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Article

**Gender Identity &
Text-Based, Online Mediation**

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Gender Identity & Text-Based, Online Mediation

M.A. Bhalla*

Online dispute resolution (“ODR”) disrupts traditional processes. In the course thereof, ODR offers opportunities to overcome limitations, such as those surrounding gender categorizations that are inherent when parties participate through visual or audible presentation. Online, text-based mediation offers a chance to remove many gender cues from the mediation process. This paper reflects upon contemporary understanding of the gender spectrum, identifies shortcomings of the use of “the gender box” in traditional processes and contemplates how, and if, text-based ODR could remove the presentation of gender – and related bias – from the mediation process.

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Le règlement des conflits en ligne (« RCL ») remet en question les processus traditionnels. Le RCL permet de remédier à certaines faiblesses, notamment celles liées aux catégorisations par genre qui sont inhérentes aux présentations visuelles ou auditives. La médiation en ligne à base de texte permet d'éliminer plusieurs indices de genre. Cet article se penche sur la compréhension contemporaine du spectre de genre, identifie les lacunes liées à l'utilisation du « gender box » dans le processus de médiation traditionnel et se questionne sur si, et comment, le RCL à base de texte élimine les indices de genre, et les biais qui y sont associés, du processus de médiation traditionnel.

I. Introduction

New technologies disrupt not only by changing how we do things but by changing how we think about what we are doing, about what needs to be done and what can be done.¹

Online dispute resolution (“ODR”) has been called disruptive.² With respect to online mediation, scholars and practitioners have expressed concerns. Traditional mediation takes place in-person and offers value as well as opportunities that cannot be replicated when the process takes place online,³ particularly in the context of text-based, online mediation. Yet, text-based online mediation can allow participants to circumvent the shortcomings of traditional processes,⁴ including gender categorization, which is firmly rooted therein.

The role of gender in traditional dispute resolution has been subject to academic scrutiny. From studies on the negotiation tendencies of women as compared to men, to considerations surrounding the impact of a mediator matching or failing to match genders with parties, considerable time has been spent categorizing people by gender and analyzing their tendencies. However, gender division risks perpetuating stereotypes and encouraging generalizations. Contemporary enlightenment as to the problems with the historic categorization of gender warrants questioning the merit of continuing with this methodology, particularly as related studies have yielded inconsistent results.

The recent emergence of online platforms within the administrative tribunal context in Canada provides practical applications of how these platforms disrupt traditional justice-seeking experiences and how they can ameliorate access-to-justice. Text-based, online mediation can remove many expressions of gender that are unavoidable during in-person mediation and lead to related categorization. As a result, each mediation participant is

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1 Orna Rabinovich-Einy & Ethan Katsh, “Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment” (2014) 1 IJODR 5 at 6.

2 *Ibid*; Janet Rifkin, “Online Dispute Resolution: Theory and Practice of the Fourth Party” (2001) 19:1 Conflict Resolution Quarterly 117 at 120–21.

3 Marta Poblet & Pompeu Casanovas, “Emotions in ODR” (2007) 21 Int’l Rev L Computer & Tech 145 at 148–49; Joseph W Goodman, “The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites” (2003) Duke L & Tech Rev 0004 at 9–13; Nicole Gabrielle Kravec, “Dogmas of Online Dispute Resolution” (Fall 2006) 38:1 U Tol L Rev 125 at 127–28.

4 Kravec, *supra* note 3 at 135.

empowered to determine for themselves how and to what extent they wish to present their gender during the process, allowing them to participate more authentically and reducing the potential for gender-based biases to arise.

Gender is most appropriately considered a spectrum, rather than two opposing and exclusive categories.⁵ There are deficiencies in gender categorization and the imposition of gender-related traits onto people. Yet, removing gender expression from ODR, a process which can already be perceived as dehumanizing, presents its own set of risks and challenges, since gender is significantly attached to identity.⁶ In light of the deficiencies of gender categorization, consideration ought to be given to jettisoning it from the mediation process; however, the significance of gender to both individuals and society must be appreciated.

Mediation is a flexible process that can be tailored to the needs and preferences of participants. Since an outcome is not imposed upon the parties, they have a say in how or if their dispute is resolved. With in-person mediation, such flexibility can include accommodations pertaining to scheduling, location, attendees and even the set-up of the meeting room to foster an environment conducive to good faith negotiations and creative explorations. This can encourage win-win outcomes or with the mediation otherwise concluding in a manner that leaves everyone in a better position.

Text-based, online mediation offers further flexibility by allowing parties to choose how they participate. By jettisoning requirements of visual or oral participation, ODR can give each participant greater control over how they present themselves, including with respect to their gender. This can overcome deficiencies of in-person mediation requiring gender expression from participants and stereotypes applying as a result of the imposition of a gender upon each party. However, in the course of addressing these issues, new challenges emerge as ODR can be perceived to lack the personalization of in-person encounters.

II. Gender Identity, Expression & Categorization

5 Samantha J. Levy, “Trans-Forming Notions of Equal Protection: The Gender Identity Class” (2002) 12 Temp Pol & Civ Rts L Rev 141 at 142; Anne Fausto-Sterling, “How Many Sexes Are There?,” *The New York Times* (12 March, 1993) online: <nytimes.com> [perma.cc/LCQ4-X9BM]; Kath Woodward et al, eds, *An Introduction to the Social Sciences: Understanding Social Change* (London: Open University Press, 2000) at 39; Marilyn Frye, *The Politics of Reality: Essays In Feminist Theory*, 1st ed (New York: Crossing Press, 1983) at 23, 25.

6 Woodward, *supra* note 5 at 41; David B Cruz, “Disestablishing Sex and Gender” (2002) 99 Cal L Rev 997 at 1016–20 [Cruz, “Disestablishing Sex and Gender”]; David B Cruz, “Just Don’t Call It Marriage: The First Amendment and Marriage as an Expressive Resource” 74:4 S Cal L Rev 925 at 958–59; JM Balkin, “The Constitution of Status” (1997) 106:8 Yale L J 213 at 2363–65.

