JUDICIAL MEDIATION IN CANADA: WHEN JUDGES ACT AS MEDIATORS FOR THE BENEFIT OF CITIZENS AND LAWYERS *

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INTRODUCTION

The crisis affecting the administration of civil and commercial justice, in its classic form, traces its origin to numerous factors that stem from the rigidity and complexity of the adversary system, which has become outdated in many respects, and from the institutional failings of the system itself. Another simpler, less costly and more desirable channel for dispute resolution is slowly beginning to emerge within the judicial system.

Seeking to reflect the movement of western societies eager to participate in their judicial destiny, courts, such as the Quebec Court of Appeal, have begun to introduce a unique mediational form of justice that reinvests the parties with their decisional powers.

The classical system of civil justice

The evolution of western societies has led to the institutional expression and resolution of judicial conflict. For decades, only the trial mode – leading to the judiciarisation of the conflict – has enabled dispute resolution through an adversarial and contradictory procedure. In short, a state-controlled justice system whose essential purpose has been the judging of opposing subjective rights of the parties by judicial decision.

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* *La justice conciliationnelle: l'envers du lent droit,* published in *Éthique publique, revue internationale d'éthique sociétale et gouvernementale*, Autumn 2001 – vol. 3, n° 2.

Many contributory factors have assured the perpetuation of the contradictory justice system which still remains the regal pathway to conflict resolution: notably, the independence and impartiality of the decision-maker; the application of a uniform and neutral procedural code; the assurance that the judicial decision will essentially emanate from the evidence produced by the parties; the resolution of the dispute with regard for rule of law and the juridical stability as assured by judicial precedents. Not insignificant are the phenomena by which the judiciary has become a function of social regulation which punctually defines the ordinary relation of the individual to society and accounts for its evolution (abortion, assisted suicide, the right to equality, bio-rights...). The judicial decision translates the relativity of the juridical norm and bears witness to the degree of risk that pluralistic western society is willing to take with regard to the common values that mould it.

In essence, the act of judging proceeds from a reflexive analysis and a maturation of juridical thought that fuels positive law, debate and argument. It is inevitable that the course of a judicial dispute that ends in judgment be subject to procedural and, by necessary implication, temporal constraints. The efficiency of the judicial system and the modern management of proceedings may, indeed, restrict frivolous or dilatory actions, but these measures will never constrain the act of judging, introspective by nature, to a conclusion incompatible with its attributes: discernment, reason and wisdom. Another form of justice, of a conciliatory nature, is about to join the classical system of civil justice in order to divert the disputes which are unsuitable to such a formalistic system, and to settle them swiftly, and, in all respects, in the best possible way. For if the mission of adjudication, or the act of judging, remains steadfast, one must nevertheless recognize that, in most civil disputes, contradictory debate, both complex and procedural, is ill-adapted to the efficient resolution of these disputes in modern juridical reality, and the interests of litigants.

In fact, the classical adversary system, hinges on the *polarization* of roles (plaintiff-defendant; appellant-respondent), the *opposition* of legal representatives, and the exacerbation of the *antagonism* at the source of the conflict.[1] These considerations bring about the unweildiness of the contradictory debate, weighed down by the procedural burden (discoveries, preliminary exceptions, incidental proceedings, expert reports…).

The judicial determination of the parties' rights constitutes the cornerstone of contradictory justice. The cause and the resolution of the conflict at the origin of the dispute do not constitute, namely, the object of the judicial contract and can be ignored in the processing of the dispute.[2]

The shortcomings of the traditional system[3] - enunciated time and again - have created a real crisis in the authoritative judicial order and have resulted in emergence of new means of conflict resolution, more functional and better adapted to settling a great proportion of civil disputes.

Amongst these tallied shortcomings, let us mention the delays (administrative and procedural),[4] the judicial and extrajudicial costs[5] related to

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1 W.B. Wendel, "Value Pluralism in Legal Ethics" (2000) 78 Washington University Law Quarterly 113 at 212.

2 L.L. Riskin, "Mediation and Lawyers" (1982) 14 Ohio State Journal on Dispute Resolution 59; see also, A.J. Black, "Separated by a Common Law: American and Scottish Legal Education" (1993) 4 Indiana International and Comparative Law Review 15 at 31; K.J. Rigby, "Alternative Dispute Resolution" (1984) 44 Louisiana Law Review 1725 at 1727.

