

# COULD JUDICIAL MEDIATION DELIVER A BETTER JUSTICE? SUPPOSING WE TRAINED JUDGES AS EXPATS?

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## Could judicial mediation deliver a better justice? Supposing we TRAINed judges as EXPATS?

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### Summary

What challenges face the contemporary Canadian judicial system and how can the justice system be improved to deliver a better quality of justice for litigants? Here we bring together analyses and results emerging from the first large-scale Canadian study to theoretically and empirically verify the hypothesis that judicial mediation may be an answer to the contemporary Canadian judicial system's challenges. How do "judicial mediator" judges deliver justice? How could judicial mediation deliver a better justice? We respond to these questions by sketching an analytic profile of judicial mediation in Canada and its impacts, based on perspectives found in the academic and practitioners' literature and expressed by Canadian judges. Our studies have led us to devise two complementary typologies to describe current practice in judicial mediation. The **TRAIN** typology identifies four intervention *models* for the practice of judicial mediation, along the **TR**Aditional-**IN**novative continuum; while the **EXPAT** typology identifies three manager/facilitator *styles* judges adopt in the practice of judicial mediation, along an **EX**pertise-**PA**rTicipation continuum. Although each model and style has the potential to improve the judicial system to the benefit of the parties involved, our conclusion is that both the literature and Canadian judges espouse the view that the optimal way for judicial mediation to help remedy the judicial system's constraints and lack of adaptability is for it to be conceived and practiced along innovative and participatory lines. The question then becomes, "How do we train judges in innovative-participatory judicial mediation? Should we TRAIN judges as EXPATS?"

## Sommaire

Quels sont les défis du système judiciaire canadien et comment peut-on l'améliorer pour rendre une justice de meilleure qualité aux justiciables? Dans cet article nous présentons les résultats de la première étude qui vérifie à la fois théoriquement et empiriquement l'hypothèse selon laquelle la « médiation judiciaire » peut être une réponse aux défis que doit relever le système judiciaire canadien. Comment les « juges médiateurs » pratiquent-ils la médiation judiciaire? Comment la médiation judiciaire peut-elle améliorer la qualité de la justice? Sur la base de la littérature universitaire et professionnelle de même que les données recueillies auprès de juges canadiens, nous proposons deux modèles d'analyse des types/styles d'intervention en médiation judiciaire. Le modèle « TRAIN » décrit quatre types d'intervention sur la base d'un continuum traditionnel-innovateur. Le modèle « EXPAT » propose trois styles d'intervention sur la base d'un continuum expertise-participatif. Même si tous ces types peuvent avoir un certain impact sur le système judiciaire au bénéfice des parties, notre conclusion est que la littérature et les juges praticiens croient que la « médiation judiciaire » peut réduire les contraintes et améliorer la souplesse d'adaptation du système judiciaire si elle est pratiquée dans une logique innovatrice et participative. Une prochaine question pertinente serait donc celle de la formation des juges pour pratiquer une « médiation judiciaire innovante-participative » ? Devrait-on enTRAINer les juges comme des EXPATriés?

## Introduction

How do “judicial mediator” judges deliver justice? How could judicial mediation deliver a better justice? Based on the perspectives found in the academic and professional literature and expressed by Canadian judges, we respond to these questions by sketching an analytic profile of the emergence, practices, and impacts of Canadian judicial mediation. In the first part of this article, we will present two complementary typologies for understanding the practice of judicial mediation: the TRAIN typology describes four *intervention models* and the EXPAT typology describes three empirical *styles* adopted by judges. In the second part of the article, we will discuss each model's and style's potential to improve the judicial system to the benefit of the parties involved. The analysis presented in the article reflects our innovative work to theoretically and empirically verify the hypothesis that “judicial mediation can deliver a better justice and help the judicial system overcome challenges it faces”.

One might say the aim of this paper is to raise the question “Should we TRAIN judges as EXPATS?” Judicial mediation, like an expatriate as viewed by the people of the host country, was perceived not so long ago,

and may still be perceived by some, as an inappropriate, alien procedure within the traditional judicial system and legal culture. However, the once dubious phenomenon of judicial mediation has now gained credibility in the judicial community and with the general public, to the point where it has been institutionalized in all Canadian provinces and territories. How judges deliver judicial mediation is a serious question that calls for deep reflection and analysis. Do “EXPAT” judges exist? Do judges conceive and practice judicial mediation in such a way that they may be perceived as “expats” in relation to the world of the traditional judicial system? How might judicial mediation benefit the judicial system, the judicial community, and litigants? This article will propose answers to these questions. After presenting the TRAIN and EXPAT typologies in Part 1, in Part 2 we will explore the potential of the various models and styles of mediation practice to overcome the challenges the Canadian judicial system is facing in terms of constraints and adaptability. But first, what challenges are we talking about? And who thinks the Canadian judicial system faces these many challenges?

Canada’s adversary justice system is often depicted as increasingly complex and procedural and has been criticized to this effect in various quarters.<sup>1</sup> At the seminar entitled “Whose Court Is it Anyway?” held at Victoria (Canada) in April 2003, which focused on the modes of judicial dispute resolution, a member of the press assessed the state of the justice system as summarized below:

She outlined the real concerns that have been expressed: that the system is too slow, too costly, – financially and emotionally, that decisions aren’t followed, that the system leaves parties dissatisfied. She questioned the relevance of today’s court to the average Canadian and expressed concerns as to the accessibility of justice for all Canadians. She challenged the judges present to improve the system, to look more closely at promising alternative approaches such as JDR.<sup>2</sup>

1. Law Commission of Canada, *Transforming Relationships through Participatory Justice* (Ottawa: Government of Canada, 2003) at 100-103 [Law Commission of Canada, “Participatory Justice”]; Georges A. Legault, “Les nouveaux modes de règlement des différends et la transformation de la fonction de juger: vers une justice renouvelée?” (2001) 3 *Éthique publique* 69 at 76 [Legault, “Justice renouvelée”]; Louise Otis, “The Conciliation Service Program of the Court of Appeal of Quebec” (2000) 11 *World Arbitration and Mediation Report* 80 at 80-81 [Otis, “Conciliation Service”]; Yves Lavertu, “Améliorer l’efficacité de la justice” (15 février 2004) 36 *Le Journal du Barreau* at 5. Hugh F. Landerkin and Andrew J. Pirie, “Judges as Mediators: What’s the Problem with Judicial Dispute Resolution in Canada?” (2003) 82 *Canadian Bar Review* 249 at 262 [Landerkin, Pirie, “Mediators”].
2. Royal Roads University, *Judicial Dispute Resolution in Canadian Courts: A Symposium for Judges: Summary Report* (Victoria, 24-26 April 2003) at 4. JDR is an acronym that refers to modes of judicial dispute resolution other than trial.

Judges themselves are fully aware of the phenomenon, as demonstrated in the following excerpts from statements by Justice Louise Otis of the Quebec Court of Appeal and by Justices Nancy A. Flatters and Hugh F. Landerkin of the Provincial Court of Alberta:

While the foundations for the mission fulfilled by the act of judging remain unshakeable, we must note that, in a large proportion of civil cases, the adversarial, complex, and distressing process is not very well adapted to modern judicial reality and the paramount interests of persons at trial. [...] Among the deficiencies that have been noted are the [administrative and procedural] delays, court costs and out-of-court expenses owing to the adversarial process, the agency costs that sometimes result from overlapping interests, physical and psychological traumas associated especially with long legal battles, and the inherent limitations of the adversarial process in seeking the best solution that will truly put an end to the litigation.<sup>3</sup> [Translated by author.]

As a society we seem to have developed a mind caste [sic] that courts should resolve every crisis in our lives, and the escalating court filings show there is no relief in sight. We all recognize that cases are much more than numbers and statistics. They represent flesh and blood controversies often profoundly affecting peoples' lives. Moreover, court judgments throughout history have shaped and defined matters of great societal significance. However there are still hard realities about the litigation process today that cannot be ignored, many cases in the courts – particularly those involving disintegrated personal relationships – probably do not belong there at all; indeed, keeping such disputes in a formal litigation mold may often times actually exacerbate the human tragedy. Therefore, it is essential that we find those cases and “non cases” that are needlessly distorting and misshaping our adversary system and resolve them in other ways.<sup>4</sup>

Court congestion and long delays, staggering legal costs, and problems enforcing judicial orders can mean access to justice is compromised. [...] The courts cannot be viewed, as a 1996 report on the Canadian justice system found, as a system in which “many Canadians feel that they cannot exercise their rights effectively because using the civil justice system takes too long, is too expensive, or is too difficult to understand.”<sup>5</sup>

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3. Louise Otis, “La justice conciliatoire: l'envers du lent droit” (2001) 3 *Éthique publique* 63 at 63-64 [Otis, “Justice conciliatoire”]. See also Louise Otis & Eric H. Reiter, “A New Phenomenon in the Transformation of Justice” (2006) 6 *Pepperdine Dispute Resolution Law Journal* 351 at 360-361 [Otis, Reiter “New Phenomenon”].
  4. Nancy A. Flatters, “Family/Child Judicial Dispute Resolution (JDR)” (2003) 41 *Family Court Review* 182 at 182.
  5. Landerkin, Pirie, “Mediators” *supra* note 1 at 282. Canadian Bar Association Task Force on Systems of Civil Justice, *Report of the Task Force on Systems of Civil Justice* (Ottawa, 1996) at 11.

Similar opinions abound in the academic world. Legal scholarship has produced two complementary hypotheses to explain the criticism aimed at the justice system. The first hypothesis revisits, as has happened before in other contexts, the notion of civil justice founded on a judicial theory of primary modernity in which sovereign and state law predominates.<sup>6</sup> The second hypothesis, which complements the first with a pragmatic perspective, concerns law's challenge to provide adapted solutions in the context of a pluralistic society.<sup>7</sup> Thus we can say the players in the justice system are faced with the daunting challenge of adapt-

6. "In the nineteenth century a particular view of justice [...] prevailed over its rivals. This modern institution of justice is subject today to the dynamic of cultural and social change. The modern institution of justice would appear today to be in decline or to be undergoing radical change." Jean-Guy Belley, "Une justice de la seconde modernité: proposition de principes généraux pour le prochain *Code de procédure civile*" (2001) 46 R.D. McGill 317 at pp. 336-338 [translated by author].
7. "Legal disputes as argued before the judiciary amount to no more than a contest of legal claims. In the trial context, the dispute is defined in purely legal terms and not in terms of how the individual parties experience it. Hence it is clear that the individual judge in deciding a legal case is by no means guaranteed in so doing of even resolving the 'conflict' which gave rise to or forms part of the action before the court. There is an evident danger therefore of creating a gap between the needs of parties involved and the remedies actually provided by the formal justice system." Béatrice Gorchs, "Discours de synthèse général" (9 décembre 2005) 245 Petites affiches 21 at 21 [translated by author]. "It is important for the justice system to acknowledge the fact that people want their conflicts resolved, but not necessarily tried. A tailored solution which the litigants feel is fair and which they design is more satisfying to all concerned. 'Legal' cases are not simply about legal issues but rather involve a mix of law, morals, business or family sociology and a high degree of uncertainty as to outcome. The zero-sum response of courts does not, many times, do justice to this rich mix of forces." Georges W. Adams & Naomi L. Bussin, "Alternative Dispute Resolution and Canadian Courts: A Time for Change" (1995) 17 *Advocates' Quarterly* 133 at 145-146. See also the following authors who recognize the need for consensual modes of dispute settlement to deal with conflicts experienced by the parties (and distinguished from the legal case) in a pluralistic social context: Louise Lalonde, "Les modes de PRD: vers une nouvelle conception de la justice?" (2003) 1:2 *Revue de prévention et de règlement des différends* 17 at 19-21 [Lalonde, "Justice"]; Julie Macfarlane, "The Mediation Alternative" in Julie Macfarlane, ed., *Rethinking Disputes: The Mediation Alternative* (Toronto: Emond Montgomery, 1997) 1 at 5 [Macfarlane, "Mediation Alternative"]; Christian Jarroson, "Le médiateur: questions fondamentales" in Centre français de droit comparé, ed., *Les médiateurs en France et à l'étranger* (Paris: Société de législation comparée, 2001) 21 at 21; Antoine Garapon, "Qu'est ce que la médiation au juste?" in *La médiation: un mode alternatif de résolution des conflits?* (Zurich: Publications de l'Institut suisse de droit comparé, 1992) 211 at 214; Jean-Louis Renchon, "La médiation familiale comme réponse aux impasses du traitement judiciaire de la séparation conjugale" in *La médiation: un mode alternatif de résolution des conflits?* (Zurich: Publications de l'Institut suisse de droit comparé, 1992) 295 at 300-301, 304.

