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## **Effects of Institutionalized Culture of Out-of-Court Settlement of Labour Disputes in Quebec on Access to Justice and Effectiveness of Labour Law**

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It is commonly claimed that labour law is “conflict law.” The very nature of the employment relationship, which is essentially non-egalitarian, the deeply divergent interests of employees and employers, and the reality of the workplace make the conflicts that labour law was devised to govern inevitable.<sup>1</sup> Since employees are the disadvantaged party, the question of access to justice becomes particularly acute. Indeed, employees’ rights and remedies under the law must be accessible and easily exercised in the competent jurisdictions, thus helping ensure the effectiveness of labour law.

Given the frequency of labour conflicts and the threat they represent to the survival of capitalism,<sup>2</sup> the legal system has institutionalized a method of handling labour disputes with the aim of compensating to some extent for the power imbalance between the parties, and in so doing, guaranteeing the parties rapid access to a form of justice and the pursuit of economic activity. The method initially used was quasi-legal and took the form of an administrative tribunal, less formal than a court of law, but with its own set of formal constraints and system costs.

But the costs of justice to employees wishing to exercise their rights and remedies under Quebec labour laws have been a source of concern to the Quebec government for several decades, particularly the more general question of access to justice, defined as “the action of making accessible a form of justice that must be perceived as a form of justice by the person for

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1. See, for example, P. Verge and G. Vallée, *Un droit du travail? Essai sur la spécificité du droit du travail* (Cowansville, QC: Éditions Yvon Blais, 1997) at 40–50.

2. B. E. Kaufman, “Industrial Relations: Retrospect and Prospect” in B. E. Kaufman, ed., *The Global Evolution of Industrial Relations: Events, Ideas and the IIRA* (Geneva: International Labour Office, 2004) at 583–631.

whom it is intended and that responds to his or her motivations and expectations of justice.”<sup>3</sup> This definition highlights the importance of putting relatively simple, quick and inexpensive conflict settlement mechanisms within the reach of employees and employers. In addition to this objectively verifiable economic aspect, the definition also raises a subjective aspect: It is important for such mechanisms to be perceived as legitimate by the parties and the objective of resolving disputes can be achieved by several means.

The Quebec state has therefore sought other ways of meeting the challenge of making justice accessible, such as alternative dispute resolution (ADR) methods, which, unlike administrative justice, encourage the parties to actively seek a mutually acceptable resolution with a view to obtaining justice that meets their needs, more quickly and inexpensively than by going to court. Third-party mediation and conciliation of labour conflicts are examples of ADR methods.

The object of our analysis is to describe the scope of this phenomenon in Quebec and to offer critical reflection on the issues raised by this tendency to resort to ADR methods to promote justice in labour conflicts. The analysis will be limited to individual labour relations, the system under which most employees in Quebec work. In fact, close to 60% of Quebec employees are not part of a bargaining unit for which a union has been accredited to represent them.<sup>4</sup>

This analysis is presented in three parts. The first sets forth the main reasons why the Quebec government decided to encourage ADR methods as the principal means of resolving labour disputes. The second part presents the results of some institutional ADR methods in labour law. The third and last part is a critical, prospective analysis of the use of ADR methods to facilitate employees’ access to justice and improve the effectiveness of labour law.

## **I – Towards Justice Promoting Out-of-Court Settlement of Labour Conflicts in Quebec**

The development of labour law in Quebec rests on three pillars: Civil Law, collective labour relations and direct state involvement in determining working conditions for all employees.

Civil Law has played a real, if somewhat minimal, role in defining labour relations, starting with the Industrial Revolution in the early 19th century. Industrialization saw employers committing flagrant abuses that Civil Law was unable to prevent. That led to the birth of the labour movement and the development of collective labour relations, which grew significantly from the 1930s until the early 1970s. Since that time, the Quebec Labour Code (LC) has provided a legal framework for trade union representation and collective bargaining in companies.<sup>5</sup> The

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3. J.-F. Roberge, *La justice participative: Changer le milieu juridique par une culture intégrative de règlement des différends* (Cowansville, QC: Éditions Yvon Blais, 2011) at 23. [Translated from French]

4. A. Labrosse, “La présence syndicale au Québec en 2011” (2012) 9 *Regards sur le travail* at 1.

5. *Labour Code*, RSQ, c. C-27.

subsequent rapid rate of technological change in the means of production and the globalization of economic markets have adversely affected unionization rates in North America. Working conditions have deteriorated and the unionization rate in Quebec (the highest in North America) peaked at about 40%.

