

# EMERGING TRENDS IN ACCESS TO JUSTICE AND DISPUTE RESOLUTION IN CANADA

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## **Emerging Trends in Access to Justice and Dispute Resolution in Canada**

Jean-François Roberge

### **ABSTRACT**

Providing access to justice is a major challenge for any judicial system. Canada has gone to great lengths to meet this challenge over the past thirty years, in part by developing alternative dispute resolution methods. Unfortunately, results have been mixed. Canadian society is currently preparing to renew its vision of access to justice and the contribution of dispute resolution methods in meeting that challenge. What lessons can we learn from Canada's experience? What are the new directions and initiatives for access to justice? Our paper suggests that the Canadian experience can make two contributions to the access to justice debate. First, we suggest that the notion is evolving in the legal community from an institutional perspective to a contextual vision of access to justice. Second, we point out an evolution of alternative or appropriate dispute resolution methods toward a participatory justice culture. Our paper suggests an evolving Canadian perspective on access to justice and dispute prevention and resolution methods.



## INTRODUCTION

Access to justice has been a major issue in Canada for over thirty years.<sup>1</sup> Despite the many efforts made by legislators, legal administrators and public policy makers, Canada is not ranked among the best in the world in terms of fostering access to civil justice for its citizens.<sup>2</sup> Why is that? This disappointing conclusion is causing the Canadian legal community to mobilize and intensify its efforts to address the access to justice challenge.<sup>3</sup> What can we do differently in the future to be more effective? Our paper addresses these two issues.

In the first part, we will explore the evolution of the Canadian vision of access to justice. We describe the *institutional* approach to access to justice that prevails in Canada. According to this vision, the starting point

1. See, for example, the speech of the Chief Justice of Canada: B. McLachlin, *Speech at the Canadian Bar Association Council Meeting*, Vancouver: 2012, online: <<http://www.canadianlawyermag.com/4273/chief-justice-mclachlin-speech-to-cba-council-2012.html>>; B. McLachlin, *Access to Civil Justice for Middle Income Canadians Colloquium*, University of Toronto: 2011, online: <<http://hosting.epresence.tv/MUNK/1/watch/219.aspx>>; B. McLachlin, *The Challenges We Face*, Toronto, Empire Club of Canada, 2007, online: <<http://www.scc-csc.gc.ca/court-cour/ju/spe-dis/bm07-03-08-eng.asp>>. See also: T.C.W. Farrow, *Civil Justice, Privatization, and Democracy*, University of Toronto Press, 2014; National Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice. A Roadmap for Change*, October 2013 <<http://www.cfcj-fcjc.org/collaborations>>; Canadian Bar Association, *Reaching Equal Justice Report: An Invitation to Envision and Act*, November 2013 <<http://www.cba.org/CBA/equaljustice/main>>.
2. Canada ranks 8th out of 24 in North America and European in an analysis conducted in 2014, 9th out of 16 countries in North America and Western Europe in 2012-2013 and ranked 9th out of 12 countries in 2011; M.D. Agrast and J.C. Botero *et al.*, *World Justice Project Rule of Law Index 2014*, Washington D.C., 2014; M.D. Agrast and J.C. Botero *et al.*, *World Justice Project Rule of Law Index 2012-2013*, Washington D.C., 2013; M.D. Agrast, J.C. Botero and A. Ponce, *World Justice Project Rule of Law Index 2011*, Washington D.C., 2011, online: <<http://worldjusticeproject.org/rule-of-law-index>>.
3. See in particular the reports filed in 2012 and 2013 by the National Action Committee on Access to Justice in Civil and Family Matters, headed by the Supreme Court of Canada: <<http://www.cfcj-fcjc.org/collaborations>>; and the access to justice committee of the Canadian Bar Association: <<http://www.cba.org/ABC/Access/main/default.aspx>>. See also "Cost of Justice. Weighing the Costs of Fair and Effective Resolution to Legal Problems" <<http://www.cfcj-fcjc.org/cost-of-justice>>.

is the judicial system. We suggest that this approach, which focuses on the constraints of the legal process and attempts to reduce them in order to improve public access to civil justice, is essential but not sufficient to respond to the challenge of access to civil justice. To better meet this challenge, we propose the complementary *contextual* approach, with the public's expectations of justice as the starting point. This vision focuses on the expectations of justice and the ability of litigants to achieve them in order to enhance the sense of justice felt during and after use of the judicial system. We note that the contextual vision of access to justice is coming to the fore in Canada and its potential is promising.

In the second part, we will point out the hopes resting on dispute prevention and resolution methods for improving access to justice in Canada. We will demonstrate the influence of the institutional approach to access to justice on their development and limitations. We will then explore the influence of the contextual approach to access to justice on the creation of a participatory justice movement in Canada. We conclude that Canada's contribution to the access to justice challenge can be viewed as the intersection between the traditional approach and a new contextual perspective that is demonstrated by the use of participatory justice practices.

## 1. The evolution of the access to justice vision in Canada

What is access to justice? The term is not universally defined and is viewed from several different angles.<sup>4</sup> In Canada there are two different and complementary visions. Traditionally, we have addressed the challenge of access to justice from an *institutional* perspective: we have tried to improve public access to legal information so people will know their rights, as well as access to the courts, so they can exercise them. The goal of this method is to facilitate the legal process for parties within the dispute settlement mechanisms and thereby ensure the stability of the

4. Canadian Bar Association, *Access to Justice Metrics. A Discussion Paper. Envisioning Equal Justice*, April 2013 at p. 5, online: <[http://www.cba.org/ABC/Access/PDF/Access\\_to\\_Justice\\_Metrics\\_fr.pdf](http://www.cba.org/ABC/Access/PDF/Access_to_Justice_Metrics_fr.pdf)>; L. Curran, *Literature Review: examining the literature on how to measure the 'successful outcomes': quality, effectiveness and efficiency of Legal Assistance Services*, Australia, 2012 at p. 3; P.-C. Lafond, *L'accès à la justice civile au Québec. Portrait général*, Cowansville, Éditions Yvon Blais, 2012 at p. 14; M. Buckley, "Searching for the Constitutional Core of Access to Justice" (2008) 42 S.C.L.R. (2d) 567; R.A. Macdonald, "L'accès à la justice aujourd'hui au Canada – étendue, envergure et ambition" in J. Bass, W.A. Bogart and F.H. Zemans, dir., *L'accès à la justice pour le nouveau siècle: les voies du progrès*, Toronto, Law Society of Upper Canada, 2005 at pp. 23-29; R.A. Macdonald, "Accessibilité pour qui? Selon quelle conception de la justice?" (1992) 33 C. de D. 457-480.

rule of law. The emphasis is on justice rendered through the law. Recently we have noticed the emergence of a *contextual* approach to access to justice. According to this view, a citizen is supported throughout the legal process to ensure he feels a sense of justice. The objective is to adapt the judicial system so that it matches the expectations of justice for people living in a fair legal State. The emphasis is on justice conceived by citizens as fairness. We will explore these two concepts of access to justice in this first part.