ing the system that puts law and justice into effect to the contemporary realities experienced by persons at trial.<sup>8</sup>

Some Canadian authors, both judges and legal scholars, advance the hypothesis that judicial mediation may transform the justice system to the benefit of persons at trial.<sup>9</sup> The term “judicial mediation”<sup>10</sup> may be defined as the mode of dispute resolution through which a third party, the

8. Justice Hugh F. Landerkin of the Provincial Court of Alberta states clearly this responsibility of judges: “While it is not the place nor function of judges to advocate law reform, it is the right and obligation of judges to deal with these perceptions and ask questions about the adjudicatory process. In the present era of fiscal restraint everyone is expected to do more with fewer resources. Restructuring is taking place, and courts must be part of this as they are accountable to the public they serve. The Court as a master of its own house, can better serve its own process by becoming more accessible, more efficient and more educational, so the public can learn how to deal more appropriately with family problems.” Hugh F. Landerkin, “Custody Disputes in the Provincial Court of Alberta: A New Judicial Dispute Resolution Model” (1996) 35 *Alberta Law Review* 627 [Landerkin, “Custody”].
9. “Alternative Dispute Resolution in the courts is an obvious antidote, the argument goes, to help cure the ailments that plague the adjudicative process. The challenge is to adopt a court-friendly definition of ADR – originally the antithesis to the courts – for use within the courts so common ADR benefits, such as saving time and money, reaching win-win results, making lasting arrangements, reducing recidivism, and increasing disputant satisfaction with the process and the result, would also accrue to parties who are using the courts to resolve their problems.” Landerkin, Pirie, “Mediators” *supra* note 1 at 282. See also Otis, “Justice conciliatoire” *supra* note 3; Louise Otis, “La conciliation judiciaire à la Cour d’appel du Québec” (2003) 1:2 *Revue de prévention et règlement des différends* 1 at 3 [Otis, “Conciliation judiciaire”]; Otis, “Conciliation Service” *supra* note 1; John A. Agrios, “A Handbook on Judicial Dispute Resolution for Canadian Judges” (January 2005) [unpublished, archived at the National Judicial Institute] at 6; Louis Marquis, “La conférence de règlement à l’amiable et l’émergence d’une nouvelle coutume en droit québécois” (2003) 1:1 *Revue de prévention et règlement des différends* 1 [Marquis, “Conférence”]. Many Alberta Provincial Court judges – Youth and Family Division have written on this perspective. See Joanne Goss, “Judicial Dispute Resolution. Program Setup and Evaluation in Edmonton” (2004) 42 *Family Court Review* 511; Nancy A. Flatters, *supra* note 4; Landerkin, “Custody” *supra* note 8.
10. The generic term “judicial mediation” is used here to denote the method of dispute settlement whereby the judge facilitates negotiation between parties to help them reach a mutual agreement or compromise settlement so that they themselves settle their dispute. It is interesting to note that the instruction given to judges on this score makes reference to the principles of private mediation as adapted to the justice mission of the justice system and of judges. The Honourable Louise Otis, recently retired from the Court of Appeal of Quebec and a pioneer of mediation in Quebec, makes specific use of the term “judicial mediation”. The term is retained here. See Otis, Reiter “New Phenomenon” *supra* note 3 at 360-361. Despite the differences in practice that may exist, in each of the Canadian provinces and territories judicial mediation implies the presence of a judge who is mediating, reconciling the interests of conflicting parties without rendering a judgment himself.

conciliating judge, assists the parties in their process of developing a negotiated solution.<sup>11</sup> In Canadian legislation, the process through which resolution is arrived at is generally referred to as a “settlement conference” or “conférence de règlement à l’amiable”. The conciliating judge is a member of the judiciary who can both act as a *decision-making* judge and as a *conciliating* judge that reconciles parties in order to negotiate agreements depending on the mandate given when the legal case is assigned. Thus “conciliating judge” is defined in light of both the judge’s membership in the justice system and the mandate of conciliation entrusted to him by his organization and by the law as a way of settling judicialized disputes.

Until now, we have had very little information to support any hypothesis regarding the potential of judicial mediation. First, there is no published empirical research available to support any conclusions on this issue.<sup>12</sup> Next, it seems that we are confronted with a variety of kinds of intervention in judicial mediation on the national level.<sup>13</sup> Finally, each of those various kinds of intervention is either not very well documented or not documented at all. We definitely do not possess a clear definition of what distinguishes judicial mediation from other types of intervention. It therefore appears difficult to assess its potential for allowing the justice system to adapt to contemporary pluralistic society. The aim of this article is to shed new light on the subject by examining what is at stake, and what is promised in the movement of judicial mediation.

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11. “Judicial mediation draws in a general way on the rules of private mediation as regards consent, the establishment of a mandate, communication, negotiation (depending on the type of mediation in question), and the drawing up of an informed solution.” Otis, “Conciliation judiciaire” *supra* note 9 at 3 [translated by author].
  12. See Jean-François Roberge, “Typologie de l’intervention en conciliation judiciaire chez les juges canadiens siégeant en première instance et ses impacts sur le système judiciaire, le droit et la justice. Étude de la perception des juges canadiens” (2007) (unpublished LL.D. thesis, Laval University-Sherbrooke University, Canada) (on file with author) [Roberge, “Typologie”].
  13. Royal Roads University, *supra* note 2 at 5, 12. “What are the goals of mediation? It depends. [...] The spectrum of goals in mediation can range from efficiency claims (primarily cheaper, faster, more competitive) to qualitative-justice claims (values apart from time, cost, and institutional convenience). [...] For judges who are considering whether or how mediation fits into their judicial role, there clearly are opportunities to match the diverse processes, goals and characterizations of mediation with long-standing judicial needs, responsibilities and structure. [...] Goals for judicial mediation would have to be set to be in line with a judge’s skill level or the needs of the specific court. [...] The core or essential meaning of mediation for judges would likely need to be unique.” Landerkin, Pirie, “Mediators” *supra* note 1 at 257, 261.

## 1. How do judges deliver justice in judicial mediation?

How do judicial mediator judges deliver justice? Our studies led us to build two complementary typologies to describe the current practice of judicial mediation. The TRAIN typology, which describes models of intervention in judicial mediation, is based on a synthesis of the literature on judicial mediation/settlement conferences, the socio-judicial literature on the methods of dispute prevention and resolution (DPR) and alternative dispute resolution (ADR), and the literature on private mediation. EXPAT provides an original typology of styles of judicial mediation derived from empirical research on the practice of trial court judges in all Canadian provinces and territories. Built from different perspectives, the two typologies complement each other and help in understanding the diverse conceptions that exist of mediation and the diverse ways it is practiced. The need for such a typology or typologies is evident in comments emerging from both the legal and the academic worlds:

Judicial mediation, or the appropriate nomenclature, might be fundamentally understood as an essential element of accessing justice in a free and democratic society, as bringing law to every person's door, as a wiser and fuller utilization of our judicial elders, as an opening up of a traditionally closed and often misunderstood justice system, as a move to empower parties in the sometimes disempowering litigation process, or as a legal process geared towards saving time and money. Appropriate and judiciously considered combinations of various understandings of mediation will be the obvious way to develop an overall characterization of judicial mediation in Canadian courts. In any event, the ideology of mediation in the courts, with its unique goals and procedures, needs to be carefully developed.<sup>14</sup>

### 1.1 The "TRAIN" model of judicial mediation types

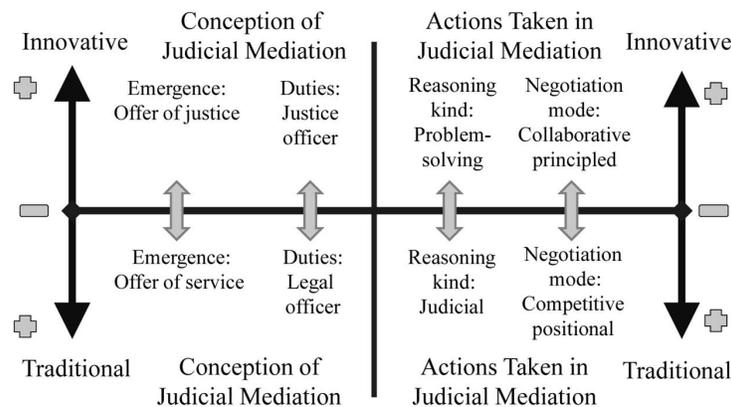
The TRAIN model we propose here is innovative for at least two reasons. First, it puts forward a novel theoretical framework within which one can read about and analyse the practice of judicial mediation even though theoretical and empirical knowledge on the topic are not yet very well developed. Second, it presents for the first time an innovative logic of settlements reached through judicial mediation, one that has been constructed by inference, is coherent, and is supported by an overview of the relevant literature.

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14. Landerkin, Pirie, "Mediators" *supra* note 1 at 262.

The TRAIN typology rests on two tendencies found in the literature and discourse produced by both practitioners and academics: traditional and innovative. TRAIN is thus built on a *traditional-innovative continuum*. Generally, the *traditional* tendency is one according to which judicial mediation is practiced using the *same* rights-based reasoning as litigation so that the judge’s role is not significantly different than that of a legal expert in a trial. The *innovative* tendency conceives of the practice of judicial mediation from the perspective of an *independent* logic according to which the judge’s role is that of a facilitator, evoking the ideal of facilitative private mediation.

We present here an analysis of the traditional and innovative tendencies in accounts of judicial mediation that is based on four themes: (1) the emergence of judicial mediation, (2) the duties of the conciliating judge, (3) the kind of reasoning to be applied during judicial mediation, and (4) the mode of negotiation to be applied during judicial mediation. The first two themes relate to the *conception* of judicial mediation in relation to the justice system: namely the methods by which judicial mediation is integrated into the justice system: the reasons for its integration and the role played by the judge. The second two themes relate to the *actions* taken in judicial mediation: namely the modes of action, in the form of the kinds of reasoning and the modes of negotiation actually applied by the judge in order to resolve the dispute. The typology as a whole is presented in Figure 1.



Roberge (2010)

**Figure 1.** Fundamentals of the TRAIN typology, based on the traditional and innovative tendencies in judicial mediation mapped on two dimensions (conception, action) and under four themes (1. the emergence of judicial mediation, 2. the duties of the conciliating judge, 3. the type of reasoning applicable in judicial mediation, 4. the mode of negotiation applicable in judicial mediation).

What is meant by “*the emergence* of judicial mediation”? Here “*emergence*” is considered to be the appropriation by institutions of, and the increasingly greater recourse sought by citizens to, the consensual modes of dispute resolution and more specifically judicial mediation. Based on the literature on judicial mediation, the socio-judicial literature on the modes of ADR, and the literature on private mediation, two main causes would appear to account for the emergence of judicial mediation.

The first cause relates to institutional flaws in the classic civil justice system.<sup>15</sup> These flaws create injustice, since they impede access to justice for persons at trial. In response to this concern, judicial mediation has emerged in the form of an additional offer of *service* in the justice system, one that will circumvent the flaws in the adversary system.

The second cause relates to the “quality of the justice rendered”<sup>16</sup> and to “a movement in Western societies that wishes to participate in its judicial destiny”.<sup>17</sup> For proponents of judicial mediation as a way of enhancing the quality of justice and allowing for participation, it does constitute an additional offer of service, but one that represents an additional offer of *justice* for persons at trial.

What is meant by the “*duties* of the conciliating judge”? These duties correspond to the role of the judge in the resolution of the dispute. Does that role consist of fulfilling the traditional duties associated with presiding over trials, or has it been transformed? The literature on judicial mediation, the socio-judicial literature, and the literature on private mediation suggest two trends exist: (1) first, the function of the conciliating judge is *similar* to that of a judge during trial but its procedural latitude is increased;<sup>18</sup> (2) second, the function of the conciliating judge has been *transformed vis-à-vis* that of a trial judge.<sup>19</sup>

15. Otis, “Justice conciliatoire” *supra* note 3 at 63. Otis, Reiter, “New Phenomenon” *supra* note 3 at 360.

16. Georges A. Legault, “Enjeux éthiques de la conférence de règlement à l’amiable” (2005) 3:1 *Revue de prévention et règlement des différends* 1 at 9-11 [Legault, “Enjeux éthiques”]. Otis, Reiter, “New Phenomenon” *ibid.* at 361.

17. *Ibid.*

18. In the exercise of his *traditional duties*, the judge can be viewed as an *agent of the law*. His role can be defined in terms of the following four duties: (1) the duty to manage the judicial procedure; (2) the duty to act as an expert on the law; (3) the duty to act as legal evaluator of the remedies; (4) the duty to ensure distributive justice by upholding the law as a “guardian of the law”.