In parallel, since about the mid-1970s, Quebec state has acted on a massive scale to provide a framework for working conditions and relations between employers and employees,<sup>6</sup> as evidenced by the Act Respecting Labour Standards (ALS),<sup>7</sup> the Pay Equity Act (PEA),<sup>8</sup> the Act Respecting Occupational Health and Safety (AOHS)<sup>9</sup> and the Act Respecting Industrial Accidents and Occupational Diseases (AIAOD).<sup>10</sup> In addition, the enactment in 1975 of the Quebec Charter of Human Rights and Freedoms<sup>11</sup> brought profound change to relations between the state and individuals, as well as to private relations, including labour relations. These laws establish mandatory working conditions that provide universal protection for all employees. They are all laws of public order.<sup>12</sup>

For each of these laws, agencies are set up to ensure compliance with the standards. Our discussion will be limited to the Commission des normes du travail (Labour standards commission, or CNT), the Commission des relations du travail (Labour relations commission, or CRT), the Commission de l'équité salariale (Pay equity commission, or CÉS) and the Commission des lésions professionnelles (Employment injuries commission, or CLP). In so doing, it created, in appearance at least, a situation making it likely that complaints filed under those laws could become "judicialized" as court rules of evidence and procedure were incorporated into a conflict resolution process.<sup>13</sup>

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6. See, for example, G. Trudeau, "Conférence synthèse" in D. Roux and A.-M. Laflamme, eds., *Rapports hiérarchiques et anarchiques des règles en droit du travail: Charte, normes d'ordre public, convention collective, contrat de travail, etc.*, proceedings of the CRIMT conference held at Université Laval, November 8, 2007 (Montreal: Wilson & Lafleur, 2008) at 201.

7. *Act Respecting Labour Standards*, RSQ, c. N-1.1.

8. *Pay Equity Act*, RSQ, c. E-12.001.

9. *Act Respecting Occupational Health and Safety*, RSQ, c. S-2.1.

10. *Act Respecting Industrial Accidents and Occupational Diseases*, RSQ, c. A-3.001.

11. *Charter of Human Rights and Freedoms*, RSQ, c. C-12. The charter forbids all forms of discrimination (ss. 10–20) and enshrines freedoms, including freedom of association, religion, expression (s. 3), and the rights to dignity (s. 4) and to privacy (s. 5).

12. M. Cumyn, "Les sanctions des lois d'ordre public touchant à la justice contractuelle: Leurs finalités, leur efficacité" (2007) 41 *Revue Juridique Thémis* at 1.

13. R. Blouin, *La juridiciarisation de l'arbitrage de grief* (Cowansville, QC: Éditions Yvon Blais, 1996) at 119.

Stakeholders assessed the proposed conflict resolution methods in terms of cost as well as time and effectiveness. One result was the emergence of a school of thought that maintained that following the judicial model could lead to an overly judicialized system, or the “overly strict and exaggerated use of court rules of evidence and procedure.”<sup>14</sup> With respect to this situation, it has been suggested that “the true debate concerns the acceptable degree of judicialization,”<sup>15</sup> because the optimal threshold is subjective. For example, someone dismissed without good and sufficient cause who is still unemployed and cannot afford to pay a lawyer to defend his or her rights may believe the system is overly judicialized. An employer, on the other hand, might feel that an employee’s remedies overly judicialize the conflict when the process interferes with his or her management rights and imposes costs that eat into company profits.