### **1.1 The institutional approach to access to justice**

We define the *institutional* approach to access to justice as a benchmark framework based on three principles: rule-making, legal normativity and the expertise of those involved.<sup>5</sup> Rule-making refers to the act of regulating or to all regulations concerning a specific subject. In a representative democracy, elected officials make regulations through delegated powers. Legal normativity may be described as all social behavior prescribed by law to regulate social relationships between individuals and legal entities. The expertise of judicial actors corresponds to the knowledge and technical skills required of people who take part in the judicial system. Improving access to justice in light of these three paradigms is a way to facilitate the legal process by making regulations and the understanding of the rule of law accessible through legal experts acting as intermediaries.

According to this institutional approach, access to justice can be perceived by the public according to symbolic, normative and economic aspects.<sup>6</sup> Symbolic access refers to what a litigant considers justice. It is the image of justice according to popular belief and conjures up symbols of justice such as the courthouse, the judge in a gown holding court and the lawyer's role as counsel or representative. Normative access refers for example to a litigant's ability to obtain information about his rights and obligations and to understand the rights and obligations of other individuals with whom he interacts. It also focuses on public participation in the adoption of standards and access to justice through them. Economic access refers to a litigant's ability to bear the constraints and costs associated with enforcing his rights, whether that involves seeking legal advice from an expert or presenting arguments to a judge. The economic aspect of access to justice in the institutional approach will also involve a

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5. J.-F. Roberge, *La justice participative. Changer le milieu juridique par une culture intégrative de règlement des différends*, Cowansville, Éditions Yvon Blais, 2011 at p. 25.

6. *Ibid.*

more comprehensive study of the costs generated by the judicial system or those of the reforms designed to improve it.

The institutional concept of access to justice is still present in Canada today. Several recent reports refer to it. For example, the *Report of the Court Processes Simplification Working Group*,<sup>7</sup> produced in 2012 at the request of the Chief Justice of the Supreme Court of Canada, considers that access to justice means access to lawyers and courts first and foremost. This view is also shared in the *White Paper presented to the Association of Canadian Court Administrators*<sup>8</sup> which, in its recommendations to improve access to justice for people who are self-represented, develops solutions that come from traditional components of the law, namely courts, court clerks and lawyers. This report suggests a rethinking of the traditional roles of clerks, judges and administrative officers (among others) in order to promote access to justice, not a rethinking of the role of the law in justice itself. In Quebec, the only civil law jurisdiction in Canada, we also see this tendency to consider access to justice primarily as access to lawyers and the courts. In its *État de droit 2012*, the Quebec Bar defines access to justice as follows: [Translation] "...access to information to be able to assert one's rights and to build confidence, conflict prevention, access to lawyers, access to the courts, reasonable delays before a case is heard, access to appropriate dispute resolution methods, understanding and control of one's case."<sup>9</sup>

The institutional approach to access to justice is relevant but has its limitations. Canada's low international standing attests to this. According to this approach, justice is essentially viewed as law enforcement. This turns the spotlight on developing, publicizing and enforcing the law. Improving justice thus corresponds to allowing citizens to be heard and have a judge solve their legal problems within a judicial system that is the least constraining possible. However, the real problem experienced by a person is not necessarily legal and going to court is not necessarily the best avenue for resolving it.<sup>10</sup> This is why we have seen the development

7. Action Committee on Access to Justice in Civil and Family Matters, *Report of the Court Processes Simplification Working Group*, 2012 at pp. 2-3, online: <<http://www.cfcj-fcjc.org/collaborations>>.
8. T.C. Farrow *et al.*, *Addressing the Needs of SRLs*, ACCA White Paper, Toronto: Association of Court Administrators of Canada, 2013.
9. Barreau du Québec, *Regard du Barreau du Québec sur l'État de droit 2012, bilan des interventions*, Montréal, Barreau du Québec, 2013 at p. 27, online: <<http://www.barreau.qc.ca/fr/publications/public/etat-droit/>>.
10. P.-C. Lafond, *L'accès à la justice civile au Québec. Portrait général*, Cowansville, Éditions Yvon Blais, 2012 at p. 18; M. Galanter, "La justice ne se trouve pas seulement dans les décisions des tribunaux" in M. Cappelletti, dir., *Accès à la justice et État-providence*, Paris, Économica, 1984, p. 151 at pp. 151-167.

of alternative dispute resolution methods that allow the parties to negotiate a solution out of court. However, amicable methods based on an institutional concept will seek to improve access to justice by allowing regulated legal normativity and the expertise of the actors to prevail over the public's needs and expectations of justice. We suggest that another approach which takes into account the context experienced and felt by the individual involved is also necessary to meet the challenge of access to justice in Canada.

### **1.2 The contextual approach to access to justice**

The *contextual* approach to access to justice is a framework based on three principles: social regulation, internormativity and proactivity of the actors.<sup>11</sup> Social regulation corresponds to all methods of developing and enforcing standards that govern the relationship between natural or legal persons.<sup>12</sup> Internormativity refers to all social behavior prescribed and punishable in a specific context. It refers to an interaction between several types of normativity (moral, social, legal, scientific, professional, etc.) and involves the dejudicialization of social relationships since the legal norm no longer prevails.<sup>13</sup> Proactivity of the actors corresponds to the autonomy of the parties to a dispute in selecting norms they consider fair to prevent and resolve their dispute. Improving access to justice according to these three paradigms involves supporting the parties' capacity to choose the norms they deem equitable to prevent or resolve their dispute.

To reflect this new contextual approach, we suggest the following definition of access to justice. "Access to justice is the act of making available a form of justice that should be seen as a form of justice by the person for whom it is intended and that meets his needs and expectations of justice".<sup>14</sup> It is a broad and inclusive definition that is open to

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11. J.-F. Roberge, *La justice participative. Changer le milieu juridique par une culture intégrative de règlement des différends*, Cowansville, Éditions Yvon Blais, 2011 at p. 27.

12. J. Commaille, "La fonction de justice et le changement de régime de régulation des sociétés" in N. Kasirer and P. Noreau, dir., *Sources et instruments de justice en droit privé*, Montréal: Éditions Thémis, 2002 at p. 87.

13. R. A. Macdonald, "L'hypothèse du pluralisme juridique dans les sociétés démocratiques avancées" (2002-2003) 33 R.D.U.S. 135-152; J.-G. Belley, "Une justice de la seconde modernité: proposition de principes généraux pour le prochain Code de procédure civile" (2001) 46 McGill Law Journal 317.