19. In the exercise of his *innovative duties* the judge can be viewed as an *officer of the law*. His role can be defined in terms of the following four duties: (1) the duty to empower parties; (2) the duties to mediate and create trust; (3) the duty to communicate and develop a constructive dialogue; (4) the duty to ensure procedural justice as a “guardian of equity”.

What is meant by the “*reasoning to be applied*” by the conciliating judge in judicial mediation? By the term “reasoning”, we are referring to the cognitive processes and logic applied during dispute resolution. Does it correspond to the traditional reasoning applied at trial, or does it follow a different logic? The literature on judicial mediation, the socio-judicial literature, and the literature on private mediation suggests two trends exist: (1) support for applying *judicial reasoning*, of the kind used in a trial;<sup>20</sup> (2) support for applying *problem-solving reasoning*, of the kind applicable in private mediation.<sup>21</sup>

How can we define the “*modes of negotiation*” favoured by the conciliating judge in judicial mediation? The modes of negotiation correspond to the strategies and tactics used to generate, modify, and choose from among optional solutions in order, ultimately, to reach an agreement that will resolve the dispute. The literature on private mediation identifies two predominant forms of negotiation:<sup>22</sup> classical competitive-positional and collaborative-principled. Classical negotiation corresponds to the form traditionally used in out-of-court negotiations.<sup>23</sup>

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20. The *traditional reasoning* applied by judges may be termed judicial. It can be defined in terms of the following four variables: (1) Diagnostic reasoning, where the object of dispute and solutions are presumed to be found in law (legal dispute, legal case); (2) interpretative reasoning according to the principles and values of the legal system; (3) evaluative reasoning and a legal justification for remedies; (4) limited creative reasoning subject to legal norms.

21. The *innovative reasoning* applied by judges may be termed problem-solving. It can be defined in terms of the following four variables: (1) Diagnostic reasoning, where the solution is not presumed to be found in law (the conflict is contextualized – the parties provide the context); (2) interpretative reasoning according to the relationship between the parties; (3) integrative reasoning and a statement of the reason for the remedies according to the values and interests of the parties; (4) expanded creative reasoning restricted only by respect for public order.

22. Roger Fisher & William Ury, *Comment réussir une négociation* (Paris: Seuil, 1982) at 21-29 [Fisher, “Négociation”]; George W. Adams, *Mediating Justice: Legal Dispute Negotiations* (Toronto: CCH, 2003) at 29-30.

23. George W. Adams, *ibid.* at 65; Michael Noone, *Mediation* (London: Cavendish Publishing, 1996) at 11-13; Carrie Menkel-Meadow, “Aha? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?” (2001) 6 *Harvard Negotiation Law Review* 97 at 755-757 [Menkel-Meadow, “Problem Solving”]; K. Mackie et al., *The ADR Practice Guide. Commercial Dispute Resolution*, 2<sup>nd</sup> ed. (London: Butterworths, 2000) at 25; Julie Macfarlane, “Why Do People Settle?” (2001) 46 *McGill L.J.* 663 at 665 [Macfarlane, “Settle”]. In the context of judicial mediation, if the judge follows the *traditional* tendency, classical position-based negotiation can be defined in terms of the following four variables: (1) negotiation directed at individual problems; (2) negotiation that seeks the respect of parties’ rights; (3) negotiation that assesses according to the legal merit of the position of the parties; (4) negotiation directed at arriving at a reasonable compromise in law.

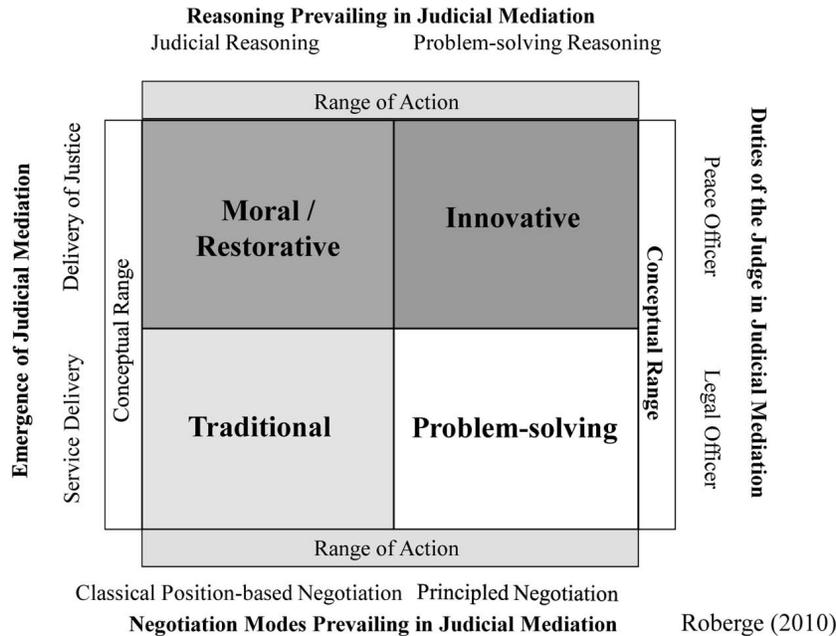
Principled negotiation is advanced as an alternative to classical negotiation and is the form generally favoured in mediation.<sup>24</sup> The literature on judicial mediation does not explicitly specify the mode of negotiation to be favoured. It does however discuss the importance of negotiation as part of the intervention in judicial mediation. “The conciliator is, above all, a neutral negotiator trained by usage and practice”<sup>25</sup> [translated by author]. However, the literature on judicial mediation seems implicitly to support both forms of negotiation.

We consider that the practice of judicial mediation is influenced by the combined parameters of the traditional and innovative tendencies. It could be argued that judges’ actual practice, however, resembles a continuum and that these two tendencies identified in the abstract do not faithfully reflect practice. Consequently, we have constructed a typology of intervention models by combining the entries under the four themes for the two tendencies. We do not claim these themes are exhaustive, but we can affirm they are found in the relevant literature. It is based on these themes as supported by the literature that we propose the TRAIN typology of interventions in judicial mediation, as presented in Figure 2. We will now explore the four intervention models: traditional, innovative, problem-solving, moral/restorative.

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24. Andrew J. Pirie, *Alternative Dispute Resolution. Skills, Science and the Law* (Toronto: Irwin Law, 2000) at 174; Laurence Boulle & Kathleen J. Kelly, *Mediation. Principles, Process, Practice* (Toronto: Butterworths, 1998) at 144-145. Christopher W. Moore, *The Mediation Process. Practical Strategies for Resolving Conflict*, 2<sup>nd</sup> ed. (San Francisco: Jossey-Bass, 1996) at 8. In the context of judicial mediation, if the judge follows the *innovative* tendency, principle-based negotiation can be defined in terms of the following four variables: (1) negotiation directed at common problems; (2) negotiation that seeks to develop shared goals (mainly diverse relationship issues) and an openness as to the means by which these are achieved; (3) collaborative negotiation stemming from the parties’ recognition of shared goals; (4) collaborative negotiation directed at the search for a creative, just, and equitable remedy.

25. Otis, “Conciliation judiciaire”, *supra* note 9 at 1.



**Figure 2.** The TRAIN typology, which presents four models for intervention in judicial mediation: moral-restorative, innovative, traditional, problem-solving. Built on the traditional and innovative tendencies found in the literature on judicial mediation as plotted along two dimensions (conception, action) and under four themes (1. the emergence of judicial mediation; 2. the duties of the conciliating judge; 3. the kind of reasoning applicable during judicial mediation; 4. the mode of negotiation applicable during judicial mediation).

1.1.1 *The traditional intervention model in judicial mediation*<sup>26</sup>

In this section, we will address the *traditional* tendency in judicial mediation. According to the themes established in this article, the conciliating judge who favours this tendency may conceive of judicial mediation as a new *offer of service* of the justice system that *gives greater room for manoeuvre* in order to allow justice to be more accessible to persons at trial. The conciliating judge’s actions will be directed by the application of *judicial reasoning* and by the practice of *classical-positional negotiation* founded on the parties’ judicial positioning.

We would suggest the traditional tendency finds expression within the following practice parameters: fundamentally, the conciliating judge

26. **Traditional model:** (1) Emergence of judicial mediation: Service delivery. (2) Duties of the judge: Legal officer. (3) Kind of reasoning that prevails: Judicial. (4) Mode of negotiation: Classical position-based.

conceives his role to be that of assessing the parties' rights arising from judicial positions presented and inciting them to admit that it is preferable to settle in favour of the reasonableness in law of the solutions proposed. Thus the judge places his legal expertise at the parties' disposal in order to assess the optional solutions and relies on his moral legitimacy in influencing the parties during negotiations and as they choose the appropriate solution. Rights-based positional negotiation seems to predominate in the traditional tendency, since it is the mode of negotiation practiced in out-of-court negotiations and it is somewhat akin to conflict management within the framework of the decision-making process of the trial.

In fact, a trial is concerned with the settlement of "rights" according to an adversarial form of conflict resolution practiced within the conflict resolution paradigm of "competition".<sup>27</sup> From the introductory trial procedure to the end of the in-court trial, the management of the dispute is subject to an adversarial model that promotes confrontation and argument based on judicial positions in order to uncover the "truth".<sup>28</sup> Classical positional negotiation clearly reflects conflict management as practiced during trials, as it favours the parties' search for exclusive power based on the merits of their legal claims. The resulting agreement will be the fruit of a compromise in favour of which all the parties will have moderated their demands and expectations, generally in proportion to the merit of their legal claims. Does this model have at least some significance for the practice of judicial mediation?

The literature on judicial mediation in Canada sometimes seems to conceive of judicial mediation as one mode among many others along a continuum that is placed at the disposal of the judges and persons at trial by the justice system.<sup>29</sup> These modes are generally differentiated by

27. Fisher, Ury, *supra* note 22 at 24-25; Menkel-Meadow, "Problem Solving" *supra* note 23 at 755-757; Henri J. Brown & Arthur L. Marriott, *ADR Principles and Practice*, 2<sup>nd</sup> ed. (London: Sweet and Maxwell, 1999) at 109-110.

28. "In our evidentiary based system, the law determines how truth is established in court. Not only does the law prescribe the procedures for giving evidence; it also determines in advance the weight to be attached to evidence thus delivered." Henri Kélada, *Notions et techniques de preuve civile* (Montreal: Wilson Lafleur, 1986) at 5-6 [translated by author]; see also Chris Guthrie, "The Lawyers' Philosophical Map and the Disputant's Perceptual Map: Impediments to Facilitative Mediation and Lawyering" (2001) 6 *Harvard Negotiation Law Review* 145 at 151; Lon L. Fuller, "The Adversary System" in Harold J. Berman, ed., *Talks on American Law* (2<sup>nd</sup> ed. 1971) at 34-36.

29. "These main models are grouped under the term 'Judicial Dispute Resolution' or 'Judicially Assisted Dispute Resolution' and include judicial mediation (settlement conference), mini-trial and early neutral evaluation". John A. Agrios, *supra* note 9. See also D.H. Lissaman, "Civil pre-trial conferences: A judicial perspective" (1995) 14:3 *The Advocates' Society Journal* 10.

their *form* of dispute settlement,<sup>30</sup> but they are similar with respect to the settlement of the *content* of the dispute.<sup>31</sup> The ethos of the traditional system, which relies on judicial reasoning and conventional legal negotiation, is thus perpetuated all along this continuum of modes of case settlement, although the techniques used to reach a settlement may be more informal and broader than those of the trial. Each of those modes generally favours the use of a method of risk assessment of the legal case if it were to go to trial. This excerpt illustrates the point:

[The risk assessment] is an attempt, with the assistance of counsel, to, based on the best available information, make a determination of a percentage on the likely outcome of a trial. [...] The parties are invited to set out the strengths and weaknesses of the case and the judge [will] hopefully facilitate a frank and open discussion, hopefully to arrive at a meritorious settlement. The clients may or may not contribute to discussions, depending on the circumstances.<sup>32</sup>

To illustrate this type of intervention, let us take the example of a quarrel between neighbours about the division of insurance insufficient to cover (1) all the goods lost by neighbour A whose warehouse caught fire and (2) repairs to neighbour B's sailboat that was housed in the warehouse that caught fire. Neighbour A had agreed to store the sailboat for free in the warehouse and now neighbour B is suing A, invoking his negligence in maintaining the warehouse. To help the parties solve the matter, the judge mediator who favours the *traditional* type of mediation would evaluate the legal responsibility of each as a function particularly of the disaster expert's report and of each of the neighbour's chances of success in court, and would encourage them to "buy peace" through monetary sharing in proportion to the risk they run if they bring this to court. For example, if the person being sued estimates his chances of

30. These modes are represented as distinct even though their boundaries are relatively flexible in the literature, given that their definition varies from province to province and that they all share a common origin and are interconnected. "[A] dispute resolution construct sees judges and judicial adjudication as part of a dispute resolution continuum – capable of learning from, influencing, and impacting upon parts of that continuum. [...] Judges themselves are responsible for making informed, independent decisions concerning their individual and institutional roles on and within the dispute resolution continuum." John A. Agrios, *ibid.* at 6.

