermath of this major dispute emphasize a more collaborative tone.

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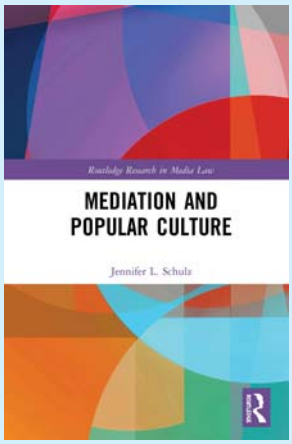

Mediation and Popular Culture

Jennifer L. Schulz,
Routledge, 2020

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ISBN (e-book) 9780429059551

Reviewed by: Pat Bragg, B.A., B.Ed

PAT BRAGG, B.A., B.ED

Pat Bragg, B.A., B.Ed worked as a mediator in human rights, personal injury, and family mediation for over 30 years. She is currently president of Mediation Yukon and has served on numerous boards of mediation organizations - locally and nationally. Pat facilitates mediation trainings in the Middle East, Turkey and Canada. Bio: https://www.northernfocus.ca and https://patbragg.ca

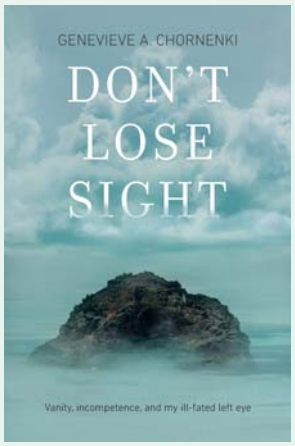
What a fun, dense, and important read about mediation! We are deceived at first by the slimness of Dr. Schulz's stimulating book. This book covers everything important that there is to think about mediation values, practice, and ethics. It adds dimensions of how mediation is viewed through movies and television and how the images of mediators are influenced by what our clients see and hear through popular culture. It is richly referenced to classical and recent mediation texts and articles, and provides an invitation to the reader to reflect again on all we have individually learned and collectively created as a body of literature.

Why do I say it is fun? Reading *Mediation and Popular Culture* brought back learnings from the earliest and most inspiring developers of modern mediation practice and set them in the current context. I was taken back so many times to my first experiences of these pioneers of mediation—Bush, Folger, Fisher, Ury, Lang, Winslade, Monk, Kolb, LeBaron, Izumi, Picard, Moore, Cloke, Harper, and so many more whose teachings happened through reading or experientially in conferences and clinical demonstrations. I feel inspired to review, re-assess, and integrate everything I have learned in 30-plus years of mediation and training into who I am now as a mediator. What informs my practice? What have I gained from each of these mediators and what have I added on or tossed out? My identity as a mediator is under review in light of the stimulation—both literary and through popular culture—that Dr. Schulz has created.

It is dense. Every page has extensive footnotes, displaying Dr. Schulz's scholarly expertise and vast research capability and knowledge. She is a true teacher and is careful to share her sources with any new or experienced students of mediation who are lucky enough to find their way to this beautiful book. I read it in big gulps and then had to put it down to think about what I had been invited to consider. I took the questions raised into my everyday practice and use them continually as a means of self-evaluation.

Mediation and Popular Culture is important reading for today. It should be required reading for any student of mediation. All the ethical, ideological, and practical considerations for mediation practice are brought to our attention in the light of movies and television examples that we have seen or can see, including some international examples. Some of the topics raised and explored include: How to keep the process "fair." What is the role of mediator intuition (the artistry and magic of mediation)? What are the dangers of shuttle mediation and caucusing? How do mediators address feelings, both clients' and their own? When does diplomacy become deception? How can mediators abuse their power? Do good results justify the mediator's abandonment of transparency, the use of deception or manipulation?

The last words of the book are "Let's do that." The author was talking about letting the world know who and what we mediators are and what we can do to create more peace and harmony in the world, with better and more durable solutions to problems. Mediators can start by examining, knowing, and owning their own practice. We can continually ask the big questions and learn from each other and improve. *Mediation and Popular Culture* provides a wonderful structure for the pursuit of excellence.



Don't Lose Sight: Vanity, incompetence, and my ill-fated left eye

Genevieve A. Chornenki,
Iguana Books, 2021

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Reviewed by: Heather Swartz, C.Med, M.S.W.