14. J.-F. Roberge, *La justice participative. Changer le milieu juridique par une culture intégrative de règlement des différends*, Cowansville, Éditions Yvon Blais, 2011 at p. 23.

internormativity, placing litigants in a position to choose what is right or wrong depending on the situation. For the public, there is not *one type of justice but several types of justice, stemming from the grassroots rather than a higher authority*.<sup>15</sup> A person's sense of justice corresponds to all these representations which resemble the notion of equity.<sup>16</sup>

The contextual approach to access to justice is being developed in Canada. Some recent reports refer to it. For example, *the Report of the Prevention, Triage and Referral Working Group* of the National Action Committee on Access to Justice in Civil and Family Matters suggests focussing on the needs of individuals in an approach to justice that starts with the problems people are facing. Its first recommendation sets as a priority the legal problems faced by people in considering access to justice.<sup>17</sup> In a report on the methodologies used to measure access to justice, the Canadian Bar Association points out an international trend toward taking into account the public's experiences with and perceptions of justice.<sup>18</sup> In Quebec, the current reform of the *Code of Civil Procedure*

15. G. Rocher, "Le droit et la justice: un certain regard sociologique" (2001) *C. de D.* 873 at 877-878. See also: P.-C. Lafond, *L'accès à la justice civile au Québec. Portrait général*, Cowansville, Éditions Yvon Blais, 2012 at p. 8; R. Devanesan and J. Anesti, "ODR and Justice. An Evaluation of Online Dispute Resolution Interplay with Traditional Theories of Justice" in M.S. Abdel Wahab, E. Katsh and D. Rainey, eds., *Online Dispute Resolution: Theory and Practice. A Treatise on Technology and Dispute Resolution*, The Hague, Eleven International Publishing 2012 at pp. 263-305; P. Noreau and M. Normandin, "L'autorité du juge au service de la saine gestion de l'instance" (2012) 71 *R. du B.* 207-249; J. Kellerhals, "Relativisme et sociologie: le cas du sentiment de justice" (2003) 126 *Revue européenne des sciences sociales* 137-150; R.A. Macdonald, "Access to Justice and Law Reform 2" (2001) 19 *Windsor Yearbook Access Justice* 317-326.
16. This rapprochement between justice and fairness is particularly inspired by the thoughts of John Rawls and Amartya Sen. J. Rawls, *A Theory of Justice*, Cambridge, Harvard University Press, 1971; J. Rawls, *Justice as Fairness: A Restatement*, Cambridge, Harvard University Press, 2001; A. Sen, *The Idea of Justice*, United States, Belknap Press, 2009.
17. "Recommendation 1: that all stakeholders adopt the principle that priority and resources should be directed toward serving people in the most just and effective way possible, as early as possible, as they begin to experience a legal problem." "The principle fundamentally recasts the notion of access to justice because it is built on the recognition of the breadth and depth of problems in people's everyday lives, and the need to develop a wide range of appropriate responses to these problems, rather than to funnel them to a single high cost destination (the courts and legal representation). This type of response begins with an understanding of the everyday experiences of individuals and whether they possess the legal capability to address problems." National Action Committee on Access to Justice in Civil and Family Matters, Report of the Prevention, Triage and Referral Working Group, Canada: February 2013 at pp. 3-4, online: <<http://www.cfcj-fcjc.org/collaborations>>.
18. Canadian Bar Association, Access to Justice Metrics. A Discussion Paper. Envisioning Equal Justice, April 2013; online: <[http://www.cba.org/ABC/Access/PDF/Access\\_](http://www.cba.org/ABC/Access/PDF/Access_)

seeks better access to justice by developing a “new legal culture” focusing on “... the prevention and resolution of disputes through appropriate, efficient and fair-minded processes that encourage those persons involved to play an active role”.<sup>19</sup> In view of the limitations found in the institutional approach, the contextual approach to access to justice is a new path that Canada intends to build on in order to improve justice as a public service.

## 2. The evolution of dispute prevention and resolution culture in Canada

Dispute prevention and resolution methods have been recognized in Canada as a solution for improving access to civil justice for over 30 years.<sup>20</sup> Several reports have suggested that potential.<sup>21</sup> Historically,

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to\_Justice\_Metrics\_fr.pdf>. See also: J.C. Botero, R.L. Nelson and C. Pratt, “Indices and Indicators of Justice, Governance, and the Rule of Law: An Overview” (2011) 3 Hague Journal on the Rule of Law 153-169; M. Gramatikov, M. Barendrecht and J.H. Verdonschot, “Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology” (2011) 3 Hague Journal on the Rule of Law 349-379.

19. Bill 28, *An Act to establish a new Code of Civil Procedure*, adopted in February 2014, <<http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-28-40-1.html>>. See the press release of the Quebec Minister of Justice: [Translation] “With the new *Code of Civil Procedure*, I hope to instill a culture change among all participants in the justice system . . . Through this reform, we will modernize the procedure in our courts so that Quebec civil justice moves from the 20th to 21st century, a shift that will make our justice system more accessible, faster, less onerous and less costly while finding new ways of doing things.”
20. C. Morris, “The Impact of Mediation on the Culture of Disputing in Canada: Law Schools, Lawyers and Laws” in Fan Yang and Guiguo Wang, eds., *Mediation in Asia-Pacific: A Practical Guide to Mediation and Its Impact on Legal Systems*, New York, Wolters Kluwer Law & Business, and Hong Kong, CCH Hong Kong, 2013; Jean-François Roberge, “The Future of Judicial Dispute Resolution. A Judge Who Facilitates Participatory Justice” in Tania Sourdin and Archie Zariski, *The Multi-Tasking Judge. Comparative Judicial Dispute Resolution*, Thomson Reuters, 2013 at pp. 21-32; John D. Rooke, “The Multi-Door Courthouse is Open in Alberta: Judicial Dispute Resolution is Institutionalized in the Court of Queen’s Bench” in Tania Sourdin and Archie Zariski, *The Multi-Tasking Judge. Comparative Judicial Dispute Resolution*, Thomson Reuters, 2013.
21. Rapport du Groupe de travail sur l’accessibilité à la justice, *Jalons pour une plus grande accessibilité à la justice*, Québec, Government of Quebec, 1991 at p. 477; Task Force on Systems of Civil Justice, *Report of the Canadian Bar Association Task Force on Systems of Civil Justice*, Ottawa, CBA, 1996; Comité de révision de la procédure civile, *La révision de la procédure civile – Une nouvelle culture judiciaire*, Bibliothèque et Archives nationales du Québec, Canada, Government of Quebec, 2001; BC Justice Review Task Force, *Effective and Affordable Civil Justice*, British Columbia, Government of British Columbia, 2006; Action Committee on Access to Justice in Civil and Family Matters, *Report of the Court processes Simplification*

alternative methods were developed with the aim of reducing the constraints of the judicial system for litigants,<sup>22</sup> reflecting an institutional vision of access to justice. Dispute Prevention and Resolution (DPR) offers Canadians a faster, less expensive and less contentious alternative than the judicial path that leads to a trial. For about 10 years, we have been seeing a new trend that puts the litigant at the heart of the legal system and encourages him to actively participate in the decision-making process leading to a fair solution, reflecting a contextual vision of access to justice. According to this view, DPR methods are part of a participatory justice movement which aims to improve litigants' ability to create a tailored solution that will give them a sense of justice.<sup>23</sup> The contribution of the Canadian experience lies in this complementarity between improvement of the judicial system and consideration of the public's expectations of justice.

