

Global Trends in Mediation

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## Chapter 5 Judicial Mediation in Quebec

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**Abstract.** Judicial mediation is established in Quebec in all courts and most administrative tribunals. Upon a voluntary joint request by the parties, a judge will mediate the dispute by working with the parties to seek a creative and global resolution to their conflict. The integration of mediational and adjudicative forms of conflict resolution in Quebec has created a unified hybrid system, one that represents a new way to render justice. This chapter examines some of the key ways in which judicial mediation complements traditional adjudication by providing many litigants with a flexible, efficient and creative mode of resolving their conflicts. It outlines certain factors that can affect the success of mediation; it evaluates the roles the judicial mediator plays during the process; finally it follows a judicial mediation session step-by-step to signal some of the concerns and innovations that contribute to making judicial mediation a powerful tool for resolving conflicts and delivering justice.

### 5.1 INTRODUCTION

As Quebec's judicial mediation system nears the end of its first decade, the program's success has placed it in the vanguard of the institutionalisation of new ways of rendering justice. The system combines mediational and adjudicative modes of decision-making at every judicial level, creating a unified and integrated hybrid system. The program is unique in the world: no comparable model exists in any other jurisdiction. It represents nothing less than a new way of rendering justice, a new way for citizens to resolve their conflicts within the state-run justice system. As such, it promises to provide a fascinating field for legal research in the coming years.

From its beginnings at the Quebec Court of Appeal in 1997,<sup>1</sup> judicial mediation has expanded and now operates throughout the Quebec judicial

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1 The Court of Appeal is effectively Quebec's court of last resort. In civil matters permission to appeal to the Supreme Court of Canada is rarely granted, so that the vast majority – about 99 percent – of its decisions regarding the civil law are final.

system. All courts and the majority of tribunals – including the Superior Court, the Court of Quebec and the *Tribunal Administratif du Québec* – now use some form of judicial mediation similar to the program at the Court of Appeal, though each have made necessary adaptations to ensure adherence to its applicable rules of practice and adoption of its own terminology.<sup>2</sup> Mediation by a judge is available in any civil, family or commercial matter, provided all parties consent and a judge who vets the case finds it suitable for mediation.<sup>3</sup> In addition, since 2004 the three courts of criminal jurisdiction in Quebec – the Court of Appeal, the Superior Court and the Court of Quebec – have initiated an 18-month pilot project of mediation in criminal matters. It is called ‘facilitation’ to underscore that it is oriented more toward facilitating exchanges between the parties than to finding a solution to a dispute. This program allows the judge and the lawyers involved to meet and seek an agreement on any issue – including sentencing – so as to facilitate criminal proceedings.<sup>4</sup> The result of these developments is that litigants throughout the Quebec judicial system have access to a free and voluntary system of judicial mediation, administered and conducted by judges in all cases.

Judicial mediation has developed its own logic and its own dynamic during these years of experience. In 1997 there were those who feared that judicial mediation would be a mechanical method of dispute resolution that would simply become one aspect of the global organisation of court files – a more sophisticated kind of case management. Others saw it as an extension of the already familiar pre-trial conference and therefore as an innovation in judicial services. What quickly became evident, however, was that the legal community was searching for an appropriate frame of reference to understand what was an entirely new practical method that as yet lacked theoretical roots and

- 2 Though in their essentials the programs at the different courts and tribunals are identical, the Court of Appeal refers to ‘judicial mediation’, the Superior Court to ‘settlement conferences’, the Court of Quebec to ‘amicable dispute resolution conferences’, and the *Tribunal Administratif du Québec* to ‘conciliation’.
- 3 Constitutional matters, cases involving Charter rights, and cases involving domestic violence are excluded ab initio. Other cases might be rejected at the evaluation stage, for example, if it appears they will have important precedential value on a point of law.
- 4 As in civil mediation, the proceedings are based on consent and remain confidential. Unlike civil mediation, however, the parties (the accused and the victim) are not present at the sessions and the judge must provide reasons for accepting, modifying or rejecting the joint proposal reached in mediation. This is a recognition of the public nature of criminal proceedings and serves to protect both the integrity of the process and the rights of the accused to fundamental justice. For a recent example see *R. v. Lefebvre*, 2005 OCA 56, 1 E. 2005-487, available in English translation at <<http://jugements.gc.ca/traductions/index.php>>.