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Heather Swartz is a partner with Agree Incorporated. She has over two decades of workplace, family, and civil mediation experience. Her current practice focuses on workplace assessments and restorations. In 2017 Heather received the ADR Institute of Canada (ADRIC) Lionel J. McGowan Regional Award of Excellence.

In *Don't Lose Sight: Vanity, incompetence and my ill-fated left eye*, esteemed arbitrator and mediator Genevieve Chornenki invites the reader into the pain caused by emergency surgery on her left eye, as well as her tenacious pursuit to safeguard others from similar harm. She shows what it is like to sit in the chair of a participant with a personal interest in a dispute rather than in the chair of a "neutral" who leads others through a settlement process. Genevieve's intimate and relatable tale is woven with wit, wordplay, and vivid imagery that grasped my attenton immediately and kept me engaged, without pause, for the next 125 pages.

After her optometrist twice failed to diagnose a detached retina, putting Genevieve at risk of permanent vision loss, she decides to submit a formal complaint to the College of Optometrists. A proposed settlement of a guilty plea of professional misconduct and a quality assurance file audit fails to address Genevieve's underlying motivation for her complaint. Seeking a resolution that will protect other patients from the risk of misdiagnosis, Genevieve declines an invitation to provide a victim impact statement, not seeing herself as a "victim," and opts to attend the discipline hearing with counsel in order to be taken seriously. Nevertheless, she finds the process impersonal and incomprehensible.

In 1996, as a student of dispute resolution, I read the practical and educational *Bypass Court: A Dispute Resolution Handbook* co-authored by Genevieve and Christine Hart. It opened my mind and my eyes to a new way of resolving conflict and created a foundation for my developing career. A quarter century later, reading the novelistic *Don't Lose Sight* likewise provoked both professional and personal reflection and insight.

We who put ourselves forward as professional listeners should take note. The failings of the discipline process and the errors of the optometrist in *Don't Lose Sight* reminded me of the responsibilities all professionals, including dispute resolution professionals, have. It reinforced my operating principle, borrowed from the medical field, to "do no harm." As mediators we use our skills to help parties articulate their "symptoms" and we actively listen for interests knowing that resolution is unreachable if what is significant to the parties remains unacknowledged. Similarly, as workplace assessors, we ask open-ended questions and listen to many voices to diagnose and name the themes within a workplace so that restoration efforts can be focused effectively. In either role, we risk a misdiagnosis if our assumptions interfere with truly hearing what the other person is saying or if we conduct an inadequate "investigation'" before "treating" the problem. In the field of dispute resolution, mistakes can cause further emotional pain or prompt an urgent crisis that may be difficult for the parties to a mediation or a workplace to recover from.

On a personal level, *Don't Lose Sight,* made me aware of my own blind spots, by which I mean those areas where I take my own experience to be a shared or universal one. My brother-in-law of 45 years was unable to pursue his dream of being a firefighter due to colour blindness. Despite knowing this, I recently had a conversation with him where, once again, I forgot he is unable to see colour in the same way that I do. My dearly loved sister, waiting for cataract surgery, has restricted her freedom as the glare and distorted light means she is no longer comfortable driving at night. Shortly after she shared this information with me, I neglected to consider her limitations when discussing a potential visit. Both are stark reminders to me that I need to open my

eyes to others' lived experiences and imagine myself in their circumstances so as to empathize with them.

I was completely immersed while reading the book. Genevieve's sense of humour and profound humanity took me on a professional and personal journey. *Don't Lose Sight* reawakened me to the fragility of vision and sparked an instant appreciation of its power. Looking out the window, I noticed areas of high ground sprinkled with the first snow of the season, golden grasses waving in the wind, juxtaposed against a backdrop of dark green pines and slender white birches highlighted by the afternoon sun. This heightened level of attention to detail will help me avoid overlooking what I should see in my personal relationships and professional practice.