### **2.1 Reducing constraints of the judicial system**

In North America, the criticisms regarding the constraints of the judicial system, especially in terms of cost, time and complexity, are well documented.<sup>24</sup> In the mid-1970s, a North American movement oriented towards "faster, cheaper, better" justice led to the development of dis-

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*Working Group*, Canada, ABC, 2012, online: <<http://www.cfcj-fcjc.org/collaborations>>; Canadian Bar Association, *Envisioning Equal Justice. Toward National Standards for Publicly-Funded Legal Services*, Canada, CBA, 2013, online: <<http://www.cba.org/ABC/Access/PDF/TowardNationalStandardsFR.pdf>>; Canadian Bar Association, *Envisioning Equal Justice, "Underexplored Alternatives for the Middle Class"*, Canada, CBA, 2013, online: <<http://www.cba.org/CBA/Access/PDF/MidClassEng.pdf>>; Action Committee on Access to Justice in Civil and Family Matters, *Meaningful Change for Family Justice. Beyond Wise Words*. Final Report of the Family Justice Working Group, Canada, 2013, online: <<http://www.cfcj-fcjc.org/collaborations>>.

22. C. Morris, "The Impact of Mediation on the Culture of Disputing in Canada: Law Schools, Lawyers and Laws" in Fan Yang and Guiguo Wang, eds., *Mediation in Asia-Pacific: A Practical Guide to Mediation and Its Impact on Legal Systems*, New York, Wolters Kluwer Law & Business, and Hong Kong, CCH Hong Kong, 2013.
23. Law Commission of Canada, *Transforming Relationships Through Participatory Justice*, Ottawa: Ministry of Justice, 2003, online: <<http://publications.gc.ca/site/eng/250010/publication.html>>; J.-F. Roberge, *La justice participative. Changer le milieu juridique par une culture intégrative de règlement des différends*, Cowansville, Éditions Yvon Blais, 2011.
24. R. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, (29 ABA Rep. 1906 at p. 395; A.L. Levin and R.R. Wheeler, eds., *The Pound Conference: Perspectives on Justice for the Future*, United States, West Publishing, 1979; W. Burger, "Isn't There A Better Way?" (1982) 68 ABA Journal 274; M. Galanter, "Delivering Legality: Some Proposals for the Direction of Research" (1976) *Law & Society Review* 224-264.

pute prevention and resolution methods that still exist today.<sup>25</sup> In Canada, DPR methods were initially developed as an alternative to the judicial system,<sup>26</sup> then they were gradually institutionalized, particularly through civil procedure reforms. Today, the Canadian judicial system provides for case management procedures that encourage the use of a continuum of dispute resolution methods, particularly mediation in several forms depending on the areas of law involved.<sup>27</sup>

Dispute prevention and resolution methods in all the provinces of Canada have been institutionalized to improve the administration of justice by reducing the cost, time and complexity of the legal process. This objective is consistent with an institutional vision of access to justice. Some provinces have opted for a system of mandatory court-annexed mediation and judicial mediation. Others prefer a voluntary system of complementary or judicial mediation. The provinces also differ as to whether they choose to have mediation conducted by professional mediators and/or judges. The settlement rate is about 50% when mediation is mandatory and about 80% when the system is voluntary.<sup>28</sup> The number of cases that are treated in voluntary mediation varies greatly among the provinces and it is difficult to establish a reliable average.<sup>29</sup>

Our hypothesis is that legislators, legal administrators and public policy makers who have an institutional vision of access will make differ-

25. M. Cappelletti, ed., *Access to Justice and the Welfare State*, v. 4, Florence, European University Institute, 1981; C. Honeyman, "Two Out of Three" (1995) 11 *Negotiation Journal* 5; C. Morris, "*Canada*" in *Mediation and Its Impact on Judicial Systems in Asia-Pacific*, Wolters Kluwer Law & Business and CH Hong Kong, forthcoming 2013.
26. There are several professional associations in Canada. For example, ADR Institute of Canada is a non-profit national association which includes seven provincial mediators and arbitrators associations in civil, commercial and familial matters. <<http://www.amic.org/>>.
27. See Association of Canadian Court Administrators, *Dispute Resolution*, Journal of the Association of Canadian Court Administrators, 2011, Vol. 1; Action Committee on Access to Justice in Civil and Family Matters, *Report of the Court Processes Simplification Working Group*, Canada, ABC, 2012, online: <<http://www.cfcj-fcjc.org/collaborations>>.
28. See Association of Canadian Court Administrators, *Dispute Resolution*, Journal of the Association of Canadian Court Administrators, 2011, Vol. 1.
29. See for example: J.B. Kelly, "Family Mediation Research: Is There Empirical Support for the Field?" (2004) *Conflict Resolution Quarterly* 3; Peter Adams *et al.*, *Evaluation of the Small Claims Program, Vol. 1* (Province of British Columbia, Ministry of Attorney General, 1992) 32; Mediate BC, *Survey on "Judicial Mediation" Summary of Survey Results* (December 12, 2011) <<http://library.constantcontact.com/download/get/file/1102335284681-290/Summary+of+Survey+Results+Dec+12+11+Final.pdf>>, accessed 21 May 2013; J. Macfarlane, *Court-Based Mediation for Civil Cases: An Evaluation of the Ontario Court (General Division) ADR Centre*, Windsor, University of Windsor.

ent choices depending on the balance they seek between costs and time. The mandatory scheme seems more likely to reduce backlogs in the judicial system than the voluntary scheme. We know that for every 1,000 cases referred to mediation, about 500 will be settled out of court. To have the same effect on reducing delays, 625 cases will have to go to voluntary mediation since 80% of 625 equals 500. However, the compulsory scheme will cost the parties or the State more since it requires the use of additional resources (private mediators paid by the parties or a public program, mediators paid by the State, judges, etc.) for every case.<sup>30</sup> On the other hand, the voluntary scheme has a better cost-benefit ratio but will have little impact on reducing delays if a small number of cases go to mediation. To promote access to justice according to an institutional vision, the ideal balance between cost and time seems therefore to be a voluntary mediation scheme where resources are spent on promoting the relevance and credibility of mediation to convince parties to voluntarily choose mediation as early as possible in the legal process. In this manner, legal administrators can reduce the phenomenon of out of court settlements just before trial and ensure that courtrooms are used to full capacity every day.