underpinnings.<sup>5</sup> Old names and old categories proved insufficient to describe what the system was doing and to capture its implications. Today, enriched by the practical experience gleaned from years of completed judicial mediations (both those that succeeded and those that did not) and by the theoretical insights of academics and practitioners,<sup>6</sup> we can see that judicial mediation is a crucial development in the history of modern law. Having judges mediate disputes within the conventional justice system has begun to profoundly modify our relationship to the law; it amounts to nothing less than a reorientation of justice.<sup>7</sup>

Through mediation the parties reclaim the dispute they had relinquished to the justice system. They work together toward settling their differences, taking into consideration their respective interests. The originality of the process lies in the fact that it takes place within the judicial system itself, with the support of a judge who, in setting aside his or her power to state the law, provides the parties with a normative space within which they may come to their own decision. The process constitutes a veritable transfer of judicial power. The parties voluntarily reclaim responsibility for their conflict and control of their legal destinies as they commit themselves to finding a solution. The judicial mediator provides them with the confidence they require to begin this journey. In this way mediation calls upon two innovative principles of justice – the empowerment of the parties by the judicial mediator and the responsibility of subjects of the law with respect to their own conflict.

The judge’s traditional task involves making a decision based on a legal norm in an adjudicative process. In mediation, however, the judge’s task is that of a neutral facilitator, encouraging consensus by creating a space for the parties to express their own norms, values and interests. In effect the judge allows the

- 5 On other forms of institutionalised alternative dispute resolution, see J. Resnik, ‘Managerial Judges’ (1982) 96 *Harvard Law Review* 374 (case management), J.M. Wilson, ‘Case Management in Ontario: When There’s a Will, There’s a Way’ (1990) 9 (2) *Advocates’ Society Journal* 3 (case management) and E. Brunet, ‘Judicial Mediation and Signaling’ (2003) 3 *Nev. L.J.* 232 (evaluative mediation by judges).
- 6 See J. Pierre Bonafé-Schmit, ‘La médiation: une alternative à la justice?’ in N. Kasirer & P. Noreau (eds), *Sources et instruments de justice en droit privé* (Montreal: Thémis, 2002) at 141, L. Lalonde, ‘Les modes de PRD: vers une nouvelle conception de la justice?’ (2003) 1(2) *Revue de prévention et de règlement des différends* 17, and H.F. Landtken & A.J. Pirie, ‘Judges as Mediators: What’s the Problem with Judicial Dispute Resolution in Canada?’ (2003) 82 *Canadian Bar Review* 249.
- 7 See L. Ois, ‘La justice conciliatoire: l’envers du lent droit’ (2001) 3 (2) *Éthique publique, Revue internationale d’éthique sociale et gouvernementale* 63. These ideas are further developed in L. Ois & E.H. Reiter, ‘Mediation by Judges: A New Phenomenon in the Transformation of Justice’ (2006) 6 (3) *Pepperdine Dispute Resolution Law Journal* 351–403.

parties to be seized of their own legal dispute and, in a sense, to write their own judgment – a resolution that represents their consensus rather than an imposition from outside.

As guardian of the law and public order, the judicial mediator must ensure that the agreement does not transgress these fundamental considerations. Beyond this, however, he or she has no control over the legal outcome and the parties are free to resolve their conflict in a creative and mutually satisfactory way. The judicial mediator's influence is limited to controlling the process of mediation and, with the parties' consent, to developing options. Removed from the formal adjudicative process and the procedural safeguards of a trial, the judicial mediator expresses an opinion on the law only in exceptional circumstances. In short, the judicial mediator is above all a negotiator with expertise, experience and a profound knowledge of the law, who also brings an important element of moral authority into the mediation room.

## 5.2 CHARACTERISTICS OF JUDICIAL MEDIATION

The basic model and inspiration for judicial mediation is of course private mediation. Both depend on consent, on the development of a specific mandate, on communication, on negotiation and on the production of a settlement reflecting the parties' consent and mandate. Beyond these general points of convergence, however, judicial mediation has key characteristics that distinguish it fundamentally from extra-judicial mediation and that make it a powerful tool for resolving legal conflicts.