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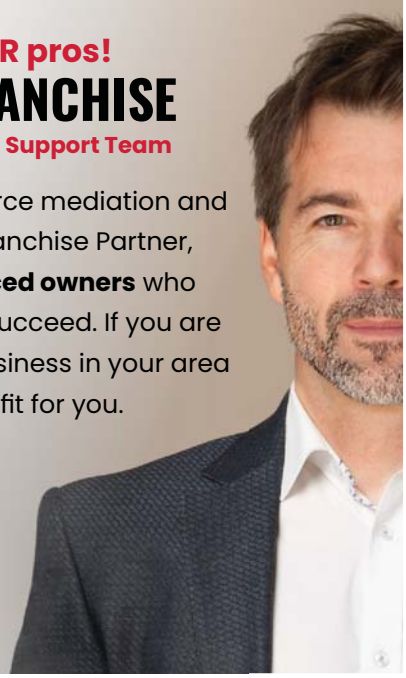

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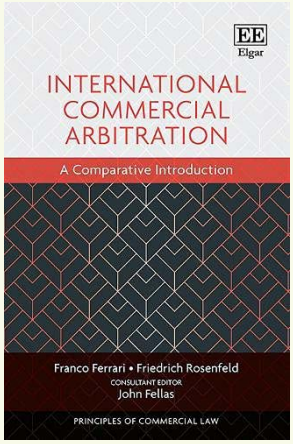

International Commercial Arbitration: A Comparative Introduction

Franco Ferrari and Friedrich Rosenfeld, Edward Elgar Publishing, 2021

ISBN: 978-1-80088-280-5

Reviewed by: Eric Morgan, Q.Arb
with additional commentary by
Hon. Barry Leon

Arbitration practitioners can pick and choose for each dispute the most appropriate aspects from various national dispute resolution processes and traditions, in addition to processes that have been developed for arbitration. In international commercial arbitration, where practitioners are exposed to many other ways and thinking about resolving disputes between businesses, this is particularly so. Without being tied necessarily to any specific jurisdiction, international commercial arbitration practitioners can borrow and adapt ideas and approaches from all jurisdictions.

In *International Commercial Arbitration: A Comparative Introduction*, Franco Ferrari and Friedrich Rosenfeld, professors at New York University in New York and Paris, offer a practical introductory overview of international commercial arbitration and how it is both separate from and influenced by national legal systems.

The book is structured in the chronological order of an arbitration, first laying out general concepts around an arbitration agreement before moving through the initiation and conduct of an arbitration through to the award and its enforcement.

It begins by exploring key concepts and dichotomies animating arbitration—the importance of the parties' consent as the basis for arbitrating their dispute, institutional versus ad hoc arbitrations, commercial versus investment treaty arbitrations—as well as examining the benefits and disadvantages of arbitration compared to other forms of dispute resolution.

The book draws on several sources as it moves through the typical steps in an arbitration proceeding, hugging closely to the UNCITRAL Model Law on International Commercial Arbitration which underpins many national arbitration laws, including all Canadian arbitration statutes. The book also draws on the procedural rules and soft law instruments of various international arbitration institutions and bodies, such as the International Bar Association.

Ferrari and Rosenfeld's book, though, is at its most interesting when it departs from any particular set of rules and procedures and explores practical issues like the assessment of evidence or when arbitrations are especially complex due to the involvement of multiple contracts and multiple parties. These chapters raise issues around the practice of arbitration on the ground rather than the broader framework of rules and laws which occupy more the other chapters.

ERIC MORGAN, Q.ARB

Eric Morgan, Q.Arb is a partner at Kushneryk Morgan LLP, a Toronto boutique law firm specializing in corporate governance, securities litigation and commercial and corporate litigation and arbitration. He was selected as an inaugural member of the NextGen Roster of Arbitrators at Arbitration Place.

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HON. BARRY LEON, CIARB

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https://www.arbitrationplace.com/arbitrator/barry-leon

When dealing with the national laws of specific countries and how they interact with international commercial arbitration, the book is necessarily fragmented almost to the point of being scattershot. So we learn what the Tokyo High Court has to say about the right to be heard, what the Frankfurt Court of Appeals held regarding procedural deficiencies and an arbitrator's independence and impartiality, and how the Singapore High Court approaches the standard of review on questions of jurisdiction. Canadian case law makes its fair share of appearances too, for example, the Supreme Court of Canada's decision in *Dell Computer Corporation v Union des Consommateurs et al.*, [2007] 2 SCR 801 regarding the court deciding arbitral jurisdiction on a question of law, and the Federal Court's decision in *Canada (Attorney Gen.) v S.D. Myers Inc.* [2004] 3 FC 38 regarding the principle of minimal judicial intervention when a court is asked to set aside an award. The commentary of some Canadian practitioners such as Henry Alvarez is also featured.