Although the parties’ tolerance threshold varies according to their expressed positions, nonetheless, objectively speaking, an overly judicialized system can impede access to justice. Yet without true access to justice, employees’ rights, even those clearly recognized by laws of public order, cannot be protected.<sup>16</sup> Furthermore, as we shall see, CNT lawyers have been representing employees free of charge in any recourse under the ALS, undoubtedly the most important piece of legislation to Quebec employees since the 1990s, specifically to facilitate their access to justice.

But over time, administrative justice, in the form of the agencies and tribunals responsible for enforcing labour laws set up as the Quebec government’s response to an overly judicialized traditional justice system, has gradually become overly judicialized itself. As Daniel Mockle explains:

For all practical purposes, the complexity of the evidentiary and procedural issues and, above all, the highly technical nature of the various specialized litigation matters under them, make the assistance of a lawyer informed about these issues essential. Thus the increasing formalization of administrative justice is bringing it closer to the classic adversarial model typical of the operation of courts of law, with the prospect of those institutions undergoing a more or less subtle transformation into administrative courts.<sup>17</sup>

In 1989, concerned above all by the costs and delays engendered by the overly judicialized administrative justice system, the Quebec government formed the Groupe de Travail sur

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14. *Ibid.* at 124. [Translated from French]

15. *Ibid.* at 119. [Translated from French]

16 P.-C. Lafond, *L'accès à la justice au Québec: Portrait général* (Cowansville, QC: Éditions Yvon Blais, 2012) at 5–20.

17. D. Mockle, 1994, “Le développement des formules non juridictionnelles inspirées du modèle de l’Ombudsman” in K. Lippel, ed., *Nouvelles pratiques de gestion des litiges en droits social et du travail* (Cowansville, QC: Éditions Yvon Blais) at 62. [Translated from French]

l'Accessibilité à la Justice [working group on accessibility of justice].<sup>18</sup> The group came to the conclusion that to improve access to justice, there must be greater use of ADR methods.<sup>19</sup> So cutting costs and reducing delays in administrative justice were the government's main reasons for establishing institutional ADR methods.<sup>20</sup>

In short, it was decided that the administrative justice favoured in Quebec to counter the effects of the overly judicialized traditional justice system had itself become overly judicialized. The administrative justice system had become too complex, too time consuming and too expensive and did not settle labour conflicts as it was supposed to.<sup>21</sup> This position, expressed loud and clear by representatives of both employers and employees, prompted the state to introduce ADR methods into labour legislation.

## **II – Alternative Dispute Resolution of Labour Conflicts in Quebec: A Practice Widely Adopted by Stakeholders Under the Aegis of the State**

The ALS, LC, PEA, AOHS and AIAOD therefore all provide for the institutional ADR methods that allow employers and employees to settle their disputes out of court. The ADR methods used by those agencies are conciliation and mediation.<sup>22</sup>

### **A – Commission des normes du travail's Mediation Service**

The CNT[labour standards commission] was set up to enforce the labour standards laid out in the ALS.<sup>23</sup> It does so by receiving and handling several categories of complaints, chiefly pecuniary and administrative;<sup>24</sup> prohibited practices (dismissal for being pregnant, forced

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18. Ministère de la justice du Québec, *Rapport du Groupe de travail sur l'accessibilité à la justice* (Quebec City: Publications du Québec, 1991).

19. *Ibid.* at 189.

20. See, for example, J. Leroux, "La conciliation en matière de lésions professionnelles: Le jeu en vaut-il vraiment la chandelle," in K. Lippel, ed., *supra*, note 17 at 19–41.

21. See, for example, D. Mockle, "Les modes alternatifs de règlement des litiges en droit administratif" in J.-L. Baudoin, ed., *Médiation et modes alternatifs de règlement des conflits: Aspects nationaux et internationaux* (Cowansville, QC: Éditions Yvon Blais, 1997) at 93–98.

22. D. Veilleux and G. Trudeau, "La résolution à l'amiable des conflits et des litiges du travail au Québec: De la tradition vers de nouvelles directions" (2011) 1 *Revue d'arbitrage et de médiation* at 49 [Résolution]; and D. Veilleux and G. Trudeau, "Les maîtres du jeu dans la médiation institutionnelle des différends du travail au Québec" (2011) 2 *Revue d'arbitrage et de médiation* at 71.

