"SENSE OF ACCESS TO JUSTICE" AS A FRAMEWORK FOR CIVIL PROCEDURE JUSTICE REFORM: AN EMPIRICAL ASSESSMENT OF JUDICIAL SETTLEMENT CONFERENCES IN QUEBEC (CANADA)

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ABSTRACT

An emerging worldwide civil procedure justice reform trend takes the user's point of view into account in order to promote access-to-justice and support for the rule of law. In the Canadian context, the Quebec civil law province has taken the lead to renew its legal culture towards a participatory justice, rooted in fair-minded processes that encourage the persons involved to play an active role. In an effort to monitor such ambitions, carried by the civil procedure code reforms of 2003 and 2014, our paper offers an empirical evaluation through the lens of litigant's "Sense of Access to Justice" ("SAJ"). We empirically tested this framework in settlement conferences conducted by Quebec trial court judges practicing under a facilitative integrative problem-solving approach. The results herein show that settlement conferences are evaluated by litigants and lawyers as fair-minded processes, providing them with a sense of access to justice. This study provides a new framework and methodology to monitor the civil procedure justice reform and legal cultural shifts taking place in Quebec. Adaptations to other dispute resolution mechanisms and various jurisdictions seem promising. This study helps ascertain user's views, determining whether they are in support of public policies, private policies, or actions in response to the access-to-justice challenge.

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I. INTRODUCTION

Access-to-justice is a contemporary, international issue.[1] Given the influence of access-to-justice on citizen support for the rule of law, addressing this challenge is fundamental to democracy.[2] Recently, Canada has made access-to-justice a priority.[3] Important reports have suggested a renewed vision, focusing on litigants' realities and offering a roadmap for change[4] that involves institutional measures, an encouragement of empirical research and the transformation of the delivery of legal services. The reali-

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1 *See, e.g.*, 1 MAURO CAPPELLETTI & BRYANT GARTH, ACCESS TO JUSTICE: A WORLD SURVEY (1978); CHRISTINE PARKER, JUST LAWYERS: REGULATION AND ACCESS TO JUSTICE (Oxford University Press, 1999); RODERICK A. MACDONALD, ACCESS TO JUSTICE IN CANADA TODAY: SCOPE, SCALE AND AMBITIONS (Julia Bass, W A Bogart & Frederick Zemans eds., 2005); Trevor C.W. Farrow, CIVIL JUSTICE, PRIVATIZATION, AND DEMOCRACY (University of Toronto Press, 2014); Pascoe Pleasence, Nigel J. Balmer, Alexy Buck, Aoife O'Grady & Hazel Genn, *Multiple Justiciable Problems: Common Clusters and Their Social and Demographic Indicators*, 1 J. EMPIRICAL LEGAL STUD. 301 (2004); Pascoe Pleasence, Nigel J. Balmer & Rebecca L. Sandefur, *Paths to Justice: A Past, Present and Future Roadmap*, NUFFIELD FOUNDATION (2013), http://www.nuffieldfoundation.org/sites/default/files/files/PTJ%20Roadmap%20NUFFIELD%20Published.pdf.

2 *See generally World Justice Project Rule of Law Index*, WORLD JUST. PROJECT, http://worldjusticeproject.org; *see also* Hague Journal on the Rule of Law 2011/2 (Special issue dedicated to the measurement of institutional indicators of justice across countries).

3 *See* Chief Justice of the Supreme Court of Canada Beverly McLachlin P.C.'s speeches on access to justice. *E.g.*, Chief Justice Beverly McLachlin P.C., *Why Should We Care About Access to Justice?*, NAT'L MAG. (Aug. 17, 2013), http://www.nationalmagazine.ca/Blog/August-2013/Why-should-we-care-about-access-to-justice.aspx; Chief Justice McLachlin Speech to CBA Council 2012, CANADIAN LAW. MAG. (Aug. 11, 2012), http://www.canadianlawyermag.com/4273/chief-justice-mclachlin-speech-to-cba-council-2012.html; Lucianna Ciccocioppo, *There is No Justice Without Access to Justice: Chief Justice Beverley McLachlin*, U. TORONTO (Nov. 11, 2011), http://www.law.utoronto.ca/news/there-no-justice-without-access-justice-chief-justice-beverley-mclachlin; Chief Justice Beverley McLachlin P.C., *The Challenges We Face*, SUP. CT. CAN. (Mar. 8, 2007), http://www.cfcj-fcjc.org/sites/default/files/docs/2007/mclachlin-empireclub-en.pdf.

4 The report provides a nine-point access to justice roadmap designed to bridge the implementation gap between ideas and action. It sets out three main areas for reform. The topics for reform deal with specific civil and family justice innovations, institutions and structures, and research and funding. The recommendations in nine points are as follow: (1) Refocus the Justice System to Reflect and Address Everyday Legal Problems; (2) Make Essential Legal Services Available to Everyone; (3) Make Courts and Tribunals Fully Accessible Multi-Service Centres for Public Dispute Resolution; (4) Make Coordinated and Appropriate Multidisciplinary Family Services Easily Accessible; (5) Create Local and National Access to Justice Implementation Mechanisms; (6) Promote a Sustainable, Accessible and Integrated Justice Agenda through Legal Education; (7) Enhance the Innovation Capacity of the Civil and Family Justice System; (8) Support Access to Justice Research to Promote Evidence-Based Policy Making; and (9) Promote Coherent, Integrated and Sustained Funding Strategies. Action Committee on Access to Justice in Civil and Family Matters, *Access to Civil and Family Justice: A Roadmap for Change* (Oct. 2013), http://flsc.ca/wp-content/uploads/2014/10/ACCESSActionCommFinalReport2013.pdf.

