



# **THE SENSE OF ACCESS TO JUSTICE FOLLOWING A SETTLEMENT CONFERENCE**

RESEARCH REPORT ON THE EXPERIENCE  
OF CITIZENS AND LAWYERS AT THE  
SUPERIOR COURT AND COURT OF QUÉBEC

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01/12/2014



## FOREWORD

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The Superior Court and the Court of Québec have been enthusiastic participants in the research project launched by Professor Jean-François Roberge of the Faculty of Law at Université de Sherbrooke to look at settlement conferences as a tool to improve access to justice. The project could not have come into being without the enthusiasm and determination of Judge Pierre-C. Gagnon of the Superior Court, who made it the central element of his period of study leave with Professor Roberge. Judge Gagnon then “sold” the project to the Superior Court and the Court of Québec before contacting the presidents of the bar associations concerned one by one.

After the Barreau de Montréal, a partner from the outset, other bar associations agreed to take part in this first-ever empirical study of how participants assessed settlement conferences ten years after they first “appeared” in the Code of Civil Procedure. These were the bar associations in the districts of Arthabaska, Bedford, Laurentides-Lanaudière, Laval, Longueuil, Outaouais, Richelieu, Québec, Saguenay-Lac-Saint-Jean and Saint-François. All these players in the judicial system recognized that the study provided an excellent opportunity to validate their work and could be used as a tool to improve the supply of justice services by looking at the experiences reported at first hand by people who had taken part in a settlement conference. The project would not have been possible without the ongoing collaboration of judges, lawyers and parties, who agreed to complete questionnaires to describe and assess their experience of the settlement conference.

The research findings are encouraging: users assess the quality and value of the settlement conference in an extremely positive way, and its use helps increase public confidence in the judicial system. The value of Professor Roberge’s study also lies in the possibilities for the future he outlines for lawyers, judges and chief justices, guiding the actions needed to make settlement conferences even more useful and beneficial. The work accomplished is made even more significant by the fact that it has taken place against the backdrop of a culture shift introduced by the new Code of Civil Procedure, in particular concerning the promotion of amicable dispute resolution processes.

We would like to thank all respondents for taking the time to share their impressions and comments, which created the precious raw material analyzed by the university research team to improve our understanding of the impact of settlement conferences on access to justice, along with the factors that encourage parties to seek an amicable resolution to their dispute.

We must stress the outstanding work of the Associate Chief Judge for the Civil Division of the Court of Québec, Pierre E. Audet, Judge André Roy, at the time responsible at the Superior Court for settlement conferences in all the judicial districts in Montréal and its surrounding area, and Judge Sylvain Coutlée, research coordinator at the Court of Québec.

Once again, we would like to congratulate and offer our sincere thanks to Professor Jean-François Roberge and his team for the remarkable quality of their research report, whose original approach will help us work more effectively to improve the offer of participatory justice and better meet the needs of all citizens.

The Honourable François Rolland  
Chief Justice of the Superior Court

The Honourable Élisabeth Corte  
Chief Judge of the Court of Québec



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# ABSTRACT

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This research report constitutes the first empirical study of the “sense of access to justice” (SAJ). We measured the feeling of fairness, the feeling of usefulness and the feeling of professional support reported by parties and lawyers after taking part in a settlement conference presided by a judge of the Superior Court or the Court of Québec. Judges play an active role as conciliators in order to “(...) facilitate dialogue between the parties to help them better understand and assess their respective needs, interests and positions, and explore solutions that may lead to a mutually satisfactory agreement to resolve the dispute” (Article 162 in Québec’s new Code of Civil Procedure).

Our results show that the settlement conference promotes access to justice. Users assess its quality and value extremely positively. We note that the support provided by judges in seeking a solution that is considered fair by the parties and adapted to their actual needs and interests has a considerable influence over the parties’ SAJ. We also show that among the benefits sought by settlement conference users, the creation of a climate of trust is a priority. Our results show that an increase in costs (financial costs, opportunity costs, time) during the judicial process has a negative impact on the SAJ. In addition, we observe that the probability of an agreement increases if the solution is quicker and creates less risk than a trial and if the parties feel that they have been treated with respect and dignity.

Our results show that settlement conferences promote access to justice. Users assess their quality and value highly.

Our study is part of a current trend in Québec, Canada and the world to reform the judicial system in order to take the user’s point of view into account, promoting access to justice and support for the rule of law.



# INTRODUCTION

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Access to justice is one of the major challenges facing the Canadian judicial system.<sup>1</sup> Over the last few years, alternative dispute resolution methods have been established within Canadian courts, and are considered as a promising way to promote access to justice.<sup>2</sup> In Québec, settlement conferences (SCs) presided by a judge were introduced during the civil procedure reform of 2003.<sup>3</sup> They are not mandatory, and all types of court case are admissible. A SC may last an entire day. The judicial mediation method applied is integrative problem-solving.<sup>4</sup> The judge intervenes mainly to facilitate communication and define interests (facilitative intervention) rather than to evaluate the merit of each party's legal position (evaluative intervention).<sup>5</sup> The judge plays an active role as a conciliator, in order to "(...) facilitate dialogue between the parties to help them better understand and assess their respective needs, interests and positions, and explore solutions that may lead to a mutually satisfactory agreement to resolve the dispute" (Article 162, new Québec Code of Civil Procedure).

Ten years on from 2003, Québec's courts have decided to review the situation and report on the progress made. Although SCs have a high resolution rate (80% on average), we know little about the quality of the process and the agreements negotiated. Until now, no Québec-wide empirical study had been conducted to measure the parties' and lawyers' perception of the justice offered by the SC. Do SC users feel that they have had "access to justice"?

Our study measures the users' own assessment of the quality and value of the outcome, process, and judge's actions during the SC.

What are the objectives of our field study? The first is to measure the "sense of access to justice" (SAJ) of parties and lawyers who have been through the SC process, as expressed via their assessment of the quality of the outcome, the process and the judge's actions. The second is to identify the factors having a determining influence over the level of the "sense of access to justice" and the probability of achieving an agreement following the SC. This influence is measured by the relative strength of the factors of (1) equity, (2) usefulness and (3) support from legal professionals (judge, lawyers) during the SC.

What are the expected outcomes of our study, and how will they be of benefit? Our research targets three outcomes. First, an assessment of the relative sense of access to justice felt by citizens and lawyers who have taken part in a SC at the Superior Court or Court of Québec.<sup>6</sup> This will help us define the strengths of the SC and the aspects that need improvement. Second, an identification of the factors influencing the degree of satisfaction of SC users, and the relative importance of the factors. These indicators will be used to improve the actions of judge-mediators and legal advisers to ensure that the SC is adapted to the needs of citizens. Third, an identification of the factors that influence the probability of reaching a negotiated agreement during the SC, ranked by order of importance. By understanding these factors, negotiations between the parties will be made more efficient and fairer, and the probability of achieving an agreement that matches the realities they face will be increased.

# 1. REFERENCE FRAMEWORK FOR THE SENSE OF ACCESS TO JUSTICE

Our theoretical reference framework for the “sense of access to justice” (SAJ) is based on (1) a feeling of fairness with respect to the outcome and SC process, (2) a feeling of usefulness with respect to the cost-effectiveness of the SC, and (3) a sense that professional support was available from the judge mediator and legal adviser during the SC. This was the reference framework used to draw up the questionnaire.

**THE SENSE OF ACCESS TO JUSTICE (SAJ) IS A COMBINATION OF THREE FEELINGS EXPERIENCED BY SC USERS:**

- a feeling of fairness;
- a feeling of usefulness;
- a feeling that professional support was provided.



## 1.1. FEELING OF FAIRNESS (FF) <sup>7</sup>

Recent research on cooperation, in the field of social psychology, shows that people are not solely motivated by the need to maximize gains and minimize losses.<sup>8</sup> They also want to do what is right, appropriate and fair. Concerning their feelings of satisfaction, the way in which they are treated and in which their problems are managed by the courts is as important as the outcome of their case.<sup>9</sup> If, for example, people perceive that the process used to resolve a dispute or make a decision is fair, they will be more likely to find its outcome fair, even if it is not in their favour. In addition, people who perceive a process as being fair will be more likely to abide by the result.

The feeling of fairness reflects how citizens and lawyers assess the quality of the outcome and the quality of the process following a SC.

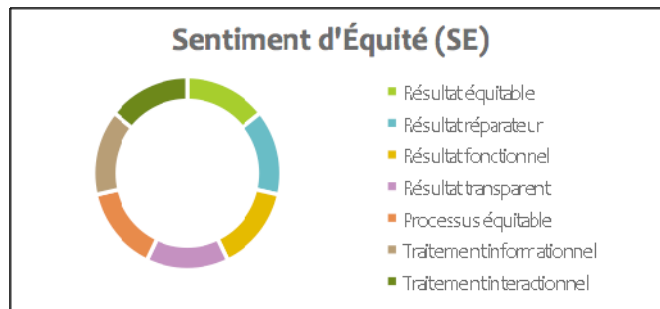
With respect to settlement conferences, the parties are also concerned by both the quality of the *outcome* and the quality of the *process* leading to the outcome. The parties compare their outcomes on the basis of a standard,

which is what they feel to be fair in the circumstances.<sup>10</sup> In other words, they have an idea of what they think they are entitled to receive, and assess the outcome on the basis of this standard. The parties will also compare the process to expected standards of behaviour for social interactions and decision-making.<sup>11</sup> This subjective assessment of the outcome and process influences their level of satisfaction with the settlement conference itself.

The quality of the *outcome* is generally assessed using four principles of fairness, namely: (1) *distributive fairness*– the outcome is fair because it is founded either on the criterion of merit or equality, or on the criterion of capacity, limits and needs; (2) *reparative fairness* – the outcome is reparative because it compensates for financial and non-financial loss; (3) *functional fairness* – the outcome is functional because it resolves the actual problem; (4) *transparent fairness* – the outcome is transparent because it is substantiated and comparable to the outcome achieved in similar situations.<sup>12</sup>

The quality of the *process* may be assessed using three principles of fairness, namely: (1) *fair process* – the decision-making process is coherent and impartial and allows all the parties to be heard, considered and involved; (2) *informational treatment* – transparent communications lead to an enlightened decision; (3) *interactional treatment* – sincere communications respect the parties' status and dignity.<sup>13</sup> Our questionnaire measures the quality of the SC outcome and process using this typology of fairness.



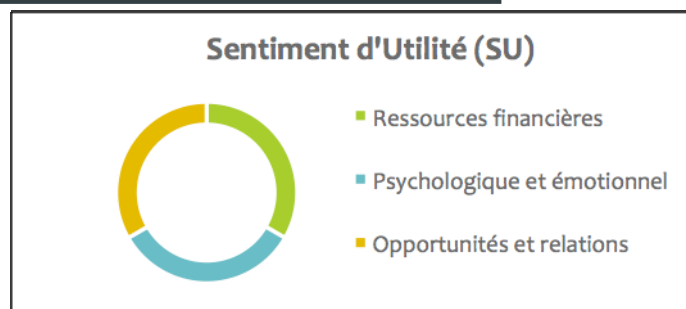


**Figure 1.** Feeling of fairness: fair outcome, reparative outcome, functional outcome, transparent outcome, fair process, informational treatment, interactional treatment.

## 1.2. FEELING OF USEFULNESS (FU)<sup>14</sup>

Research focusing on the economic analysis of legal conflicts has highlighted the importance of an utilitarian assessment of the cost-effectiveness of individual and group choices.<sup>15</sup> In a judicial context, the parties assess the potential costs and gains of the dispute resolution processes available to them.<sup>16</sup> As one of their criteria, the solution negotiated during a SC may be assessed against the known, probable constraints associated with a trial. The costs borne by the parties to obtain justice may be placed in three categories: (1) financial costs – judicial and extra-judicial costs connected with the court process (lawyer's fees, bailiff, witness and expert fees, costs for the locating, collecting, translation and forwarding of information, etc.); (2) psychological and emotional costs (stress, negative feelings, etc.); (3) opportunity costs in terms of business and reputation (network of contacts, clients, funders, business partners, etc.)<sup>17</sup>. Our questionnaire measured the value of the costs and potential benefits of the SC, based on this typology of usefulness.