The dispute prevention and resolution initiatives taken by the provinces sometimes include methods specific to a contextual vision of access to justice. Voluntary mediation seems more consistent with the contextual approach since it offers people the choice of whether or not to participate in a process that will allow them to create a solution tailored to their needs. Favoring a mediator judge can foster a sense of justice among parties by allowing them, and their lawyers, to express their needs and create a solution that can refer to normativities other than the law (such as recognized business practices, shared family values, etc.). The parties' expectations of justice are then taken into account and in this way mediation can improve access to justice from a contextual perspective. We have prepared a list of initiatives institutionalizing dispute prevention and resolution methods in the Canadian legal system. All Canadian provinces are actively developing methods for preventing and settling disputes. Some have done so according to a decidedly institutional approach while others are open to a contextual approach. Several recent initiatives have pursued the goal of reducing the constraints of the judicial system while showing a willingness to consider the litigant's broader legal needs.

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30. Regarding costs, they can be borne by the parties if the mediator is private or assumed by the public if the mediators are paid by the state as a public servant or a public program has been set up.

The *voluntary* mediation system has been chosen by the majority of Canadian provinces. Alberta has developed a “multi-door courthouse”, offering litigants several choices of dispute prevention and resolution methods.<sup>31</sup> A continuum of methods ranging from information, education, negotiation and mediation to early neutral evaluation are possible.<sup>32</sup> Judges are involved in a Judicial Dispute Resolution Program which offers a variety of techniques including mini-trials, case evaluation, mediation and binding arbitration. Mediation is available for family and civil matters and is sometimes led by a private mediator paid by the parties and at other times by a judge in judicial dispute resolution.<sup>33</sup> The public Family Mediation Program allows parties free access to a mediator if they qualify.<sup>34</sup> British Columbia also offers several judicial or complementary ways for parties to resolve their disputes.<sup>35</sup> For example, an accelerated arbitration program conducted by lawyers specialized in civil law is available at the Provincial Court for parties wishing to participate in it.<sup>36</sup> A voluntary program of judicial settlement conference conducted by a judge is available at the Supreme Court and the Court of Appeal.<sup>37</sup> A new law, the *Civil Resolution Tribunal Act*, was enacted in May 2012 and should be adopted in 2014.<sup>38</sup> The aim of that statute is to allow the parties to a small claims dispute (amounting to less than \$25,000) to participate in a “voluntarily administered court” rather than following the traditional judicial system. A range of settlement methods would be made available including online dispute resolution, face-to-face mediation, neutral eval-

31. John D. Rooke, “The Multi-Door Courthouse is Open in Alberta: Judicial Dispute Resolution is Institutionalized in the Court of Queen’s Bench” in Tania Sourdin and Archie Zariski, *The Multi-Tasking Judge. Comparative Judicial Dispute Resolution*, Thomson Reuters, 2013; Article 4.16 Alberta Rules of Court; Association of Canadian Court Administrators, “Dispute Resolution” (2001) *Journal of the Association of Canadian Court Administrators*, 2011, Vol. 1.
32. Association of Canadian Court Administrators, *Dispute Resolution*, *Journal of the Association of Canadian Court Administrators*, 2011, Vol. 1 at pp. 6-7.
33. <<http://www.albertacourts.ab.ca/CourtServices/tabid/71/Default.aspx>>.
34. <<http://www.albertacourts.ab.ca/fjs/adr.php>>. There is no cost for qualifying families. To qualify, there must be at least one dependent child under the age of 18 and one or both parties must have an income of less than \$40,000 per year.
35. <<http://www.mediatebc.com/Mediation-Services.aspx>>.
36. Action Committee on Access to Justice in Civil and Family Matters, *Report of the Court Processes Simplification Working Group*, Canada, ABC, 2012, online: <<http://www.cfcj-fcjc.org/collaborations>>.
37. *Judicial Settlement Conferences* (Civil Practice Directive, 19 September 2011) <[http://www.courts.gov.bc.ca/court\\_of\\_appeal/practice\\_and\\_procedure/civil\\_practice\\_directives\\_/Civil-Judicial%20Settlement%20Conferences.htm](http://www.courts.gov.bc.ca/court_of_appeal/practice_and_procedure/civil_practice_directives_/Civil-Judicial%20Settlement%20Conferences.htm)>.
38. Action Committee on Access to Justice in Civil and Family Matters, *Report of the Access to Legal Services Working Group*, 2012 at p. 23, online <<http://www.cfcj-fcjc.org/collaborations>>; *Civil Resolution Tribunal Act*, online: <[http://www.leg.bc.ca/39th4th/1st\\_read/gov44-1.htm](http://www.leg.bc.ca/39th4th/1st_read/gov44-1.htm)>.

uation and adjudication. Through this statute, consensual dispute resolution will become the heart of the judicial process. And lastly, new family law legislation was adopted in 2013 and aims specifically to promote settlement by mediation or negotiation.<sup>39</sup>

In Manitoba, judges have been involved in voluntary judicially assisted dispute resolution (JADR) in civil matters since 1997. JADR allows the parties to choose the appropriate method for settling their case from a set of methods which include neutral evaluation, mini-trial and caucusing (where the judge meets privately with each of the parties).<sup>40</sup> The vast majority of parties ask for JADR before going to trial.<sup>41</sup> In New Brunswick, family mediation is available to the parties at no cost.<sup>42</sup> A voluntary settlement conference conducted by a judge is also available in civil matters.<sup>43</sup> Nova Scotia provides for voluntary settlement conferences and family mediation.<sup>44</sup> Newfoundland and Labrador has various mediation programs: court-ordered mediation when the case requires it, family mediation administered by family justice services and settlement conferences presided over by a judge.<sup>45</sup> The Territories are also part of the trend to include mediation and other dispute resolution methods in the legal process: the rules of civil procedure in the Yukon, Nunavut and the Northwest Territories provide for the use of settlement conferences.<sup>46</sup>

39. *Family Law Act*, March 2013, s. 4, online: <[http://www.leg.bc.ca/39th4th/3rd\\_read/gov16-3.htm#part2div1](http://www.leg.bc.ca/39th4th/3rd_read/gov16-3.htm#part2div1)>.