Gender identity is each person's internal and individual experience of gender. It is their sense of being a woman, a man, both, neither, or anywhere along the gender spectrum. A person's gender identity may be the same as or different from their birth-assigned sex. Gender identity is fundamentally different from a person's sexual orientation.⁷

Traditional mediation calls for in-person participation by parties. This requires each individual involved to express their gender through the way that they present themselves to others throughout the course of their participation in the process. Gender expression can be as direct as requiring participants to select a box that indicates their gender on forms to initiate conflict resolution. However, it can manifest more subtly, whereby participants use their appearance (e.g. wardrobe, accessories and hair style) to convey their gender during in-person mediation. Perceptions of each individual's gender are formed based on these presentations. Such perceptions are predicated on societal assumptions and expectations pertaining to gender, and related behaviours as well as the potential they have to interfere with how someone participates in mediation.

Amongst the most important aspects of an individual's identity is their gender identity.⁸ Not to be confused with sex, which is understood as one's physical or biological make-up, gender identity is mental or psychological in nature, it is internal.⁹ A criticism of Western culture surrounds historically assumed assimilations as between sex, gender and sexual orientation.¹⁰ Although the three are independent of each other, traditional mediation processes, along with historic and recent gender-related research in the field, have not always appreciated the distinction.

Once it is determined that someone is female or male, expectations surrounding their behaviour are imposed upon them as a result of the selection. Traditionally, such expectations have included the general notion that females are submissive and males dominant, that females are cooperative and males competitive and that females are caregivers and males more egotistical. These expectations apply to everyone placed into one of two gender categories and extend to how individuals are expected to address their conflicts, including how they negotiate and otherwise participate in

7 Ontario Human Rights Commission, "Policy on preventing discrimination because of gender identity and gender expression" (April 14, 2014) at 3, online (pdf): *Ontario Human Rights Commission* <<http://www.ohrc.on.ca/sites/default/files/Policy%20on%20preventing%20discrimination%20because%20of%20gender%20identity%20and%20gender%20expression.pdf>> [perma.cc/A4NF-VTYF].

8 Woodward, *supra* note 5 at 18. ("Our sense of who we are is most significantly linked to our awareness of our identities as women or as men.")

9 Robyn B Gigl, "Gender Identity and the Law", *New Jersey Lawyer* (August 2018) 16 at 17.

10 Heike Polster, "Gender Identity as a New Prohibited Ground of Discrimination" (2003) 1:1 NZJPIIL 157 at 183; (Consideration of sexual orientation is beyond the scope of this paper); Jennifer L Nye, "The Gender Box" (1998) 13:1 Berkeley Women's LJ 226 at 228.

mediation. This risks limiting the extent to which one may feel free to be themselves as they address their dispute. The underlying assumptions are that biological sex and gender identity are related and every individual can be simply categorized as female or male.¹¹

A. *The Gender Box*

*These two assumptions create a “gender box” into which every human being is supposed to fit neatly... Unfortunately, the gender box is inadequate and poorly designed. The range of human possibilities extends far beyond that recognized by the gender box.*¹²

By categorizing a mediation participant as female or male, we place them into one of only two boxes that can set expectations of how they will conduct themselves. The traditional mindset is one of conformity. Many traits are considered gender attributable. Yet, imposing a gender category upon an individual (or requiring them to do so to themselves) may fail to account for who they are.¹³ In the context of mediation, opportunities to resolve a dispute or improve a situation can be missed if the individuals involved in the conflict are disregarded and assumptions are made about them based on generalizations.¹⁴ Mediation’s flexibility can be leveraged to suit those involved in a dispute when there is consideration of who they are as individuals. This can be missed when generalizations or assumptions are made. Accordingly, it is time that we reconsider whether gender categorization is required in mediation.

While often presented as such, “[f]emininity and masculinity are not fixed concepts,”¹⁵ rather they vary by culture¹⁶ and evolve over time.¹⁷ Mediators and scholars should appreciate this. At the turn of the 20th century, the colour blue was attributed to girls and pink to boys.¹⁸ Any baby gender reveal¹⁹ you come across today embraces reversed attribution

¹¹ Nye, *supra* note 10 at 228.

¹² *Ibid* at 228–29.

¹³ Michelle LeBaron, *Bridging Cultural Conflicts: A New Approach For a Changing World*, 1st ed (San Francisco: Jossey-Bass, 2003) at 21 [LeBaron, “Bridging Cultural Conflicts”].

¹⁴ *Ibid* at 22.

¹⁵ Nye, *supra* note 10 at 230.

¹⁶ Adam R Chang & Stephanie M Wildman, “Gender In/sight: Examining Culture and Constructions of Gender” (2017) 18:1 *Geo J Gender & L* 43 at 68.

¹⁷ Cruz, “Disestablishing Sex and Gender”, *supra* note 6 at 1007; Ana Carden-Coyne, ed, *Gender and Conflict Since 1914: Historical and Interdisciplinary Perspectives*, 1st ed (New York: Palgrave MacMillan, 2012) at 3.

¹⁸ Marjorie B Garber, *Vested Interests: Cross-Dressing and Cultural Anxiety*, 3rd ed (New York: Routledge, Chapman and Hall Inc, 2011) at 1.

¹⁹ Ashley Metzger, “7 best gender reveal videos” (September 15, 2015), online: *Today’s Parent* <<https://www.todayparent.com/pregnancy/being-pregnant/best-gender-reveal-videos/>> [perma.cc/NV9Y-RNCX].

of colour to gender. Still, perpetuated is the notion of two opposite and exclusive gender categories.²⁰ When embraced in the course of one's participation in a mediation, the application of these gender categories can foster divisiveness. This applies especially when conflicting parties are placed in different categories and is heightened when they are expected to conform to obsolete, gendered behavioural expectations. The characteristics affiliated with each gender category are viewed as fixed and non-transferrable to the other. Furthermore, it does not allow for commonality between those who find themselves in opposing gender categorizations, creating an unnecessary barrier for parties attempting to establish common ground as they participate in mediation. Consequently, we must question what the oversimplification of an archaic gender divide adds to today's mediation processes.