The feeling of usefulness reflects how users assess the value of the SC in terms of its cost-effectiveness.



**Figure 2.** Feeling of usefulness: financial cost-effectiveness, psychological and emotional cost-effectiveness, cost-effectiveness in terms of opportunities and relations.

### 1.3. FEELING OF PROFESSIONAL SUPPORT (FPS)<sup>18</sup>

Several recent reports have concluded that professional legal practices must evolve in order to ensure a more effective administration of justice and enhance citizens' support for the rule of law.<sup>19</sup> In recent years, several authors have focused on changes in the professional roles of lawyers<sup>20</sup> and judges.<sup>21</sup>

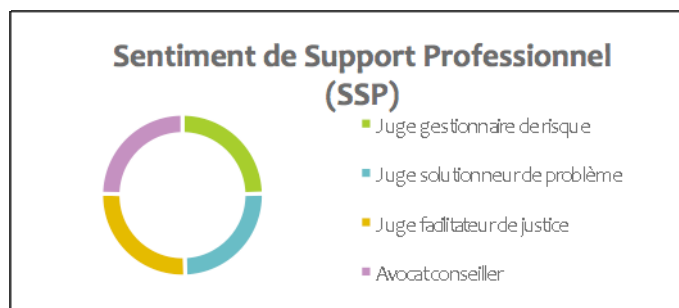
The feeling of professional support reflects how users assess the quality of the judge-mediator's actions to help the parties obtain justice and the quality of the lawyer's actions as an adviser.

In many countries, there is a trend for judges to adopt facilitative and problem-resolution approaches during hearings and settlement conferences,<sup>22</sup> and Canada is one of the leaders in the field. We carried out a quantitative empirical study of all Canadian judges sitting in first instance to determine the range of conciliation styles applied. This study identified three approaches used by judge-mediators to help the parties obtain justice: (1) *risk manager* – an expert who assesses the strengths and weaknesses of each party's

case to orient their negotiations towards a solution that is well-founded in law; (2) *problem-solver* – a communications and negotiations expert who identifies the interests of the parties to orient negotiations towards a solution that matches reality; (3) *justice facilitator* – a facilitator who develops a relationship of cooperation and trust between the parties to orient negotiations towards a fair solution that will generate a feeling of justice.<sup>23</sup> Our questionnaire was based on this typology of approaches.

As a complement, we conducted an exploratory empirical study of citizens in Québec to document their vision of “participatory justice”, in other words their involvement in a process to define and settle their dispute in a way that generates a feeling of justice for them.<sup>24</sup> Our findings show that the qualities of collaboration, respect, proactiveness and creativity are statistically correlated to a significant degree with the concept of participatory justice.<sup>25</sup> Our findings suggest that participatory justice practised on the basis of these qualities has potential for improving access to justice.<sup>26</sup>

In a settlement conference, the role played by lawyers differs from their habitual role as advocates for clients before the civil courts.<sup>27</sup> Lawyers are required to act as advisers, since it is actually the client who negotiates a satisfactory solution.<sup>28</sup> For this reason, the role of a lawyer in an SC can be assessed using three criteria: (1) preparation of client before the SC; (2) legal advice given during the SC to help the client assess his or her rights and obligations; and (3) the advice given on the value of the negotiated agreement compared to the client's various interests connected with the resolution of the dispute. In Québec, lawyers have a professional duty in this respect,<sup>29</sup> and our questionnaire takes this into consideration.



**Figure 3.** Feeling of professional support: the judge as risk manager, the judge as problem solver, the judge as justice facilitator, the lawyer as adviser.



## 2. RESEARCH METHODOLOGY

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### 2.1. RESEARCH PROCESS

The research was carried out with assistance from the Superior Court, the Court of Québec, and the bar associations in the following judicial districts: Arthabaska, Bedford, Laurentides-Lanaudière, Laval, Longueuil, Montréal, Outaouais, Québec, Saint-François and Saguenay-Lac Saint-Jean.

The research was carried out with assistance from the Superior Court, the Court of Québec and the bar associations in several districts. 740 participants (380 citizens and 360 lawyers) completed the questionnaire.

In all, 740 participants completed the questionnaire to assess the settlement conference process. Of this number, 380 were citizens (51% of the sample, with 259 respondents for the Superior Court and 121 for the Court of Québec), and 360 lawyers (49% of the sample, with 210 respondents for the Superior Court and 150 for the Court of Québec).

We used an empirical quantitative methodology, gathering information on the experience of each participant using a self-administered questionnaire (French and English) completed in a single session following the settlement conference. The parties

and lawyers could either complete and submit the questionnaire at the conference location, or mail it back in a pre-paid envelope. Since each settlement conference experience is unique, the parties and lawyers could complete a questionnaire every time they took part in a settlement conference.

The questionnaire measured the methods used during the settlement conference (section 3 of the questionnaire) and assessed its quality and value once it was over (section 4 of the questionnaire). The questionnaire included questions to establish the degree of conflict between the parties (section 2). Respondents were asked to indicate their degree of agreement using a 6-point Likert scale (1 = completely disagree – 6 = completely agree). We also included questions to group respondents by socio-demographic category (type of case, sex, educational level, etc.) (section 1). The questionnaire had a high level of psychometric fidelity.<sup>30</sup>

### 2.2. ANALYSIS METHODS

We used three analysis methods to process the answers to the questionnaire : (1) *descriptive* – a measurement of frequency in terms of means and standard deviations; (2) *comparative* – a measurement of statistically significant differences between groups of respondents; and (3) *correlative* – a measurement of correlations between the settlement conference process and its outcome.

For our first research objective, which was to measure the sense of access to justice experienced by participants in a settlement conference, we used a descriptive approach. We then used a comparative method to better understand the differences between citizens and lawyers.

We used correlation analyses for our second research objective, which was to identify the factors having a determining influence over the degree of the sense of access to justice (SAJ) and the probability of achieving an amicable agreement during the settlement conference. We wanted to better understand the relationship between the offer of justice during the settlement conference (section 3 of the questionnaire) and the sense of justice at the end of the settlement conference (section 4). Last, we used a comparative method to better understand the differences based on the role of the respondent (citizen or lawyer), the status of the parties (natural person or legal person) and the type of case (family, civil, commercial). This gave us an opportunity to check whether any differences existed between these categories and whether or not they were due to chance. We used the statistics software SPSS (version 21) for our analyses.

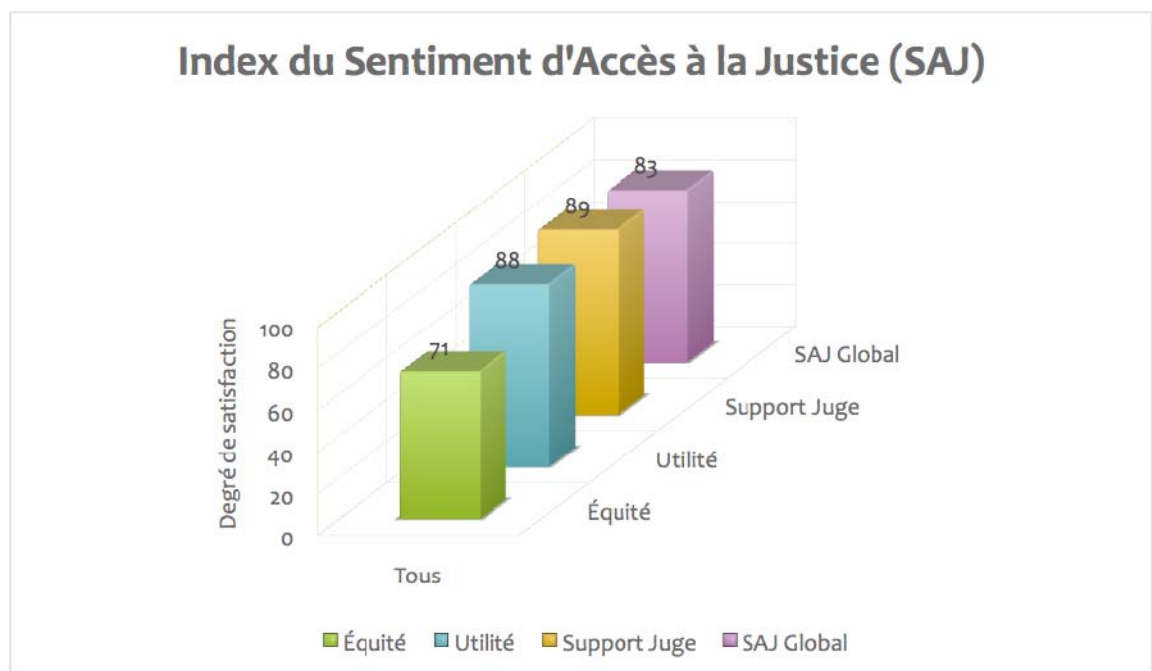
### 3. RESEARCH RESULTS AND INTERPRETATION

This section presents the results of our empirical research, along with our interpretation of the results. The results are presented under three headings: (1) an index of the sense of access to justice (SAJ) experienced by settlement conference users, (2) the determining factors influencing the degree of the sense of access to justice, and (3) the determining factors influencing the probability of an amicable agreement.

#### 3.1. INDEX OF THE SENSE OF ACCESS TO JUSTICE (SAJ)

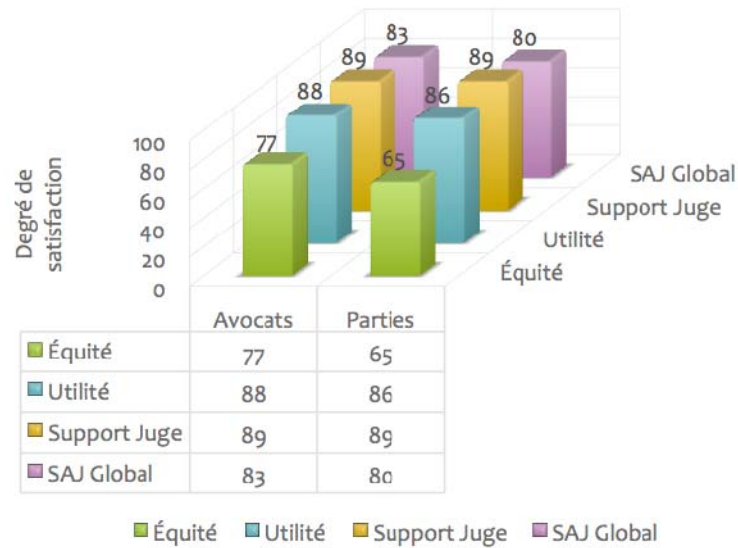
The first objective of our research was to see how users assessed the quality and value of the settlement conference. We measured their *sense of access to justice* (SAJ) (figures 4 and 5), and this assessment can be interpreted as their degree of satisfaction based on their needs. The SAJ is a combination of three of the user's feeling from the settlement conference, namely (1) the feeling of fairness, (2) the feeling of usefulness, and (3) the feeling of professional support. These three feelings are derived from the users' self-assessed satisfaction with four aspects: quality of the outcome (fair, reparative, functional, transparent), quality of the process (fair, informational, interpersonal), cost-effectiveness (resource cost, psychological cost, opportunity cost) and the quality of the judge's actions at the settlement conference (figure 6). Our results distinguish between the experience reported by citizens and lawyers. The index is calculated using the respondents' mean response. Each of the three feelings (fairness, usefulness, support) was given equal weighting in calculating the overall SAJ. The results are expressed on a scale of 1 to 100, representing the percentage degree of satisfaction of settlement conference users.

Our results show how the parties and lawyers assess the quality and value of the SC as a tool for access to justice. We can then measure their sense of access to justice (SAJ).