31. *Ibid.* at 18. The American literature on negotiation reinforces this perspective: "But the common view is that most judges do not really mediate – rather, they conduct shuttle bargaining, alternately pressuring each side to be more forthcoming in its settlement offers. They warn those on each side about the risks they face at trial, express skepticism about the weaker parts of their case, and cajole them to lower their expectations." Howard Raiffa, *Negotiation Analysis. The Science and Art of Collaborative Decision Making* (Cambridge: Harvard University Press, 2002) at 315.

32. John A. Agrios, *ibid.* at 18.

winning in court at 60%, that person could pay 40% to the other party to solve the matter outside of court and “buy peace”.

Given that this model of intervention in judicial mediation reproduces aspects of trial practice, one may wonder about its merits in adapting the justice system to the needs of persons at trial. This question will be addressed when we examine the potential impact of this model of practice in Part 2 of this article. For now, let us become acquainted with the innovative type of intervention.

### 1.1.2 *The innovative intervention model in judicial mediation*<sup>33</sup>

As explained above, the conciliating judge who favours this tendency may conceive of judicial mediation as the offer of a new form of justice for litigants and that their role is to make this new form accessible. In order to do so, the judge’s practice is based on dialogue about values, interests, basic needs, and mutual recognition between parties; problem-solving reasoning; and principled negotiation. Thus he considers that judicial mediation is defined by parameters belonging to it alone and that consequently, as regards both the way the dispute is conceived and its resolution, judicial mediation is practiced as an authentic alternative to the form of justice delivered under the traditional, decision-making justice system.

We would suggest the innovative tendency finds expression within the following practice parameters. Fundamentally, the conciliating judge considers his role to be that of offering a true alternative to persons at trial. This he does by deploying a distinctive methodology in *diagnosing* the dispute and *resolving* it, and he thus contributes to the implementation of a new form of *equitable participatory justice*. In making his diagnosis, the conciliating judge will label the conflict situation as an “intersubjective, relational conflict”. Emphasis is thus placed on the relationship between the parties, and terming the conflict “intersubjective” means all of the parties’ normative ties are taken into account. The *conflict* is understood to include the judicial *litigation*, which refers to the legal affiliations of the parties and their legal relationship. The parties are thus seen as subjects in a relationship that is legal, cultural, moral, administrative, and so on. In resolving the intersubjective relational conflict, including the legal relationship and therefore the litigation, the conciliating judge will favour a two-stage, problem-solving approach, which includes,

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33. **Innovative model.** (1) Emergence of judicial mediation: Delivery of justice. (2) Duties of the judge: Peace officer. (3) Kind of reasoning that prevails: Problem-solving. (4) Mode of negotiation methods: Principled.

first, the definition of a problem common to the parties based on their values, interests, needs, and emotions; and second, the solving of this common problem through the creation of an “ethically acceptable” norm by the parties, who will regulate their future relations according to their interests, needs, and values.

More specifically, the conciliating judge will favour *dialogue* and *mutual recognition* in order to define the *common problem*. That common problem will necessarily be a *relational conflict*, but this can be defined in many ways according to the parties’ normative affiliations and the importance they wish to attribute to them. It should be noted that that relationship may be material, with a direct, continuous tie, such as a working or business relationship, or immaterial and symbolic, such as a terminated business relationship in the construction field, in which the reputation in the business world of one party’s entrepreneur or architect (reputation among other contractors or architects, suppliers, civil engineers, etc.) may be influenced by the other party.

The conciliating judge will then favour *principled negotiation* in order to resolve the intersubjective conflict. The solution options developed will consist of behavioural norms acceptable to all the parties involved, to which they will all be subject in their future relationship, whether the relationship be material or immaterial (e.g., reputation). These “contextualized” norms will be created according to the values, interests, needs, and emotions of the parties in conflict. They should therefore comply with the parties’ feelings of justice and equity in the context. The solution chosen by the parties to resolve the conflict will focus on one or several of those behavioural norms that they consider fair and equitable and that they will have created. The chosen norm or norms will define the ethically acceptable behaviour(s) the parties will adopt in their future relationship. The behaviour(s) will be considered “ethical” in that they will correspond to a manner of treating the other and of being treated by the other and thus attaining an equitable relational end that conforms to the parties’ values, interests, and needs. Thus the use of principled negotiation leads to a “contextualized”, fair, and equitable solution that will allow the parties to regulate their future relationship to their mutual satisfaction.

The literature on judicial mediation seems to support this innovative conception, as witness these following excerpts, which focus on the process, the role of the judge, and the empowerment of the parties:

The judge-mediator’s job in the opening, therefore, is to maintain the gap between adjudication and mediation, so as to keep the rigid classification

characteristics of litigation out of mediation as much as possible, and to prevent the process from becoming simply litigation by another name. [...] The judge-mediator's job is to effect this transition from communication to negotiation, from narrative to dialogue, from lecture to conversation. As the mediation progresses, the mediator must work to shift communication from the I-centered airing of points of view with which the parties began to the resolution-centered negotiation that will ultimately lead to settlement. [...] At a basic level, transforming the communicational dynamics requires creating a different dynamic of listening between the parties. [...] Mediation, by contrast, requires what we might call "constructive listening", which aims both at comprehending and at keeping the conversation going. Since settlement rather than victory is the goal, the listener must evaluate things from both sides and not strictly from his or her own point of view. [...] Changing communication from adversarial to conversational also involves bringing the parties to the realization that communication is a relational process and that its dynamic will be colored by the past and future of the parties' relationship as well as its present. [...] Negotiation builds on and feeds off an understanding of the relational aspects of conflict, and the judge-mediator's task is to seek ways to foster this understanding. [...] Understanding the dynamics of the situation – the parties' relationships, their cultural standpoints, and the emotions behind the problem – can suggest what is behind the impasse and can help break up a logjam in negotiations.<sup>34</sup>

It is important as well to acknowledge that mediation requires judges to play a different role than their familiar adjudicative function. The judge must act more as an efficient and neutral negotiator and not simply as an oracle decreeing the law to the disputants from [on] high. Though this greatly expands the latitude of what the judge can do, at the same time, it imposes certain constraints. For example, and most significantly, judicial mediation is all about empowering the parties, who themselves design the judicial solution to their problem and who at all times have the option of returning their dispute to the adjudicative stream. For this reason, the judge-mediator must refrain from expressing any opinion on the legal merits of the case or, in the case of an appeal, on the validity of the judgment being appealed.<sup>35</sup>

As an illustration, imagine a quarrel about the division of dividends amongst shareholders in a private family firm. To help the parties resolve the issue, the judge mediator who favours the *innovative* type of mediation would identify the parties' common values such as, for example, respect for the feeling of belonging and the subjective recognition of shareholders' contributions amongst themselves and of shareholders'

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34. Otis, Reiter, "New Phenomenon" *supra* note 3 at 383-387.

35. *Ibid.* at 369.

contributions to the company. The criteria for sharing dividends and concrete gestures to apply the parties' proposed solutions to distribute the dividends now and, in future, will be evaluated as a function of their potential to fairly realize the common values of belonging and recognition. The criteria and gestures that most embody these common values will be preserved as ethically acceptable standards in the context and will govern social relationships amongst shareholders.

This tendency in intervention is advanced, then, as a true *alternative* to the traditional, decision-making justice system and to its ends, which consists of placing the justice of the law at the disposal of persons at trial. Given that this model of intervention is so distant from the kind supported by the traditional justice system, some might ask why a conciliating judge would favour it. We will suggest some answers in Part 2 of this article, focusing on the impact of each intervention model.

### 1.1.3 *The problem-solving intervention model in judicial mediation*<sup>36</sup>

The conciliating judge who favours a *problem-solving* mediation model views the relationship between judicial mediation and the justice system as follows: the emergence of judicial mediation occurred so that the justice system could broaden its services without erecting a "new ideal of justice". The institutional dysfunctions in the justice system (costs, delays, etc.) obliged the creation of this new specialized *offer of service* in order to render the justice of the law accessible to persons at trial; this justice would have been obtainable at trial had they had the means to support the attendant costs and delays. The justice system offers persons at trial the services of a conciliating judge whose *powers are expanded* in order to allow him to act as a specialist in the type of dispute resolution that relies on a *different methodology*, that of problem-solving reasoning and principled negotiation, than that generally favoured by the justice system. This different *methodology* constitutes the fundamental distinction between the problem-solving model and the moral/restorative one we discuss below, although both of these models are of a mixed type.

We would suggest the mixed problem-solving tendency finds expression within the following practice parameters. Fundamentally, the conciliating judge considers his role to be that of presenting to persons at trial the opportunity to define their problem as both a "dispute" and a

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36. **Problem-solving model.** (1) Emergence of judicial mediation: Service delivery. (2) Duties of the judge: Legal officer. (3) Kind of reasoning that prevails: Problem-solving. (4) Mode of negotiation: Principled.

“conflict”.<sup>37</sup> The method of *diagnosis of the problem* is thus meant to be different than that of the traditional justice system. In fact, the “rule of the relevance of the facts” is broader in a “conflict” than in a “dispute”, as the parties may exchange thoughts regarding their interests, needs, and values, as well as the facts that have a judicial impact. This broadening to take interests, needs, and values into account allows the conciliating judge to clearly diagnose the problem in its entirety. Following that, the conciliating judge begins the *problem-solving* stage, when the conflict is used in order to resolve the dispute. The conciliating judge will incite the parties to collaborate in order to use the elements of the conflict in the creation of a mutually-satisfying solution that will put an end to judicial proceedings. In this context, the conciliating judge acts as a specialist in problem-solving reasoning, with that reasoning being applied in two stages, the diagnosis and the resolution, such that the “dispute” is settled by recourse to the “conflict”.

Thus in this type of intervention, the justice system places at the disposal of persons at trial a new *specialized offer of service* founded on a *different methodology* in order to settle the dispute. The conciliating judge possesses the powers of a specialist in a kind of dispute resolution whose methodology consists of problem-solving reasoning and principled negotiation. This “new” methodology proves necessary where the traditional methodology of judicial reasoning and classical position-based negotiation have failed in settling the dispute. The addition of this specialized problem-solving service to the traditional dispute-settlement service is intended to make the justice system more efficient in settling disputes and in the way it renders the justice of the law accessible to persons at trial. Has this intervention model proven worthwhile in the practice of judicial mediation?

The literature on judicial mediation implicitly recognizes this intervention model when it refers to the value of treating the “conflict” instead of strictly the “dispute”. It also does so when it claims that judicial mediation allows one to circumvent the problems produced by an adversarial process and develop creative solutions that traditional methodology

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37. “A legalized dispute which arises from a conflict of rights is the preferred view of a ‘dispute’ in the trial context. The case centers on the parties’ relationship to the law and accordingly focuses solely on their legal relationship with one another. The legal literature on judicial mediation would seem to favour a broader concept when it states that a conciliating judge can take into account elements of the conflict situation which will enable him to assess the origin and development, the complexity, and the gravity of the ‘conflict’ “. Otis, “Conciliation judiciaire” *supra* note 9 at 5-6 [translated by author]. Nancy A. Flatters, *supra* note 4 at 183-184. Otis, Reiter, “New Phenomenon” *supra* note 3 at 371-376.

does not allow for.<sup>38</sup> It seems that one might consider this intervention model as a democratically legitimized extension of judges' special function of settling the disputes of persons at trial. "The independence of the judicial institution, the impartiality of its judges, the depth of their knowledge of the law and of conflicts, their traditional mission of taking care of disputes and rendering justice explain why the conciliating judge enjoys such strong moral authority in relation to the parties" [translated by author].<sup>39</sup> Judges' expertise in dispute settlement combined with their democratic legitimacy in playing this role would appear to destine them to offer this new service to persons at trial.

The literature on judicial mediation appears to validate this problem-solving methodology.

With respect to the *diagnosis* stage, the conciliating judge may focus his interest on elements of the conflict situation that allow him to gauge the evolution, complexity, and size of the "conflict".<sup>40</sup> The conflict focuses on the relationship to the various affiliations (administrative, moral, judicial, etc.) that the parties claim.<sup>41</sup> During a trial, "The legal determination of the parties' rights constitutes the cornerstone of adversarial justice. The cause and resolution of the conflict which forms the foundation of the judicial dispute do not constitute the object of the legal contract and may be ignored in the handling of the dispute" [translated by author].<sup>42</sup> Through judicial mediation, the conciliating judge may focus his interest on the "source of the conflict".