B. *Expressing Gender – Intentionally and Unintentionally*

*There are many kinds of men and women – typical men and atypical men, and similarly typical women and atypical women... although what counts as typical will vary between cultures.*²¹

Traditional, in-person mediation often require that parties present gender cues as they participate. There is some element of choice to one's expression of their gender identity.²² How one chooses to express their gender helps others categorize them.²³ This connects people to the world and others within it.²⁴ Gender perceptions are formed in response to how people present themselves.²⁵ Though we have some control over how we choose to express our gender, we have little control over how we are perceived.²⁶ This is particularly the case in consideration of variant cultural interpretations.²⁷ "Appearance, clothes and gestures are crucial in the presentation of self, but sometimes ... may inadvertently reveal more about a person than the information directly or intentionally given."²⁸

Getting to know the individual people involved in a dispute is often significant in mediation. Parties can best leverage the mediation process

20 Nye, *supra* note 10 at 230; LeBaron, "Bridging Cultural Conflicts", *supra* note 13 at 281;

Carden-Coyne, *supra* note 17 at 3.

21 Woodward, *supra* note 5 at 46.

22 *Ibid* at 7, 10–11.

23 Woodward, *supra* note 5 at 14; Frye, *supra* note 5 at 4; "Sexual Orientation, Gender Identity and Justice: A Comparative Law Casebook" (2011) at 174, 194–95, online (pdf): *International Commission of Jurists* <<https://www.icj.org/wp-content/uploads/2012/05/Sexual-orientation-gender-identity-and-Justice-report-2011.pdf>>; Nye, *supra* note 10 at 238–40.

24 Woodward, *supra* note 5 at 10.

25 *Ibid* at 14, 50; LeBaron, "Bridging Cultural Conflicts", *supra* note 13 at 214.

26 Woodward, *supra* note 5 at 63.

27 *Ibid* at 14–15.

28 *Ibid* at 15.

to attempt to resolve their dispute if they are able to better understand the individual interests of those involved in the conflict and consider them, collectively. Such interests are specific to each individual and often unique to each particular dispute, making it difficult to see the merit of including gender-based generalizations within the process. When related assumptions are applied, there is a risk that they will impact how one will view others, and participate themselves, and otherwise restrict their capacity to freely participate in a truly self-determined manner throughout mediation. The mediation process must avoid these limitations to deliver on the promise of all it has to offer.

Restrictions on gender expression are also attributable to the fact that “it is costly for individuals to frustrate gender expectations (for instance, most men would be mortified to appear in public wearing dresses and makeup).”²⁹ This risks influencing how parties participating in mediation present themselves. For instance, participants may become, discouraged from revealing their actual interests or otherwise communicating openly; they may feel that they have to present in accordance with imposed gender-based expectations surrounding what they want and how they negotiate. Society restricts people from feeling free to violate traditional expectations surrounding their behaviour, based on gender.³⁰

People have been discriminated against when they fail to comply with the generalizations attributable to their perceived gender.³¹ Non-conformists of both biological sexes have faced violent responses for being perceived as deviant.³² In the context of mediation, as a result of these societal tendencies, parties to mediation may be circumspect about participating in the process as their authentic selves, and choose instead to conduct themselves in a manner that they feel is expected of them. This contributes to the potential of mediation resulting in lesser outcomes than what could otherwise be achieved through genuine participation in the process.

Gender stereotypes are deeply embedded into our society; they, their power³³ and the harm they cause are not always obvious.³⁴ It may be tempting for one to express the gender and related behaviour they feel is expected of them as they participate in mediation. This can particularly apply when parties in conflict are invested in a particular outcome, have

29 Anea Gheaus, “Gender Justice” (2011) 6:1 J of Ethics & Soc Philosophy 1 at 8.

30 Michelle LeBaron, *Bridging Troubled Waters: Conflict Resolution From The Heart*, 1st ed (San Francisco: Jossey-Bass, 2002) at 59 [LeBaron, “Bridging Troubled Waters”].

31 Balkin, *supra* note 6 at 2331; Nye, *supra* note 10 at 236–37; “Gender Identity Discrimination in Public Education: A Legal Analysis” (2016) at 2, online (pdf): *Congressional Research Service* <<https://crsreports.congress.gov>>; Marsha Lichtensein, “Mediation and Feminism: Common Values and Challenges” (2000) 18:1 Mediation Q 19 at 23.

32 While beyond the scope of this paper, non-conformists have faced violent reactions to who they are. This must be accepted as a risk of expression that they face.

33 Clare Chambers, *Sex, Cultural and Justice: The Limits of Choice*, 1st ed (University Park: Pennsylvania State University press, 2008) at 113.

34 Chang, *supra* note 16 at 62–63; Gheaus, *supra* note 29 at 8.

an ongoing relationship and/or want to make a good impression on their process facilitator.³⁵ We must question the impact that this has on those participating in mediation and the relevance of a party's gender category in their pursuit of dispute resolution in the 21st century. Mediation should be offered equally to everyone, regardless of their perceived gender, or more appropriately, where they fall on the gender spectrum.

Even to the extent that assimilation is not made as a conscious decision, the influence of gender expectations has an unconscious influence as well.³⁶ *Self-stigmatization*³⁷ occurs when individuals internalize traditional gender ideology and therefore consider their inclination not to conform thereto as problematic or wrong. "Assumptions about what is appropriate for women and for men can shape and influence our identities and the scope which we have for deciding both 'who we are' and 'who we want to be'."³⁸ In the context of mediation, such questions should be posed with respect to the particulars of the dispute and the relationship between the parties. Extending such considerations beyond the context of the conflict risks failing to sufficiently focus mediation, introducing inefficiency and complicating the path to conflict resolution. The mediation process need not include broad existential considerations. Such considerations, in relation to one's behaviour and in connection with their perceived gender, distract from the focus and very purpose of most mediations. It should not matter which (if any) gender labels apply to a process participant in the vast majority of cases.