3 H. Stinzing, *Mediation – A Necessary Element in Family Dispute Resolution?: A Comparative Stude of the Australian Model of Alternative Dispute Resolution for Family Disputes and the Situation in German Law* (Frankfurt: Peter Land ed., 1994) at 28-35.

4 M. Conrod, "Case Management Wins Plaudits" (1999) The Lawyers' Weekly 18:38 (February 19, 1999) 13.
For example, procedural delays (inscription in appeal, appearance, factum preparation, incidental proceedings, etc.) inherent to the course of any ordinary civil case, vary between eight and ten months. It is only once the procedural delays have expired that the appeal is deemed ready and can be put on the role for hearing. It then takes another eighteen months, on average, for the appeal to be heard.

5 A.L. Levin & D.D. Colliers, "Containing the Cost of Litigation" (1985) 37 Rutgers Law Review 219. A study led by the Commission of Revision of Civil Justice of Ontario established the fees related to a typical civil case at over $38 000. 75% of the awarded

the contradictory debate, agency costs[6] resulting, at times, from overlapping interests, the physical and psychological trauma associated with, most particularly, long judicial conflicts,[7] and the inherent limits of contradictory debate with regard to the search for the best solution that can, in real terms, put an end to the dispute.[8]

Mediational justice: another way of rendering justice

As the subjective shortcomings inherent to adversarial debate became apparent, consensual models of dispute resolution began to develop within state-controlled justice. At the same time, consensual models of normative output made their appearance: there emerged regulatory models under which agents who are subject to rules also actively take part in their formulation. These models operate primarily in the area of regulated activities (environmental protection, welfare state, financial markets) and they coincide to some extent with what *Habermas*[9] and *Van de Kerchove*[10] described as a loss of legitimacy of norms resulting from the democratic deficit in post-industrial societies. Whether scientific or grounded in social regulation, norms are withdrawn from state control

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amount was applied towards fees and legal costs. See the *Rapport du groupe de travail sur les systèmes de justice civils,* Canadian Bar Association, August 1996, at 16.

6 W.P. McKeown, "Expert and Survey Evidence in Patent and Trademark Cases: Proposed Federal Court Case Management Procedures" (1997 14 C.I.P.R 1 and 2; M. Teplitsky & W. Low, "Arbitration: An Alternative" (1983) 4 Advocates' Quarterly 233.

7 V.J. Christiansen, "Ritual and Resolution: The Role of Reconciliation in the Mediation Process" (1997) 52 Dispute Resolution Journal 66; see also G. Appleby, "An Overview of Alternative Dispute Resolution" in C. Samson & J. McBride, eds., *Solutions de rechange au règlement des conflits* (Ste-Foy: Presses de l'université Laval, 1993) at 25. During the course of appellate judicial mediation sessions, parties have consistently and spontaneously expressed the physical and psychological aftereffects that ensue from enduring disputes. Episodes of situational depression as well as pathologies related to the stress of judicial litigation are frequently reported by the parties and their attorneys.

8 In matters related to property law (boundary marking, servitudes, common property, co-ownership, etc.) the adjudicative function, limited to the judicial contract of the parties and the rigid application of the norm, has a hard time achieving dispute resolution. One notices the judicial recurrence of disputes related to such matters.

9 J. Habermas, *Théorie de l'agir communicationnel* (Paris : Fayard, 1987), see also from the same author : *La technique et la science comme idéologie* (Paris : Gallimard, 1990). See also, M. Van de Kerchove & F. Ost, *Le système juridique entre ordre et désordre* (Paris : Presses Universitaires de France, 1988).

10 M. Van de Kerchove & F. Ost, *ibid.*

(a process which *Lucie Lamarche* calls «désétatisation») as the role of the state shifts.