Ferrari and Rosenfeld do not allow any one jurisdiction to dominate their examples, though it may have been better if they had reflected a bit more the case law from the common hubs of international commercial arbitration. Anyone wanting a further analysis of any one jurisdiction's approach to international commercial arbitration will have to look elsewhere.

In this relatively slim book, we are only given snatches and glimpses, though with some attempts to set out categories and recognize trends. This analysis includes how national laws can diverge fundamentally from each other, with implications for international arbitration. For example, in certain jurisdictions, including Germany and Italy, the partial invalidity of a contract invalidates the entire contract, which then gives rise in arbitration (including under the UNCITRAL Model Law) to the doctrine of separability by which an arbitration clause is considered a separate agreement from the other terms in the contract for the purpose of establishing arbitral jurisdiction. Learning about other jurisdictions can help Canadian practitioners understand what lies behind certain international arbitration instruments and practices. Sometimes these are aimed at addressing issues that are not commonplace in Canadian law.

The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("New York Convention") rightly dominates the post-award discussion. A careful tour through the New York Convention occupies fully about one-fifth of the book. Ferrari and Rosenfeld look at both the requirements of the New York Convention and how national courts have approached enforcement of arbitral awards.

The authors end their book by tying the New York Convention and the post-award phase more generally to the pre-award phase. Ferrari and Rosenfeld look at how decisions at the drafting phase can impact the ability to enforce an award made following an arbitration pursuant to that contract.

International Commercial Arbitration: A Comparative Introduction will be a helpful resource to arbitration practitioners in any jurisdiction, including Canada, as an introduction to the area and as a reminder that there are many choices to be made about how a dispute is resolved through arbitration, informed by but not necessarily restricted to the national jurisdictions of arbitration practitioners. The book offers Canadian practitioners a richer understanding of international commercial arbitration at both a conceptual and practical level, including the points of view of practitioners from other jurisdictions. Under the UNCITRAL Model Law (which underlies arbitration laws in all Canadian jurisdictions), regard must be had to its international original and the need to promote uniformity; this book helps Canadian practitioners do this by showing how arbitration is developing at the international level and in other jurisdictions. Even for those not practising international commercial arbitration, this book may inspire Canadians practising domestic arbitration or litigation to be more creative about working to resolve their clients' disputes.

ADDITIONAL COMMENTARY BY HON. BARRY LEON

A practical take-away from Franco Ferrari

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and Friedrich Rosenfeld's book for Canadian disputes lawyers—and indeed disputes lawyers in many jurisdictions—is that arbitration should not mimic any national court system's procedures and practices.

While those of us who have done court litigation in a particular jurisdiction may be comfortable with "how we have always done things," our ways of doing things are not the only ways and are not necessarily the best ways—at least not for every dispute. Indeed, those ways usually lack the flexibility that would enable parties to customize procedures and practices to fit their circumstances.

Commercial arbitration's ways of doing things provide opportunities for disputing parties and their counsel to shape the process to fit the dispute and the circumstances of the parties, to be efficient in both time and cost, and to do things in ways that make sense in the circumstances. Almost nothing must be done in a particular way simply because "the rules require it."

Lawyers who view arbitration as court litigation done in private and sitting down, miss opportunities for their clients.

Arbitration offers process options for dispute resolution that can benefit from customization and creativity. If the objective is to enable an arbitral tribunal to obtain what it needs (evidence, relevant law, etc.) to make a fair, timely, and sensible decision in accordance with the law chosen by the parties, the lawyers involved need to consider at each step whether the activity is advancing that objective, and whether there are better ways to do it.

Congratulations to the 2021 winners of the Lionel J. McGowan Award of Excellence!

On October 21, 2021, the Lionel J. McGowan awards were presented virtually at ADRIC's AGM in recognition of leadership and excellence in the field of Alternative Dispute Resolution. The McGowan Awards are named in recognition and honour of Lionel J. McGowan, the first Executive Director of the Arbitrators' Institute of Canada. Presentations take place annually at ADRIC's annual national conference.