Asking a party who they are and who they want to be in the context of their dispute and in connection with others involved in it makes sense. By contrast, asking a party who they are and expecting them to behave in alignment with generalized, societal assumptions about gender categories does not. The inclusion or imposition of gender stereotypes in mediation impedes the ability of parties to participate authentically therein and, by extension, decreases the likelihood of an authentic, collaboratively-designed outcome.³⁹ The risk is someone feeling required to present themselves in a certain way in the course of their participation in mediation, beyond what is genuine to them.

Concerns about being negatively judged can influence behaviour and can therefore affect how one conducts themselves in a mediation. Behaviour that deviates from gender stereotypes can give rise to one being

35 Even though the mediator does not have the ability to impose an outcome, I have observed through my mediation practice that parties typically try to make a good impression on their mediator.

36 Gheaus, *supra* note 29 at 8, 16.

37 Gordene Olga Mackenzie, *Transgender Nation* (Bowling Green: Bowling Green State University Popular Press, 1994) at 6.

38 Woodward, *supra* note 5 at 22.

39 Lorig Charkoudian & Ellen Kabcenell Wayne, "Fairness, Understanding, and Satisfaction: Impact of Mediator and Participant Race and Gender on Participants' Perception of Mediation" (2010) 28: 1 Conflict Resolution Q 23 at 25–26.

viewed as irregular or labelled an outsider.⁴⁰ Many are self-conscious about acquiring such a label. “All individuals are to some extent vulnerable to cultural attitudes about sex and gender, since these attitudes form the basis upon which one’s entire identity is constructed.”⁴¹ One may feel inclined to act a certain way as they participate in mediation, regardless of what is authentic for them, or risk repercussions and judgment.⁴²

Society enforces gender stereotypes and boundaries, punishing those who are considered to refuse to comply with them.⁴³ “The public’s misunderstanding is perpetuated by the legal system’s ignorance.”⁴⁴ Forms that require a gender box to be selected, the use of traditional, gender-based formal salutations and legal culture’s expectations with respect to appearance and presentation unnecessarily force participants to be distinguished by gender. If one feels compelled to express the gender that they think is expected of them (such as a result of their biology), the gender cues they offer may not truly indicate who that individual is. This risks gender expression being contrived or inauthentic, a hindrance to the aims of the mediation process. At the very least, it risks adding discomfort for a process participant who feels unable to take part in proceedings as their true self. On such occasions, it is difficult to see the value of requiring gender categorization in mediation.

C. Gender Categorization Creates Faultlines

*Stereotyping functions as a safety and convenience mechanism. It allows us to make judgments about people, provides a basis from which to engage (or not to engage) the other person, and gives us a false sense of knowing others.*⁴⁵

Gender categorization inconsistently predicts behaviour and encourages stereotyping.⁴⁶ This includes surrounding behaviours and approaches to negotiation. Historically, those viewed as female were considered to be cooperative, and empathetic, and to value relationships, while those viewed as male were seen as competitive and focused on winning.⁴⁷ Such sentiments fuel expectations of how people will act without considering the individual human being, or the unique circumstances they face. Participants in mediation should be considered for who they are as

40 Michelle LeBaron & Venashri Pillay, *Conflict Across Cultures: A Unique Experience of Bridging Differences*, 1st ed (Boston: Intercultural Press, 2006) at 17.

41 Mackenzie, *supra* note 37 at 65.

42 Woodward, *supra* note 5 at 46.

43 Nye, *supra* note 10 at 255.

44 Levy, *supra* note 5 at 144.

45 LeBaron & Pillay, *supra* note 40 at 31.

46 Meredith M Render, “Gender Rules” (2010) 22:1 Yale JL & Feminism 133 at 165.

47 Charkoudian, *supra* note 39 at 25.

individuals, not based upon generalities that have no regard for the unique person or their circumstance.

“[T]he difficulties associated with the law’s adoption of a rigid binary construct can be painful and humiliating.”⁴⁸ Behavioural expectations based on gender create unnecessary challenges in mediation.⁴⁹ Expecting everyone who is placed into a particular gender category to act the same way neglects to take individual traits into account.⁵⁰ Each person has multiple identities that form who they are, which are drawn from different aspects of their life.⁵¹ Deeper consideration of the individual is warranted for mediation to truly offer all that it can to help those addressing disputes.

Dividing people into groups based on their attributes is known as creating *faultlines*,⁵² where identities are shaped based on similarity and variance.⁵³ “This alignment can create fractures...that have the potential to inhibit essential processes such as communication, coordination, cohesion, and trust.”⁵⁴ Such inhibitors preserve or risk escalating conflict, creating obstacles for the very purpose of mediation. Stereotypes suggest that all members of a particular group are a set way.⁵⁵ This leads to assumptions about how others think and act, including why they do so. As such, “[G]ender norms oppress *both* women and men.”⁵⁶ Mediation should not oppress those who participate in it.

Faultlines perpetuate bias.⁵⁷ By grouping individuals into two categories: *women* and *men*, members of each category may view the other as different and threatening to them.⁵⁸ There is potential for people grouped in the same category to feel that they have something in common as a result of their shared categorization. However, I suggest that each gender box is so broad that this would only apply in limited circumstances and, by extension, gender categorization in mediation would only be useful if all

48 Aileen Kennedy, “Gender Identity: Reassessing the Definition of Sex and Gender” (2013) 38:3 *Alternative LJ* 186 at 187.