However, neither the classical judicial system's efficiency crisis nor the legitimacy crisis which has gripped post-modern society can explain, on their own, the rise of mediation practices by judicial bodies. One is preeminently compelled to recognize the desire of the community to gain independence – in suitable cases – from imposed justice in order to seek, through the emergence of a collective maturity, a mutually negotiated and accepted solution.[11] In order to mirror societies' movement towards the control of its judicial destiny, tribunals have agreed to introduce, within the state-controlled system, a judicially supervised participation which, according to the will of the parties, substitutes for the authoritative juridical order, which imposes its judicial solution, but does not always succeed in reconciling the parties differences.[12] This judicial solution of mediation becomes part of a supple, efficient and inexpensive process. In a nutshell, humane, participatory and accessible justice.

Alternative modes of dispute resolution, specific to the postmodern era, experienced the first phase of their development during the 1970's.[13] They literally exploded thereafter, going on to penetrate numerous spheres of public and private activity. Alternately criticized[14] and praised[15], the existence of

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11 L.L. Riskin, "The Represented Client in a Settlement Conference: The Lessons *of G. Heileman Brewing Co. v. Joseph Oat Corp.*" (1991) 69 Washington University Law Quarterly 1059.

12 J. MacFarlane, "An Alternative to What?" in J. MacFarlane, ed., *Rethinking disputes: The Mediation Alternative* (Toronto: Emond Montgomery Publications Ltd, 1997) at 4-8.

13 To learn about the origine of these conflict resolution measures and their development, see : S.B. Goldberg, F.E.A. Sander & N.H. Rogers, *Dispute Resolution : Negotiation, Mediation, and Other Processes,* 3rd ed. (Boston : Little, Brown & Company, 1996) c. 1.

14 O.M.Fiss, "Against Settlement" (1984) 93 Yale Law Journal 1073; O.M. Fiss, "Out of Eden" (1985) 94 Yale Law Journal 1669; J. Resnick, "Managerial Judges" (1982) 96 Harvard Law Review 376; J. Resnick, "Failing Faith: Adjudicatory Procedure in Decline" (1986) 53 University of Chicago Law Review 494.

15 See *e.g.*: J. Thibault, *Les procédures de règlement amiable des litiges au Canada* (Montreal: Wilson & Lafleur, 2000) at 311; J. Paré, "Solution de rechange pour le règlement des litiges: la médiation" in J.-L. Baudouin, ed., *Médiation et modes alternatifs de règlement des conflits: aspects nationaux et internationaux* (Cowansville, Qc: Yvon Blais, 1997) at 193; A. Wellington, "Taking Codes of Ethics Seriously: Alternative Dispute

alternative modes of conflict resolution has contributed to the revival of the ideological disagreement with regard to the concept of justice: interventionism/liberalism; antagonism/interdependence; procedure/substance, etc.

The dichotomy of these seemingly opposite concepts has been resolved, in the Quebec Court of Appeal, by the integration of mediational justice within the classical judicial system based on adjudication. Thus, trial justice and mediational justice cohabit within the same quarters and, according to their respective vocation, participate in fulfilling the mission vested in courts and other tribunal: rendering justice.

The experience of the Quebec Court of Appeal

The judicial mediation program introduced at the Quebec Court of Appeal en 1998 was conceived to ease the deficiencies of the classical system of civil justice and, also, to reflect the evolution of society's interest in participating in its judicial destiny.

Judicial mediation offers an additional pathway to judicial conflict resolution to parties already involved in a contradictory debate. Whereas alternative means of dispute resolution usually tend to avoid trial justice and favour the conclusion of out-of-court settlements, judicial mediation offers, within the framework of the state-controlled judicial system, a channel to negotiate a settlement intended to put an end to litigation. Should the negotiations fail, the parties pursue their proceedings within the formal system so as to obtain judicial adjudication. The Quebec Court of Appeal has integrated both tracks to a judicial

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Resolution and Reconstitutive Liberalism" (1999) 12 Canadian Journal of Law and Jurisprudence 297; C. Nélisse, "Le règlement déjudiciarisé: entre la flexibilité technique et la pluralité juridique" (1992) 23 Revue de Droit de l'Université de Sherbrooke 269; D.L Marston, "Project-based Dispute Resolution: ADR Momentum Increases Into the Millenium" (2000) 48 Canadian Law Review 221.

solution within a unique, harmonious and functional conflict resolution structure. Approximately 450 cases have already been deferred to judicial mediation by joint request. Of this number, 80% reached a final settlement between January 1998 and June 2002.