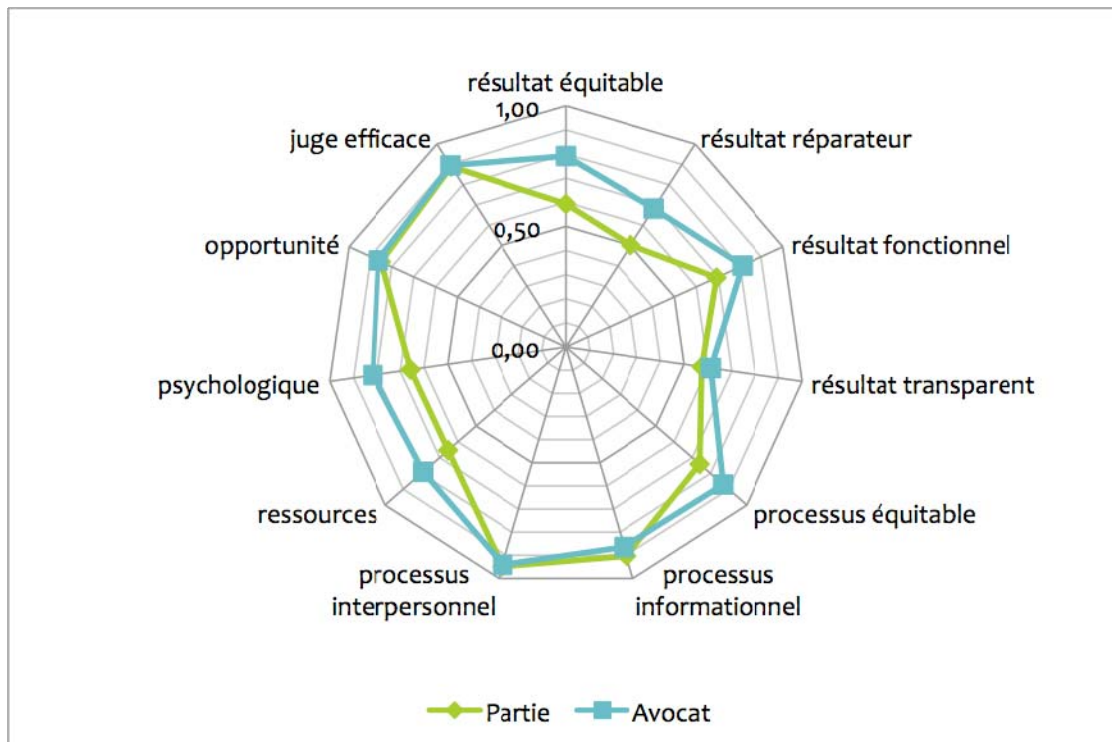


**Figure 4.** The degree of the sense of access to justice among all settlement conference users (citizens and lawyers combined) based on the feeling of fairness, feeling of usefulness and sense of support from the judge (on a scale of 0 to 100).

## Index du Sentiment d'Accès à la Justice (SAJ)



**Figure 5.** Degree of the sense of access to justice among citizens and lawyers having participated in a settlement conference based on the feeling of fairness, feeling of usefulness and sense of support from the judge (on a scale of 0 to 100).



**Figure 6.** Degree of satisfaction expressed by citizens and lawyers based on the quality of the outcome, quality of the process, cost-effectiveness and quality of support from the judge (on a scale of 0 to 100).

Our study also measured the parties' satisfaction with the quality of the support provided by their *lawyer*, if applicable. The results show that the satisfaction rate for support from a lawyer at a settlement conference was extremely high, whether or not an agreement was achieved. The parties report an overall satisfaction rate of 87% for their lawyer at a settlement conference. The rate is 86% for preparation for the settlement conference, 87% for legal advice, and 89% for advice concerning the value of the negotiated solution. In addition, there was no significant difference between the three categories mentioned above, indicating that lawyers not only successfully perform their role as legal advisers to their clients' satisfaction, but also their more general duty to prepare for the conference and evaluate the value of the solution.

Our study is innovative in that it is the first to measure empirically the sense of access to justice among settlement conference users. This is a response to the need clearly expressed, in particular, in the Canadian reports of the National Action Committee on Access to Justice in Civil and Family Matters and the Canadian Bar Association published in 2013.<sup>31</sup> It is essential to ascertain users' views before making decisions on public or private policies or actions in response to the access to justice challenge.

It is crucial to measure the views of justice system users empirically in order to meet the access to justice challenge.

Our results show that the overall sense of access to justice reported by settlement conference users is 83 out of a possible score of 100 (figure 4).<sup>32</sup> We note that the assessment of the quality and value of the settlement conference is slightly higher among lawyers than among citizens (figure 5). The feeling of professional support from the judge and the feeling of usefulness are perceived by users as the strengths of the settlement conference (with satisfaction rates of 89% and 87%, respectively). The feeling of fairness reported by settlement conference users could be improved, especially among citizens (satisfaction rate of 65%).

More specifically, our results show that lawyers assess the quality of the outcome and cost-effectiveness more positively than the parties (figure 6). This difference may be explained by the lawyers' trial experience, which gives them a basis for comparison when assessing the settlement conference. Our results show that the quality of the settlement conference process (combined rate of 88%) and the effectiveness of the judge (rate of 89%) achieve the highest satisfaction rates. Interpersonal treatment is identified by parties and lawyers as the greatest strength of the settlement conference (satisfaction rate of 94%). These results can be explained, in particular, by the fact that Québec judges are trained in the settlement conference process, with a focus on mediation and integrative problem solving; this means that the judges intervene more to facilitate communication and an understanding of interests than to assess the merit of the parties' legal positions.

The quality of interpersonal relations is seen by the parties and lawyers as the greatest strength of the SC. However, the feeling of fairness reported by users could be improved, especially for citizens.

Given these strong results, we can conclude that the settlement conference approach has proved itself able to promote access to justice, the objective when it was introduced into Québec's *Code of Civil Procedure* in 2003. The results offer a benchmark that will help the courts identify and determine which aspects they wish to improve, and ultimately to determine the target level of access to justice. From this point of view, the courts could use these results

to assess their own performance over time and to ascertain whether the quality of the justice provided by settlement conferences has increased or decreased over the years. Our results can be used as a benchmark to measure the impact of future changes of direction or practice that the courts wish to implement.

### 3.2. FACTORS INFLUENCING THE SENSE OF ACCESS TO JUSTICE (SAJ)

The second objective of our research was to identify the factors that have a determining influence over the *sense of access to justice* (SAJ) reported by settlement conference users. The factors can be practices or patterns of behaviour during the settlement conference, which we measured using the questionnaire (section 3). We measured users' perception of the presence and degree of importance of these patterns, which are connected to the outcome sought at the settlement conference, the process and communication, the judge's actions and the role of lawyers.<sup>33</sup>

Our results identify the factors which have a determining influence over the level of the sense of access to justice (SAJ) reported by SC users.

We measured perceptions with respect to the criteria of distributive justice,<sup>34</sup> procedural justice,<sup>35</sup> interactional justice,<sup>36</sup> the instrumental motivation for the negotiated agreement,<sup>37</sup> the actions of the judge as a risk manager, problem solver or justice facilitator,<sup>38</sup> and the support offered by the advising lawyer.<sup>39</sup>

The results are presented under the three headings of our reference framework for the sense of access to justice, namely the feeling of fairness, the feeling of usefulness and the feeling of professional support, using a scale of 0 to 1 which represents the correlation between the behavioural factor and one of the three components (fairness, usefulness, support) of the sense of access to justice. The closer the result is to 1, the more the factor has a determining influence. A perfect match is shown by the score of 1. The factors are presented by order of decreasing importance, from the most to the least influential. Only the factors with the most significant influence are shown in figures 7 to 9; the factors found to be statistically significant, but with a lesser influence, are listed in the notes at the end of the document. Other factors were found to be non-significant in terms of influencing the SAJ.

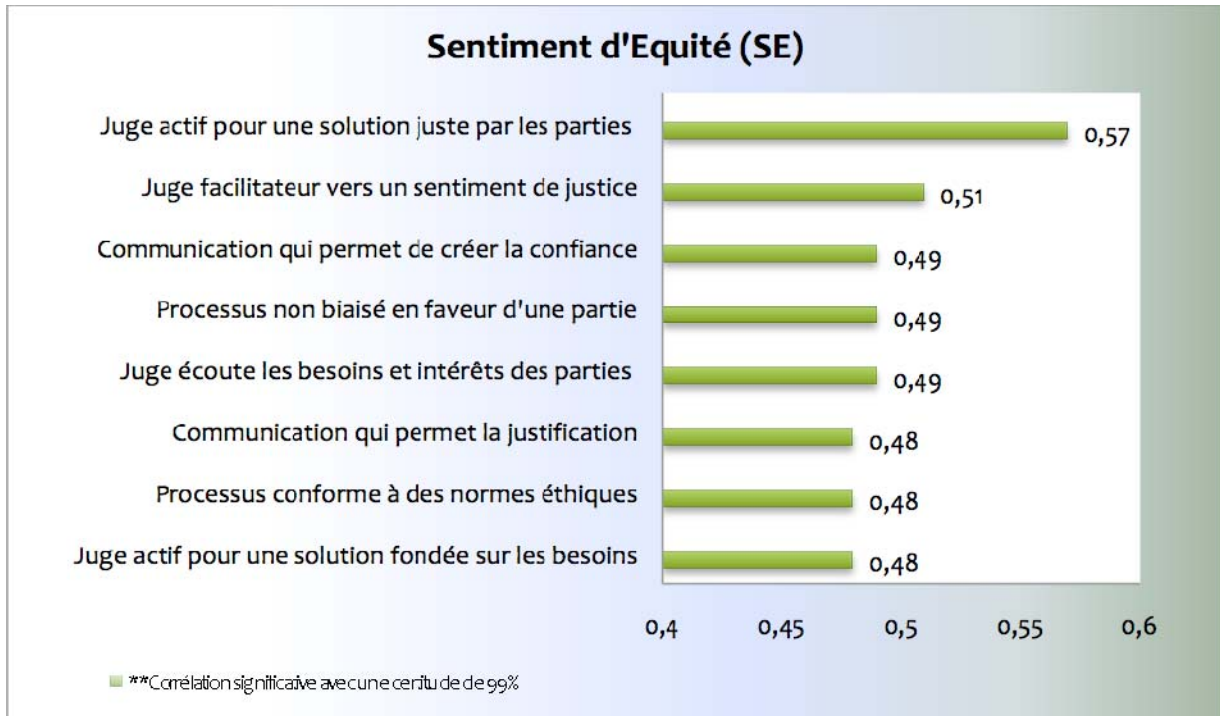


Figure 7. Factors influencing the feeling of fairness.<sup>40</sup>



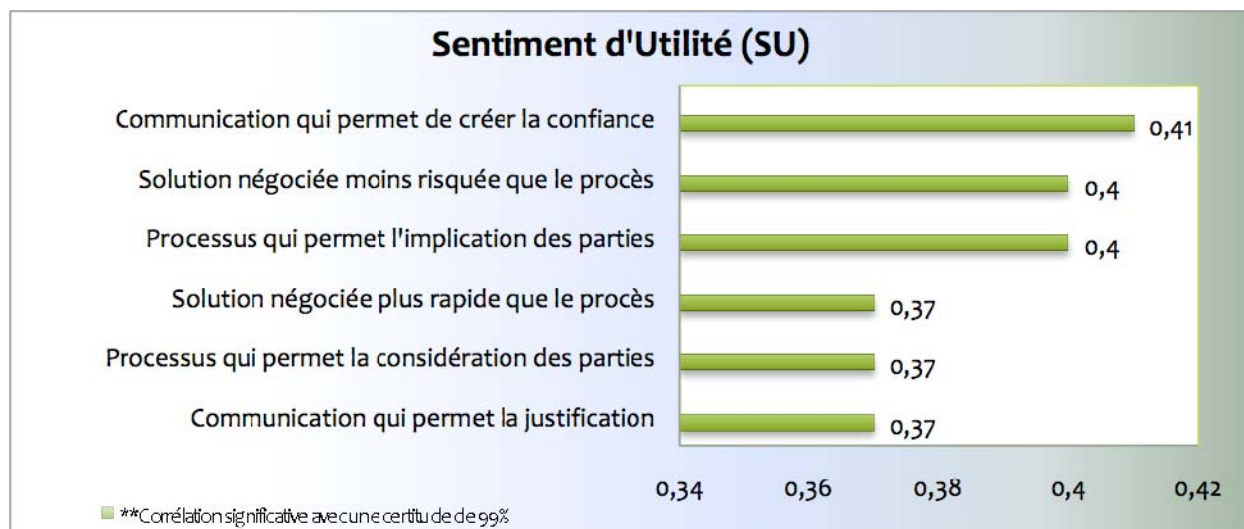


Figure 8. Factors influencing the feeling of usefulness<sup>41</sup>.