23. ALS, s. 4.

24. ALS, ss. 98–121 and 139–147.

retirement at a certain age, etc.);<sup>25</sup> dismissal without good and sufficient cause (for employees having two or more years of continuous service at the same enterprise);<sup>26</sup> and psychological harassment.<sup>27</sup> When a pecuniary complaint is filed (claim for pay or other compensation not paid by the employer, such as vacation, statutory holidays, severance pay, etc.), the CNT investigates. If the complaint is deemed to be founded, the CNT then initiates, on the employee's behalf, proceedings against the employer in general courts of law.<sup>28</sup> The employee is represented without cost by CNT lawyers. In cases of complaints concerning prohibited practices, dismissal without good and sufficient cause and psychological harassment,<sup>29</sup> CNT lawyers also represent the employee free of charge at hearings before a specialized administrative tribunal, the CRT.

The CNT offers free mediation services to employees and employers when it receives a complaint concerning prohibited practices, psychological harassment or dismissal without good and sufficient cause. These two measures (free representation before tribunals and ADR) were taken to enable the parties to settle their conflicts more quickly and cheaply (especially for employees who were at a great disadvantage with respect to employers and who, most of the time, had to give up their suit or settle "at a bargain rate").

## **B – Commission des relations du travail's Conciliation Service**

The CRT [labour relations commission] is an administrative tribunal established in 2002 under the Labour Code. Today the CRT "has, through conciliation or decisions, a full range of remedies related to employment, both individual and collective labour relations, protection of the public through maintenance of essential services, the status of artists, professional qualifications and the construction industry. During legal strikes, it also determines and assesses essential services in both the public and quasi-public sectors."<sup>30</sup>

The CRT offers free conciliation to the parties to a dispute on request,<sup>31</sup> especially to ensure prompt handling of complaints. Employees whose complaints under the ALS have been referred

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25. *Ibid.*, ss. 122–123.3.

26. *Ibid.*, ss. 124–131.

27. *Ibid.*, ss. 123.6–123.16.

28. *Ibid.*, s. 113.

29. *Ibid.*, ss. 123.5, 123.13 and 126.1.

30. Quebec, "Commission des relations du travail: Notre mission," [http: www.crt.gouv.qc.ca/la-commission.html](http://www.crt.gouv.qc.ca/la-commission.html), accessed January 18, 2015. [Translated from French]

31. LC, s. 121.

to the CRT are usually represented free of charge by a CNT lawyer in conciliation or at a hearing before the CRT.

The CRT encourages the parties to a conflict to negotiate settlements by themselves or with the help of their qualified staff at any stage of the process. In short, the CRT, like the CNT, aims primarily for settlements to ensure that conflicts are resolved simply, speedily and inexpensively. When a settlement cannot be reached or when one of the parties fails to respect it, the case is referred to a hearing before a CRT commissioner for a final ruling. The parties may reach a settlement through negotiation any time prior to the commissioner's ruling.

### **C – Commission de l'Équité salariale's Conciliation Service**

The CÉS [pay equity commission] was established in 1996 to implement the Pay Equity Act "to redress differences in compensation due to the systemic gender discrimination suffered by persons who occupy positions in predominantly female job classes."<sup>32</sup>

Since 2002, the CÉS has offered a conciliation service in cases of disputes or complaints. Within the meaning of the PEA, a dispute is a conflict that occurs when the members of a company's pay equity committee, whether employee or employer representatives, cannot agree as to the application of the Act. One of the parties may then submit the dispute to the Commission.<sup>33</sup> Under the PEA, a complaint is a conflict that occurs when an employee or union feels that the members of the pay equity committee have failed to apply the Act. In such cases, a complaint may be filed with the CÉS.

The CÉS offers conciliation in both those types of conflict. Once the parties have agreed to take part, the CÉS appoints a conciliator to help settle the dispute. Should a settlement not be reached or should either of the parties fail to respect it, the CÉS investigates and issues a ruling.