The mediation process is based on the expressed *consent* of all parties involved and is characterized by the *flexibility,* the *confidentiality* and the *breadth* of the intervention negotiated with the help of the *judge*.

- *Consent*

Judicial mediation is accessible to all parties involved in civil, commercial or matrimonial litigation at the appellate level. Public law and penal litigation are obviously excluded from the mediation procedure.

In order to initiate the conciliatory process, the parties must sign a « joint mediation request ». This request is handed in to the Court's clerk, at the earliest, after the filing of the inscription in appeal, or at the latest, before a final judgment is rendered. Thus, the settlement of a case might occur a few days after the filing of the inscription in appeal, or, during the Court's deliberations on the case. This illustrates that judicial conflict is constantly evolving and that litigants entrenched in a position of firm opposition may, in light of circumstances, wish to –temporarily and voluntarily - exit the adjudicative track at any point in the course of litigation in order to take steps towards a judicial settlement negotiated under the authority of a judge of the Court of Appeal.

Thus, judicial mediation is based on and justified by the expressed will of the parties who remain entirely free to engage in a mediational process and to

withdraw from it, at any stage of the process, in order to return to the formal system.[16]

▪ *Confidentiality*

The joint mediation request contains an undertaking that marks the exchanges between parties with the seal of confidentiality.[17] This undertaking assures the fluidity of communication and negotiation, and guarantees the reciprocal impenetrability of mediational justice and formal justice which coexist independently.

The undertaking signed by the parties is of a contractual nature and entails an ethical obligation for attorneys.

It seemed unnecessary to add coercive measures to the obligation of confidentiality considering that the mediation system rests on the willingness of the parties, good faith and procedural flexibility. Furthermore, the experience of four years of judicial mediation has confirmed this proposed principle.

Moreover, it must be emphasized that the mediation file is kept in the mediator-judge's chambers and not at the office of the court. Mediation sessions are never mechanically recorded and the mediator-judge's hand-written notes are destroyed at the end of mediation.

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[16] The Court of Appeal has adopted a voluntary rather than mandatory judicial mediation system since it is the highest Court whose mission is to state the law. Certain lower courts (Canadian and American) have opted for mandatory modes of judicial dispute resolution. This often successful choice can be explained by the fact that alternative modes are directly integrated in case management and that the contradictory debate has only just begun.

[17] O.V. Gray, "Protecting the Confidentiality of Communications in Mediation" (1998) 36 Osgoode Hall Law Journal 667; J. Watson-Hamilton, "Protecting Confidentiality in Mandatory Mediation: Lessons from Ontario and Saskatchewan" (1999) 24 Queen's Law Journal 561; R. McConomy, "La portée et les limites de la confidentialité des séances en médiation", in Barreau du Québec, Service de la formation permanente, *Développements récents en médiation* (Cowansville, Qc: Yvon Blais, 1996) at 111.

▪ *Procedural Flexibility*

The appellate mediation session is preceded by the forwarding of the case summary (inscription in appeal and the lower court's judgment), as well as the written and testimonial evidence deemed important by the parties. By eliminating the need to transcribe stenographic notes and to prepare a factum, mediation procedure has been considerably simplified, and, as a result, costs have been reduced to the basic essentials.

The parties choose, with the help of the mediator judge, the rules that will govern the mediation session by combining the flexibility of the process and the maximization (caucusing; plenary; meeting with attorneys; video-conference; conference calls, etc.). The objective sought by the parties is to find, by way of compromise, the best solution possible to a common problem without having to abdicate their material and personal interests.

It is interesting to note that – at the end of a three hour session[18]- the parties usually can not only clearly and concisely expose the juridical nature of their case, but, equally, begin a dialogue towards resolution that is divorced from the acrimonious enunciation of the problem, providing an opening towards a joint participative solution which will preserve the interests of all.[19] Sometimes, calling upon an expert (engineer, land-surveyor, accountant...) allows an immediate measurement of the feasibility of the solution negotiated by the parties so as to extinguish all possibility of future conflict. Acting as an ochestrator, the mediator judge conducts, in a subtle manner, the negotiation unfolding between the parties. Cleverly, he keeps the parties from veering off the track of the main dispute and abates discussions likely to lead to a break down in communication.