THERE ARE TWO AWARDS:

National Award of Excellence

This award is presented annually to an individual who had made an outstanding contribution to the support, development and success of the ADR Institute of Canada: its policies and programs, and/or to promotion of ADR on a national scale.*

Regional Award of Excellence

This award is presented annually to an individual to recognise outstanding contributions to the development and success of an affiliate of ADR Institute of Canada or to the promotion and development of alternative dispute resolution within a region.*

* Professional ADR teaching, simply hearing ADR cases, and/or other regular ADR practice activities do not qualify. Similarly, simply being on the Board of the ADR Institute of Canada or its affiliates does not qualify unless it included major contributions.

2021 Lionel J. McGowan Award of Excellence FOR NATIONAL SERVICE

Janet McKay, Former ADRIC Executive Director,
National McGowan Award Winner

Presenting the Award: Michael Schafler, FCIArb, Q.Arb,
ADRIC Vice-President

Ms. Janet McKay was awarded the national McGowan award for her outstanding contribution to the development and success of the ADR Institute of Canada on a national level, and for her significant contributions to the promotion and development of ADR across Canada. Andrew Butt, Past President of ADRIC and Chair of the Awards Committee, stated: Janet McKay has been a long time advocate and tireless worker on behalf of ADRIC. During her almost 13 years as an ADRIC employee, she has impacted every part of our operation and vision for ADRIC. Her efforts, work ethic and leadership are obvious in the successes of our core mandates – increasing services to members, increasing services to affiliates, expanding and enhancing professional designations, providing successful National Conferences, improving print and on-line communications with members and groups interested in ADR processes, improving and setting standards for ODR processes, providing quality on-line learning, and nurturing provincial/Affiliate partnerships – and too many other items to mention. We present our 2021 National McGowan award to Janet as a symbol of our appreciation and respect. Congratulations, Janet!

2021 Lionel J. McGowan Award of Excellence FOR REGIONAL SERVICE

Me. Dominique Lettre is being recognized as a 2021 Regional McGowan award winner as a thought leader and outstanding practitioner-educator from Quebec. Her expertise in alternative dispute resolution for the mediation field has made her one of the most sought-after mediators and teachers in the field of family and civil disputes. While leading an ongoing active professional ADR practice, Me Lettre has always remained very involved with IMAQ, especially with its IMAQ's Network (Les Réseaux de l'IMAQ), in the promotion, networking, training and development of ADR practitioners. She also served as a member and Vice-President of IMAQ's Board of Directors between 2014 and 2020. Me Lettre is a well-known leader and an active ambassador in the field of mediation and ADR both in the province of Quebec and Canada. The ADR Institute of Canada is proud to count Dominique as one of its members and ambassadors in all her engagements. Congratulations, Dominique!

Me. Dominique Lettre, LL. B., Arb.Acc, Méd.Acc,
Regional McGowan Award Winner

Wendy M. Scott is our 2021 Regional McGowan award recipient for her contributions as a builder in both Atlantic Canada and across Canada. A mediator in private practice for much of her career, Wendy's diverse volunteer contributions to ADR began some 25 years ago. They include senior leadership roles at the Atlantic affiliate level, including President; and a decades-long commitment to membership development, mediation standards and designations, and training. She has been an active and sincere committee member on many regional and national committees aimed at advancing the goals "on the ground" of our national mediation community. Wendy also recently completed two years on the national Board of Directors, during which she contributed to the Presidents' Roundtable, and development of the refreshed MOU among our federation partners. Wendy Scott is a grassroots founder and sustainer of our organization, with an impact across the country. Congratulations, Wendy!