### **D – Commission des lésions professionnelles' Conciliation Service**

The CLP [employment injuries commission] is an administrative tribunal established in 1998 under the Act to Establish the Commission des Lésions Professionnelles and Amending Various Legislative Provisions.<sup>34</sup> The CLP is governed by the AIAOD and charged with hearing and deciding contestations of decisions made by the Commission de la Santé et de la Sécurité du Travail du Québec [Quebec workers' compensation commission] after an administrative review.<sup>35</sup> Contestations mainly concern recognition of occupational injuries, the right to refuse

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32. PEA, s. 1.

33. *Ibid.*, ss. 96–111.

34. *Act to Establish the Commission des Lésions Professionnelles and Amending Various Legislative Provisions*, SQ, 1997, c. 27.

35. AIAOD, s. 369 *et seq.*

to perform dangerous work<sup>36</sup> and the right of pregnant or breast-feeding women to be preventively reassigned.<sup>37</sup>

Since its establishment, the CLP has offered free conciliation services to the parties to a dispute at any stage of a case. Conciliation is governed by legislation<sup>38</sup> and the CLP's internal procedures.<sup>39</sup> The goal is always to settle disputes quickly and efficiently. Generally speaking, a conflict between an employee and employer that has not been settled in conciliation is quickly referred to a CLP commissioner for adjudication, although settlement is possible at any time up until the commissioner issues a ruling.

## E – Results of Institutional ADR Methods

The tables below, based on information published by the four government agencies discussed above, show the results obtained for the ADR methods. Table 1 gives the percentage of parties who agree to mediation or conciliation rather than going before the administrative tribunal provided for by statute.

**Table 1**

**Acceptance rate (%) of proposed mediation or conciliation rather than administrative tribunal hearings, 2003–2004 to 2013–2014**

	2003 – 2004	2004 – 2005	2005 – 2006	2006 – 2007	2007 – 2008	2008 – 2009	2009 – 2010	2010 – 2011	2011 – 2012	2012 – 2013	2013 – 2014
CNT	82.1	84.9	89.6	85.7	84.9	85.5	85.4	83.9	84.9	85.8	
CÉS – Complaints	83	82	100	94.7	93	88.7	94.9	100	100	98	91
CÉS – Disputes	83	82	100	94.7	93	88.7	94.9	83	100	94	100

This table illustrates the steady success of mediation and conciliation over a decade. In the case of the CNT, acceptance rates remain stable but high, and in the case of CÉS, the rate has climbed to the ceiling of 100% in the case of disputes, while it has increased by 10% in the case of complaints.

36. AOHS, ss. 12–31.

37. *Ibid.*, ss. 40–48.

38. See AIAOD, ss. 429.44–429.48.

39. On this subject, see Québec, *Cadre d'exercice de la conciliation à la Commission des lésions professionnelles*, [http://www.clp.gouv.qc.ca/documentation/autres\\_documents/le\\_cadre\\_dexercice\\_de\\_la\\_conciliation.html](http://www.clp.gouv.qc.ca/documentation/autres_documents/le_cadre_dexercice_de_la_conciliation.html), accessed January 18, 2015.

Table 2 gives the percentage of disputes settled by mediation or conciliation.

**Table 2**  
**Success rate (%) of proposed mediation or conciliation rather than administrative tribunal hearings, 2003–2004 to 2013–2014**

	2003– 2004	2004 – 2005	2005 – 2006	2006 – 2007	2007 – 2008	2008 – 2009	2009 – 2010	2010 – 2011	2011 – 2012	2012 – 2013	2013 – 2014
CNT	64.9	70.1	67.2	64.8	67.5	64.3	63.7	67.9	69.2	71.5	
CRT	81.7	86.6	84	83.4	80.9	81.2	82.7	82.9	79.7	82.9	
CÉS – Complaints	–	–	–	–	–	89.6	92.3	100	95	100	99
CÉS – Disputes	–	–	–	–	–	89.6	92.3	85	85	100	75
CLP	49	49.5	48.6	48.8	49.8	51.6	48.3	46.9	48.9	51	51.9

This table shows how well these mechanisms find solutions accepted by both parties; the success rate varies depending on the agency, but is still impressive in the first four cases, ranging from 52% to 72%.