### 5.2.1 Integration within the Justice System

Judicial mediation operates within the framework of the traditional adversarial system as it provides litigants already before the courts with an option for resolving their disputes. The Court of Appeal, the courts of first instance, and the administrative tribunals have integrated two distinct routes towards resolution – hearing and mediation – into a hybrid structure that is unique, harmonious and effective. Judicial mediation is thus not a preventative measure for resolving conflicts, that is a process to which parties might resort in order to avoid litigation, but rather it has an integral place within the classical justice system. It is a way to take a dispute already being litigated and resolve it in a different and more satisfactory way.<sup>8</sup>

<sup>8</sup> See L. Ots, 'The Conciliation Service Program of the Court of Appeal of Québec' (2000) 11 (3) *World Arbitration & Mediation Report* 80.

### 5.2.2 The Role of the Judge

To a certain extent the judicial office restricts the scope of the judicial mediator's role. At the same time it confers an undeniable moral authority deriving from the judge's status as an impartial and independent decision-maker. As a judge the judicial mediator operates within certain strictures peculiar to the judicial office in that he or she cannot bind the court, compromise judicial authority by expressing legal opinions nor in any way alter the future progress of a hearing should the mediation fail. At the same time, however, the parties to mediation see the judicial mediator as a judge, with the respect, dignity, and gravity that that entails. Though the judicial mediator does not adjudicate, the fact that a judge is conducting the mediation lends the proceedings a seriousness that facilitates settlement.

### 5.2.3 Independence of the Adjudicative and Mediation Systems

Confidentiality must be at the heart of judicial mediation so as to guarantee that the two systems (mediational and adjudicative) remain mutually impervious and independent.<sup>9</sup> To this end the parties sign an undertaking of confidentiality when they file their joint request for mediation, committing not to reveal anything about the proceedings should the case later go to trial or hearing. This undertaking has recently received added support from amendments to the *Code of Civil Procedure* which make confidential '[a]nything said or written' during a judicial mediation session.<sup>10</sup>

As a practical way to ensure confidentiality, the judicial mediation file is kept at all times in the chambers of the judicial mediator. No record of the mediation – not even a summary reference – is kept in the registry of the court. Furthermore all notes and other documentation relating to the mediation are shredded after the session.

### 5.2.4 Efficient Use of the Judicial Mediator's Time

Given the limitations of human and material resources, a judge cannot be expected to devote more time to a mediation session than to a traditional adjudicative hearing of the same matter. At the Court of Appeal, however, about 80 percent of mediations each year settle after just one or two mediation

<sup>9</sup> See, for example, J. A. Epp, 'Civil Pretrial Conference Privilege: 'A Cosmic Black Hole'?' (1993) 72 *Canadian Bar Review* 337. Confidentiality is particularly important because mediation does not operate according to the same evidentiary and procedural rules as adjudication.

<sup>10</sup> L.R.Q. c. C-25, art. 151.21, as adopted by L.Q. 2002 c. 7, art. 19.

sessions, each of which lasts on average four hours. This is a huge saving of time as an appellate hearing requires many hours of pre-hearing preparation as well as post-hearing deliberation and drafting, all multiplied by three (since three judges typically hear an appeal). At the Superior Court, which mediates around 900 cases per year, the success rate is similar and the time savings even more dramatic. The duration of trials on the merits varies considerably but a two-day trial for relatively simple matters is typical, while complex commercial litigation can last six months or more. Moreover these figures are increasing. Mediation sessions at the Superior Court generally last one day, and though some commercial mediations can last longer, mediations of more than three or four days are rare.

The high rate of success in mediation and the time savings assure a more optimal use of the decision-maker's time. By focusing the intervention on solving the conflict, the mediator saves time, resources, and energy – not just those of the judicial system, but of the parties as well. These savings are particularly evident with respect to preparation time for mediation. Preparation time in mediation is less than in adjudication, as much depends on the dynamics of the mediation session itself, and as – for appellate mediation at least – only one judge is involved instead of three. In addition, prior evaluation of the file allows the judicial mediator to consider the case from the point of view of settlement and to enter the mediation session with a strategy in mind. At the appellate level, for example, as the case has already been subject to a judicial decision at first instance, the judge, in preparing for mediation, can establish the legal parameters of the case by examining the written pleadings, the documentary evidence and the judgment rendered. This allows the judicial mediator to maintain a balance between the applicable substantive law, the merits of the respective positions of the parties and the possibilities for settlement.

