



## Alternative Dispute Resolution Goes Virtual

by Martin Gariépy

June 2020

The current COVID-19 crisis has shaken up every sphere of our society and has forced everyone to rethink their ways of working. This is no exception for the field of alternative dispute resolution (ADR) and its professionals must adapt to the new context. Considering that in-person arbitrations and mediations are not feasible at this time, a migration towards virtual proceedings has become inevitable. This new reality has brought with it a host of opportunities and challenges.

Thanks to its state-of-the-art technology and a long-standing familiarity with conducting virtual proceedings, the Sport Dispute Resolution Centre of Canada (the Centre) has remained fully operational since the beginning of the crisis and its tribunal services have been very minimally impacted, if not at all. Considering its expertise in this area, the Centre wishes to give an overview of its own practices and provide some advice to efficiently conduct virtual arbitration proceedings and mediation sessions.

*"The SDRCC has been a forerunner in running secure, professional and efficient virtual hearings. Having developed the technology with a third-party partner right from the start instead of relying on existing platforms, they were able to "get it right the first time". As organizations have massively been required to pivot towards online platforms in 2020, the SDRCC was lightly jogging ahead of all the others who are now awakening to this new reality. As an arbitrator, I find the process to be secure and efficient, and allows for the ideal combination of speediness and fairness for my awards to be rendered."*

*- Patrice Brunet, SDRCC and TAS Arbitrator*

### ***Advantages and Disadvantages of Virtual Proceedings***

Cost-saving is probably the biggest advantage of conducting proceedings virtually. Because there is no need to arrange for travel, meals, accommodations, meeting space, transcription services and more, parties can save significant amounts of money. Certainly, an attractive option in the not-for-profit sport sector!

Online proceedings also allow parties, as well as arbitrators and mediators, to enhance their productivity in general. Since people don't have to travel or commute and are participating in the proceedings from their home or office, the time they save can be leveraged to work on other projects.

Virtual proceedings offer greater flexibility as they can take place with shorter notice, no matter where in the world parties are (and in the sports context, they are often scattered across the globe), and they allow for proceedings to be more easily rescheduled or reconvened, if necessary.



On the flip side, conducting virtual proceedings raises inclusion and accessibility concerns. Indeed, some individuals might be excluded or disadvantaged because they have limited familiarity with the technology and software used, or they rely on public spaces such as libraries for their Internet and computer access, for example. Unreliable Internet connections or obsolete devices also complicate the use of modern online platforms and software. Virtual proceedings should be inclusive, easily accessible and should never penalize a participant more than another. Those who conduct virtual proceedings must ensure that all participants agree to the method used and that those who need assistance with the technology are properly supported by meeting organizers.

Confidentiality issues and security risks also arise when online platforms are used to conduct proceedings, as illustrated by the recent missteps of Zoom, the popular cloud platform for video and audio conferencing, chat and webinars. Confidentiality and privacy are discussed in more detail below.

### ***Different Formats and Technological Tools***

*Synchronous* technology, or tools that enable people to interact all at the same time, includes several videoconferencing and teleconferencing platforms and software. The intent here is not to provide a comparative analysis of products; there are numerous websites providing such information. However, it is crucial to carefully choose the tools, based on your needs and those of the participants involved in the proceedings, and not jump on the cheapest service or the coolest-looking interface.

A wide variety of functionalities are offered by online platforms, such as end-to-end data encryption, password-protection, attendance by invitation only, locking of the meeting, sound and/or video recording, screen sharing, remote control by hosts or by participants, chats and private chats, breakout rooms, blurring or changing one's background, etc. Those of you who have attended these types of conference calls will be familiar with some of the disturbances that arise, such as background noise from participants' unmuted phone lines that overcome the meeting itself. You will be glad to know that there are platforms out there that offer a higher degree of control over individual participants, including the capacity for the host to mute/unmute, increase/decrease volume, dial-in, or even disconnect others. Knowing what you need will drive the choice of the platform.

Regardless of the system you decide to use, all its fancy functionalities will be useless if eventual users are not informed on how to use them. It is therefore highly recommended that first-time users among participants be given an opportunity to become familiar with the software in advance. Ideally, pre-meeting online sessions should be mandatory before the actual hearing or mediation session takes place in order to reduce the chance of wasting time troubleshooting and distracting from the task at hand.

At the Centre, the vast majority of arbitration and mediation proceedings are conducted by conference call, managed online thanks to GlobalMeet, a business communication platform. The interface of the platform allows the case manager to control the participants individually (identify them by their name, increase/decrease their volume, mute the sound/disconnect) or to record the session. The function that is the most appreciated by mediators and arbitrators is the capacity to move selected participants in a private meeting room in parallel to the main room. In mediation, this feature is invaluable for the conduct of caucuses, while in arbitration it is most often used by



legal counsel to confer privately with their clients. In a proceeding before a three-person panel, that function allows the panel members to retire for deliberations separately from the parties. Participants can connect via toll-free numbers from more than 60 countries. When a visual contact between participants is desired, the sessions are just as easily conducted via videoconference.