40. See Association of Canadian Court Administrators, *Dispute Resolution*, Journal of the Association of Canadian Court Administrators, 2011, Vol. 1 at p. 12. See also Manitoba JADR, report of CFCJ, online: <<http://www.cfcj-fcjc.org/inventory-of-reforms/manitoba-judicially-assisted-dispute-resolution-jadr>>.

41. See Association of Canadian Court Administrators, *Dispute Resolution*, Journal of the Association of Canadian Court Administrators, 2011, Vol. 1 at p. 11.

42. <<http://www.gnb.ca/cour/04cqb/mediation-e.asp>>; *Family Services Act*, c. 22, online: <<http://www.gnb.ca/0062/pdf-acts/f-02-2.pdf>>.

43. Rules 50.01-50.15, Rules of Court, New-Brunswick, Regulation 82-73. See also Association of Canadian Court Administrators, *Dispute Resolution*, Journal of the Association of Canadian Court Administrators, 2011, Vol. 1 at p. 17.

44. Rules 10.59, *Nova Scotia Civil Procedure Rules*, <<http://www.courts.ns.ca/rules/toc.htm>>; <[http://www.courts.ns.ca/supreme/sc\\_family6.htm](http://www.courts.ns.ca/supreme/sc_family6.htm)>.

45. Rules 37A, 39B, 56C, <<http://www.assembly.nl.ca/legislation/sr/regulations/RulesSC/Rc86.htm>>. See also Journal of the Association of Canadian Court Administrators, *ACCA: Canadian Court Communiqué*, *Dispute Resolution*, 2011 at p. 14.

46. Association of Canadian Court Administrators, *Dispute Resolution*, Journal of the Association of Canadian Court Administrators, 2011, Vol. 1 at p. 17; <<http://www.yukoncourts.ca/courts/supreme/ykrulesforms.html>>; <[http://www.justice.gov.nt.ca/pdf/REGS/JUDICATURE/Rules\\_Supr\\_Crt\\_NWT\\_Pt\\_1.pdf](http://www.justice.gov.nt.ca/pdf/REGS/JUDICATURE/Rules_Supr_Crt_NWT_Pt_1.pdf)>; <[http://www.nucj.ca/rules/CRNu\\_603\\_Rules\\_of\\_NCJ\\_Regles.pdf](http://www.nucj.ca/rules/CRNu_603_Rules_of_NCJ_Regles.pdf)>.

In the civil law province of Quebec, voluntary judicial mediation began in 1997 and was introduced into the *Code of Civil Procedure* in 2003.<sup>47</sup> Taking another step toward the recognition of dispute prevention and resolution methods in the judicial system, the adopted 2014 new *Code of Civil Procedure* specifically provides for the use of various amicable settlement methods in the preliminary provision and introductory articles.<sup>48</sup>

Some provinces have chosen *mandatory* dispute prevention and settlement. In Alberta, the use of one of several dispute settlement methods is required prior to setting a date for a trial.<sup>49</sup> In British Columbia, a compulsory settlement conference and mediation program for small claims is in force since 1992<sup>50</sup> and a quasi-mandatory mediation procedure exists in civil<sup>51</sup> and family<sup>52</sup> claims. In Ontario, a wish to reduce costs and the length of legal proceedings and to facilitate access to justice has led to the implementation of a mandatory mediation program in civil (except for family) matters in the three largest judicial districts of the province: the cities of Ottawa, Toronto and Windsor.<sup>53</sup> Ontario has also changed its rules of procedure so that preparatory conferences conducted by a judge are mandatory and their scope extended to foster ami-

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47. *Quebec Code of Civil Procedure*, chapter C-25. Louise Otis and Eric Reiter, "Mediation by Judges: A New Phenomenon in the Transformation of Justice" (2006) 6 *Pepperdine Dispute Resolution Law Journal* 351.
  48. Preliminary provision, Articles 1-7, Bill 28, *An Act to establish a new Code of Civil Procedure*, February 2014, <<http://www.assnat.qc.ca/fr/travaux-parlementaires/projets-loi/projet-loi-28-40-1.html>>.
  49. Articles 8.4(3), 8.5(1) *Alberta Rules of Court*, <<http://www.albertacourts.ab.ca/RulesofCourt/Spotlight/tabid/310/Default.aspx>>. However, since February 2013, the application of these rules will not be enforced in Queen's Bench Court until judicial complement of the court or other resources permit reinstatement.
  50. Provincial Court, small claim rules, online: <[http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/LOC/freeside/—%20C%20—/Court%20Rules%20Act%20RSBC%201996%20c.%2080/05\\_Regulations/18\\_261\\_93%20Small%20Claims%20Rules/261\\_93\\_02.xml#rule7.5](http://www.bclaws.ca/EPLibraries/bclaws_new/document/LOC/freeside/—%20C%20—/Court%20Rules%20Act%20RSBC%201996%20c.%2080/05_Regulations/18_261_93%20Small%20Claims%20Rules/261_93_02.xml#rule7.5)>.
  51. Notice to Mediate (General) Regulation, British Columbia 4/2001, online: <[http://www.bclaws.ca/EPLibraries/bclaws\\_new/document/ID/freeside/4\\_2001](http://www.bclaws.ca/EPLibraries/bclaws_new/document/ID/freeside/4_2001)>; <<http://www.ag.gov.bc.ca/dro/regulations-rules/index.htm>>.
  52. Notice to Mediate (Family) Regulation, British Columbia 296/2007, online: <[http://www.ag.gov.bc.ca/dro/regulations-rules/regulations/LawEquity296\\_2007.pdf](http://www.ag.gov.bc.ca/dro/regulations-rules/regulations/LawEquity296_2007.pdf)>; <<http://www.ag.gov.bc.ca/dro/regulations-rules/index.htm>>.
  53. Journal of the Association of Canadian Court Administrators, *ACCA: Canadian Court Communiqué, Dispute Resolution*, 2011 at pp. 12-13, Rules 24.1, 75.1 Ontario Rules of Civil Procedure, online: <[http://www.e-laws.gov.on.ca/html/regs/english/elaws\\_regs\\_980451\\_e.htm](http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_980451_e.htm)>; <[http://www.e-laws.gov.on.ca/html/regs/english/elaws\\_regs\\_900194\\_e.htm#sched75.1.01](http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm#sched75.1.01)>.

cable dispute resolution and encourage out-of-court settlements.<sup>54</sup> In Saskatchewan, mediation is mandatory in civil matters with the exception of family matters.<sup>55</sup> It began in 1997 and is administered by the Dispute Resolution Office of the Ministry of Justice and Attorney General.<sup>56</sup> In Quebec, mediation is mandatory in family matters. The parties must attend an initial information session on mediation conducted by an accredited private mediator who is paid by a public program.<sup>57</sup>

The pre-trial conference practiced in every Canadian province can also be added to the mandatory initiatives aimed at arriving at a negotiated settlement. It is part of the judge's work to try to reconcile the parties in order to reach a settlement.<sup>58</sup> All Canadian provinces now have pre-trial conferences in the hope of reducing costs and time, which confirms Canadian interest in dispute settlement and prevention methods, as well as the importance of the institutional approach to access to justice.