### 5.2.5 Separation of Roles

When judicial mediation does not result in a settlement, the judicial mediator is of necessity excluded from participating in the further adjudication of the case. This separation of roles is one of the foundations of the system and it ensures the integrity of judicial mediation by guaranteeing the independence and impartiality of decision-makers. Furthermore the parties' knowledge and understanding of this separation of roles contributes to the fluidity and ease of negotiations as it encourages frank discussion without reservations based on confidentiality or long-term litigation strategy.

## 5.3 PREREQUISITES FOR JUDICIAL MEDIATION

Before the parties commit to judicial mediation, the judicial mediator and the parties themselves must carefully consider certain factors that could jeopardise the success of the mediation. Unlike adjudication, in which one party at least is compelled to participate, mediation is voluntary and so requires of both parties a degree of acceptance of the process and understanding of their conflict.

### 5.3.1 The Evolution of the Conflict

Viable resolution of a conflict requires intervention at an opportune moment, namely when the tensions between the parties have reached a certain level of intractability and the parties realise the need for ending the dispute.<sup>11</sup> This is true of judicial mediation no less than of other forms of dispute resolution. In particular, before seeking compromise, the parties must have determined their positions with respect to the conflict and come to a preliminary acceptance that settlement on certain terms would be better than continued conflict. This consideration is crucial for determining the moment when a conflict is ripe for settlement,<sup>12</sup> before this point is reached, mediation will be difficult if not impossible.

### 5.3.2 The Complexity of the Conflict

The nature and scope of certain conflicts can make mediation more difficult and thereby demand more from the judicial mediator, and these situations must be considered beforehand. Some conflicts, for example, involve many parties or raise complex legal questions. Factors such as these must be carefully evaluated before the mediation session so as not undermine or derail the process. For example multi-party or similarly complicated negotiations, are becoming more and more common,<sup>13</sup> and special techniques can be used to simplify the proceedings while preserving their flexibility. Such negotiations present no more difficulty than bilateral ones when the file has been carefully prepared and the

11 M. Deutsch, 'A Theoretical Perspective on Conflict and Conflict Resolution' in Dennis J.D. Sandole & I. Sandole-Staroste (eds), *Conflict Management and Problem Solving: Interpersonal to International Applications* (New York: New York University Press, 1987) at 38.

12 J. Macfarlane, 'Why Do People Settle?' (2001) 46 *McGill Law Journal* 663 at 710-711.

13 C. Menkel-Meadow, 'From Legal Disputes to Conflict Resolution and Human Problem Solving: Legal Dispute Resolution in a Multidisciplinary Context' (2004) 54 *Journal of Legal Education* 7.

judicial mediator understands what is at stake and the particular interests of each party.

In complex cases where the judicial mediator identifies a particular stumbling block, it is always possible – indeed desirable – to limit the mediation to certain parties or certain questions and leave the remainder to the adjudicative system for resolution. This allows the judicial mediator to help untangle at least some of the conflict. The synergy between the two systems is evident in such situations as each can contribute its particular strengths towards the global resolution of the conflict.

### 5.3.3 The Will to Resolve the Conflict

It can happen that a party might wish – unconsciously or otherwise – to participate in mediation solely to maintain and prolong the conflictual relationship that exists with the other party, rather than to find a definitive solution to it. A party might also sometimes undertake mediation to prop up its factual case in order to strengthen its legal position. Such cases are rare but the integrity of the process requires that the judicial mediator uncover them quickly. To ensure the success of the mediation and the efficient management of his or her time, the judicial mediator must promptly make certain that all parties have a genuine will to find a solution to their dispute, without reservation, subterfuge or stratagem. Telephone conferences, in which the judicial mediator can probe this issue with each party and their lawyers, are an indispensable tool to this end.

### 5.3.4 Power Relationships

A balance of power between the parties in conflict is a vital element in settlement negotiations. This need not mean that the parties be strictly equal in power or influence, though situations where a strong power imbalance would dominate proceedings should not go to mediation. Rather it means that the judicial mediator must perceive the relative status of the parties and work to keep them on an even footing as the mediation unfolds. Certain factors, for example, resource differences, personality differences or quality of counsel, can affect this balance and compromise the process of mediation.<sup>14</sup> The judicial mediator must have a good understanding of the relational dynamic between the parties before beginning the mediation.