When it comes to *asynchronous* technology, or tools that enable people to access information at a time most convenient for them, ADR practitioners use various means of communication with parties, ranging from email to cloud technology, for information sharing and document exchange. Exchanging documents by email is surely fast and easy, but it also creates issues such as message transmission errors, lost or omitted attachments, attachments that are too large, and so on. Privacy issues are also a concern when communicating via email. File transfer protocols, secure file-sharing platforms, password-protected attachments and encryption methods are suitable alternatives.

The Case Management Portal (CMP), the Centre's innovative and proprietary online dispute resolution platform, allows all participants full access to their case files online, from anywhere in the world, 24 hours a day from any computer or smartphone. From documents submitted by the parties and their representatives to administrative tribunal correspondence, including the panel's orders and awards and an interactive calendar of proceedings, the entire case is literally at the users' fingertips, regardless of their location or the time of day.

*"As counsel, I have had the opportunity of participating in several video conference hearings run by the SDRCC. The platform is user friendly and the SDRCC team always provide expert assistance as required. To be able to participate in a fully contested hearing in your office, with witnesses able to connect from anywhere in the world makes for an incredibly efficient process."*

*- Luisa Ritacca, Counsel*

### ***Confidentiality and Data Security***

Security merits a special section as it should be a priority of all users involved in proceedings, during which personal and sensitive information may be shared that could be damaging if it became public. Where proceedings are meant to be confidential, ADR practitioners or the organizations responsible for the case's information management have an added responsibility to ensure the protection of their clients' and members' personal information.

The Centre's CMP was built with security in mind and its safety features are constantly being upgraded to keep up with the newest technologies. Random passwords are assigned to new users, who can only change them for a robust password after answering personal questions. A user account is blocked following three unsuccessful connection attempts. Sessions expire after a predetermined period of inactivity, which is even shorter when the user is on a public or shared device. All documents uploaded to the CMP are encrypted and are completely deleted 21 days after a case has been closed. From an administrative perspective, because messages to the parties are generated directly from the CMP platform and because case-related documents are



accessible online, email attachments sent by the Centre's personnel have almost become a thing of the past. This has eliminated many risks, from sending the wrong attachment to inadvertently including unwanted recipients.

### ***Best Practices***

Here are a few good practices to adopt when conducting online proceedings, highlighted in recent resources produced for Canadian arbitrators and mediators by the ADR Institute of Ontario and the ODR Taskforce of the ADR Institute of Canada, to which the Centre contributed its expertise:

- Use a secure Internet or telephone connection. Participants should not take part in a confidential hearing or mediation session using a public wi-fi connection (in a hotel or coffee shop, for instance). The security of the proceedings is only as strong as the weakest link. A careless individual can make everyone else vulnerable.
- Online meetings created for confidential hearings or mediation sessions should always be password-protected and use unique meeting IDs. Participants should undertake not to disclose or share these with anyone who is not an authorized participant to the proceedings.
- Parties should disclose who else is in the room with them, to ensure they are authorized participants, and confirm that their device cannot be overheard or observed by others.
- Unless agreed upon in advance by all participants in a proceeding, parties should also confirm that they will not, nor anyone else on their behalf, be audio or video recording the proceedings. Of course, an arbitrator may allow the recording of a session for transcription purposes.
- Participants should acknowledge that they considered, discussed, understand and accept the risks of using electronic or online platforms.

Always keep in mind that ensuring confidentiality and data security comes with a price and, if it is important in your context, you should not hesitate to pay for it.

### ***It is the Way Forward, Like it or Not***

It is impossible to predict when we will emerge from this pandemic, but there will definitely be a before and an after COVID-19. It's obvious that virtual proceedings will become the norm during this time and likely long after we overcome this. In fact, if there is any good coming out of this crisis, it is the realisation that it is sensible and smart to conduct business virtually by many who were once reluctant to even consider doing so. Of course, using the right tools, knowing how to use them and helping others do the same, while keeping data security top-of-mind, will enable a smooth transition to the future of alternative dispute resolution.

### ***The Centre at the Service of the Sport Community***

Relying on its vast experience and expertise from having conducted virtual mediations and arbitrations for close to 20 years already, the Centre is now offering independent and professional case management services for internal discipline or internal appeal processes on a fee-for-service basis. If your sport organization is looking for a professional case manager at an affordable rate to provide administrative support to your disciplinary panels or appeal panels, the Centre has



exactly what you are looking for. These services include the management of submissions and of communications between the panel and the parties, note-taking for preparatory meetings, planning of virtual hearings and the use of its state-of-the-art CMP. A few national sport organizations have already used those services and the Centre is currently seeking to expand the program.

If you are interested and want more information about our case management services, contact us by email at [tribunal@sdrcc.ca](mailto:tribunal@sdrcc.ca)

*"The SDRCC case management services are second to none in Canada. They offer sport organizations, such as Swimming Canada, invaluable and cost-effective assistance with complex legal-type procedures. First, its state-of-the-art online Case Management Portal ensures proper, timely and accurate distribution of information to all parties, which is critical in the execution of any policy. Second, the human expertise of its staff, working behind the scenes, helps panels manage a case in a clear, precise and fair matter. No sport organization should have to manage these types of cases on its own".*

*- Ahmed El-Awadi, CEO of Swimming Canada*