## 2.2 *The participatory justice movement*

The participatory justice movement stems from the work of the Law Commission of Canada published in 2003.<sup>59</sup> After conducting consultation studies for three years, the Commission concludes that Canadians have new expectations of the judicial system.

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54. Rule 77 Rules of Civil Procedure, Ontario, online: <<http://www.canlii.org/on/laws/regu/1990r.194/index.html>>.
55. *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01, s. 42. Association of Canadian Court Administrators, *Dispute Resolution*, Journal of the Association of Canadian Court Administrators, 2011, Vol. 1 at p. 9.
56. <<http://www.justice.gov.sk.ca/Mediation>>.
57. Family mediation rules, *An Act to institute, under the Code of Civil Procedure, pre-hearing mediation in family law cases and to amend other provisions of the Code*; online: <<http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=5&file=1997C42A.pdf>>. See also <<http://www.justice.gouv.qc.ca/francais/programmes/mediation/seance-parentalite.htm>>.
58. For example, see the following legislation: *Supreme Court Civil Rules*, B.C. Reg. 221/90, s. 35(4)(j) (British Columbia and Yukon); *Intake and Case Flow Management Rules*, Alta. Reg. 163/2001, s. 8 (Alberta); *Court of Queen's Bench Rules*, Manitoba Regulation 553/88, s. 50.01(1)(g)h (Manitoba); *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 (Ontario), ss. 50.01j), 76.12 and 77.14; *Nova Scotia Civil Procedure Rules*, s. 26.01(1)(e) (Nova Scotia) *Nova Scotia Civil Procedure Rules – Practice Memoranda and Directions, Practice Memoranda No. 5, Alternative Dispute Resolution Procedure*, s. 1, 2 (Nova Scotia); *Rules of the Supreme Court*, 1986, s.n.l. 1986, c. 42, ss. 39.02(5)(i), 39.04 (Newfoundland and Labrador); *Rules of the Supreme Court of the Northwest Territories*, r-010-96, s. 283(e) and 284(1)(e), (2)(c).
59. Law Commission of Canada, *Transforming Relationships Through Participatory Justice*, Ottawa, Department of Justice, 2003, online: <<http://publications.gc.ca/site/eng/250010/publication.html>>.

The Commission's consultations revealed that Canadians want choices for resolving their conflicts, and that many want to actively participate in the conflict resolution process. The Commission believes that participatory justice – with its emphasis on the reconstruction of relationships through dialogue and on outcomes developed and agreed to by the disputants themselves – responds to this need.<sup>60</sup>

The notion of “participatory justice” has been developed to the greatest extent in Quebec. Academics and legal professionals began promoting the term around 2007.<sup>61</sup> The Quebec Bar defines it as follow: [Translation] “participatory justice is a different way of asserting one's rights and facilitating access to justice. The person, with the assistance of his lawyer, chooses the conflict prevention and resolution method based on his needs, interests and financial means.”<sup>62</sup> According to a socio-economic survey conducted by the Quebec Bar in 2008, approximately 40% of lawyers consider participatory justice and appropriate dispute resolution methods to be the way of the future for the practice of law.<sup>63</sup> According to a study by the Quebec Bar envisioning the future of the profession in 2021, participatory justice will be at the heart of legal practice.<sup>64</sup> In addition, the Montreal Bar has organized an annual roundtable to develop concrete actions for participatory justice in the legal community since 2008.<sup>65</sup>

Due to progress in research and development of professional practices, participatory justice is evolving and developing its own identity. We propose the following definition which reflects the current state of knowledge: “Participatory justice is an intervention framework based on three values (respect, creativity, proactivity) found in the three dimensions (interaction, content, process) of a dispute prevention and resolution

60. Law Commission of Canada, *Transforming Relationships Through Participatory Justice*, Ottawa, Department of Justice, 2003 at pp. xv-xvi, online: <<http://publications.gc.ca/site/eng/250010/publication.html>>.

61. See: Université de Sherbrooke: <<http://www.usherbrooke.ca/droit/formation-continue/seminaires-en-justice-participative-et-en-prevention-et-reglement-des-differends/>>; Quebec Bar: <<http://www.barreau.qc.ca/fr/avocats/justice-participative/>>; Institut de Médiation et d'Arbitrage du Québec (IMAQ): <<http://www.imaq.org/>>.

62. See the Quebec Bar website: <<http://www.barreau.qc.ca/fr/avocats/justice-participative/>>.

63. M. Beaudoin, “Étude socio-économique du Barreau du Québec: Matière à réflexion” (2009) 41:5 J. Barreau 29.

64. Barreau du Québec, *Rapport sur les avocats de pratique privée en 2011*, Montréal, Barreau du Québec, 2011, online: <<http://www.barreau.qc.ca/fr/publications/avocats/avocats-2021/index.html>>.

65. See the Montreal Bar website <<http://www.barreaudemontreal.qc.ca/en/barreau/comite/round-table-participative-justice/>>.

(DPR) method and pursuing three forms of fairness (distributive, procedural, interactional).”<sup>66</sup>

Our definition stems from both literature and empirical studies. With respect to literature, we were inspired by applied ethics involving the notion of axiological actions based on values. We also built it based on literature in social psychology and dispute prevention and resolution regarding the three dimensions of content, process and interaction, and the three values of creativity, proactivity and respect. Studies on cooperation and procedural justice within a judicial context were particularly inspiring.<sup>67</sup>

We conducted two empirical studies, the results of which support our definition of participatory justice. In our first study, we surveyed Canadian judges about their perceptions of various types of intervention in judicial mediation/settlement conferencing.<sup>68</sup> Our research results identify three types of intervention: (1) Legal Expert – Risk Manager;

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66. J.-F. Roberge, *La justice participative. Changer le milieu juridique par une culture intégrative de règlement des différends*, Cowansville, Éditions Yvon Blais, 2011 at p. 13; J.-F. Roberge, “La justice participative. Fondement et pratique” in P. Cecchi-Dimeglio and B. Brenneur, eds., *Regards croisés sur les modes alternatifs de règlement de conflits*, Bruylant-Larcier, 2015.