<sup>14</sup> This is a frequent issue in divorce mediation, see T. Grillo, 'The Mediation Alternative: Process Dangers for Women' (1991) 100 *Yale Law Journal* 1545 and P.E. Bryan, 'Killing Us Softly: Divorce Mediation and the Politics of Power' (1992) 40 *Buffalo Law Review* 441.

## 5.4 THE ROLE OF THE JUDICIAL MEDIATOR

A judicial mediator plays a variety of different roles during a mediation, from moderator to evaluator, from investigator to negotiator, from counselor to facilitator.<sup>15</sup> As part of his or her intervention the judicial mediator must allow the parties to examine their dispute from all angles, to define the basic questions and to identify underlying – and sometimes unexpressed – interests that can affect settlement. The judicial mediator must offer the parties the chance to explore in a mutual fashion all the options that might allow them to settle their conflict in a satisfactory way. The following roles are particularly important.

As an agent of rapprochement the judicial mediator must move the parties from their initial polarised and antagonistic positions to an understanding of the common task that lies before them. This involves procuring their consent to mediation, hammering out a clear mandate for the process, bringing them to a common desire to negotiate in good faith and establishing a common ground for agreement.

As a manager of procedure the judicial mediator must establish rules for speaking and must ensure the participation of all parties implicated in the conflict. As well the judicial mediator must deal with questions of law that arise during the course of negotiations without letting these become obstacles to the process.

As a facilitator of communication the judicial mediator must listen actively in order to get inside the conflict to uncover its hidden motivations. He or she must know when to intervene and when to let the parties reflect, and must also know when to deal with issues, and when to set them aside for later (or even for another forum). In short the judicial mediator is like the conductor of an orchestra, subtly keeping the parties on point and tempering or cutting off discussions that threaten negotiations. Through control without interference the judicial mediator keeps the parties focused in a constructive way on the problem before them, so as to let parties air their point of view fully and constructively.

As a balancing force the judicial mediator sometimes must work against the dynamics of power between the parties so as to maintain the equilibrium of the process. In this the judicial mediator can resemble a referee, subtly intervening in order to ensure fairness and that the positions of both parties are presented with equal force. Particularly useful in this regard are individual meetings or caucuses, in which a weaker or less confident party speaks privately with the judicial mediator, who then reports the information back to the other

<sup>15</sup> On the various roles of the mediator see G. Smith, 'Unwilling Actors: Why Voluntary Mediation Works, Why Mandatory Mediation Might Not' (1998) 36 *Osgoode Hall Law Journal* 847. The author interprets mediation as a form of theatre.

party.<sup>16</sup> Keeping face-to-face contact between the parties to a minimum can help neutralise the advantage of a more experienced or more forceful negotiator. The perception of the integrity and independence of the judicial office is vitally important here to defuse any suspicions about *ex parte* communication.

As a reality check the judicial mediator can bring the parties back to a realistic understanding of their differences.<sup>17</sup> This is particularly important when one party resorts to conjecture or exaggeration in pressing its position; a sober and neutral assessment by the judicial mediator can keep the negotiations focused on what is workable.

Finally as problem solver the judicial mediator can use his or her position as neutral facilitator to propose solutions at an opportune time. It is important to remember that the parties to mediation frequently have lost their objective perception of the conflict. It is up to the judicial mediator to keep in mind the global view of the conflict. From this privileged position he or she can lead the parties out of the confines of the narrow legal dispute they have articulated and bring them back to the human conflict of which they are seeking resolution.<sup>18</sup>

## 5.5 THE MEDIATION SESSION

The judicial mediator alone is responsible for keeping the process of mediation moving forward, which involves considerable strategic thinking, psychological insight, tact, and common sense. The substance of the settlement, however, is entirely up to the parties. The judicial mediator must never interfere with the parties' decision, since the essence of mediation is a transfer of decision-making power from the state to the parties.