49 LeBaron & Pillay, *supra* note 40 at 186.

50 Regina Graycar, “The Gender of Judgments: Some Reflections on Bias” (1998) 32:2 *UBC L Rev* 1 at 3 (“[T]he idea that all women are the same is merely another manifestation of treating women as caricatures ... rather than as real people with a variety of different lives and different backgrounds.” at 3).

51 LeBaron, “Bridging Cultural Conflicts”, *supra* note 13 at 35–36, 96.

52 Matthew J Pearsall, Aleksander P J Ellis & Joel M Evans, “Unlocking the Effects of Gender Faultlines on Team Creativity: Is Activation the Key?” (2008) 93:1 *J Applied Psychology* 225 at 225.

53 Woodward, *supra* note 5 at 10; Cruz, “Disestablishing Sex and Gender”, *supra* note 6 at 1006.

54 Pearsall, *supra* note 52 at 225.

55 LeBaron & Pillay, *supra* note 40 at 186.

56 Gheaus, *supra* note 29 at 3 [emphasis in original].

57 Pearsall, *supra* note 52 at 227–30.

58 LeBaron & Pillay, *supra* note 40 at 89; Stella Ting-Toomey, “Managing Identity Issues in Intercultural Conflict Communication: Developing a Multicultural Identity Attunement Lens” in V Benet-Martinez & Y-Y Hong, eds, *The Oxford Handbook of Multicultural Identity: Basic and Applied Psychological Perspectives* (New York: Oxford University Press, 2014) 485 at 495; Woodward, *supra* note 5 at 36, 47.

involved shared the same gender identity – which is difficult to determine by observation alone - as true gender identity is internal in nature. It also risks engendering divisiveness amongst those who share a category yet land differently along the spectrum. This focuses on general differences rather than specific commonalities.⁵⁹ It views one's actual traits against a false set of expectations that define "appropriate" behaviour. Someone categorized as female in gender can be viewed negatively for using a competitive, aggressive negotiation strategy by a fellow person in the same category embracing a more conciliatory approach. These stereotypes foster a false expectation of how people should behave. Division on this basis encourages conflict over differences and perpetuates fundamental attribution error.⁶⁰ This stands in the way of core principles of the mediation process.

The removal of faultlines could move away from a focus on differences in mediation. This would discourage generalizations and minimize the potential for parties involved in a dispute to view one another as belonging to opposing groups, or as failing to adhere to the behavioural characteristics imposed by their general common categorization. It would offer opportunities for commonality and new groups to be formed, focusing on what individuals have in common over what differentiates them generally.

D. *The Role of Gender in Mediation*

*We need to be careful not to replicate stereotypes and generalizations around gender. We need to recognize that people have many different gifts and they don't just pick up one role or one way of being in the world. And so it is with gender.*⁶¹

Research has focused on the gender differences of participants in negotiation and "the results of extensive studies using sex as a variable were inconsistent."⁶² In mediation, there is unclear evidence to suggest a definitive, consistent connection between gender and success.⁶³ In light of the foregoing, we must question the continued relevance of such gender division. In the absence of consistent and conclusive evidence that gender

59 Mackenzie, *supra* note 37 at 157; Claire Colebrook, *Gender*, 1st ed (New York: Palgrave MacMillan, 2004) at 151.

60 LeBaron, "Bridging Cultural Conflicts", *supra* note 13 at 230.

61 UVic Indigenous Law Research Unit ILRU, "Lecture: John Borrows" (5 October 2015) at 00h:47m:41s, online (video): *YouTube* <<https://youtu.be/axpw2FRtoac>>.

62 John C Kleefeld et al, eds, *Dispute Resolution: Readings and Case Studies*, 4th ed (Toronto: Emond Montgomery Publications Limited, 2016) at 204.

63 Charkoudian, *supra* note 39 at 27; Christine Rack, "Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the Metrocourt Study" (1999) 20:2 *Hamline J Pub L & Pol'y* 211 at 224–25, 234. (This suggests several studies indicate that women are more likely to settle at mediation than men; yet, introduces contradictions which give rise to questions about clear, definitive distinctions based on gender).

box categorizations make a difference in negotiation or mediation, it is difficult to see the value of analyzing the tendencies of people participating in dispute resolution on this basis. This supports the notion that there is much more to each individual than their placement into one of two overly general gender categories.

In 2013, a paper was published by the *Journal on Migration and Human Security* on adjudicator bias. The study examined decisions rendered by the Immigration and Refugee Board of Canada, upon gender and other classifications of adjudicators. In the course of explaining the inconsistent results yielded by the studies surrounding the gender classification of adjudicators, the author suggested that “[a]s a judge or adjudicator’s gender is one of the most easily observable pieces of information, this is a promising area for further study...”⁶⁴ The ignorance of this statement perpetuates an overly simplified, boxed view of gender. It highlights the impact that imposed expressions of gender can have on perceptions formed surrounding who an individual is and, in this context, how they will perform their responsibilities. Surely, there is much more to each adjudicator analyzed than their observed gender. It is not even certain that the observed gender of the adjudicators studied matched their biological genders or their gender identities.

The cultural lens through which one’s gender is perceived influences the categorization process. While historic studies based on gender may be justified by a lack of appreciation of the complexity of gender at the time,⁶⁵ the relevance and usefulness of continuing to analyze the behaviour of individuals based upon their perceived gender is questionable. The more that the mediation field continues to hold onto antiquated views of gender and related categorization, the less it will be able to: 1) support what is unique about each individual participating in the mediation process and 2) allow them to comfortably participate in the process and, by extension, help reach an outcome that best serves them. Mediation has been promoted for decades as a flexible, personal and customizable process. The field should distance itself from basic generalizations that display no regard for the individuals involved in a particular conflict and impose related, behavioural expectations that are based on superficiality. While some studies suggest that there is a difference in the way people labelled as *women* and *men* approach negotiation, in mediation and elsewhere, it is difficult to understand what is intended to be accomplished through such findings beyond creating generalizations and assumptions surrounding behaviour. To imply that all

64 Innessa Colaiacovo, “Not Just the Facts: Adjudicator Bias and Decisions of the Immigration and Refugee Board of Canada (2006-2011)” (2013) 1 *J on Migration & Human Security* 122 at 137.