Despite disparities in the way the four government agencies compile statistics, the results of ADR methods in labour cases are still impressive. They demonstrate a legal culture strongly focused on out-of-court settlement of labour conflicts.

The results of complaints filed under the ALS and handled by the CRT are especially revealing of this culture (Table 3). Between 2010 and 2013, 60% of complaints were settled out of court. But there are also many settlements hidden behind the relatively high number of dropped cases (28%). In all, 88% of complaints submitted were settled or dropped without a CRT ruling.

**Table 3**

**Handling of complaints submitted to CRT under ALS, 2010–2011, 2011–2012 and 2012–2013<sup>40</sup>**

Total number of complaints closed by CRT (ALS)	7,386
Complaints handled without hearing	6,533 (88%)
Settlements (reached directly by parties or after pre-decision conciliation)	4,437 (60%)
Cases dropped	2,091 (28%)
Rulings on grounds (complaint accepted or rejected)	853 (12%)

Yet the data do not indicate which factors contribute to the success or failure of these mechanisms. Moreover, they say nothing about employee perceptions of respect for fairness during the mediation and conciliation process or about access to justice. And they do not say whether settlements reached under the aegis of these government agencies helped achieve the goals of the legislation.

**III – Do Québec ADR Methods Give Employees Access to Justice and Make Labour Laws More Effective?**

The Quebec state seems to have achieved its objective of giving employees easy access to labour conflict resolution mechanisms and limiting the effects of an overly judicialized system in such cases. In fact, the parties use ADR methods on a grand scale, and the figures show that these mechanisms result in settlements in a very large number of cases. For example, parties that take a conflict to the CNT agree to mediation in over 80% of cases, and the success rate of this form of ADR has held steady for the past decade. This success rate is over 80% for complaints (prohibited practice, unfair dismissal or psychological harassment) referred to the CRT in which the parties have agreed to attend a conciliation session.

Although those figures speak volumes, they cannot say what employees and employers actually perceive. Do they think that ADR methods deliver justice? And furthermore, objectively, do these mechanisms ensure the effectiveness of labour law? No studies have yet been done on precisely those questions.<sup>41</sup> It therefore remains to be seen whether the ADR methods offered by the CNT, CRT, CÉS and the CLP give employees greater access to justice and ensure the

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40. Data provided by the CRT. We would particularly like to thank Danuta Brzezinska for her invaluable help.

41. One of the co-authors of this paper, Errico Urbani, addresses all these questions in his doctoral dissertation, which he is writing under the supervision of the other two co-authors, professors Dominic Roux and Marie-Josée Legault. See E. Urbani, *Les modes institutionnels de prévention et de règlement des différends dans les rapports individuels du travail au Québec et leurs effets sur l'accès à la justice et l'effectivité des lois d'ordre public*, draft doctoral dissertation, Faculty of Law, Université Laval (in progress).

effectiveness of labour law. We have seen, however, that the purpose of establishing labour relations administrative tribunals was to solve the major social problem of the disparity of resources between the parties. Despite that, when employees use ADR methods outside the specific framework of the ALS, they do not enjoy free representation and must therefore pay a lawyer out of their own pockets, which does not help restore the balance between the parties. The literature also raises the question of the limited scope of a settlement, as compared to a court ruling, and that of the ability to ensure that public statute standards are met by private agreements.

### **A – Resource Disparity Between Parties**

According to Owen Fiss,<sup>42</sup> ADR methods pose a problem in conflict resolution, because they do not take into account the disparities in resources between the parties. He argues that the poorer party is generally less able to gather information that would be useful in negotiations. Furthermore, that party may not be able to afford to wait for damages to be paid, even if he or she is entitled to them. In short, the poorer party knows ahead of time that it will want to settle because it cannot afford to go to court.