The conciliator must be capable of engaging in powerful, active listening. He must have the intelligence and vision to penetrate to the internal work-

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38. "It avoids many of the problems associated with the adversarial system and permits, in some cases, creative solutions to disputes using collaborative techniques. [...] It does not take long before one realizes that there are solutions possible in J.D.R. that could never be used at trial. [...] J.D.R. opens up a whole new world for resolving disputes which can make trials look positively medieval." John A. Agrios, *supra* note 9 at 6. "Mediation offers a means of appreciating the complexity and power of these relationships during dispute resolution; it allows conflict to be understood as it is actually lived, rather than as bracketed into the artificial environment of the legal disputes." Otis, Reiter, "New Phenomenon" *supra* note 3 at 372.
39. Otis, "Justice conciliatoire" *supra* note 3 at 66. John A. Agrios, *ibid.* at 25.
40. Otis, "Conciliation judiciaire" *supra* note 9 at 5-6.
41. Louise Lalonde, "Médiation et droit: opposition, intégration ou transformation? Le « continuum » dans la pratique civile et commerciale de la médiation" in Barreau du Québec, Service de la formation permanente, ed., *Développements récents en médiation* (Cowansville: Éditions Yvon Blais, 2001) at 87 [Lalonde, "Continuum"]. See also Jean-François Roberge, "Comment diagnostiquer la substance d'un conflit en médiation?" (2003) 1:1 *Revue de prévention et de règlement des différends* 35 at 37-38 [Roberge, "Conflit"].
42. Otis, "Justice conciliatoire" *supra* note 3 at 64.

ings of the conflict in order to discover hidden motivators. He will be able to hear not only what is said, but he will perceive the undiscovered interests that may elude the solution of the conflict.<sup>43</sup> [Translated by author.]

A distinctive characteristic of communication in mediation is that it need not be strictly limited to the formal-rational mode as required by adjudication. [...] [R]ather, because mediation is a conversation designed to explore the relationships behind a conflict, the mediator can more freely allow expressions of emotion to colour the proceedings, since emotion can be a window into the real conflict behind the dispute.<sup>44</sup>

Unlike adjudication, with its procedural and evidentiary strictures, mediation allows the parties to explore their dispute holistically, as a conflict involving human relationships rather than simply as a single flashpoint.<sup>45</sup>

This interpretation of the literature on judicial mediation is supported by the literature on private mediation with regard to the conflict-dispute distinction.<sup>46</sup>

The literature on judicial mediation also seems to support the possibility of a separate *methodology* with regard to the problem-solving stage. The following excerpts allow us to illustrate the expansion of the judge's procedural powers with regard to *dispute management* during the stages of the judicial mediation process.

[In settlement conferencing, the] focus would be on facilitative interest-based problem solving, improvement of communication, constructive case assessment, ascertaining barriers to settlement, and the delivery of a judicial nonbinding, impartial evaluation and assessment of the case. Presumably, this would satisfy the needs of a party who wanted to be heard by a judge yet did not necessarily need, or want, that hearing in the form of trial. [...] Last, and recognizably, there would be a shift from party to judicial control of litigation [...] [Settlement conferencing] is a blend of predictive settlement (what a court would do) and problem-solving techniques (not predictive of what a court would do) in a judicially facilitated and directed negotiation framework with the judge giving a nonbinding evaluation and opinion."<sup>47</sup>

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43. Otis, "Conciliation judiciaire" *supra* note 9 at 7.

44. Otis, Reiter, "New Phenomenon" *supra* note 3 at 387.

45. *Ibid.* at 386.

46. See Marquis, "Conférence" *supra* note 9 at 8. See also Lalonde, "Continuum" *supra* note 41 at 87; Roberge, "Conflict" *supra* note 41 at 37-38; Harold Abramson, "Problem-Solving Advocacy in Mediations: A Model of Client Representation" (2005) 10 *Harvard Negotiation Law Review* 103 at 116.

47. Nancy A. Flatters, *supra* note 4 at 184-185.

For example, let us revisit our quarrel amongst neighbours. To help the parties solve the problem, the judge mediator who favours the *problem-solving* intervention will define the problem between neighbours by delving into their monetary and non-monetary interests, such as their personal friendship and their relations with others under the same roof (spouse, children, etc.), as well as their state of mind, respect for municipal regulations, etc. Then, he or she will help the parties develop alternative solutions that combine the monetary and non-monetary interests of each neighbour, such as a loan or manual assistance to repair the boat or the use of a network of contacts to obtain the materials at a reasonable price, etc.

The socio-judicial literature explicitly recognizes the development of a “communicational specialty” that emphasizes the diagnosis of the *conflict* and the resolution of the *dispute*.<sup>48</sup> Complementing the recognition of this specialized model, it also warns against claims to make the law evolve through the sole use of a more flexible communicative process.<sup>49</sup> We will cover the impacts of this problem-solving intervention type on law and justice in the next part of this article.

#### 1.1.4 *The moral/restorative intervention model in judicial mediation*<sup>50</sup>

The moral/restorative model of judicial mediation implies the conciliating judge possesses a *conception* of judicial mediation that differs from the traditional decision-making justice system. We believe the conciliating judge who favours this tendency will consider the emergence of judicial mediation to be due to the need to offer a *new form of justice* in the justice system. This new form of justice would focus on the “restoration” of relations that have “broken down” because of the conflict situation. Thus it focuses on relationships in the broad sense between the parties, according to their various affiliations, including their legal affiliations.

The *role* of the conciliating judge in this type of mediation is also differentiated from his role in the traditional decision-making system, in that he no longer acts simply in order to resolve the dispute but instead to regulate the relationship between the parties in conflict. The conciliating

48. Lalonde, “Justice” *supra* note 7 at 21-23; Lalonde, “Continuum” *supra* note 41 at 86-89. Jacques Faget, “Accès au droit et médiation” in Carole Younes & Étienne LeRoy, eds., *Médiation et diversité culturelle. Pour quelle société?* (Paris: Karthala, 2000) at 41.

49. Lalonde, “Justice” *ibid.* at 22.

50. **Moral/restorative type.** (1) Emergence of judicial mediation: Delivery of justice. (2) Duties of the judge: Peace officer. (3) Kind of reasoning that prevails: Judicial. (4) Mode of negotiation methods: Classical position-based negotiation.

judge's role is thus to be a "social regulator". Judicial mediation is the medium through which he will regulate social relations as he restores broken down relations. However, in order to do so, the conciliating judge will favour *modes of action* similar to those of the traditional justice system. He will proceed to regulate social behaviours through *rights-based reasoning* and will use his authority and moral influence to favour an application of regulatory norms, by favouring *positional negotiations*. With the addition of this "moralizing-restorative" offer of justice, the judicial system offers persons at trial the possibility of regulating their social behaviours while taking into account their diverse affiliations and repairing their broken relationships with the persons with whom they are experiencing a conflict. Hierarchically, the legal affiliation will take precedence over all others, although the other affiliations are necessarily considered in order to ensure that past relations are restored and future relations will be compliant with the parties' judicial and social communities.

We suggest the mixed moral/restorative tendency finds expression within the following practice parameters. Fundamentally, the conciliating judge conceives his role as that of *assessing the social behaviours* the parties have engaged in which were at the source of the conflict situation and *assessing the relational prejudice* that has resulted. This assessment is conducted in light of what the parties' social and judicial community considers to be acceptable and beneficial to the community's cohesion and durability.

The conciliating judge will assist the parties in determining how the values of the judicial and social community may be implemented in the circumstances in order to restore broken legal and other relationships among the members of the community. Therefore the judge places his legal expertise at the parties' disposal in order to determine the applicable legal norm and its moral legitimacy and then guide the parties in determining what social behaviours are socially acceptable according to that norm. Thus the conciliating judge acts as somewhat of a guardian of social order within society in the broad sense and as a "reasonable person / good family man" within the more restricted community (or communities) the parties live in.

*Judicial reasoning* is valuable in that it allows for the determination of the state's legal norms, and these serve as higher-status benchmarks in the resolution of the conflict. Social and moral norms will also be considered, but their status is lower than the level of acceptable benchmarks which the legal community has established for itself. The cohesion and

durability of the legal community take precedence over those of the social community in which the parties live. The conciliating judge will favour *negotiations* in which legal norms carry more weight than the other social and moral norms. The solution will allow for the restoration of the parties' relationships in accordance with the values of the social and judicial community through the choice of legal and social norms that will allow those involved to ensure the community's cohesion and durability. In short, the legal norms take precedence, but they are complemented by the social and moral norms that allow them to be adapted to the community's needs and in a way that promotes its cohesion.

In the literature on judicial mediation, the role of the judge as a peace officer and the education of the parties through the process of judicial mediation are highlighted.

As we have argued before, mediation differs from adjudication in that it has an explicitly prospective purpose and effect. The parties are not just resolving a past dispute; they must carry their relationship forward, beyond the stumbling block of the particular disagreement for which they sought mediation. This brings to the fore a different aspect of both mediation and mediator, one that is latent in the entire process but that we can bring out explicitly at this point – namely, the educative or teaching function of the process. Judicial mediation is particularly suited to developing and exploiting this teaching role. The judge mediator brings to the process moral authority as well as intimate experience with both adjudication and mediation, and this unique position allows the judge-mediator to step back from the dispute and the mediation process to ask the parties what they have learned, in effect to conduct a brief but searching autopsy of the mediation session.<sup>51</sup>

In examining the preceding hours [spent in judicial mediation], the judge-mediator can lead the parties to understand and to integrate into their lives the basic principles of conflict resolution. [...] The judge-mediator in effect shows the parties how to become agents of peace, working at the micro level to transform society. [...] But more than that, it brings forward an essential aspect of law (and by extension the judge) that is often overlooked – its pedagogical function. Part of the judicial role has always been social: judges work to ensure the smooth running of society by resolving disputes and attempting to ensure coordination and even cooperation rather than antagonism. Judicial mediation and the educative lessons it brings forward allow the judge-mediator to play a more active role in pacifying the wider environment into which the parties return after they have settled their specific legal dispute.<sup>52</sup>

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51. Otis, Reiter, "New Phenomenon" *supra* note 3 at p. 391.

52. Otis, Reiter, "New Phenomenon" *ibid.* at 391-392.

As an illustration, let us return to the quarrel over distribution of dividends amongst shareholders of a private family firm. To help the parties resolve the dispute, the judge mediator who favours the *moral-restorative* intervention would identify the behaviour causing relational prejudices (for example, lack of respect for the informal hierarchy or rules of politeness) and would evaluate its legal and moral basis. Then, he or she would guide the parties towards a range of acceptable and beneficial behaviour to maintain positive relations amongst shareholders (for example, together establishing common standards so that the hierarchy would be clear to all, or receiving training in communication to favour positive feedback when we are referring to the contribution of each to the firm) to ensure the long-term future of the family firm.

In summary, the TRAIN model presented here emerges from an analysis of conceptions of judicial mediation and the practice of judicial mediation based on the scholarly literature and the discourse of practitioners. Its base is the traditional-innovative continuum. The four models of intervention it presents differ under four themes (see Figure 1)<sup>53</sup> and have varying potential impacts on the judicial system and the evolution of law and justice.

In the next section, we present a complementary typology for analysing conceptions of judicial mediation and modes of practicing it. The EXPAT typology is based on an empirical study assessing Canadian judge's perceptions and complements the TRAIN typology. The EXPAT typology describes three styles of judicial mediation as they occur on an expertise-participation continuum.

### **1.2 The "EXPAT" typology of styles of judicial mediation**

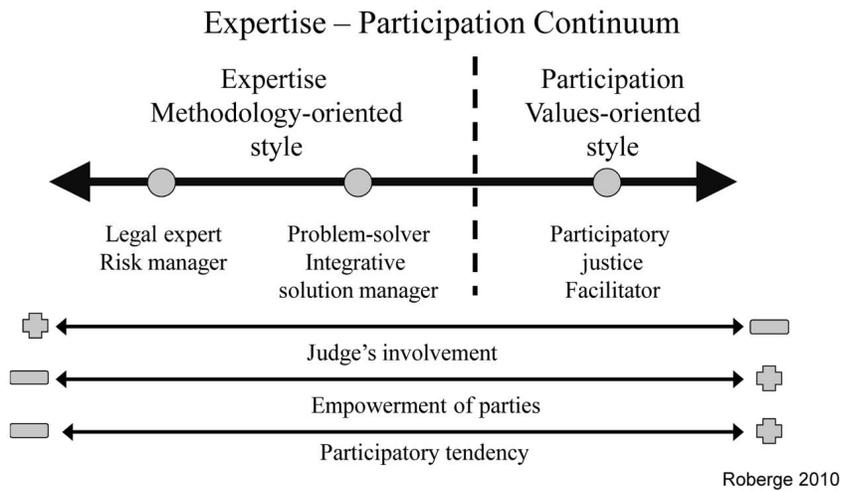
The EXPAT typology we present here is novel in at least two ways. First, it proposes the first empirically based analysis of the Canadian judiciary's perceptions of judicial mediation. Second, it presents an original typology of three different styles judges adopt when practicing judicial mediation: 1. legal expert and risk manager, 2. problem-solving expert and integrative-solution manager; and 3. facilitator of participatory justice.<sup>54</sup> These styles differ according to their position on the Expertise-

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53. A recap: (1) Emergence of judicial mediation: service delivery or delivery of justice. (2) Duties of the judge: legal officer or peace officer. (3) Kinds of reasoning that may prevail: judicial or problem-solving. (4) Modes of negotiation: classical position-based or principled.