This requires great sensitivity on the part of the judicial mediator as his or her role is crucial in how the mediation session will unfold. No single set of qualities exists that combine to form the perfect mediator. One quality that is essential in a judicial mediator is the ability to be able to step outside of him- or herself – outside of what is known and accepted – so as to apprehend and understand the conflict from the parties' point of view without moral judgment. This requires more than simply mastering a set of professional skills; it requires profound knowledge of oneself, which then serves as a foundation for understanding others.

As to procedure, planning a mediation session around a certain sequence of distinct steps or stages facilitates communication and negotiation. The precise content of these steps will be different in each mediation, but together they allow

the process to unfold in a logical order without unduly constraining flexibility. At the Court of Appeal mediation sessions generally comprise six principal steps: consent, opening, communication, negotiation, decision and closure.<sup>19</sup> Each step has a specific goal, entails a positive action and leads to a particular result.

Judicial mediation, as a voluntary process, must begin with an expression of consent by the parties. Consent derives from the submission of a joint request for mediation, signed by the parties and, if applicable, their lawyers.<sup>20</sup> In some cases, if a party refuses mediation, the other party can contact the office of the judicial mediator to ask for a conference call in which the judicial mediator explains to the reluctant party the goals of the process and seeks to clear up any fears or confusion that party might have. Often a party's refusal to agree to mediation derives simply from ignorance of the process, which a telephone conference call can clear up. This step also allows the judicial mediator to evaluate the parties' will to settle, as at this point the judicial mediator will explain clearly that mediation is not for obtaining a judicial opinion or a kind of pre-decision but rather involves goal-oriented negotiation. Finally the consent stage allows the judicial mediator to ensure that all parties necessary for the complete resolution of the conflict are present.

The opening of the mediation session – usually but not necessarily in a plenary session with the parties and their lawyers – allows the judicial mediator to set out the goals and the procedural framework of what will follow. If it has not yet been done, the parties must agree to the terms of the judicial mediator's mandate at this stage, though the terms of this mandate can change or evolve as negotiations proceed. This stage also allows the parties to begin to air their positions in a preliminary way so as to begin to establish the substantive content of the negotiations to follow. Finally, and particularly in cases where the parties are hostile towards each other, the judicial mediator can meet privately with the parties' lawyers, who act as officers of the court to work with the judge in developing strategies to increase the chances of a successful negotiation. One key goal of this meeting with the lawyers is to establish whether the ensuing mediation would be most fruitful if conducted as plenary or as individual sessions.

Communication begins as the parties – whether individually or in plenary session – transmit to the judicial mediator the information that they feel to be

19 These stages adopt the essentials of the STAR method ('A Systematic Approach to Mediation Strategies') developed by the Straus Institute for Dispute Resolution at the Pepperdine University School of Law. They have been adapted for the particular needs of judicial mediation. See the brief description at the web site of the Straus Institute, available at

20 <<http://law.pepperdine.edu/straus/conferences/summer05/star.jsp>>.

For examples of the forms used for joint requests, see Appendix I below.

16 Above Note 15 at 868–871.

17 Above Note 15 at 871–873.

18 Menkel-Meadow, above Note 13 at 8.

indispensable for evaluating precisely the scope of their conflict, that is whether the conflict is based on presuppositions, interests, values, relationships, and the like.<sup>21</sup> In effect each party successively tells his or her story and sets out their boundaries, in effect turning this stage into an exercise in egotism – a necessary starting point. This is communication of a linear nature; while each party narrates their story, the judicial mediator simply poses questions, listens empathetically and marks effective pauses so as to allow each party to express their own version of the conflict. Though this type of communication has the effect of accentuating the starkness of the parties' positions, this is in fact one of the most important stages in mediation. By focusing on points of conflict in this way, the judicial mediator can begin to see how the potential settlement agreement might look, clause by clause.

From these opposed expressions of position, the mediation next moves to negotiation. This is the stage of innovation and creativity. The judicial mediator gradually leads the parties to imagine ways out of the prison of polarised positions in which they feel themselves trapped. The essence of negotiation is for the parties to find a solution that is viable, even vital, for both of them. The parties are the negotiators; the judicial mediator must allow them to speak, listen and reflect in silence as necessary, as the responsibility for the decision rests entirely on them. A veritable judicial transfer takes place; the judicial mediator encourages the parties to take risks to resolve their conflict but never dispossesses them of their decisional power. As a result mediations can often result in surprisingly creative solutions, which would be beyond the jurisdiction of a traditional court or tribunal, such as dividing or exchanging disputed property, constructing infrastructure, jointly preparing a letter of apology, redefining shareholder conventions and the like.