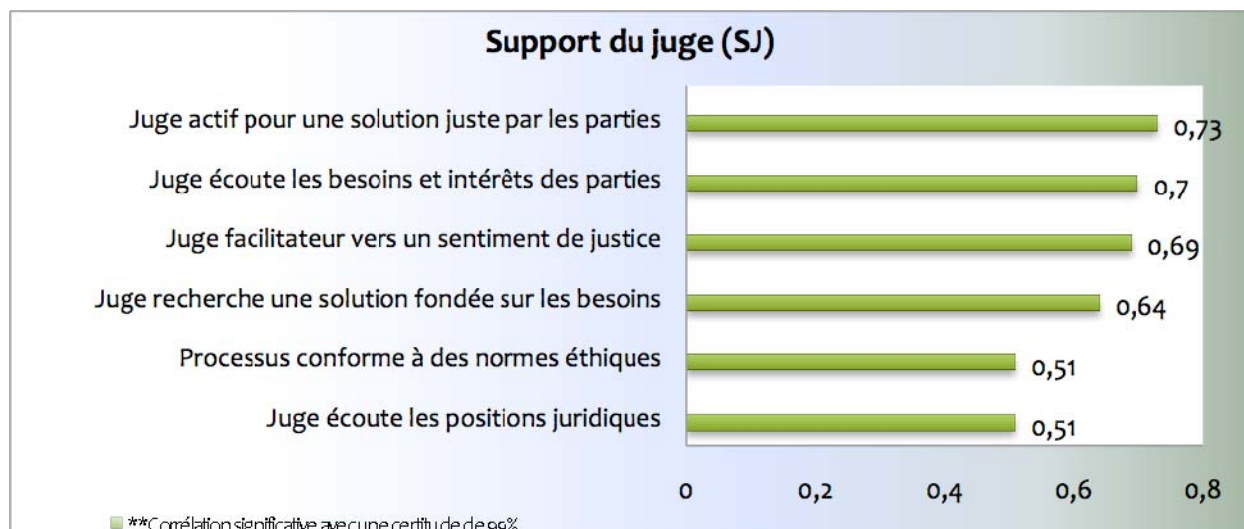


Figure 9. Factors influencing the feeling of professional support from the judge.<sup>42</sup>

In addition to analyzing the correlations, as presented above in figures 7 to 9, we also compared the groups of respondents and noted statistically significant differences concerning their satisfaction with the settlement conference process. We noticed that lawyers were, on average, more likely to be satisfied with the settlement conference process than citizens.<sup>43</sup> A significant difference was noted between the assessment of defendants, which was higher, and plaintiffs, which was lower.<sup>44</sup>

Our results show a significant difference in terms of satisfaction with costs. The higher the costs, the lower the satisfaction rate.

Our results also show that parties and lawyers were more satisfied with the settlement conference experience when an agreement was reached.<sup>45</sup> In addition, we noted a significant difference concerning the satisfaction reported by participants in a civil settlement conference compared to a commercial settlement conference, with the civil participants reporting greater satisfaction.<sup>46</sup> There was also a significant difference concerning satisfaction with the costs. The higher the costs incurred in the judicial system, the lower the satisfaction rate. The parties that spent more than \$31,000 were less satisfied than those that spent less.<sup>47</sup> Satisfaction was also lower among those who lost more than \$10,000 in opportunity costs<sup>48</sup> or spent more than 100 hours resolving the problem.<sup>49</sup>



The correlations presented in the figures above range from 0.37 to 0.73.<sup>50</sup> For an initial study of the sense of access to justice, we find these correlations high. Factors between 0.6 and 1 have a strong influence over the SAJ, since their presence during the settlement conference is linked to a high assessment by respondents of their sense of access to justice. These factors concern the support provided by the judge. In short, a judge who helps the parties find a solution that appears to them to be fair and adapted to their needs offers a type of support that has a strong influence over their satisfaction and their sense of having had access to justice.

In short, a judge who helps the parties seek a solution that appears to them to be fair and adapted to their needs provides a kind of support that strongly influences their sense of access to justice.

The factors that score between 0.4 and 0.59 have a moderate influence over the feeling of fairness, the feeling of usefulness and the feeling of support from the judge, which make up the sense of access to justice reported by settlement conference users. These factors are: support from the judge in finding a solution that the parties consider fair and adapted to their needs, a communication process that creates trust, and an impartial process that complies with ethical standards and ensures that the parties feel involved and considered while allowing them to justify their actions and better understand the behaviour of the other party.

Some of the results may appear counter-intuitive in some ways. The feeling of usefulness is influenced by risk (0.4) and time (0.37), as we could have predicted. We also note the importance that users place on the development of trust (0.41) and the feeling that they are involved (0.4), considered (0.37) and able to justify their actions during the settlement conference (0.37). These communications-related and psychological aspects are, clearly, considered to be a key benefit by both parties and lawyers.

The feeling of usefulness is influenced by risk and time and it is just as important that communicational and psychological factors be taken into account.

The results may be explained by the training on settlement conference provided for judges, which focuses on defining problems in a way that takes into account a human conflict that is broader than the legal dispute. The duration of the settlement conference, which may last a whole day, is another possible factor in the result. Judges can take the time to address the conflict between the parties as a whole and to offer them a full opportunity to have their “day in court”.

Several significant differences were noted between the respondent groups. To explain why defendants reported more satisfaction than plaintiffs, we can refer to the psychological phenomenon of “overconfidence”.<sup>51</sup> The unrealistic expectations of one party, sometimes nourished by the party’s own lawyer, have a negative influence over the satisfaction rate when confronted with reality during the settlement conference. We also noted that an

We noted that it is important for users to feel involved and considered and to be able to justify their position during the SC. These aspects are considered a key benefit by parties and lawyers.

increase in previously-incurred costs (resource costs, opportunity costs, time) have a negative impact on satisfaction and that parties that reach an agreement are more satisfied. In addition to positive cost-effectiveness, the psychological pitfall of “escalating commitments” could explain this result,<sup>52</sup> since the party concerned sees the resources of time and money devoted to the dispute as an “investment”. As a result, the party expects to recover its costs, in addition to receiving what it believes it is entitled to by law. The more the costs in terms of money and time increase, the smaller the

potential zone for financial agreement, with a potential deadlock that reduces the satisfaction level.

Given the often high correlations obtained during this research project, we are in a better position to understand why the parties and lawyers felt they had been given access to justice during the settlement conference. The factors we have identified are practices that have a major influence over settlement conference user satisfaction. They can also help guide judge-mediators as they seek to improve their effectiveness. Our results demonstrate the potential of settlement conferences as a tool for access to justice, and to look critically at the “new judicial culture,”<sup>53</sup> of which settlement conferences form a key element, introduced by the reform of Québec’s *Code of Civil Procedure* in 2003.

### 3.3. FACTORS INFLUENCING THE AMICABLE AGREEMENT

A further objective of our study was to identify the factors having a determining influence over the probability that an *amicable agreement* will result from the settlement conference. The results are presented based on the role of the respondent (citizen or lawyer), the status of the parties (natural person or legal person), and the type of case (family, civil, commercial). An

Our results identify the factors influencing the probability of an agreement during the SC. They help us understand the realities faced by the parties and what influences them to accept an agreement.

independent analysis was conducted for each category of respondent. Once again, the influence of each factor is presented using a scale of 0 to 1. The closer the result is to 1, the more the factor will have a determining influence on the probability of an agreement. The factors are presented by order of decreasing importance, from the most to the least influential. Only the factors with the most significant influence are presented; the factors found to be statistically significant, but with a lesser influence, are listed in the notes at the end of the document. Other factors were found to be non-significant in terms of influencing the amicable agreement. We noted an agreement rate of 83% in our sample of respondents.