54. Roberge, "Typologie" *supra* note 12. In 2005, we surveyed Canadian trial court judges in all provinces and jurisdictions on their conception of judicial mediation and their perceptions of their practice in all areas except criminal proceedings. We received 500

PARticipation continuum. This continuum is defined by the degree of the judge’s involvement vis-à-vis the degree of the parties’ involvement as regards the substance of the conflict and the methodology for solving the conflict (see Figure 3).



**Figure 3.** The EXPAT model presents three styles of judicial mediation (legal expert and risk manager, problem-solver and integrative-solution manager, participatory justice facilitator) that fall along an expertise-participation continuum.

*1.2.1 Legal expert and risk manager*

The first empirical style is that in which the judge sees himself or herself as a “legal expert and risk manager.” Within this style of intervention, the judge is an expert evaluating the strengths and weaknesses of the parties’ legal cases and influencing negotiation towards a solution consistent with the law. It recalls the traditional intervention model presented above as part of the TRAIN typology. Accordingly, we may assume the judge’s role will be similar to that described in the traditional model.

The legal-expert and risk-manager judge assumes leadership as regards both the substance of the dispute and the methodology for

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responses to our questionnaire out of a possible 1,500 and carried out a statistical treatment of the data through exploratory factorial analysis. It was on this basis that we arrived at the three styles of empirical intervention.

solving it. Little focus is placed on empowering the parties. Judicial mediation represents an opportunity for the parties to access the judge's legal expertise to avoid a trial and the attendant uncertainty. The judge focuses on the legally relevant facts of the dispute instead of the broader conflict; gives weight to lawyers' pleadings; and guides the parties to a settlement based on their legal merits. He may even give a non-binding legal opinion and use its moral authority to influence parties in their negotiations. He is prohibited from rendering a binding decision since he acts as a conciliating judge. Some may argue however that any opinion given by a judge may be perceived by parties as the probable decision if no settlement is reached and the dispute goes to trial (even if another judge hears the case). The legal expert and risk manager acts as a "guardian of the law" who applies judicial reasoning and ensures that private settlements respect the law and public order. The settlement will generally be a compromise vis-à-vis the parties' initial positions. It will most likely take the form of monetary compensation for prejudice and be based on the parties' legal merits.

The legal-expert and risk-manager judge takes control of the substance and the methodology and conducts the judicial mediation process in a manner similar to a trial as regards substance and similar to the process of out-of-court settlement as regards methodology. He will privilege the classical position-based mode of negotiation in order to arrive at the "magic number" compromise figure that will settle the legal dispute and avoid the constraints of a trial and attendant uncertainty to the parties' satisfaction. In comparison with the two other styles, in the legal-expert and risk-manager style of mediation, the judge's involvement is maximal and the parties' minimal.

### *1.2.2 Problem-solving expert and integrative-solution manager*

In the second empirical style, the judge sees himself or herself as a "problem-solver and integrative-solution manager." That is, the judge is an expert in the methodology of problem-solving, leading the parties to conceive of a common problem and create integrative value-added solutions. This type of empirical intervention recalls the problem-solving intervention model in the TRAIN typology. Again, we may therefore assume the judge's role will be similar to that found in the problem-solving intervention model.

The problem-solver and integrative-solution-manager judge assumes leadership on the question of the methodology for solving the conflict but leaves leadership regarding substance to the parties. The parties' empowerment is promoted with regard to the substance while

the judge keeps full control over the process. Judicial mediation offers the parties an opportunity to try a different methodology to solve their dispute with the assistance of an expert judge trained in problem-solving and principled negotiation. The judge facilitates communication between the parties, focusing on their interests (business, family, relationship, reputation, etc.) and on relevant facts, with a view to establishing and prioritizing the latter. The law is relevant but is not the main focus. Lawyers' pleadings will be minimal. The judge helps parties find a solution based on their interests, taking into consideration their legal rights as one interest among others. The judge will not give an opinion on law. Instead, he manages to create a value-added mutually satisfactory solution based on each party's interests. Although this solution has to respect public order, parties can renounce their rights if the negotiated solution suits them better than to exercise their rights at trial. The solution can take any form the parties desire, including monetary compensation or not, and even be very different than the legal remedy awarded at a trial.

The problem-solver and integrative-solution-manager judge takes control of the methodology to solve the dispute and even the larger conflict, if parties who have kept control of the substance decide to take that route. The judge promotes interest-based "firm-flexibility" negotiations, in which the parties clarify the underlying objectives of positions and work to assert them while being flexible on how to achieve their objectives. Here judicial mediation follows an innovative path in which the parties are empowered to find a mutually satisfactory solution on their own. The involvement of the problem-solving judge is maximal in regards to methodology while the parties' involvement is maximal in regards to relevant facts and interests needed to create a mutually satisfactory solution.

### *1.2.3 Facilitator of participatory justice*

In the third empirical style, the judge perceives himself or herself as a "participatory justice facilitator." The judge who embraces this style promotes the parties' empowerment to achieve a new form of consensual participatory justice. This intervention style recalls the innovative model of intervention presented above in the discussion of the TRAIN typology; we may assume the judge's role will be similar to that found in the innovative intervention model.<sup>55</sup>

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55. It is noteworthy that the "moral-restorative" intervention model does not seem to be present in our empirical findings. Nonetheless, we must keep in mind this is an initial empirical study on the subject, for which only civil and commercial topics were covered. In a subsequent study, it would be interesting to include penal issues and verify more specifically the presence or absence of the "moral-restorative" intervention model.

Where “the legal-expert and risk manager” and the “problem-solver and integrative-solution manager” were expertise and methodology oriented, the “facilitator of participatory justice” is participation and values oriented style. The judge acts as a facilitator in the fulfilment of values instead of acting as an expert on content or process.

A facilitator of participatory justice judge promotes an ideal of justice in judicial mediation that will implement the values of equity, empowerment, recognition, openness, and creativity. This ideal of justice is complementary to the justice of law provided by the judicial system. Judicial mediation provides a participatory conception of justice while the trial makes the justice of law accessible to parties. Parties can choose their dispute resolution mode in light of the nature of its offer of justice. As framed by a practitioner of this style, judicial mediation’s emergence is linked to litigants’ needs for a contextualized, sensitive, equitable justice open to pluralism regarding the social and individual values they share in and open also to their desire to take charge of their own judicial destinies.

A facilitator of participatory justice judge empowers the parties to define and solve the problem by themselves in accordance with their shared values. He promotes dialogue as opposed to argumentation, in order to bring the parties together on what their shared values are. His task is to develop trust among them to encourage information sharing and the recognition of the facts, Values, Interests, Basic needs, and EmotionS (VIBES) that are crucial to the parties and at the source of the conflict.<sup>56</sup>

The solution will take the form of “contextualized norms” respectful of parties’ VIBES, created to regulate their current and future relationship. Contextualized norms will be implemented as “ethical behaviours” corresponding to a manner of treating the other and of being treated by the other. The judicial mediation judge who is a facilitator of participatory justice facilitates openness and recognition between the parties and empowers them to creatively design a “contextualized”, fair, and equitable solution which will allow the parties to regulate their future relationship to their mutual satisfaction.

In conclusion of this article’s first part, let us remember our main question and the answers we have provided. How do judges deliver justice in judicial mediation? Briefly, we have provided two responses to this

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56. The expression “VIBES” was coined by Judge Suzanne Courteau of the Quebec Superior Court and the Quebec magistrates judicial mediation training team in 2005.

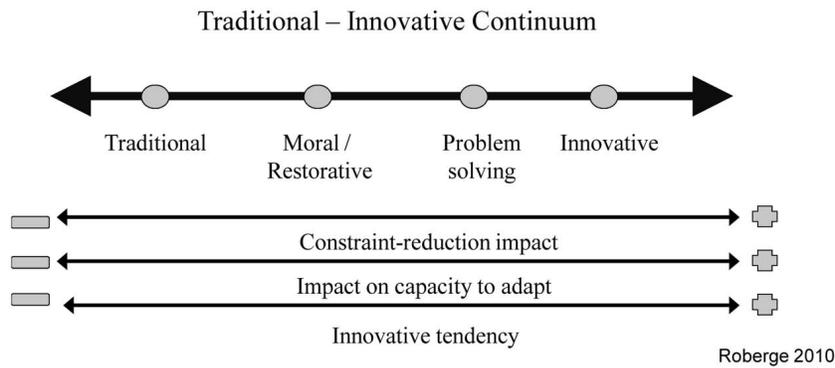
question. First we presented the TRAIN typology of intervention models, based on a TRAditional – INnovative continuum. Our analyses of the socio-judicial and practitioner literature on mediation have led us to four distinct intervention models: traditional, innovative, moral/restorative, and problem-solving. Second we proposed the EXPAT typology of intervention styles, based on an EXPertise – PARticipation continuum. The methodology underlying the development of this second typology was empirical: we surveyed Canadian judges in all jurisdictions and our analyses of their responses yielded three distinct approaches to intervention that judges perceive themselves as adopting. These we have called the styles of the legal expert and risk manager, the problem-solver and integrative-solution manager, and the facilitator of participatory justice.

Why was it important to develop pioneering scholarly knowledge about how judges deliver justice in judicial mediation and thereby theoretically and empirically verify the hypothesis that “judicial mediation can deliver a better justice and helps the judicial system overcome challenges it faces”? Do each of the intervention models in the TRAIN typology and each of the intervention styles in the EXPAT typology have the same impact as all the others? This will be the focus of Part 2 of this article.

## **2. How could judicial mediation deliver a better justice?**

How could judicial mediation deliver a better justice? We are ready to provide answers to this question now that we have covered the judicial system’s challenges in terms of constraints and adaptability and that we have presented the models of intervention that are current in judicial mediation. Can judicial mediation have an impact on the judicial system’s constraints or its adaptability? More precisely, can each of the TRAIN intervention models and each of the EXPAT intervention styles have an impact? If so, what kind of impact and to what extent?

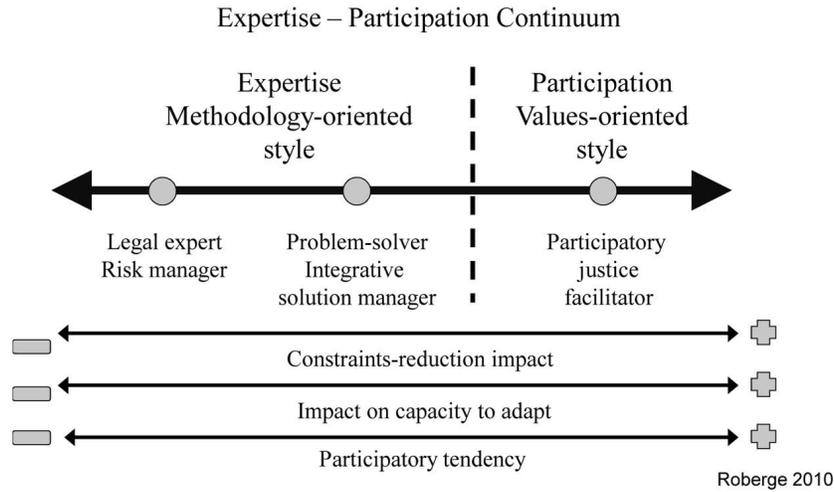
Based on the literature and on practitioners’ discourse, we have explored the intervention models in the TRAIN typology for potential impacts on constraints and adaptability (see Figure 4). It appears the traditional model may have an impact, but on constraints only. The innovative, moral/restorative, and problem-solving models appear to have varying degrees of impact on both constraint levels and the system’s adaptability. We will cover these impacts in detail in the next section, examining intervention models individually.



**Figure 4.** The TRAIN typology of intervention models and their relative impacts on reductions in the judicial system’s constraints and on enhancement of the system’s capacity to adapt to the benefit of litigants.