67. See T.R. Tyler, *Why People Cooperate: The Role of Social Motivations*, Princeton University Press, 2011; T.R. Tyler, *Why People Obey the Law*, Princeton University Press, 2006; N. Welsh, D. Stienstra and B. McAdoo, “The Application of Procedural Justice Research to Judicial Actions and Technique in Settlement Sessions” in T. Sourdin and A. Zariski, eds., *The Multi-Tasking Judge: Comparative Judicial Resolution*, Thomson Reuters, 2013 at p. 57; T.R. Tyler, “Procedural Justice and the Courts” (2007) 44: 2 *Court Review: The Journal of the American Judges Association* 26; T.R. Tyler, “Psychology and the Design of Legal Institutions”, *Tilburg Law Lectures Series*, 2007; See also: D. Balliet and P.M. Van Lange, “Trust, Conflict and Cooperation: A Meta Analysis” (2013) 139:5 *Psychological Bulletin* 1090; T.R. Tyler, “Justice Theory” in P.A. Van Lange, A.W. Kruglansky and T. Higgins, *Handbook of Theories of Social Psychology*, Sage, 2011; P.A. Van Lange, D. De Cremer, E. Van Dijk and M. Van Vugt, “Self-interest and beyond” in A.W. Kruglanski and E.T. Higgins, eds., *Social Psychology Handbook of Basic Principles*, 2nd ed., New York, Guilford Press, 2007; R. Cropanzano, D.E. Bowen and S.W. Gilliland, “The Management of Organizational Justice” (2007) 21:4 *Academy of Management Perspectives* 34-41; T.R. Tyler, “Social Justice: Outcome and Procedure” (2000) 35:2 *International Journal of Psychology* 117; T.R. Tyler, “Psychological Models of the Justice Motive. Antecedents of Distributive and Procedural Justice” (1994) 67 *Journal of Personality and Social Psychology* 850; E.A. Lind and T.R. Tyler, *The Social Psychology of Procedural Justice*, New York, Plenum Press, 1988.

68. Our study was conducted in 2005. We had 500 respondents (N = 500) out of the 1500 Canadian judges population. The results indicate that the questionnaire we developed is accurate since total items has a very good reliability coefficient (Cronbach's alpha = 0.83).

(2) Problem Solver Expert – Integrative Solution Manager; and (3) Participatory Justice Facilitator.<sup>69</sup> According to the first two types, the judge leads the mediation with his skills as a legal and risk management expert or an expert in problem-solving methodology. With the third type, the judge acts instead as a facilitator for the parties involved in a collaborative process that will provide them with a sense of justice. A judge who practices judicial mediation according to this third type of intervention would therefore fall within a contextual vision of access to justice. A judge who chooses instead a role of expertise and management would seek to make institutional justice more accessible.

We conducted a second empirical study, this time on the public perception regarding the components of access to justice and the factors that could improve it.<sup>70</sup> We invited people who visited the Éducaloi website to participate in our online survey.<sup>71</sup> Our research results confirm that a very high percentage of Quebecers believe that access to justice has three components: (1) access to legal information (98%), (2) access to the courts (98%) and (3) access to participatory justice (95%). The emphasis given to these three components demonstrates the interest of addressing the access to justice challenge with both an institutional vision (access to the law and the courts) and a contextual vision (access to participation fostering a sense of justice). Our research findings also confirm that a high proportion of Quebecers believe that the quality of civil justice would be improved if we valued (1) an integrative culture of cooperation (93%), (2) enhancement of respect (95%); (3) enhancement of proactivity (95%); and (4) promotion of creativity (89%). These four qualities are not present in the adversarial culture of dispensing traditional justice that resolves disputes through a judge's decision. In contrast, the qualities of cooperation, respect, proactivity and creativity are statistically strongly correlated to the concept of participatory justice.<sup>72</sup> We can therefore say that the improvement of access to

69. J.-F. Roberge, "Could Judicial Mediation Deliver a Better Justice? Supposing we TRAINed Judges as EXPATS?" (2010) *Revue d'arbitrage et de médiation / Journal of Arbitration and Mediation* 1.

70. J.-F. Roberge, "The Future of Judicial Dispute Resolution. A Judge Who Facilitates Participatory Justice" in T. Sourdin and A. Zariski, *The Multi-Tasking Judge. Comparative Judicial Dispute Resolution*, Australia, Thomson Reuters, 2013 at pp. 21-32.

71. Éducaloi is a non-profit organization whose mission is to inform Quebecers of their rights and obligations by providing quality legal information in everyday language. Its partners are: the Barreau du Québec, the Chambre des Notaires, the Quebec Society of Legal Information, Department of Justice Canada and the Quebec Department of Justice. The profile of users who consult Éducaloi is representative of Quebec's population subject to the rate of literacy required to view its site. A total of 1,580 people responded to the Quebec French or English version of the on-line survey (N = 1580) in April-May 2012.

justice through participatory justice, which involves the parties in the collaborative creation of a customized solution that gives them a sense of justice, can be explained by the enhancement of an integrative culture of cooperation, respect, proactivity and creativity.

## CONCLUSION

Why is Canada faring so poorly in the field of access to justice, despite significant efforts? What lessons can we learn from this? How can we shift directions to improve the public service of justice for Canadians? We can draw two conclusions from the Canadian experience. One is that the institutional approach to access to justice has caused us to focus our efforts on reducing the constraints of the judicial system while promoting access to justice through legal experts, namely lawyers and judges. DPR methods have expanded the range of services and helped make some progress in reducing the cost and time required to reach a settlement. Despite many advances, this is not enough. Our second conclusion is that we must shift our efforts toward a new perspective, that of the public, for whom the notion of justice is broader than legal justice. We must find a new starting point.

For the future, we encourage the legal community to continue its efforts to expand its horizons in terms of access to justice. We can look at the judicial system from the perspective of an administrator of justice seeking to reduce constraints (costs, delays, complexity, etc.) for litigants. We have made a great deal of progress over the years in improving justice according to this institutional vision. We can also add the perspective of an individual seeking a process where he can be involved in creating the right solution for his situation that will provide him with a sense of justice. Adopting a contextual view and promoting participatory justice may be our best avenue for meeting the Canadian public's expectations of the law. Since justice is a public service as well as a public good, what is ultimately most important is that people feel that justice has been done.

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72. We conducted a multiple linear regression to determine to what degree the promotion of such civil justice qualities can explain the potential of participatory justice for improving access to justice. The correlation coefficients are 0.63 (collaboration), 0.45 (respect), 0.55 (proactivity) and 0.52 (creativity) ( $p < 0.01$ ). The total correlation coefficient is 0.65 ( $p < 0.01$ ). The coefficient of determination explaining the probability of participatory justice improving access to justice is 42%, if practiced by enhancing these four qualities.