65 The writer does not agree with this excuse and questions the intentions behind even historical studies in the dispute resolution field that divide people by gender for analytic purposes. Such appear rooted in generalities and divisiveness, as opposed to promoting commonality, collaboration and a focus on individuals.

who fit into a particular gender box will behave the same way promotes prejudice and imposes unfair expectations upon mediation participants.

III. Removing Gender Expression & Categorization from Mediation

Is it even possible to remove gender expression and related categorization from mediation? Unlike traditional in-person and many modern processes (such as those that utilize telephone or video conferencing), text-based, online mediation does not include any visual or audio interactions between participants. This removes the gender cues affiliated with physical and oral presentation from the process, potentially avoiding related stereotypes that set behavioural expectations. This could promote authenticity and equality of participation in mediation. However, all forms of communication and interaction provide for the potential to express and perceive gender. The feasibility of truly removing gender expression and related categorization through online, text-based mediation must be assessed.

A. *Process Design Case Study: the Condominium Authority Tribunal*

Practical considerations need to be taken into account in respect of the potential removal of gender expression from the mediation process. A case study can allow for further analysis of what is viable. The Condominium Authority of Ontario launched the Condominium Authority Tribunal (the “CAT”) on November 1, 2017.⁶⁶ The CAT was created in collaboration with Cyberjustice Laboratory and is promoted as Canada’s first fully online tribunal,⁶⁷ offering negotiation, mediation and adjudication services entirely online. Specifically, it offers a primarily text-based and asynchronous process. While the CAT can allow for video and teleconferencing, many cases that have come before it have been addressed entirely through text-based

66 Condominium Authority of Ontario, “The Condominium Authority Tribunal”, online: *Condominium Authority of Ontario* <<https://www.condoauthorityontario.ca/en-US/tribunal/>> [perma.cc/WH6U-VL86]; I am an original Member of the CAT, conducting online mediations and adjudications. Reference to the CAT’s process is based upon my experience and observation, though nothing in this paper is intended to speak on behalf of the Condominium Authority of Ontario or the CAT.

67 Condominium Authority of Ontario, *supra* note 66; Cyberjustice Laboratory, “The Process PARLe”, online: *Cyberjustice Laboratory* <<https://www.cyberjustice.ca/en/parle-2-0/>> [https://perma.cc/9EMU-FL9H]. (The CAT makes use of a similar 3 step process as PARLe – first online negotiation between parties, then online mediation with a third party facilitator and, finally, online adjudication with a third party decision maker.)

communications.⁶⁸

In text-based, online mediation offered by the CAT, gender cues and expressions are minimized. Verbal tone, wardrobe and other elements of an individual's physical and auditory presentation are not a factor. As participants are not required to check a gender box or otherwise express their gender in the course of participating, the CAT presents the potential of gender not being a factor. Indeed, the role of gender is downplayed in the conflict resolution journey since individuals do not see or hear others involved and the mediator does not know much about the parties beyond their names. Though ODR offers several advantages over in-person mediation, it has its own limitations. The way that gender is expressed in text-based, online mediation impacts both parties participating in the process and the mediator as the process facilitator.

B. Names

The name one goes by can offer gender-based cues and remains part of the CAT's ODR process. While most do not have control over the name given to them at birth, it is not uncommon for adults to select an alternate or variation of the name imposed upon them. This includes short-forms, going by a middle name or legally changing one's name. Some names are associated with gender while others are considered gender neutral.⁶⁹ However, even names that are considered gender attributable require an associated cultural fluency to allow one to appropriately categorize it.

In the context of text-based, online mediation, names could be the only identifying feature of parties. To the extent that participants can choose how to present their name in the mediation, the imposition of gender categorization could potentially be removed therefrom. Each person would be free to offer as much, or as little, of a gender cue in the course of the presentation of their name as they wished.

Names also foster relationships and add a layer of personalization and humanity to interactions.⁷⁰ Resorting to initials rather than names in mediation may render the process impersonal, an issue that already besets text-based online mediation, given that it takes place online rather than in-person. Similarly, referring to a party by a number rather than a name could feel dehumanizing.⁷¹ As it is, "[p]eople in destructive conflict begin to dehumanize their adversaries when the conflict polarizes relationships."⁷²

68 "Condominium Authority Tribunal – Ontario" (last modified 5 May 2020), online: *CanLII* <<https://www.canlii.org/en/on/oncat/>> (Many CAT hearings have taken place entirely online and in writing).

69 Frye, *supra* note 5 at 20.

70 Julia Shear Kushner, "The Right to Control One's Name" (2009) 57:1 *UCLA L Rev* 313 at 323.

71 *Ibid* at 322.

72 LeBaron & Pillay, *supra* note 40 at 89.

It follows that text-based, online mediation may risk perpetuating the sentiment that it is cold and impersonal if it were to allow parties not to present their name, or permit too much variance in how names could be presented. Included in this consideration is the role of legal names in formal legal proceedings⁷³ and the importance of verifying the identity of participants in such processes. “[O]ther elements of self-expression, such as clothing, tattoos, or personal affects, are not necessarily for public communication.”⁷⁴ Names are unique in that they serve a dual role, for personal expression and for public identification and related purposes.⁷⁵

In a text-based, online mediation context, mediators could remove gender expression from being required through the manner in which parties are addressed. Gender need not be expressed in the way participants refer to one another during the mediation. Parties could be provided with the opportunity to choose how they would like to be referred to during the mediation process, including in a manner that excludes traditional, formal salutations which often indicate gender categorization. This offers choice to the individual participant. The extent to which one chooses to express their gender in the course of presenting themselves and participating in the mediation process is not offered with traditional proceedings. Physical and/or auditory presentation includes gender cues that often give rise to gender-based categorization. This can affect how parties are perceived and thus treated throughout the process (or impact their perceptions of how they are treated). Text-based, online mediation can offer opportunities to overcome gender stereotypes by offering greater self-selection over how or if one expresses gender in the course of their participation in the process. This would allow for freer participation, as gender expression would become optional rather than mandatory as one takes part in mediation online.