Based on our empirical study and statistical analysis of data collected from Canadian judges, we have explored the EXPAT intervention styles’ impacts on constraints and the system’s adaptability (see Figure 5). According to the perceptions of Canadian judges, the three styles have differing effects and different probabilities of effects.<sup>57</sup> It appears the legal expert and risk assessment style may have a limited impact, and on constraints only. The styles of the problem-solver and integrative-solution manager and (especially) the facilitator of participatory justice may have different degrees of impact on both the constraints on the legal system and the system’s adaptability. We will cover these impacts in detail in the next section, examining intervention styles individually.

57. The research results that we present here reveal the *perceptions* of Canadian judges from all jurisdictions. Thus this is an internal look at the judicial system from the perspective of its actors. Judges’ perceptions may not be representative of reality. We have no direct proof that the judicial system is truly improving. We simply have access to the beliefs of judges who practice judicial mediation and experience the judicial system on a daily basis.



**Figure 5.** The EXPAT typology of intervention models and their relative impacts on the benefit of litigants.

Although the state of knowledge is still insufficient to judge impacts with certainty, this analysis is a starting point for further inquiry and methodological refinement. Here we will seek to confirm or rebut the hypothesis that “judicial mediation can deliver a better justice and be a remedy for the judicial system to overcome challenges it faces”. The focus of our research is on Canadian judges’ perceptions of judicial mediation impacts.

**2.1 Potential impacts on the judicial system’s constraints**

In the Introduction, we established that litigants complain about access to justice due to the judicial system’s constraints. In this section, we will cover in detail the TRAIN intervention models and EXPAT intervention styles that are said, according to literature and judges’ perceptions, to have the most impact on reductions in the constraints on the judicial system. We will start with the traditional model and then cover the moral/restorative and problem-solving models and finally the legal-expert and risk-manager style.

*2.1.1 The traditional intervention model*

The judge who follows the traditional intervention model sees judicial mediation as part of a continuum with the traditional, decision-

making justice system. The objective of the modes of justice delivery on this continuum would appear to be to reach a settlement before going to trial.<sup>58</sup> The modes on the continuum are seen to be more flexible, less costly, and quicker means of obtaining a pre-trial settlement.<sup>59</sup> This conception of the continuum could have various consequences for law, justice, and persons at trial. We will now discuss three of these consequences.

First, these modes might be perceived as having a positive impact on the satisfaction of persons at trial and on the judge's mission to make the justice offered by the justice system more easily accessible to persons at trial. It is thought that the more flexible, quick, and affordable the system is, the fewer the people at trial who will have to face constraints that prevent them from using the justice system. In addition, the system places at the disposal of persons at trial a new service through which, from a certain point on, they have access to a judge who will intervene "directly" in order to favour achieving a negotiated settlement; this judge enjoys expanded procedural powers as he is not restricted by formal rules.

Second, these modes will lead to settlements that will be added to those obtained through out-of-court negotiations between counsel and will thus produce a degree of unclogging of the courts and a shortening of the time for cases to come to trial, since a number of cases will be settled without going to trial.

Third, this intervention model entails maintaining the status quo as regards the concepts of law and justice and consequently their predictability for persons at trial. This intervention model gives rise to a practice that proceeds from the same evaluative logic as the trial and seeks the same ends, namely to make the "justice of the law" accessible to persons at trial. Consequently, under this model, the conciliating judge's intervention focuses on applying the law of the state in order to make the "justice of the law" accessible to the person at trial. Judicial mediation that has the characteristics of the continuum, namely recourse to the judicial reasoning practiced at trial and in (usually out-of-court) classical positional negotiations, would have the impact of preserving the hierarchical supremacy of state law over other sets of norms (cultural, administrative, scientific, etc.). The main long-term impact of the practice of this type of intervention may be that of negotiating the law in order to maintain the

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58. John A. Agrios, *supra* note 9 at 9; Nancy A. Flatters, *supra* note 4 at p. 183.

59. John A. Agrios, *ibid.* at 6; Nancy A. Flatters, *ibid.* at 184.

predominance and hierarchical superiority of state law in regulating the social behaviours of persons at trial.

In summary, judicial mediation practiced according to a traditional model would appear to constitute an additional offer of service by the justice system that are said to have these consequences: unclogging the courts; shortening the time before a case goes to trial; increasing the satisfaction of persons at trial given improved access to justice; maintaining the justice system's ends, namely the "justice of the law"; and maintaining the hierarchical supremacy of "state law" over other forms of social norms in order to regulate the social behaviours of persons at trial.

### 2.1.2 *The moral/restorative intervention model*

The mixed tendencies of the *moral/restorative* intervention model would appear to be able to have a "community" impact, in that this model emphasizes the restoration of relationships that have "broken down" between members of a community, based on legal and moral norms that are socially accepted in the community. It thus restores "peace" in the community by keeping in view the values of that community, which are implemented when legitimated by parties. The socio-judicial literature discusses the possibility of "restoring social ties" and implementing a form of justice other than that of the justice of the law. The literature on penal mediation is particularly interesting in this respect. It generally makes an appeal to the notion of "restorative justice".<sup>60</sup>

The moral/restorative intervention model does not allow for the true attainment of an "internorm" in order to transform the law.<sup>61</sup> In fact, the tendency of the moral restoration of relationships first requires consent to the dominant legal positioning, which will likely be determined through

60. It is important to point out however that penal mediation is sometimes conceived of as an arena for legal justice and not restorative justice. In certain respects the practice of penal mediation is also not in keeping with the philosophy of mediation as it is conceived in other contexts. Étienne LeRoy "La médiation comme « dialogie » entre les ordonnancements de régulation sociale" in Carole Younes and Étienne LeRoy, eds., *Médiation et diversité culturelle. Pour quelle société?* (Paris: Karthala, 2000) at p. 90. [LeRoy, "Dialogie"]

61. "It appears that the modes of DPR practiced as part of restorative justice may assume a normative value in connection with other normative systems (apart from legal norms) and are akin to a kind of internorm. On this hypothesis, then, an internorm is understood to comprise ethical, moral, and even cultural sets of norms that are at work in the community that suffered the infringement/transgression of the legal norm. Through the mechanism of this internorm, DPR will treat the consequences of the infringements and repair the social fabric damaged by them." Lalonde, "Justice" *supra* note 7 at 26 [translated by author].

judicial reasoning and classical negotiation. It is only after this that a certain form of flexibility regarding the sanctions outlined in the law is deployed to take into account the broken relationship between the individuals and the community.<sup>62</sup>

In summary, this tendency in the moral/restorative model is favoured by the conciliating judge who conceives of the emergence of judicial mediation as a new offer of justice focused more on the regulation of “broken relationships” within the judicial and social-moral community to which the parties in a conflict situation belong. Thus under this model, the conciliating judge conceives of his role as that of a “social regulator” who must ensure the cohesion and durability of the community through the application of legal norms as a priority and social-moral norms as a complement. His legal expertise and moral authority will be deployed through recourse to judicial reasoning and classical negotiation, which, as a priority, emphasize judicial normativeness and consider social norms to be subsidiary.

### 2.1.3 *The problem-solving intervention model*

Judicial mediation practiced with a problem-solving approach constitutes an additional service with a particular methodology that the justice system places at the disposal of persons at trial in order to resolve their dispute. Thus, under this model, the justice system offers a specialized service in *problem-solving* which pursues the same goals as the trial, namely to render the justice of the law. However, it does this through different means, based on a problem-solving and collaborative approach intended to serve the parties’ best interests through the negotiation of a win-win agreement within the limits of contractual freedom instead of the parties having a decision imposed on them at trial that will create one winner and one loser.

Thus its main impact is seen to be similar to that of the traditional approach, which is the circumventing of institutional flaws related to the costs and delays in the system. In addition, the problem-solving trend is found to promote a “new” diagnostic and dispute-resolution methodology which may prove necessary in resolving the dispute where the traditional methodology of judicial reasoning and classical, position-based

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62. “In doing so from the perspective of strict legal normativeness, the application of modes of DPR under the hypothesis of ‘remoralizing the law’ cannot be regarded as ‘alternative’. These applications should be viewed rather as corollary to legal normativeness, either preceding or following it on the judicial path and representing one more solution to the infringement of the legal norm, one more mode of applying justice.” *Ibid.* at 25 [translated by author].

negotiation has failed. The addition of a specialized service to the traditional service should therefore allow the justice system to be more effective in resolving disputes and in the manner in which the justice of the law is rendered accessible to persons at trial. The problem-solving trend may, however, appear more satisfying to litigants as they will have the opportunity to consider their interests, values, and needs in the diagnosis and resolution of the conflict. Litigants participating in a judicial mediation process may accordingly feel better listened to and better understood.

#### 2.1.4 *The style of the legal expert and risk manager*

The legal-expert and risk-manager intervention style is geared towards the following objective: evaluating the strengths and weaknesses of the legal case of the parties in the hope of directing the negotiation towards a solution in conformity with the law. Our empirical research reveals that Canadian judges believe this type of intervention in judicial mediation has a *weak* effect on the probabilities of improving the judicial system. Indeed, according to Canadian judges, the legal-expert and risk-manager intervention style would have only a 1% probability of reducing the system's constraints (delays, costs, and access to the justice of positive law) and only a 2% chance of modifying the creation and application of the law.<sup>63</sup> When we take into account the impacts expected from TRAIN intervention models, this result suggests Canadian judges as primary actors in judicial mediation are less optimistic than the literature.

Can judicial mediation have an impact on constraints reduction in the Canadian judicial system? With the current state of knowledge in judicial mediation, it would be risky to answer with a firm yes when it is practiced according to the traditional and the moral/restorative intervention models or when it is practiced with the legal-expert and risk-manager

63. These percentages were obtained through correlational statistical treatment of the data collected from a survey of judges. We have squared the coefficient of correlation amongst the three types of intervention and each of the potential effects to transform it into a coefficient of determination, with the goal of being able to determine the relation of similarity between each of the three types of intervention and each of the potential impacts. This coefficient of determination allows us to explain the variance of a variable (here, potential impacts) through another variable (here, the three EXPAT intervention styles). For methodology, see John Neter, William Wasserman & Michael H. Kutner, *Applied linear statistical models: regression, analysis of variance, and experimental designs*, 2nd ed. (Homewood, Ill.: R.D. Irwin, 1985); Alan Bryman & Duncan Cramer, *Quantitative data analysis for social scientists* (London; Routledge; New York, 1990); Barbara G. Tabachnick, Linda S. Fidell, *Using multivariate statistics*, 5th ed. (Boston: Pearson A & B, 2007).

style. Obtaining the litigant's perspective, developing a larger body of scholarship, and devising new empirical studies would help us see more clearly. However, both in the existing literature and in judges' assessments we find support for the potential for a somewhat small impact by the traditional and moral/restorative intervention models and the legal-expert and risk-manager style.

## **2.2 Potential impacts on the adaptability of the judicial system**

We established earlier the importance assigned by litigants to benefiting from tailor-made solutions that they can give input to in the context of a pluralistic society. Complaints about the judicial system and access to justice complaints can also be seen in terms of the system's adaptability. In this section, we will cover in detail the TRAIN models and EXPAT styles that are found to have the biggest impact on the reduction of constraints in the judicial system. We will start with the innovative intervention models and then examine the problem-solver and integrative-solution-manager style and finally the facilitator of participatory justice style.

### *2.2.1 The innovative intervention model*

Since the innovative model seems distant from the traditional role of judges in the judicial system, some might question why a conciliating judge would favour intervention on this model. The literature on judicial mediation and the socio-judicial literature have advanced the hypothesis that this new intervention model, which brings with it a reconceptualization of justice and of regulation by law, is justified given contemporary social phenomena and the fact that judges should adapt in order to assume their role as "social unifier".<sup>64</sup> "For a number of years now, our societies have been in process of very profound change. Currently we can see the negative features of this change in forms of absence and of calling the State into question" [translated by author].<sup>65</sup> The literature pleads especially for consensual modes of production and application of norms in order to emphasize the positive features of change.