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[18] An appellate judicial mediation session lasts, on average, three hours. A single session usually suffices to break the deadlock or to come to the conclusion that the case must proceed on its track towards adjudication.

[19] J. Macfarlane, "Why Do People Settle" (2001) 46 McGill Law Journal 663; C. Lickson, "The Use of Alternative Dispute Resolution in Intellectual Property, Technology-Related or Innovation-based Disputes" (1995) American Jurisprudence Trials 483.

Through control without interference, he induces the parties to remain focused, in a constructive manner, on the juridical problem they are confronted with.

- *The breadth of the mandate*

As soon as the case is referred to the court, at the time of the filing of the inscription in appeal, the mediator-judge can intervene, as an arbitrator, not only in the dispute giving rise to the appeal, but also in all related litigation pending before the Court of Appeal or even before other tribunals. All that is needed to set the mechanism in motion is the joint request of the parties, and the judge's assessment, further to a summary examination, that the dispute is susceptible to be resolved by way of judicial mediation.

This particular feature of the system has made it into an instrument of global conflict-management that enables the parties to eliminate many cases pending before the courts. Experience has revealed that once the mediation procedure gets under way and the parties are sincerely engaged in the dynamics of communication and negotiation, it is preferable to associate related litigation to the appeal case, resulting in saved time and resources for all involved.

- *The Judge's Role*

Each mediation session in presided by a regular judge of the Court of Appeal.

Many reasons explain the choice of a judge rather than a private mediator. These reasons are related to the perceptions of both the parties and lower-courts, as well as the moral and judicial authority of appeal court judges.

The independence of the judicial institution, the impartiality of its judges, their profound knowledge of law and conflict, their traditional mission of

determining the outcome of disputes and rendering justice explain why a mediator-judge is perceived by the parties as a strong moral authority.

These reasons apply to both trial court mediator judges as well as appellate mediator-judges.

However, in the particular circumstances of an appellate case, it appeared essential that a judge of the Court of Appeal be appointed to preside over the mediation session in order to assure that respect and deference are shown towards the trial judge, whose decision forms the basis of the appeal.

While exercising a conciliatory role, a judge pursues a narrower course of intervention than a private mediator in that the judge cannot, in any way, bind the Court nor alter the course of the adversary debate in the event mediation fails. His in-depth knowledge of judicial cases (procedures, documentary evidence and judgment) will enable him to evaluate the rightfulness of the parties' respective claims in the perspective of compromise rather than adjudication.

Within the framework of his intervention, the mediator-judge must allow the parties to examine the case in all its aspects, to define the essential questions as well as the underlying interest of a settlement. In short, the mediator-judge must create a secure environment, enabling the parties to sincerely, openly and spontaneously enter into the negotiation process without fear of altering the balance of powers.

The privileged role of the mediator-judge, as a neutral facilitator, will enable him to present to the parties – in due course - their options for a solution. After all, parties who have chosen the judicial track have often alienated their objective perception of the conflict. By his broad vision, the mediator steers the parties away from the narrow frame of the judicial dispute so as to lead them to explore avenues likely to constitute valuable settlement options.

The judge-mediator is entirely responsible for the progress of the mediation process. However, the responsibility of the outcome rests entirely on the parties. It is a true judicial transfer. Though the process encourages the parties to take the necessary risks to put an end to the dispute that opposes them, never does it take from them their decision-making power.

CONCLUSION

The emergence of alternative modes of conflict resolution within state-controlled justice systems bears witness to societies' shouldering responsibility with regard to law, which it no longer perceives as a transcendent and immutable matter against which it is powerless. Because of the scarcity of resources, the realisation of the adverse dynamics of conflict and the efficiency crisis affecting judicial institutions, whenever possible, people are reclaiming the power to resolve their disputes. Rather than a sign of loss of legitimacy of the judicial norm, this new alternative system reflects a democratic renewal. The fact that judges - guardians of societal order and democratic values - participate with the community in the transformation of the classical system of civil justice bears witness to the reduction of the distance between judicial and social matters, and that society, better understood, will be better served.

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