Wendy Scott, C.Med, BIS,
Regional McGowan Award Winner

For more information,
visit: *www.adric.ca/mcgowan*

Lionel J. McGowan Awards of Excellence in Dispute Resolution

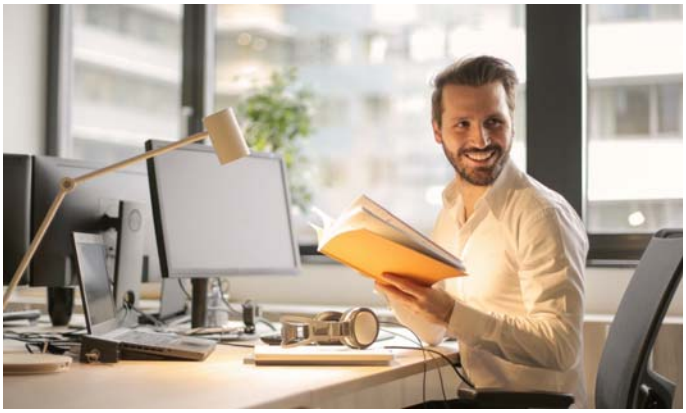
CALL FOR NOMINATIONS FOR 2022

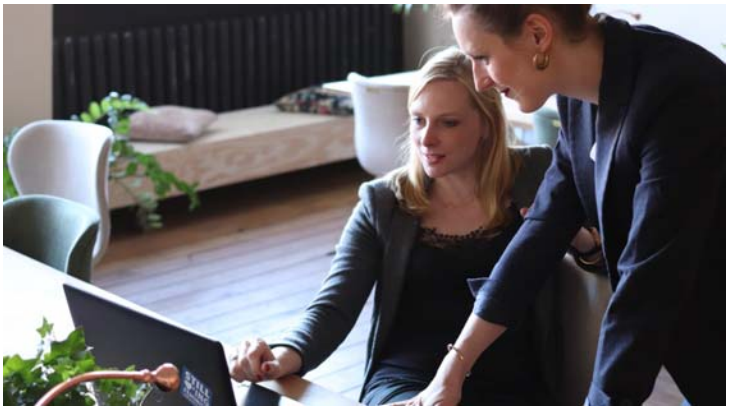
See page 38

Submit Your Articles

ADRIC welcomes articles from members and friends (in both official languages) for our two official publications.

2,000 to 2,500 words for Canadian Arbitration and Mediation Journal, *OR* 500 to 950 words to be published in ADR Perspectives.





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Congratulations to our New Designation Recipients!

We congratulate ADR Institute of Canada members who were recently awarded the designation of Chartered Mediator, Chartered Arbitrator, Chartered Med-Arbitrator, Qualified Mediator, or Qualified Arbitrator.

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More information

Lionel J. McGowan
Awards of Excellence in
Dispute Resolution

Call for Nominations for 2022

ADRIC is calling for nominees for the Lionel J. McGowan Awards of Excellence in Dispute Resolution for 2022.

The awards are named in recognition and honour of Lionel J. McGowan, the first Executive Director of the Arbitrators' Institute of Canada. The presentation of the McGowan Awards will take place at the ADRIC Annual General Meeting October 20, 2022. There are two awards: one which recognizes outstanding contribution to the support, development and success of the ADR Institute of Canada, Inc. and/or development of alternative dispute resolution nationally and one which recognizes contribution to a Regional Affiliate and within a Region.

Deadline
Nominations will be accepted until Friday, July 1, 2022. You are encouraged to submit nominations at any time prior to this date. Please send nominations **in the form of a letter explaining why you feel your nominee should be recognized and highlighting the nominee's specific contributions,** to the McGowan Nomination Committee at the ADR Institute's national office, by fax or e-mail.

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This award is similar to the Regional award, but given for contributions to the ADR Institute of Canada. A candidate's contributions to the support, development and/or progress of the ADR Institute of Canada and its policies and programs, and to promotion of ADR on a national scale, would be relevant. Professional ADR teaching, hearing ADR cases and other ADR practice activities do not qualify. Similarly, simply being on the Board of the ADR Institute of Canada does not qualify unless it included major contributions to the Institute through development of the Institute's structure, National-Regional relationships, national programs or materials, funding, or other significant Institute initiatives.

Regional Award of Excellence
This award is for an individual who has made an outstanding contribution to the development and success of the Regional Affiliate of the ADR Institute of Canada, either by a short-term exceptional effort or through constant contributions over a long period of time, or has contributed significantly to the promotion and development of ADR within the region. Note that simply being a member for many years, being on a board or committee for many years, or carrying out one's own ADR practice do not apply toward the award.

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