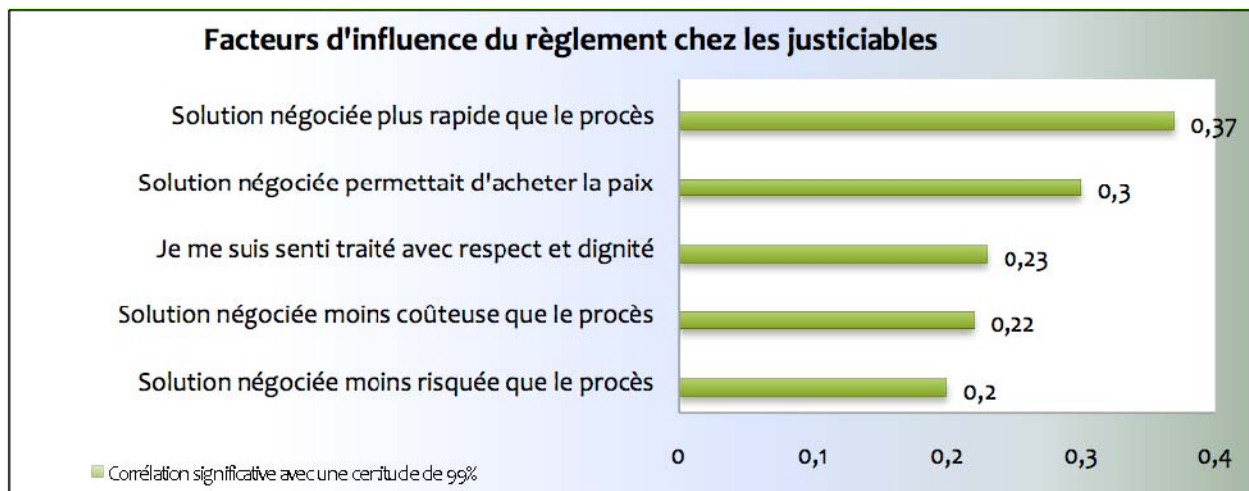


Figure 11. Factors influencing citizens to accept an agreement.<sup>54</sup>

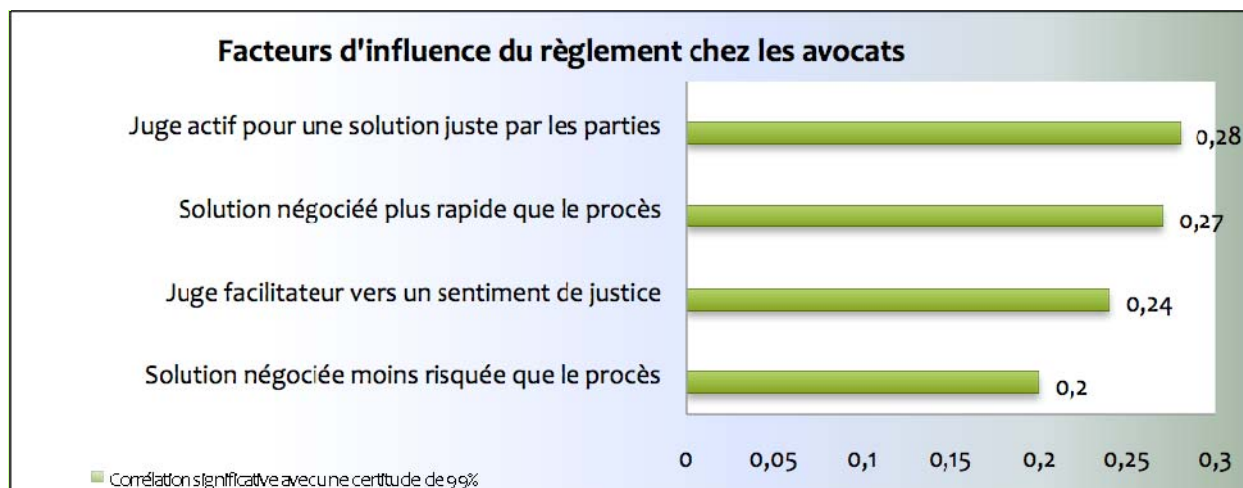


Figure 12. Factors influencing lawyers to accept an agreement.<sup>55</sup>

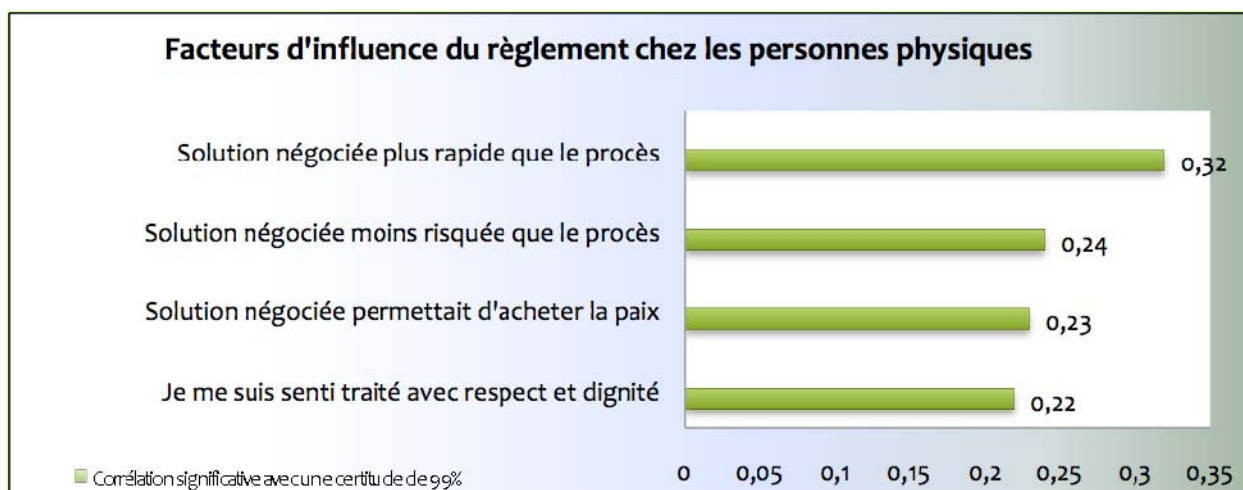


Figure 13. Factors influencing natural persons to accept an agreement.<sup>56</sup>

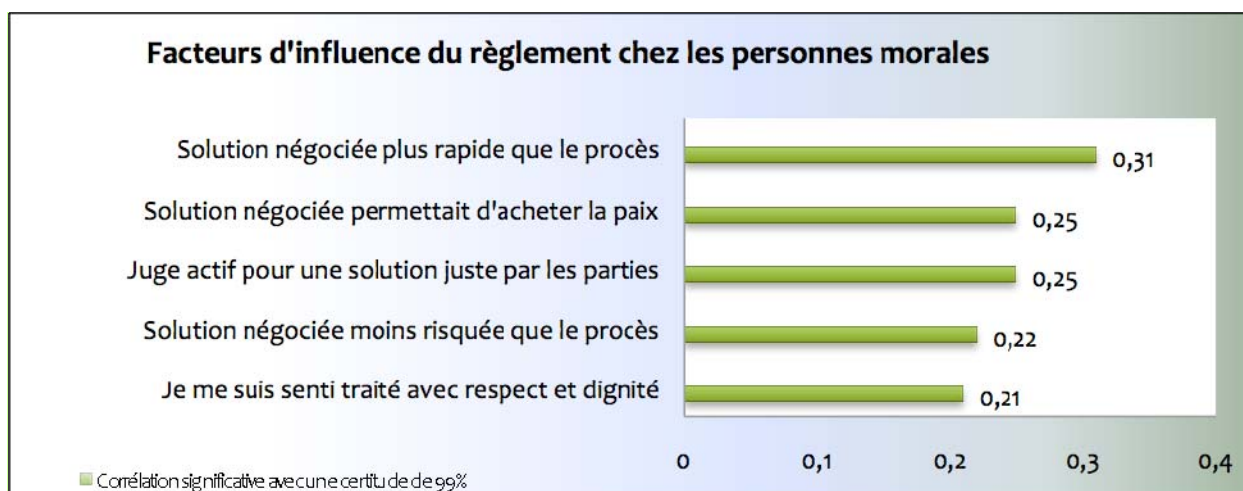


Figure 14. Factors influencing the representatives of legal persons to accept an agreement.<sup>57</sup>

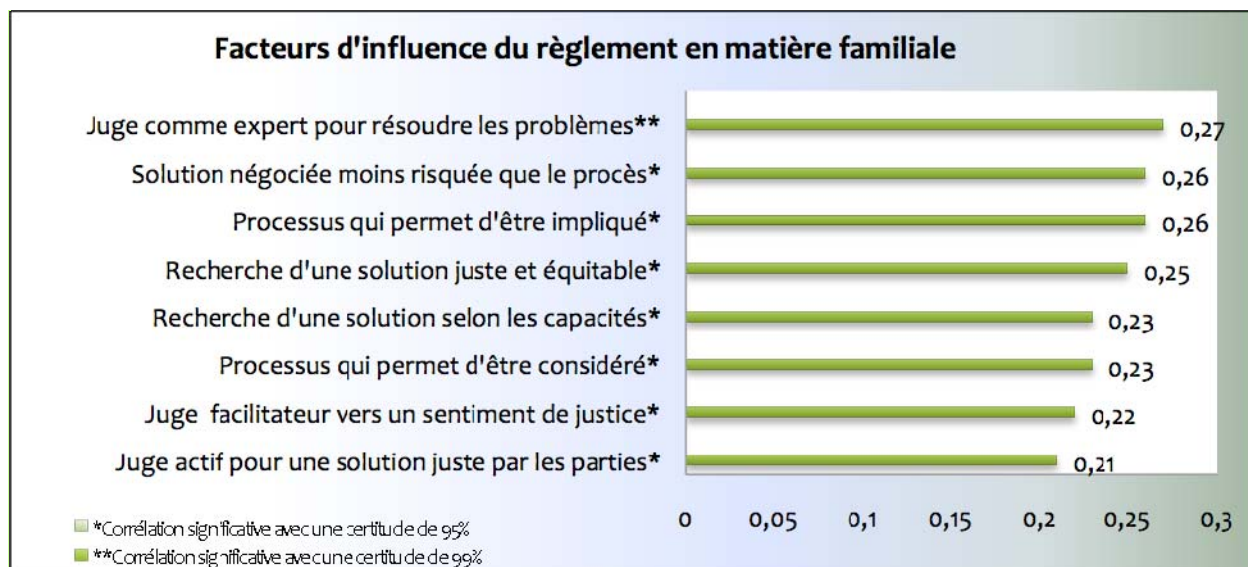


Figure 15. Factors influencing the probability of an agreement in family cases.<sup>58</sup>

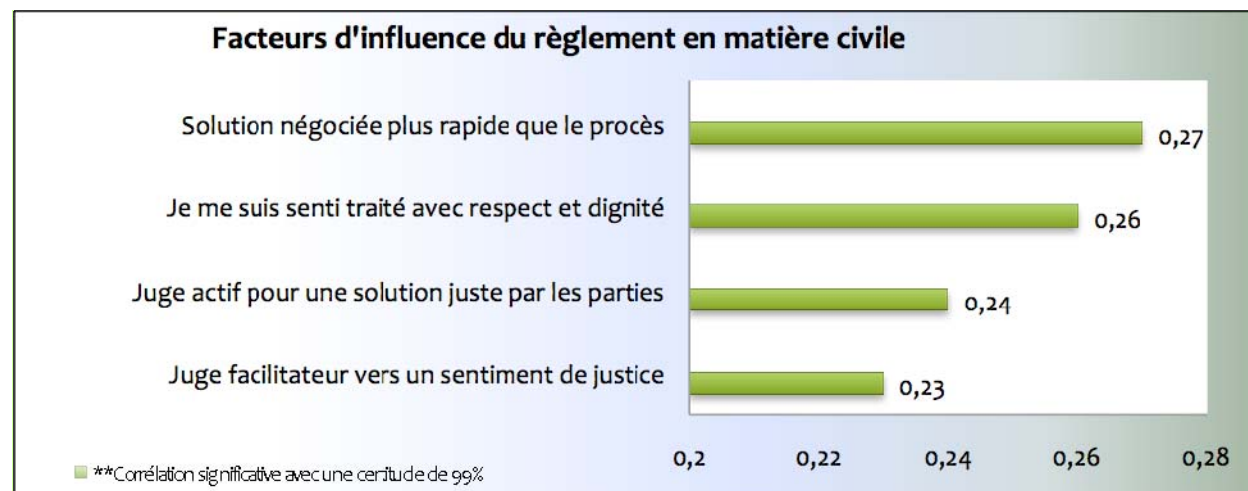


Figure 16. Factors influencing the probability of an agreement in civil cases.<sup>59</sup>

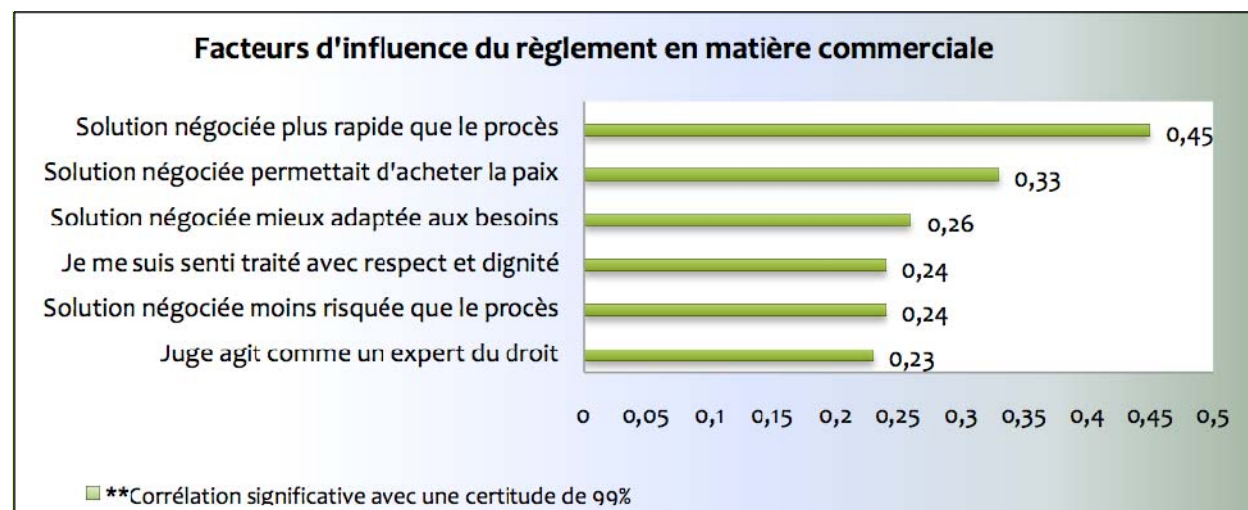


Figure 17. Factors influencing the probability of an agreement in commercial cases.