Creative negotiations, if successful, will lead to a settlement that is drafted and signed, later to be approved by the court. The drafting of the agreement is entrusted to the parties' lawyers and the judge will leave the room to allow them to work. Occasionally the agreement will require the implementation of transitional measures which will themselves require negotiation; if this is the case the judicial mediator will resume the role of facilitator to work through these final issues with the parties. At the appellate level the agreement is submitted to and homologated by a panel of the Court of Appeal (from which the judicial mediator is of course excluded) and will then become final and binding as any other judgment of that Court.

The session ends with a process of closure. In a plenary session the judicial mediator reads the decision the parties have reached in order to ensure that their

consent is still valid and that it has been translated into a legally valid and signed agreement. Beyond this, however, the closing gives the judicial mediator an opportunity to teach the parties how to learn from their experience in mediation and to apply these lessons to future conflicts they might have. The parties will see just how much they accomplished in the last few hours and how far they have come from the sterile antagonism with which they began. Since the services of the judicial mediator are free to the parties – as judges the mediators remain paid by the state – the parties can benefit from this instruction without watching the clock or worrying about its relevance. This, of course, has tremendous potential for wider efficiency benefits for society at large as equipping citizens with dispute resolution skills can help prevent future litigation from arising.

## 5.6 CONCLUSION

The emergence of alternative methods of conflict resolution within state-controlled justice systems bears witness that society is increasingly shouldering responsibility with respect to law, which it no longer perceives as a transcendent and immutable force against which it is powerless. Faced with scarcity of resources, the realisation of the adverse dynamics of conflict and the growing efficiency crisis affecting judicial institutions, people are – whenever possible – reclaiming the power to resolve their disputes. Rather than a sign that the judicial norm is losing legitimacy, this new alternative system reflects a democratic renewal. That judges – guardians of social order and democratic values – participate with the community in transforming the classical system of civil justice, demonstrates the shrinking distance between judicial and social matters. The efficiency benefits of judicial mediation are obvious; less evident, but no less important, are the benefits it brings to justice itself.

21 On the taxonomy of conflict see M. Afzalur Rahim, *Managing Conflict in Organisations*, 2nd ed. (Westport, Conn.: Praeger, 1992) at 15-35, and Menkel-Meadow, above Note 13 at 11-16.

APPENDIX: EXAMPLE OF A JOINT REQUEST FOR JUDICIAL  
MEDIATION FORM

The example below is the joint request for judicial mediation form used at the Quebec Court of Appeal. The form for a settlement conference at the Superior Court is available at <www.tribunaux.qc.ca/c-superieur/index-cs.html>; the form for conciliation at the Court of Québec is available at <www.justice.gouv.qc.ca/english/formulaires/conference/conference-a.pdf>.

COURT OF APPEAL  
PROVINCE OF QUÉBEC  
OFFICE OF THE COURT OF MONTREAL

File number: 500-09-  
First instance  
File number:

APPELLANT  
vs.  
RESPONDENT

JOINT REQUEST FOR MEDIATION

We, the undersigned, jointly request to proceed by mediation in order to attempt to put an end to the present litigation by way of a transaction.

We undertake jointly to prepare and file at the office of the court, a copy of all pertinent documents within seven (7) days prior to the date set for mediation. The documents will include the inscription in appeal, the judgment appealed from and all other proceedings and exhibits which we deem to be useful.

Upon filing of our joint request, we understand that the delays determined in accordance with Title II of the Code of Civil Procedure are suspended.

Furthermore, we undertake to respect the confidential nature of all matters discussed throughout the mediation procedure, including telephone conferences, videoconferences, individual and plenary meetings.

Date:

Appellant  
(Attorney)  
Name:  
Law firm:  
Address:

Respondent  
(Attorney)  
Name:  
Law firm:  
Address:

Telephone:  
Fax:

Telephone:  
Fax:

Please return to the Office of the Court of Appeal  
100, Notre-Dame Street East, Montréal, Québec H2Y 4B6  
clearly indicating on the envelope "REQUEST FOR MEDIATION"