C. *Limitations*

An important consideration with online mediation is that while parties engaged in conflict may interact online to address it, their interactions may not be limited to the Internet. An advantage of ODR is that it can overcome geographic distance;⁷⁶ however, an interesting aspect of the CAT is that it is focused on condominium conflict. This often involves members of a community, in close proximity, who have an ongoing relationship. Such interactions rarely take place exclusively online, even if CAT-related interactions do. It is important to recognize when ODR does not exist in a

⁷³ Including when mediation is mandatory and a part of such proceedings.

⁷⁴ Kushner, *supra* note 70 at 321.

⁷⁵ *Ibid* at 318.

⁷⁶ Colin Rule, “Technology and the Future of Dispute Resolution” (2015) 21:2 *Disp Resol Magazine* 4 at 4–5.

vacuum.⁷⁷

Users of the CAT's ODR system can be neighbours who have regular, inevitable in-person encounters. This can reduce the gendered anonymity that text-based, online mediation could offer and risks gender stereotypes applying nevertheless. Past interactions, whether or not they relate to the subject matter of the conflict, may not exclude gender expression and related perceptions being formed. Parties often engage the CAT with pre-existing notions of the gender of others involved in their conflict.⁷⁸ This is an obstacle in attempting to remove or reduce the role of gender categorization in mediation.

However, this does not mean that parties will be able to identify the gender of their mediator, or vice versa. It could also be a mistake to expect that all participants involved in the conflict have previously interacted, whether in-person, visually or audibly. Condominium unit owners who do not reside in their units may not have had in-person interactions with others involved in their dispute. Lawyers, paralegals and condominium managers may not have formed perceptions of the gender of others involved in their case.

While we should not assume that parties engaged in online mediation already have gender impressions of one another, it would be equally wrong to ignore the reach of the Internet in this day and age. Gender is expressed by people online just as it is in-person. For example, all of the original Members listed on the CAT's website expressed gender in their profile.⁷⁹ Anyone interested in ascertaining the gender of the Member assigned to mediate their case need not even go to the trouble of conducting a Google search, they could simply obtain that information from the CAT's website. Similarly, most lawyers, paralegals and condominium managers have professional profiles, social media accounts and/or marketing online which include photos and otherwise offer gender cues. It may not be possible to entirely remove gender categorization from existing in some capacity and getting drawn into a mediation. Gender perceptions may have an inevitable impact, even in text-based, online mediation.

Studies suggest that anonymous online settings can make it exceedingly difficult for participants to identify the gender of others.⁸⁰ Yet, this cannot completely remove the potential formation of impressions as to the gender of parties participating in mediation. "We are socially and

77 Colin Rule, "Is ODR ADR: A Response to Carrie Menkel-Meadow" (2016) 3:1 Intl J Online Disp Resol 8 at 8 [Rule, "Is ODR ADR"].

78 This is my observation.

79 Condominium Authority of Ontario, "CAT Members", online: *Condominium Authority of Ontario* <<https://www.condoauthorityontario.ca/en-US/tribunal/CAT-members/>> [perma.cc/G2EW-23JW] [Condominium Authority of Ontario, "CAT Members"].

80 Anita D Bhappu, Terri L Griffith & Gregory B Northcraft, "Media Effects and Communication Bias in Diverse Groups" (1997) 70:3 *Organizational Behavior and Human Decision Processes* 199 at 202.

communicatively helpless if we do not know the sex of everybody we have anything to do with.⁸¹ Society has been conditioned to always consider gender relevant.⁸² This is not to ignore the merits of minimizing or complicating the ease at which parties could categorize the gender of others; the point is that such efforts cannot entirely eradicate gender perceptions and related categorization from the mediation process. As we cannot control how others perceive us, it is plausible that gender cues could be taken from other actions – such as language selection⁸³ or writing style – nevertheless, consciously or unconsciously, in the course of one participating in text-based, online mediation. “The information as to what sex one is is always wanted.”⁸⁴ This suggests that gender, in and of itself, is *meaning making*.⁸⁵

A lack of gender categorization could negatively impact relationships and, accordingly, the mediation process.⁸⁶ Parties may feel inclined to project a gender upon others and/or express gender themselves regardless of if opportunities for traditional gender expression in text-based, online mediation are available.⁸⁷ Self-expression supports the notion of empowering individuals to express gender as and if they wish to, as opposed to requiring or preventing it entirely. This reduces the imposition of gender categorization upon parties in mediation. While it introduces a degree of selection in one’s participation that traditional processes do not provide in respect of gender categorization, it does not remove the potential for gender to have a role in the mediation process in some capacity. A distinguishing factor in this consideration surrounds the experience of the mediation participant. Even if they have existing awareness of the gender expressed by others involved in their conflict and have previously expressed their gender in turn, and even if they are aware of the gender of their mediator, text-based, online mediation platforms could prevent parties from having to express their gender to their mediator. Correspondingly, this could remove or reduce behaviours that are influenced by gender stereotypes which impact interactions with the facilitator managing the process. It could be entirely up to each party to determine the extent to which they opt to offer their mediator gender cues, potentially enhancing each party’s procedural experience through the comfort of flexibility and choice in that regard.

While it may not be possible to remove prior gender cues exchanged between parties, text-based, online mediation could provide participants

81 Frye, *supra* note 5 at 22.

82 *Ibid* at 19, 22; Lorraine Code, *What Can She Know? Feminist Theory and the Construction of Knowledge*, 1st ed (New York: Cornell University Press, 1991) at 11–12.