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64. "Although we increasingly perceive the role of judges as a unifying one, judges are not the only ones to play this badly needed social role; mediation and mediators in all their forms seem increasingly to be acting as the unifiers of the 21st century." Étienne LeRoy, "Synthèse" in Carole Younes & Étienne LeRoy, eds., *Médiation et diversité culturelle. Pour quelle société?* (Paris: Karthala, 2000) at 304 [translated by author]. [LeRoy, "Synthèse"]

65. LeRoy, *ibid.* at 305.

The literature on judicial mediation recognizes the readiness of society to take responsibility for its judicial destiny and to face the evolution in the law that may flow from this assumption of responsibility; the literature associates this shift with a new form of “conciliatory participatory” justice.<sup>66</sup>

[M]ediation serves the increasingly evident desire of the community to move away from imposed justice in order to seek – in suitable cases, of course – mutually negotiated and accepted solutions to legal conflicts. This represents an institutional manifestation of the emergence of a certain collective maturity, a move towards the control by society of its own judicial destiny. [...] Though it cannot replace adjudication, mediation contributes towards rendering justice more human, participatory, and accessible, values that better reflect many people’s needs in dispute resolution.<sup>67</sup>

This participatory justice that allows the expression of a legally negotiated, consensual solution is currently gaining significantly in popularity and is affirming its position in the name of necessity. [translated by author]<sup>68</sup>

Judicial mediation is heralded as a new way of rendering justice, one that should empower the parties and provides a new form of justice responsive to their needs.<sup>69</sup>

The judge-mediator would therefore not simply be a managerial or case-management judge but a new agent, a different actor for rendering justice.<sup>70</sup>

The socio-judicial literature views the emergence of non-judicial mediation, which we should note is a powerful influence on judicial mediation in Quebec,<sup>71</sup> as having a certain relationship with the questioning of the law of the state. This literature also mentions the social demand for “new forms of resocialization and weaving of social ties”<sup>72</sup> [translated by author].

In a reflective document on the non-judicial modes of dispute resolution, the Law Commission of Canada was particularly interested in the notion of “transformative justice” and in its actualization through media-

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66. Otis, “Conciliation judiciaire” *supra* note 9 at 15; Yves Lavertu, *supra* note 1; Otis, Reiter, “New Phenomenon” *supra* note 3 at 361.

67. Otis, Reiter, “New Phenomenon” *supra* note 3 at 363.

68. Otis, “Conciliation judiciaire” *supra* note 9 at 3.

69. Otis, Reiter, “New Phenomenon” *supra* note 3 at 371.

70. *Ibid.* at 369.

71. *Ibid.* at 3.

72. LeRoy, “Synthèse” *supra* note 64 at 304-305.

tion<sup>73</sup>. It advanced the hypothesis that the non-judicial modes of dispute resolution, including mediation, would yield transformative justice only if they were focused on the participants' needs and if they considered that all conflicts were *relational* in nature and that they must be resolved through a *consensus*,<sup>74</sup> and not just through a compromise that constitutes no more than an interim solution.<sup>75</sup>

Alongside the many reflections on the idea of transformative justice issued by the Law Commission of Canada, the socio-judicial literature on dispute prevention and resolution has advanced the hypothesis of the "ethicization of the law"<sup>76</sup> as an "alternative" conception to the process of state regulation and conflict resolution through the justice of the law.

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73. Law Commission of Canada, *supra* note 1.

74. The Law Commission of Canada uses the following definition of *consensus*. "By consensus we mean an agreement on how to move forward that is acceptable to all parties. [...] In a consensus process, participants work together to design a process that maximizes their ability to resolve their differences. Although they may not agree with all aspects of the agreement, consensus is reached if all participants are willing to live with the total package." Gerald Cormick et al., *Building Consensus for a Sustainable Future: Putting Principles into Practice* (Ottawa: National Round Table on the Environment and the Economy, 1996) at 5, cited in Law Commission of Canada, *From Restorative Justice to Transformative Justice*, Discussion Paper (Ottawa, 1999) at 51. [Law Commission of Canada, "Justice"]

75. "Transformative justice is a way of handling conflict that recognises and responds to the variety of harms caused by conflict and capitalises on the opportunities offered by conflict by bringing individuals together in a process that encourages healing and growth. Transformative justice as a general strategy for responding to conflicts takes the principles and practices of restorative justice beyond the criminal justice system. [...] Even when it does not involve a discrete wrong, conflict remains a relational concept. [...] In each situation, competing interests are at stake and values may clash as parties attempt to shape the definition of and response to the conflict. Taking a cue from restorative justice, a transformative approach to dispute resolution would begin with a commitment to transforming the relationships between parties to the conflict. [...] A transformative approach to conflict resolution would encourage accommodative relationships between groups with competing interests. The conflict situation would be transformed from one in which groups recognise their mutual interests in arriving at workable solutions." Law Commission of Canada, "Justice", *ibid.* at 47, 50.

76. The hypothesis of the "ethicization of the law" is one of three advanced by a team of researchers at the Université de Sherbrooke to account for the emergence of non-legal modes of dispute settlement. The other two hypotheses are the "individualization of law" and the "remoralization of the law". See Georges A. Legault, Louise Lalonde & Louis Marquis, "Les nouveaux modes de règlement des différends et la transformation de la fonction de juger: vers une justice renouvelée?", October 2001, Research Report archived at Law Commission of Canada at 36. [Legault, "Commission"]; Lalonde, "Justice" *supra* note 7 at 31. See also Jean-Pierre Bonafé-Schmitt, "La médiation: une autre justice?" in Jean-Pierre Bonafé-Schmitt, ed., *La médiation: une justice douce* (Paris: Syros Alternatives 1992) 179.

According to this hypothesis, the mediator considers his role as that of creating a space for dialogue focused on the development of trust, so that the parties will become actively involved in a cooperative process of recognition of a common relational problem and the creation of a plurality of optional solutions that respect the interests, broadly speaking, of each party; the final state will be the regulation of their future relationship according to norms that rest on common values.

We may suppose the judicial mediation inspired by this hypothesis would result in a practice proceeding from a kind of reasoning that is first of all “relational” as regards the dialogue between the parties and then “legitimizing” as regards the normative solution chosen by the parties; this reasoning would pursue the ends of rendering a “participatory and equitable” justice accessible to litigants.<sup>77</sup> The main long-term impact of the practice of judicial mediation along these lines could be that persons at trial will be empowered and will cooperate in order to regulate their social behaviours through the creation of norms that are efficient in their relational context and ethically justified.<sup>78</sup> The law of the state would play a supporting role, given its interdependence with the other norms; it would even play the role of a reference.<sup>79</sup> This form of dialogue would give both the majority and the various minorities a voice and thus increase respect for their values.

In summary, in this model, the conciliating judge may view his intervention in the light of an innovative and tendency, indeed one that is “alternative” to that of justice as delivered in the traditional, decision-making justice system. In this tendency, judicial mediation may be considered an alternative to trial in that it puts forward a different “offer of justice” than that of the trial and the judge’s role is transformed vis-à-vis his role at trial. The “justice of the law”, though it was presumed to be equitable when it was conceived,<sup>80</sup> is not always perceived to be equita-

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77. See Law Commission of Canada, “Participatory Justice” *supra* note 1; Lalonde, “Justice” *ibid.*; Georges A. Legault, *supra* note 16 at 9-11; Legault, “Justice renouvelée” *supra* note 1; Otis, “Justice conciliatoire”, *supra* note 3.

78. Freeman credits Jurgen Habermas with this idea of the union of the efficiency of norms and their ethical justification by means of a communicative process. M.D.A. Freeman, *Lloyd’s Introduction to Jurisprudence* (London: Sweet and Maxwell 2001) at 693; Jurgen Habermas, *Droit et Démocratie. Entre faits et normes* (Paris: Gallimard, 1997). See also Lalonde “Justice” *ibid.* at 33.

79. Marquis, “Coutume” *supra* note 9 at p. 21. One possible long-term impact might be the emergence of a “new type of custom”, as Professor Marquis suggests.

80. In a normative positive legal system, legal norms are derived from a legitimate political structure and are based on the shared values of a population that elects its political representatives within this structure. The laws enacted by these representatives are deemed valid and presumed fair.

ble to persons at trial when it is implemented. The conciliating judge renders justice accessible to the parties by managing a process that allows them to choose an adapted, normative solution which is perceived as equitable in the context. This solution, which is chosen by the parties, will allow them to settle the litigation between them and regulate their social relations in their future relationship. This more flexible form of justice, which is adapted to the life experiences of the persons at trial, should have a positive impact on their satisfaction and perhaps even on their empowerment with respect to the prevention and resolution of their future conflicts.

It thus appears that under this innovative tendency, the conciliating judge considers his intervention to be an offer of justice that allows litigants to choose an adapted, normative solution that corresponds to their conception of justice under the circumstances. Thus on this model, the conciliating judge conceives of judicial mediation as an adaptation of the justice system to contemporary social phenomena.

### *2.2.2 The style of the problem-solver and integrative-solution manager*

The style of the expert problem-solver and integrative-solution manager pursues the following objective: to propose a new methodology for problem resolution to the parties, in order to encourage them to conceive of a common problem and create integrative value-added solutions. Our analysis of Canadian judges' perceptions shows that this intervention style is thought to have a moderate impact on the probabilities of improving the judicial system. In adopting it, judges believe that they would have an 11% greater chance of reducing the system's constraints (delays, costs, and access to the justice of positive law), but only a 9.7% chance of modifying the law's creation and application, a mere 1% chance of offering a new form of justice (participatory, consensual, and equitable), and a 15% chance of permitting the judicial system to adapt to contemporary society (pluralism, questioning authority, desire of the parties to control their own legal fates, etc.).<sup>81</sup>

### *2.2.3 The style of the facilitator of participatory justice*

Intervention in the style of the participatory justice facilitator pursues the objective of favouring the empowerment of parties (enabling to seize control) to achieve a new form of consensual participatory justice.

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81. To obtain more information on legislative, theoretical and empirical Canadian parameters, please refer to my doctoral thesis: Roberge "Typologie" *supra* note 12.

According to Canadian judges, this intervention style would have a moderate impact on the probabilities of improving the judicial system. Through its practice, the judges believe that they would have a 10.8% chance of reducing the system's constraints (delays, costs, and access to the justice of positive law), a 24% chance of modifying the creation and application of law, a 10.8% chance of offering a new form of justice (participatory, consensual, and equitable), and a 26% chance of permitting the judicial system to adapt to contemporary society (pluralism, questioning of authority, desire of the parties to seize control of their own legal fates, etc.).<sup>82</sup>

Can judicial mediation have an impact on the Canadian judicial system's adaptability? According to the literature, the innovative intervention type has a significant potential to help the judicial system to adapt to a mature pluralistic society willing to take charge of its judicial destiny. According to the perception of Canadian judges, of the three intervention styles in the EXPAT typology, the participatory justice facilitator would have the most significant impact in helping the judicial system confront its challenges. The problem-solver and integrative-solutions manager style would appear to be promising. These results cannot of course be received uncritically, since knowledge in this field is still in its infancy and we have not yet empirically explored the litigants' perspective.<sup>83</sup> Nevertheless, based on the current state of knowledge, we can conclude that judicial mediation must follow innovative lines to reach its maximum potential and maximize the probabilities that it will contribute to the surmounting of the judicial system's challenges.

## Conclusion

The main objective of this article was to report on a theoretical and empirical inquiry into the hypothesis that "judicial mediation can deliver a better justice and helps the judicial system overcome the challenges it faces". Provided it is conceived and practiced along innovative and participatory parameters, our analysis has led us to conclude that judicial mediation has the potential to do as the hypothesis postulates. What would an innovative and participatory judicial mediation look like? In the TRAIN typology, the innovative intervention model would appear to have the most potential for impact. In the EXPAT typology, the style of the facilitator of participatory justice is the most promising, followed by the problem-solver and integrative-solution-manager style.

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82. *Ibid.*

83. The author has received a research grant from the *Fonds québécois de recherche sur la société et la culture* (FQRSC) to explore litigants' perspectives following participation in a judicial mediation process in Quebec. The study is in progress.

This conclusion brings a crucial element to our expectations and ambitions for the justice system, the offer of justice to litigants, and the role of judicial mediation. Does current institutionalized judicial mediation promote innovative and participatory perspectives? What is the place in judicial mediation for “expat” judges – that is, for judges who believe in innovative and participatory practices that may appear to be unorthodox from the perspective of legal traditions about the role of the judge? These reflections should guide legislators, chief judges, and conciliating judges toward models and styles of practice in judicial mediation that are consistent with their aims and ambitions.

The entire juridical community will need to mobilize to help the judicial system guarantee greater justice for those involved in legal disputes. The concrete application of innovative judicial mediation constitutes a serious challenge, since it requires a change in the dominant adversarial juridical culture. Legislators, judges, and lawyers will first need to accept that judicial mediation is more promising when it favours a new logic of collaborative autonomy to resolve differences and an expanded conception of justice. Then, they will need to apply this in practice by putting aside their comfortable habits of competitive negotiation in matters under dispute, develop steady new skills in the collaborative negotiation of a broader conflict, and adopt new roles. This seems to us the real challenge currently facing the Canadian juridical community. Meeting this challenge will allow all parties to perceive the judicial system as delivering greater justice.