The correlations presented in the figures above range from 0.2 to 0.43.<sup>60</sup> Our results show that the “time” factor is overall the most important factor motivating an amicable agreement during a settlement conference. For all respondents, and all types of case, being treated with respect and dignity appears to be the next most determining factor. The risk associated with an unfavourable outcome at trial appears to be a convincing argument for all respondents, in all types of case, except family cases. The active role played by the judge in seeking a fair solution also appears to be extremely important for lawyers and legal

Our results show that the “time” factor is overall the most important factor motivating an amicable agreement during an SC. Being treated with respect and dignity appears to be the next most determining factor. The risk associated with an unfavourable outcome at trial appears to be a convincing argument, along with the active role played by the judge in seeking a fair solution in a broad sense, rather than simply a legal solution.

persons in civil cases. In civil and commercial cases, the parties and lawyers place great importance on the judge's focus on ensuring that the settlement conference gives rise to a feeling of justice. Another important factor appears to be the achievement of a solution that brings about peace between the parties, except in civil and family cases where this factor does not appear to be statistically correlated with the achievement of an amicable agreement. The fact that they can reach a solution that is less costly than a trial appears to be enough to convince citizens to seek an amicable agreement.

Several factors appear to have specific importance in family cases: the fact that the judge plays an active role in solving problems on a broader scale than the legal dispute; the

possibility for the parties of being involved in the solution; the search for a solution that is adapted to the needs/abilities/limits of the parties; and the development of a form of communication that creates trust. In commercial cases, the feeling of usefulness appears to be most important, although respectful interpersonal relations and the support given by the judge to the legal dimensions of the case also appear to be important.

These results provide insight into the realities faced by the parties and their motivation for seeking an amicable solution. The factors identified will allow lawyers and judges to deconstruct certain myths, reflecting commonly-held ideas in the legal community concerning out-of-court negotiations in settlement conferences. The results highlight the reasons why the agreement rate of around 80% has been so high since the introduction of settlement conferences in Québec, and possible ways to make judges' actions more effective in the settlement conference context.

Several factors appear to have specific importance in *family* cases: the fact that the judge plays an active role in solving problems on a broader scale than the legal dispute; the possibility for the parties of being involved in the solution; the search for a solution that is adapted to the needs/abilities/limits of the parties; and the development of a form of communication that creates trust.



## CONCLUSION

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This study is part of a Canadian and worldwide trend that places citizens at the heart of the access to justice challenge. It is innovative in the sense that it defines a methodology for measuring the “sense of access to justice” and for understanding the factors that influence it, along with their relative importance. We all identify the factors that increase the probability that a settlement conference will lead to a negotiated agreement.

Our work also reflects the current reform of civil procedure in Québec, which led in particular to the passage of a new *Code of Civil Procedure* in 2014. The new Code, in its opening provision, enacts a new approach to dispute resolution, based on the guiding principles of proportionality, cooperation, participation and a spirit of justice.<sup>61</sup> Article 1 of the Code states that the parties “must consider” private prevention and resolution processes, which confirms their legitimacy for use in regulating social relations.<sup>62</sup>

This study is part of a Canadian and worldwide trend that places citizens at the heart of the access to justice challenge. It is innovative in the sense that it is the first field study to measure the *sense of access to justice*.

For the future, we hope that the results drawn from the past experiences of citizens will be of benefit for the

private and public sectors. We also hope that the results will make the private sector more aware of the value of the settlement conference (83% satisfaction and agreements achieved) and that they will lead to more extensive use of this public service and enhance companies’ productivity and social responsibility. We hope, in addition, that our results will help lawyers involved in negotiations and the organizations they work for (law firms, corporate law departments, insurance companies, unions, etc.) to improve their reputation and brand image by using a “problem-solving approach”<sup>63</sup> that matches the realities faced by their customers and allows them to develop new markets and new partnerships. For the public sector, we hope that our results will provide input for discussions and decisions within the legal community and for public decision-makers in their efforts to improve access to justice for citizens and the impact of better access on their support for the rule of law. In the current context in which private and public resources are precious and limited, we hope that our study will highlight the interest of developing and supporting the empirical evaluation of programs and legal practices to ensure that they meet their target objectives and to improve their effectiveness.<sup>64</sup>

In conclusion, this report is an invitation to collaborate more. We are sharing our results and our methodology with the goal of encouraging comparisons with other Canadian provinces and other countries, for example as part of a university research project or professional pilot project. A similar study could, in particular, be conducted to examine another judicial area (court-annexed mediation, early neutral evaluation, etc.) to evaluate the sense of *access to justice* among citizens. We hope to provide input for the work of academics, public decision-makers and courts in connection with best practices to improve access to justice, in particular following the recent reforms of civil procedure.





## ACKNOWLEDGMENTS

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We would like to offer our sincere thanks to everyone who helped make this project possible and extended its scope.

The project was completed with the invaluable cooperation of the Honourable Pierre-C. Gagnon of the Québec Superior Court during his 2012-2013 study leave granted by the Conseil de la magistrature. We would like to thank the Honourable François Rolland, Chief Justice of the Superior Court, and the Honourable Elizabeth Corte, Chief Judge of the Court of Québec, along with the Associate Chief Justice (Civil Division) Pierre E. Audet of the Court of Québec, all of whom energetically supported this research project. We must also thank the Honourable André Roy of the Superior Court and the Honourable Sylvain Coutlée of the Court of Québec for their unfailing support, as well as all the presidents of the bar associations that agreed to take part in the project.

We thank all the funding bodies from which we received support. This study was made possible by financial support from the Barreau de Montréal, de la Fondation des études juridiques du Barreau du Québec, the Fondation pour la recherche juridique, and the Social Sciences and Humanities Research Council of Canada (SSHRC) via a grant to the Centre de Recherche en Droit Public (CRDP) at Université de Montréal to support the project “Vers une cyberjustice”.

We must also mention the enriching contribution made by our researchers for this study, Enguerran Marty and Elvis Grahovic, Master’s students in dispute prevention and resolution, and Axel-Luc Hountohotegbè, a doctoral student at the faculty of law at Université de Sherbrooke.

We also thank all the organizations that took part in previous empirical research projects, whose results we used as the foundation for the theoretical reference framework for this study. We thanks Éducaloi for its support for the 2012 research project “L’accès à la justice et la participation citoyenne”. We thank the National Judicial Institute of Canada for its support for the 2005 research project “La vision et l’expertise de la magistrature canadienne en conciliation judiciaire”.



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# ENDNOTES

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- <sup>1</sup> Trevor C.W. Farrow, *Civil Justice, Privatization, and Democracy*, University of Toronto Press, 2014; Comité d'action sur l'accès à la justice en matière civile et familiale, *L'accès à la justice en matière civile et familiale : Une feuille de route pour le changement*, Ottawa, October 2013; Right Honourable Beverley McLachlin, address, legal conference of the Canadian Bar Association, Vancouver, 2012; Right Honourable Beverley McLachlin, "Access to Civil Justice for Middle Income Canadians Colloquium", address, University of Toronto, 2011, on-line: <http://www.hosting.epresence.tv/MUNK/1/watch/219.aspx>; Right Honourable Beverley McLachlin, "The Challenges We Face", address to the Empire Club of Canada, Toronto, March 8, 2007, on-line: <http://www.scc-csc.gc.ca/court-cour/judges-juges/spe-dis/bm-2007-03-08-fra.aspx>.
- <sup>2</sup> Jean-François Roberge, "Perspectives on Access to Justice and Dispute Prevention and Resolution: The Canadian Experience" (2013) 17: 2 *Dutch-Flemish Mediation and Conflict Management Journal*, 13-27; Catherine Morris, "The Impact of Mediation on the Culture of Disputing in Canada: Law Schools, Lawyers and Laws," in *Mediation in Asia-Pacific: A Practical Guide to Mediation and Its Impact on Legal Systems*, Fan YANG, Guiguo WANG, (eds) New York: Wolters Kluwer Law & Business, and Hong Kong: CCH Hong Kong, 2013; 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; Louise Otis, Catherine Rousseau-Saine, Eric H. Reiter, "Confidentiality and Judicial Mediation in Canada" in Tania Sourdin and Archie Zariski, *The Multi-Tasking Judge. Comparative Judicial Dispute Resolution*. Thomson Reuters, 2013. For a critical view of the situation in the United Kingdom, see Hazel Genn, "What is Civil Justice For? Reform, ADR and Access to Justice." (2012) 24: 1 *Yale Journal of Law and the Humanities*, 397.
- <sup>3</sup> See articles 151.14 to 151.23 of Québec's *Code of Civil Procedure*, in force since 2003; see also articles 161 to 165 of Québec's new *Code of Civil Procedure*, passed in 2014.
- <sup>4</sup> Institut national de la Magistrature. *Conférence de règlement à l'amiable*. Joint training program for the Superior Court and Court of Québec. 2014. <https://www.nji-inm.ca/nji/inm/accueil-home.cfm>
- <sup>5</sup> See in particular: Jean-François Roberge, "The Future of Judicial Dispute Resolution. A Judge Who Facilitates Participatory Justice." in T. Sourdin & A. Zariski. *The Multi-Tasking Judge. Comparative Judicial Dispute Resolution*, Australia: Thomson Reuters, 2013, 21-32; Louise Otis & Eric H. Reiter, *Judicial Mediation in Quebec*, in Nadja Alexander (ed) *GLOBAL TRENDS IN MEDIATION* 107 2d ed., 2006; Louise Otis & Eric H. Reiter, *A New Phenomenon in the Transformation of Justice*, (2006) 6 *PEPP. DISP. RESOL. L.J.* 351; Louise Otis, *La conciliation judiciaire à la Cour d'appel du Québec*, R.P.R.D., 2003, at 1; Suzanne Courteau, *La conciliation judiciaire à la Cour supérieure*, R.P.R.D. 2005, 51; Jean-François Roberge, "La conférence de règlement à l'amiable : les enjeux du raisonnement judiciaire et du raisonnement de résolution de problème", (2005) 3:1 *R.P.R.D.* 25.
- <sup>6</sup> The Superior Court has jurisdiction throughout Québec and sits in all the judicial districts. It is made up of 144 judges appointed for life by the Canadian government. In civil matters, the Superior Court generally hears cases in first instance where the amount at issue is at least \$70,000. It has exclusive jurisdiction in family matters such as divorce, support, and child custody. Decisions by courts or bodies in Québec, except Court of Appeal decisions, are subject to the superintending and reforming power of the Superior Court, with some exceptions specified by law. The Court of Québec is a court of first instance that has jurisdiction in civil, criminal and penal matters as well as in matters relating to young persons. It also has jurisdiction over administrative matters and appeals where provided for by law. The Court of Québec hears cases in first instance with jurisdiction in civil, criminal and penal matters, and cases involving young people. It has three divisions: the Civil Division (that includes the Small Claims Division), the Criminal and Penal Division, and the Youth Division. The Court of Québec also hears some administrative and appeal cases. as specified by law. It is made up of 290 judges, appointed for life by the Québec government. See: <http://www.justice.gouv.qc.ca/francais/publications/generale/systeme.htm>
- <sup>7</sup> See questions 1 to 16 of section 3 in the questionnaire.