According to Gay Clarke and Iyla Davies,<sup>43</sup> on the other hand, one must bear in mind that some ADR methods are provided free of charge. Furthermore, the aim of those mechanisms is to settle conflicts by means of mutually satisfactory agreements. Consequently, resource disparity between the parties is not an issue and except in extreme situations, ADR methods allow justice to be served relatively simply, quickly, inexpensively and in response to the parties' needs.

ADR methods provided for by Quebec labour law partially solves the problems raised by these authors. First of all, it is free to the parties. The organization, procedure and operation of the process are under the aegis of the state and set out in legislation. Last, mediators and conciliators are paid agents of the state, fully independent of the parties. In other words, these ADR methods are statute-based and public, not private, in nature.

That being said, aside from the three grounds for seeking remedies under the ALS (prohibited practice, dismissal without good and sufficient cause and psychological harassment), for which the employee is in almost all cases represented free of charge by a CNT lawyer, both during conciliation and at the CRT hearing, the issue of resource disparity is still relevant in ADR processes before the CÉS and CLP. In those cases, employees represent themselves or hire a lawyer at their own expense. The same question could be asked with regard to mediation organized by the CNT right after a complaint is filed under the ALS (except for a pecuniary complaint, as we have seen), as the employee is generally not represented by agency lawyers

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42. O. Fiss, "Against Settlement" (1984) 93 *Yale Law Journal* at 1082–1084. [article 1073–1090, citation 1076]

43. G. R. Clarke and I. T. Davies, "ADR: Argument for and Against Use of the Mediation Process Particularly in Family and Neighbourhood Disputes" (1991) 7 *Queensland University of Technology Law Journal* at 81–95.

until the case has been referred to the CRT for a hearing. (Even then, conciliation is still possible before the hearing takes place—and is very often used, with a success rate of 80%.)

While these ADR methods can resolve a significant number of labour conflicts, there is still reason to reflect on why the parties decided to resolve them in that way. The basis of that choice still not known: Is it a true preference or a forced choice? What is certain is that at the moment, those questions cannot be answered.

### **B – Limited Scope of Settlement As Opposed to Court Ruling**

Fiss also suggests ADR is a problem because it may lead people to wrongly believe that a settlement is an acceptable substitute for a judgment. For example, if one party is reluctant to comply with a settlement, the parties will find themselves back at square one. Like Lascoumes,<sup>44</sup> Fiss emphasizes that a settlement cannot serve as a foundation for subsequent court involvement. From this perspective, it could be said that essentially, the aim of a settlement is to allow the parties to “secure peace” privately, while the function of a judgment is much broader. A judgment is only the beginning in a public matter that may see continuing court involvement in the same case and also set a precedent for others to come.

Unlike Fiss, Clarke and Davies argue that the aim of ADR methods is to solve conflicts by means of mutually acceptable agreements. More particularly, ADR methods allow the parties to find a made-to-measure solution to their own particular conflict, which is part of their own particular reality. From this point of view, it is unlikely that one party would decide not to apply the settlement. It is also highly unlikely that other parties might find themselves in an identical situation. Consequently, publishing settlements would not be useful because they would be taken out of context.

In Quebec, the possibility of coercion in agreements reached through ADR methods is not really an issue. In fact, a validly reached settlement is a “transaction” that “has, between the parties, the authority of a final judgment.”<sup>45</sup> Furthermore, it is “subject to compulsory execution” once it has “been homologated.”<sup>46</sup> In other words, it has the same value and scope between the parties as a Québec Superior Court judgment. So an employee who reaches an agreement through an ADR method does not need to worry that the employer will not respect it. And the reverse is equally true: An employee who, for example, declines to return to work at a company as part of a settlement cannot change his or her mind later.

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44. P. Lascoumes, “De nouveaux lieux pour le règlement des conflits” (1990) 75 *Le Courrier du CNRS*, “Les sciences du droit” at 71–72.

45. *Civil Code of Québec*, SQ, 1991, c. 64, s. 2633.