83 Code, *supra* note 82 at 59, 63.

84 Frye, *supra* note 5 at 24.

85 LeBaron, “Bridging Troubled Waters”, *supra* note 30 at 138–39. There is a relational component to conflict, gender can impact the way that we are connected.

86 *Ibid* at 138.

87 Woodward, *supra* note 5 at 51 (“Gender is crucial to identity and our understanding of who we are.” at 51).

with more choice and control surrounding the extent to which they express gender to their mediator. By introducing the potential for parties to remove the requirement of gender presentation to the neutral governing the process as they participate, there is potential for the removal of perceptions of gender bias or related behavioural impositions impacting how they participate. This would allow for more natural participation, free from fear of being judged against the application of antiquated gender-created labels. Even this has limitations, as an opposing party may purposely or innocently suggest the gender of others to the mediator as they participate.⁸⁸ It may not be viable to completely remove gender from having a role in mediation, yet text-based, online mediation offers opportunities to provide more control to the end user surrounding expressions of gender than traditional, in-person mediation does.

D. *Against Gender-less Proceedings*

*The technology is clearly critical in any ODR process, but one of the biggest challenges in building and running an online dispute resolution process is to balance and integrate the human with the ... process.*⁸⁹

Beyond the challenges of removing gender expression from mediation, there are also arguments against the notion of gender-less proceedings. A lack of gender expression could create sentiments that mediators do not relate to the parties, particularly to the extent that such would serve to dehumanize them. This could give rise to impressions that the mediator is a robot or an algorithm, as opposed to a human being. The importance of personalizing and humanizing mediation may necessitate a degree of gender expression being made available to participants throughout the process. Text-based ODR already creates concerns about dehumanizing the process.⁹⁰

Almost 75% of the original Members listed on the CAT's website expressed their gender as female.⁹¹ Removing gender expression from such profiles could propagate perceptions of male-domination in this respect and take away the opportunity to display diversity.⁹² Further, removing only gender and not expressions of other characteristics, such as ethnicity cues offered by way of surnames, risks disregarding gender in comparison to

⁸⁸ How one party references others in making their submissions often includes reference to their perceived gender.

⁸⁹ Rifkin, *supra* note 2 at 121.

⁹⁰ Richard Michael Victorio, "Internet Dispute Resolution (iDR): Bringing ADR into the 21st Century" (2001) 1:2 Pepp Disp Resol LJ 279 at 292–94; Goodman, *supra* note 3 at 10–12; Kravec, *supra* note 3 at 127–30.

⁹¹ Condominium Authority of Ontario, "CAT Members", *supra* note 79.

⁹² While parties are not able to select their mediator in CAT cases, the point is focused upon general public perceptions of diversity rather than individual case assignments.

other aspects of equality.⁹³

A lack of gender expression could also prevent parties participating in mediation from better relating to one another, regardless of if they share the same gender category. There is a risk that a participant may not feel heard if they are not able to express a feature of themselves that is so closely tied to their identity. It may also be more difficult to relate to others involved in a dispute if their gender category is unknown. Many people do not know how to relate to others without relating to their gender.⁹⁴ Thus, removing gender from mediation could take away from the effectiveness of the process.

Still, text-based, online mediation offers greater control to each individual participating surrounding how or if they choose to present their gender. While the risk remains for perceptions to be formed about one's gender that are not intended and that could serve to categorize them, text-based, online mediation addresses many of the challenges surrounding gender categorization that traditional, in-person mediation requires through visual and oral presentation. This offers the potential to move mediation away from utilizing the gender box and toward embracing the gender spectrum.

IV. Conclusion

The promise of ODR in improving the quality of resolutions is enormous, and we are just getting started in exploring its full potential.⁹⁵

Text-based, online mediation removes physical and oral presentations from the dispute resolution process. This can minimize the nature and volume of cues which give rise to perceptions being formed about the gender of process participants. It may be impossible to remove gender from having a role in mediation entirely, as it is closely tied to identity, and because society is conditioned to perceive the gender of everyone. However, gender categorization perpetuates stereotypes, and risks imposing expectations of conduct upon people that can hinder their procedural experience in mediation. This can result in inauthentic participation in the mediation process, as parties may behave in ways they feel are expected of them based upon their perceived gender identity – particularly when trying to make a good impression on their mediator and others involved in efforts to address a conflict.

By reducing the ways that perceptions of gender can be formed about participants in text-based, online mediation, they can be empowered with more control over the process. While past exchanges between those involved in a dispute may have already given rise to gender suggestions, this

⁹³ Particularly if there is a culturally diverse panel, such as in the case of the CAT.

⁹⁴ Frye, *supra* note 5 at 20–21.

⁹⁵ Rule, “Is ODR ADR”, *supra* note 77 at 9.

shift in control is particularly applicable to interactions between disputing parties and their mediator. Without having to worry about their physical appearance or the sound of their voice, procedural experiences of parties participating in mediation can be enhanced. The potential for gender stereotypes to play a role in how each party participates in the process is reduced. This supports parties participating in mediation as their authentic selves.

Recognizing deficiencies of traditional views of gender, mediation should strive to remove impositions of categorization on such basis. This includes making gender expression voluntary, as opposed to required. It extends to not presenting gender categorization as containing a fixed number of selections, and moving beyond the limitations of antiquated gender-based formal salutations thereby enabling parties to direct how they would like to be addressed. Achieving greater discretion and control over how gender is expressed in mediation promotes respect and inclusiveness; as does departing from studies that utilize overly simplistic and antiquated notions of gender as a means to categorize, analyze and form expectations about behaviours.

Mediation should not assume or impose gender identity upon parties and need not require gender expression and related categorization throughout all aspects of the process. Text-based, online mediation offers more choice as to how or if participants express their gender in the course of participating in the process than has historically been offered. This flexibility of text-based, online mediation can be leveraged to offer parties greater control and comfort,⁹⁶ irrespective of their gender identity.

96 Ting-Toomey, *supra* note 58 at 16.