- <sup>8</sup> Tom R. Tyler. *Why People Cooperate: The Role of Social Motivations*. Princeton University Press, 2011. Daniel Balliet, Paul M. Van Lange, "Trust, Conflict and Cooperation: A Meta Analysis." *Psychological Bulletin*, 2013, 139, 5, 1090; Tom R. Tyler, "Justice Theory" in Paul .A. Van Lange, Arie W. Kruglansky, Tory Higgins, *Handbook of Theories of Social psychology*, Sage, 2011; Paul .A. Van Lange, David De Cremer, Eric. Van Dijk, Mark. Van Vugt, "Self-interest and beyond" in Arie W. Kruglanski and E.Tory. Higgins (eds) *Social Psychology Handbook of Basic Principles*, 2<sup>nd</sup> ed. New York, Guilford Press, 2007; Russell Cropanzano, David E. Bowen and Stephen W. Gilliland, "The Management of Organizational Justice" (2007) 21: 4 *Academy of Management Perspectives*, 34-48.
- <sup>9</sup> Nancy Welsh, Donna Stienstra and Bobbi McAdoo, "The Application of Procedural Justice Research to Judicial Actions and Technique in Settlement Sessions" in Tania Sourdin and Archie Zariski, eds, *The Multi-Tasking Judge: Comparative Judicial Resolution*, Thomson Reuters, 2013, 57; Tom R. Tyler : "Procedural Justice and the Courts" (2007) 44: 2 *Court Review: The Journal of the American Judges Association*, 26; Tom R. Tyler, "Psychology and the Design of Legal Institutions". *Tilburg Law Lectures Series*, 2007. Tom R. Tyler. *Why People Obey the Law*. Princeton, Princeton University Press, 2006.; Tom R. Tyler, "Social Justice : Outcome and procedure" (2000) 35: 2 *International Journal of Psychology*, 117; Tom. R. Tyler, "Psychological Models of the Justice Motive. Antecedents of Distributive and Procedural Justice." 67 *Journal of Personality and Social Psychology* 1994,850; E. Allan Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice*, New York: Plenum Press, 1988.
- <sup>10</sup> Tom R. Tyler, "Justice Theory" in Paul .A. Van Lange, Arie W. Kruglansky, Tory Higgins, *Handbook of Theories of Social psychology*, Sage, 2011; Elaine Walster, G. William Walster and Ellen Berscheid, *Equity: Theory and research*, Boston, Allyn & Bacon, 1978;.
- <sup>11</sup> Tom R. Tyler. *Why People Cooperate: The Role of Social Motivations*. Princeton University Press, 2011.
- <sup>12</sup> Martin Gramatikov, Maurits Barendrecht and Jin Ho Verdonschot, "Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology" (2011) 3 *Hague Journal on the Rule of Law*, 349.
- <sup>13</sup> Martin Gramatikov, Maurits Barendrecht and Jin Ho Verdonschot, "Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology" (2011) 3 *Hague Journal on the Rule of Law*, 349.
- <sup>14</sup> See questions 17 to 22 in section 3 of the questionnaire.
- <sup>15</sup> Bruno Deffains, "L'analyse économique de la résolution des conflits juridiques." (1997) 12, 3, *Revue française d'économie*, 57; Robert D. Cooter, and Daniel L. Rubinfeld, "Economic Analysis of Legal Disputes and Their Resolution." (1989) 27 3 *Journal of Economic Literature*, 1067; Richard A. Posner, "An Economic Approach to Legal Procedure and Judicial Administration" (1973) 2, *Journal of Legal Studies*, 279; John P. Gould "The Economics of Legal Conflicts." (1971) *Journal of Legal Studies*, 61; Wiliam L Landes, "An Economic Analysis of the Courts" (1971) 14 *JL and Econ* 61.
- <sup>16</sup> Alexandre Désy, *L'efficacité de la médiation judiciaire*. Montréal, Wilson Lafleur, Montréal, 2014; Éric Langlais and Nathalie Chappe, "Analyse économique de la résolution des litiges." Dans Bruno Deffains and Éric Langlais. *Analyse économique du droit. Principes, méthodes, résultats*. De Boeck, 2009, 106; Steven Shavell, "Alternative Dispute Resolution: An Economic Analysis." (1995) *Journal Legal Studies* 24 1, 10.
- <sup>17</sup> Martin Gramatikov, Maurits Barendrecht and Jin Ho Verdonschot, "Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology" (2011) 3 *Hague Journal on the Rule of Law*, 349; Martin Gramatikov et al, *A Handbook for Measuring the Costs and Quality of Access to Justice*, Apeldoorn, Maklu Publishers, 2010.
- <sup>18</sup> See questions 23 to 34 in section 3 of the questionnaire.
- <sup>19</sup> At the national level: Canada, National Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change*, Ottawa, October 2013; Canadian Bar Association, Envisioning Equal Justice Project, *Reaching equal justice: An invitation to envision and act*, Ottawa, Canadian Bar Association, August 2013.
- At the international level: Report of the World Justice Project, *WPJ Rule of Law Index 2014*, 2014; European Commission for the Efficiency of Justice (CEPEJ), *Analysis of Data from the European Commission for the Efficiency of Justice*, Council of Europe, June 2013; Institut des Hautes Études sur la Justice (IHEJ), *La prudence et l'autorité : l'office du juge au XXIE siècle*, May 2013; Maurits Barendrecht et



al, *Strategies Towards Basic Justice Care for Everyone*, La Haye, Hague Institute for the Internationalisation of Law (HILL), 2012.

<sup>20</sup> Richard Susskind, *The End of Lawyers? Rethinking the Nature of Legal Services*, 2<sup>nd</sup> ed., Oxford University Press, 2010. Julie MacFarlane, *The New Lawyer: How Settlement is Transforming the Practice of Law*, Vancouver, UBC Press, 2008. Jean-François Roberge, *La justice participative : Changer le milieu juridique par une culture intégrative de règlement des différends*, Cowansville (QC), Yvon Blais, 2011. Rosselle L. Wissler, "Representation in Mediation: What We Know From Empirical Research." *Fordham URB. L.J.* (2009), 419; See also: Laura Ervo and Anna Nylund, eds, *The Future of Civil Litigation: Access to Courts and Court-annexed mediation in the Nordic Countries*, Springer, 2014; Michael Legg, ed, *The Future of Dispute Resolution*, Lexis Nexis Australia, 2012.

<sup>21</sup> Tania Sourdin and Archie Zariski, "Introduction" in T. Sourdin & A. Zariski. (eds) *The Multi-Tasking Judge. Comparative Judicial Dispute Resolution*, Australia: Thomson Reuters, 1 2013; Archie Zariski "Understanding Judge's Responses to Judicial Dispute Resolution: A Framework for Comparison." in T. Sourdin & A. Zariski. *The Multi-Tasking Judge. Comparative Judicial Dispute Resolution*, Australia: Thomson Reuters, 2013; Machteld de Hoon and Susan Verberk, "Judicial Conflict management: What brings Litigants to Court?" T. Sourdin & A. Zariski. *The Multi-Tasking Judge. Comparative Judicial Dispute Resolution*, Australia: Thomson Reuters, 87, 2013; Machteld de Hoon, Suzan Verberk "Towards a more responsive judge: challenges and opportunities" (2014) 10: 4, *Utrecht Law Review*, 27-40.

<sup>22</sup> Machteld de Hoon, Suzan Verberk "Towards a more responsive judge: challenges and opportunities" (2014) 10: 4, *Utrecht Law Review*, 27-40; Tania Sourdin, "Facilitative Judging: Science, Sense and Sensibility" in Tania Sourdin and Archie Zariski, eds, *The Multi-Tasking Judge: Comparative Judicial Dispute Resolution*, Thomson Reuters, 231, 2013; Peter Robinson, "An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise and Fear", (2012) 17 *Harv. Negot. L. Rev.* 97.

<sup>23</sup> Jean-François Roberge, "Could judicial mediation deliver a better Justice? Supposing we trained judges as expats?" (2010) 1:1 *Revue d'arbitrage et de médiation / Journal of Arbitration and Mediation*, 3.; Jean-François Roberge, "Typologie de l'intervention en conciliation judiciaire chez les juges canadiens siégeant en première instance et ses impacts sur le système judiciaire, le droit et la justice. Étude de la perception des juges canadiens" (2007) (Thèse de doctorat, Université Laval and Université de Sherbrooke, Canada).

<sup>24</sup> We asked citizens who viewed the Éducaloi website to answer an on-line survey. A total of 1580 people (N= 1580) completed the English or French version of the on-line questionnaire during April and May 2012. Our research results confirmed that a large majority of citizens consider that access to justice has three components: (1) access to legal information (98%), (2) access to the courts (98%), and access to participatory justice (95%). The importance given to these three components highlights the interest of viewing the challenge of access to justice from both the institutional standpoint (access to the law and the courts) and the contextual standpoint (access to a form of participation that promotes a feeling of justice).

<sup>24</sup> (suite) Éducaloi is a non-profit organization whose mission is to inform Quebecers of their rights and obligations by making high-quality legal information available. Its partners are the *Barreau du Québec*, the *Chambre des Notaires*, the Société Québécoise d'Information Juridique (SOQIJ), the Department of Justice Canada and Québec's Ministère de la Justice. The typical Éducaloi user profile is representative of the Québec population in terms of the level of education required to view the website.

<sup>25</sup> Our research findings confirm that a high percentage of citizens consider that the quality of civil justice would be improved by an increased focus on (1) integrative cooperation (93%), (2) respect (95%); (3) proactiveness (95%); and (4) creativity (89%). These four qualities are not present in the adversarial, distributive culture of the traditional court process where disputes are settled by a judicial decision. A multiple linear regression was carried out to determine to what extent the promotion of this type of civil justice can explain participatory justice. The correlation coefficients are 0.63 (collaboration), 0.45 (respect), 0.55 (proactiveness) and 0.52 (creativity) ( $p < 0.01$ ). The total correlation coefficient is 0.65 ( $p < 0.01$ ).

- <sup>26</sup> The determination coefficient for the probability that participatory justice will improve access to justice is 42%, if it is practised with an emphasis on the four qualities of collaboration, respect, proactiveness, creativity.
- <sup>27</sup> Ginette Latulippe, *La médiation judiciaire. Un nouvel exercice de justice*. Cowansville, Yvon Blais, 2012; Jean-François Roberge, *La justice participative : Changer le milieu juridique par une culture intégrative de règlement des différends*, Cowansville, Yvon Blais, 2011.
- <sup>28</sup> Jean-François Roberge, *La justice participative : Changer le milieu juridique par une culture intégrative de règlement des différends*, Cowansville (QC), Yvon Blais, 2011; Harold Abramson, "Problem-Solving Advocacy in Mediations: A Model of Client Representation" (2005) 10 *Harvard Negotiation Law Review*, 103; Serge Roy, Avi Schneebalg and Eric Galton, *La médiation : préparer, représenter, participer*, Cowansville, Yvon Blais, 2005.
- <sup>29</sup> In Québec, see section 3.03.02 of the current Code of Ethics of Advocates and section 42 of the draft regulation enacting a new code of professional conduct for lawyers.
- <sup>30</sup> A questionnaire has fidelity when its questions are understood in the same way by all respondents, reducing the measurement error. We used Cronbach's alpha to calculate the homogeneity of our measuring instrument, in other words the internal coherence of the answers for all the items of the questionnaire. The closer the alpha coefficient is to 1, the more accurate the questionnaire. An accuracy of 0.8 and over is considered excellent. We obtained an alpha coefficient alpha of 0.88 for the questions on the feeling of fairness, 0.81 for the questions on the feeling of usefulness and 0.89 for the questions on the feeling of professional support. The alpha coefficient for the items connected with the sense of access to justice was 0.87.
- <sup>31</sup> Canada, Canadian Bar Association, Report of the access to justice committee, *Reaching equal justice: An invitation to envision and act*, Canadian Bar Association, 2013; Canada, National Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change*, October 2013.
- <sup>32</sup> Our sample included 518 respondents (N=518). Only respondents who answered all the questions were retained for the analysis of the sense of access to justice index.
- <sup>33</sup> See la section 3 of the questionnaire.
- <sup>34</sup> Morton Deutsch, "Equity, equality, and need: What determines which value will be used as the basis for distributive justice?" (1975) *Journal of Social Issues*, vol. 31, 137-149; Morton Deutsch. *Distributive Justice*. New Haven, Yale University Press. 1985
- <sup>35</sup> Steven L. Blader and Tom R. Tyler, "A Four Component Model of Procedural Justice. Defining the Meaning of a "Fair" Process." (2003) 29: 6 *Personality and Social Psychology Bulletin*, 747; Gerald S. Leventhal "What Should be done with Equity Theory? New Approaches to the Study of Fairness in social relationships." Dans K. Gergen, M. Greenberg, R. Willis (eds) *Social Exchange*. New York, Plenum, 1980, 27-55.
- <sup>36</sup> Steven L. Blader and Tom R. Tyler, "A Four Component Model of Procedural Justice. Defining the Meaning of a "Fair" Process." (2003) 29: 6 *Personality and Social Psychology Bulletin*, 747; R. Bies et J.S. Moag. "Interactional Justice" in R. J. Lewicki, B.M. Sheppard, M.H. Bazerman, (eds) *Research on Negotiations in Organizations*, vol. 1 Greenwich, JAI Press, 1986, 43-55; Robert. Bies, Tom R. Tyler, Interpersonal Aspects of Procedural Justice, in J. S. Carroll (ed), *Applied Social Psychology in Business Settings*, Hillsdale, NJ: Erlbaum, 1990, 77-98.
- <sup>37</sup> Rebecca E. Hollander Blumoff, "Just Negotiation". *Washington University Law Review*, 88 (2010) 381; Russell Korobkin, "The Role of Law in Settlement", in Michael L. Moffit, Robert C. Bordone, *Handbook of Dispute Resolution*, Jossey Bass, 2005, 254-276; Russell Korobkin, "Aspirations and Settlement." (2002) *Cornell Law Review*, 88:1 1; Robert Cooter, Stephen Marks, Robert Mnookin, "Bargaining in the Shadow of Law: A Testable Model of Strategic Behavior", (1982) *J. Legal Stud.* 225.
- <sup>38</sup> Jean-François Roberge, "Could judicial mediation deliver a better Justice ? Supposing we trained judges as expats?" (2010) 1: 1, *Revue d'arbitrage et de médiation / Journal of Arbitration and Mediation*, 3