46. *Ibid.*

As far as the publication of out-of-court settlements is concerned, unlike a court or tribunal ruling, a settlement achieved by an ADR method remains strictly confidential unless court approval is required.<sup>47</sup> In matters of prohibited practices, dismissal without good and sufficient cause and psychological harassment—to name just the three main grounds for seeking remedies under the ALS—confidentiality is essential to both the employer, who does not wish to publicize the amount paid or the terms of the agreement, and the employee, who does not wish to publicize the complaint nor the grounds for dismissal cited by the employer. The employee actually wishes to limit disclosure of personal information, so as not to harm his or her chances of finding another job quickly.

In contrast, a court judgment is public and establishes case law by interpreting the law. It also greatly exceeds the strict framework of an individual conflict between parties and adds to the body of interpretation of public policy standards respecting labour. In so doing, each ruling helps “say what the law is,” and may in that way be useful to other actors in similar situations. A settlement is confidential and limited solely to the particular context of the conflict between the two parties, is not so widely disseminated and is not applicable to other parties that may have the same conflict later. Does that mean that ADR methods do not help achieve the ends of a law of public order?

### ***C – Can Conflicts Involving the Application of Labour Standards of Public Order Be Resolved Through Private Agreements?***

Fiss raises an interesting point: In his opinion, it is unacceptable for conflicts involving public standards to be settled through private negotiations leading to strictly confidential agreements. In this respect, he questions the purpose of the various remedies exercised under civil law if parties seeking justice turn to mechanisms that do not publicize the application of rules that they have nonetheless chosen to govern them in their society. He feels that this does not contribute to development of the law.

Clarke and Davies, however, maintain that the very basis of ADR methods is to allow parties to take control over their own situation and, more particularly, not to involve the state in settling their conflicts. This helps reduce the backlog in the court system and lessen the tax burden on all taxpayers. The aim of ADR methods is to solve conflicts by taking into account both legal norms and person-oriented norms. This helps the parties feel that they have obtained justice. According to Clarke and Davies, the fact that negotiations are confidential facilitates the exchange of information between the parties, and not only fosters a better relationship between them or an amicable break in their relations, but also their commitment to compliance with the agreement.

This complex issue deserves its own analysis, which goes well beyond the scope of this paper. Nonetheless, we believe that answers could be supplied by parties who have used the

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47. *Résolution*, *supra*, note 22 at 70.

institutional ADR methods offered by the CNT, CRT, CÉS and CLP. Only they can confirm whether they really enjoyed access to justice and whether, looking back with a little distance, they actually obtained justice. Where applicable, it would be reasonable to claim that those mechanisms can foster the effectiveness of labour law.

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The use of ADR methods to obtain justice and strengthen the effectiveness of labour law definitely raises some very important questions, but as all we have to go on at present is general ideological considerations, it is impossible to answer them. Hence the need to conduct in-depth empirical research, questioning front-line actors (employees, employers, their respective legal counsel, mediators and conciliators).

A few years ago, Jean-Yves Brière wrote this about the results obtained through conciliation offered by the CRT, an opinion which could easily apply to other institutional ADR methods:

Regardless of these impressive figures, qualitative analysis of settlements needs to be done. Indeed, not only must a settlement be reached, but it must respect the parameters of legal precedent and be satisfactory to both parties. We currently have no data on the subject and so must be cautious in analysing the statistics.<sup>48</sup>

Institutional ADR methods are means of social regulation that help find pragmatic solutions to conflicts. They can solve conflicts more simply, quickly and cheaply than judicial and administrative tribunals do. Aside from the fact of settling such conflicts relatively simply, quickly and inexpensively, it must be determined whether employees feel that the institutional ADR methods offered by the CNT, CRT, CÉS and CLP truly improve their access to justice, both objectively, in terms of respecting the aims of the law, and subjectively, in terms of their representations of justice. We also believe that it would be just as legitimate to study the effects of such a trend towards instituting ADR methods from both a societal and individual point of view, for the satisfaction of those seeking justice is only one of the goals of justice. Fairness and consistency in the application of the law is another.

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48. J.-Y. Brière, "La Commission des relations du travail: Cinq ans déjà! (première partie)" (2009) 9:9 *Bulletin CCH Travail*. [Translated from French]