- <sup>39</sup> Ginette Latulippe, *La médiation judiciaire. Un nouvel exercice de justice*. Cowansville, Yvon Blais, 2012; Jean-François Roberge, *La justice participative : Changer le milieu juridique par une culture intégrative de règlement des différends*, Cowansville, Yvon Blais, 2011.
- <sup>40</sup> The other factors having a statistically significant influence are, by order of decreasing importance: focus on a fair and equitable solution (0.47), process allowing for consideration (0.46), communication allowing for openness (0.46), process allowing for coherence (0.44), I felt treated with respect and dignity (0.42), negotiated solution with fewer risks (0.42), negotiated solution better adapted to needs (0.41), process allowing for involvement (0.40).
- <sup>41</sup> The other factors having a statistically significant influence are, by order of decreasing importance: judge active in creating a fair solution (0.37), communication allowing for openness (0.37), negotiated solution better adapted to needs (0.36), I felt treated with respect and dignity (0.36), negotiated solution able to bring peace (0.35), negotiated solution less costly (0.34), negotiated solution less stressful (0.34), process consistent with ethical standards (0.34), process allowing the parties to express themselves (0.33), process allowing for coherence (0.33), judge facilitative in creating a feeling of justice (0.32).
- <sup>42</sup> The other factors having a statistically significant influence are, by order of decreasing importance: judge acting as an expert problem-solver (0.48), Judge exploring motivation to obtain justice (0.46), process allowing for coherence (0.44), process not biased towards one party (0.44), negotiated solution quicker (0.36), communication allowing for openness (0.32), judge acting as a legal expert (0.31), negotiated solution able to bring peace (0.31), negotiated solution with fewer risks (0.31), I felt treated with respect and dignity (0.30).
- <sup>43</sup> The average overall satisfaction rate for the SC among *lawyers* was 85%, and 77% for *parties*. The difference between the satisfaction rate for parties and lawyers was statistically significant with 99% certainty. N = 518 (263 respondents who were lawyers and 255 who were citizens).
- <sup>44</sup> The satisfaction rate for the outcome of the SC was 83% among defendants and 79% among plaintiffs following the SC. The difference was statistically significant with 99% certainty. N = 471 (229 respondents who were plaintiffs and 242 who were defendants).
- <sup>45</sup> The satisfaction rate for the SC was 82% among those who reached an agreement compared to 64% among those who failed to reach an agreement. The difference was statistically significant with 99% certainty. N = 508 (473 respondents achieved an agreement and 35 did not).
- <sup>46</sup> The difference was statistically significant with 95% certainty. N = 429 (345 respondents in civil cases and 84 in commercial cases).
- <sup>47</sup> The difference was statistically significant with 95% certainty. N = 396
- <sup>48</sup> The difference was statistically significant with 95% certainty. N = 177
- <sup>49</sup> The difference was statistically significant with 95% certainty. N = 321
- <sup>49</sup> There are two possible ways to interpret the degree of influence of these factors. According to an objective interpretation based on general norms in the area of humanities research, factors between 0.6 and 1 have a high influence, and factors between 0.4 and 0.59 have a moderate influence. According to a subjective interpretation, the degree of correlation is compared to the results obtained in other similar studies and the general state of knowledge on the topic.
- <sup>51</sup> Jennifer K. Robbennolt and Jean R. Sternlight, *Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision Making*, Chicago, American Bar Association, 2012, 68-77 and 224-226. Jean-François Roberge, *La justice participative – Changer le milieu juridique par une culture intégrative des règlements des différends*, Cowansville, Yvon Blais, 2011, 194-197.
- <sup>52</sup> Jennifer K. Robbennolt and Jean R. Sternlight, *Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision Making*, Chicago, American Bar Association, 2012, 129-130.

<sup>53</sup> Québec, Comité de révision de la procédure civile, *Une nouvelle culture judiciaire*, Éditeur officiel, 2001. See also: Pierre-Claude Lafond, *L'accès à la justice civile au Québec. Portrait général*, Cowansville, Yvon Blais, 2012; Hubert Reid, "L'avenir de la justice civile au Québec. Doit-on espérer ou se résigner?" in Benoît Moore, Catherine Piché, Marie-Claude Rigaud (eds.) *L'avocat dans la cité : éthique et professionnalisme*, Montréal, Thémis, 2012; Pierre Noreau and Mario Normandin, "L'autorité du juge au service de la saine gestion de l'instance." *Revue du Barreau* 71 (2012) 207; Jean-Guy Belley, "Une justice de la seconde modernité : proposition de principes généraux pour le prochain Code de procédure civile", *McGill L. J.*, (2001) 46, 317.

<sup>54</sup> The other factors having a statistically significant influence are, by order of decreasing importance: negotiated solution better adapted to needs (0.19), communication creating trust (0.18), communication respectful in tone (0.17), judge active in creating a fair solution (0.15), judge facilitative in creating a feeling of justice (0.15), process allowing for consideration (0.13), judge acting as a legal expert (0.13), communication allowing for openness (0.12), judge acting as an expert prolem-solver (0.11), judge attentive to legal positions (0.11).

<sup>55</sup> The other factors having a statistically significant influence are, by order of decreasing importance: I felt treated with respect and dignity (0.19), judge highlights risks (0.18), judge attentive to needs (0.18), judge active in seeking a solution based on needs (0.18), judge acting as an expert prolem-solver (0.17), communication creating trust (0.17), judge exploring motivation to obtain justice (0.17), process allowing for coherence (0.16), judge acting as a legal expert (0.15), solution targeting sharing based on abilities and needs (0.14), negotiated solution able to bring peace (0.14), judge attentive to legal positions (0.12), solution targeting equal shares (0.12).

<sup>56</sup> The other factors having a statistically significant influence are, by order of decreasing importance: judge facilitative in creating a feeling of justice (0.19), judge active in creating a fair solution (0.19), communication creating trust (0.19), negotiated solution less costly (0.16), communication allowing for openness (0.16), negotiated solution better adapted to needs (0.16), solution targeting sharing based on abilities and needs (0.16), judge exploring motivation to obtain justice (0.14), communication respectful in tone (0.14), judge acting as an expert prolem-solver (0.14), judge active in seeking a solution based on needs (0.12), judge attentive to needs (0.11), negotiated solution less stressful (0.10), judge attentive to legal positions (0.10).

<sup>57</sup> The other factors having a statistically significant influence are, by order of decreasing importance: communication creating trust (0.19), judge acting as a legal expert (0.19), judge facilitative in creating a feeling of justice (0.19), judge active in seeking a solution based on needs (0.17), judge attentive to legal positions (0.15), judge attentive to needs (0.13), solution targeting equal shares (0.13), communication allowing parties to justify their position (0.13), negotiated solution better adapted to needs (0.13), judge exploring motivation to obtain justice (0.13).

<sup>58</sup> The other factor having a statistically significant influence is: communication creating trust (0.21).

<sup>59</sup> The other factors having a statistically significant influence are, by order of decreasing importance: communication creating trust (0.18), negotiated solution able to bring peace (0.18), negotiated solution with fewer risks (0.17), judge attentive to needs (0.16), communication respectful in tone (0.15), judge highlights risks (0.14), judge exploring motivation to obtain justice (0.13), judge attentive to legal positions (0.13), judge acting as an expert prolem-solver (0.13), process allowing for coherence (0.11), judge active in seeking a solution based on needs (0.11), negotiated solution less costly (0.10), judge acting as a legal expert (0.10).

<sup>60</sup> According to an objective interpretation based on general norms in the area of humanities research, the factors have a low to moderate influence. Since this is the first study on the sense of access to justice and since we have not points of reference for a comparison, we believe that a subjective interpretation is more appropriate for assessing the degree of influence of the factors influencing the parties and lawyers to accept an agreement.

<sup>60</sup> Preliminary provision: This Code establishes the principles of civil justice and, together with the Civil Code and in harmony with the Charter of human rights and freedoms (chapter C-12) and the general principles of law, governs procedure applicable to private dispute prevention and resolution processes

when not otherwise determined by the parties, procedure before the courts as well as procedure for the execution of judgments and for judicial sales.

This Code is designed to provide, in the public interest, means to prevent and resolve disputes and avoid litigation through appropriate, efficient and fair-minded processes that encourage the persons involved to play an active role. It is also designed to ensure the accessibility, quality and promptness of civil justice, the fair, simple, proportionate and economical application of procedural rules, the exercise of the parties' rights in a spirit of co-operation and balance, and respect for those involved in the administration of justice.

This Code must be interpreted and applied as a whole and in the civil law tradition. Its rules must be interpreted in light of the special provisions it contains and those contained in other laws. In the matters it addresses, this Code supplements the silence of other laws if circumstances permit.

<sup>61</sup> Article 1. To prevent a potential dispute or resolve an existing one, the parties concerned, by mutual agreement, may opt for a private dispute prevention and resolution process.

The main private dispute prevention and resolution processes are negotiation between the parties, and mediation and arbitration, in which the parties call on a third person to assist them. The parties may also resort to any other process that suits them and that they consider appropriate, whether or not it borrows from negotiation, mediation or arbitration.

Parties must consider private prevention and resolution processes before referring their dispute to the courts.

<sup>62</sup> To prevent a potential dispute or resolve an existing one, the parties concerned, by mutual agreement, may opt for a private dispute prevention and resolution process.

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<sup>63</sup> See in particular: Barreau du Québec, *Rapport du Comité sur les problématiques actuelles reliées à la pratique privée et l'avenir de la profession, Les avocats de pratique privée en 2021*, June 2011; Canadian Bar Association, *Futures: Transforming the Delivery of Legal Services in Canada*, August 2014.

<sup>64</sup> See in particular the recommendations made by the Auditor General of Québec in his 2009-2010 report (November 18, 2009) and the follow-up concerning resource optimization in his 2012-2013 report (November 29, 2012). On-line: [http://www.vgq.gouv.qc.ca/fr/fr\\_publications/fr\\_rapport-annuel/fr\\_index.aspx?Annee=2012](http://www.vgq.gouv.qc.ca/fr/fr_publications/fr_rapport-annuel/fr_index.aspx?Annee=2012). The *Act respecting the Institut québécois de réforme du droit* (R.S.Q., c.I-13.2.1) was passed in 1992, but has not yet come into force. For the future, we envisage creative, but affordable initiatives bringing together the university and professional sectors (research chairs and teams, laboratories for innovation and pilot project assessment, etc.) since the need for empirical evaluation remains as important as even, not only in Québec but also in Canada