zation of this action plan depends on each province. Because the administration of civil justice is part of a province's constitutional responsibility, each province holds the power to implement the terms of access-to-justice that best suits the given province.[5]

Quebec is a civil law jurisdiction in Canada. It took substantial legislative reform to promote access-to-justice, most notably effectuated by the adoption of significant amendments to the Code of civil procedure in 2003.[6] This reform was finally completed in February 2014 with the adoption of the New Code of Civil Procedure of Québec ("the "NCCP") and is slated to be enforced in early 2016.[7] The NCCP supports a cultural change, informed by the preliminary provision.[8]

> 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.[9]

The civil justice system is a public good, which serves both public and private interests via processes and procedures that are guided by these principles.[10] The purpose of the NCCP is ". . . to ensure

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[5] Canada is a federation: The Constitution provides for a division of powers among the federal government, the ten provinces, and three territories. Because the administration of justice comes under provincial jurisdiction, we find a variety of access to justice measures, including settlement conferencing practices in different provinces. *See* Constitution Act, 1867, 30 & 31 Vict., c . 3 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.), ss. 91–92.

[6] Code of Civil Procedure, R.S.Q., c. C-25 (Can.).

[7] NCCP Bill no28, An Act to establish the new Code of Civil Procedure (adopted on Feb. 28, 2014) (enacted), http://www.assnat.qc.ca/en/travaux-parlementaires/projets-loi/projet-loi-28-40-1.html.

[8] *See* Justice Minister Bertrand Saint-Arnaud, *The Minister of Justice wants a civil justice more accessible*, Press release of the Office of the Minister of Justice of Quebec (Apr. 30, 2013), http://www.fil-information.gouv.qc.ca (the Justice Minister's orientation given to Bill no 28).

"With this new Code of Civil Procedure, I would like to instill a culture change among all stakeholders of the judiciary . . . We are going, with this reform, to modernize the procedure in our courts so Quebec's civil justice will move from the 20th to the 21st Century. This shift shall make our justice system more accessible, faster, less heavy and less costly, while appealing to new ways of doing things" (translation by author).

[9] NCCP, Preliminary provision, paragraph 2.

[10] NCCP, Preliminary provision, paragraph 1. 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,

the accessibility, quality and promptness of civil justice."[11] This evolution is reaffirmed namely by a reversal of perspectives regarding civil procedure, since trial is no longer the preferred default mode of settlement. Extrajudicial modes, such as negotiation and mediation, are now the preferred modes. Focus is put on preventing disputes before they escalate and become litigious. This shift starts with the text of NCCP Article 1, which requires the parties to "consider private prevention and resolution processes before referring their dispute to the courts." Articles 2–7 describe the principles applicable to extrajudicial private modes that are ". . . mainly negotiation between the parties to the dispute as well as mediation or arbitration in which the parties rely on the assistance of a third parties." These principles are: self-determination of the parties (Articles 2 and 6), "good faith," "transparency" as well as "active cooperation" (Article 2), impartiality of third persons called to assist the parties (Article 3), and confidentiality of exchanges in order to reach an amicable settlement (Articles 4 and 5). There is also a framework concerning the legal effects related to waiving the acquired prescription and suspending prescription for not more than six months during the process (Article 7). Articles 605–55 govern mediation and arbitration specifically. And lastly, once the dispute is before the courts, another way to effectuate an amicable settlement is to have a judge conduct a settlement conference (NCCP Articles 161 to 165). Trial before a judge is the last resort.[12]

In civil law, this preliminary provision has significant impact on the interpretation of codified articles as a whole.[13] The preliminary provision has a normative force that sets the tone of the law

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procedure before the courts as well as procedure for the execution of judgments and for judicial sales.

11 NCCP, *supra* note 9.

12 *See* Montreal Bar Press Release, The Honourable François Rolland, Chief Justice of the Superior Court of Quebec (Nov. 17, 2014). On the 7th Annual Round Table of the Bar of Montreal on Participatory Justice, an invitation to the legal community was launched to take the turn of participatory justice:

> "The court simply cannot be the first forum which is approached to have a dispute resolved. There is evidence that the prosecution responds poorly to the needs of our citizens who want convenient and expeditious solutions to their problems, at a reasonable cost . . . It is in this spirit that participatory justice exists." (translation by author)

13 NCCP, Preliminary provision, paragraph 3. This Code must be interpreted and applied as a whole, 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.

and informs its interpretation as a coherent whole.[14] The preliminary provision confirms that the methods of prevention and settlement of disputes and litigations, both extrajudicial and judicial, must be "fair-minded" and "encourage the persons involved to play an active role." This participatory justice is central to the cultural evolution brought about by the NCCPC and is needed to reinforce citizens' support for the rule of law.

The foregoing brings us to ask two fundamental questions regarding Quebec law, with the aim of evaluating civil procedure reform of 2003 through 2014: (1) What is a fair-minded dispute prevention and resolution process?; (2) How do we empirically measure the fairness of a process from the litigant's perspective? This paper contributes to the advancement of knowledge by answering these questions. This paper's first contribution is an innovative theoretical framework of the "sense of access-to-justice" ("SAJ") experienced by the litigant who participates in a preventive and resolution process of a dispute. Although this framework can be applied to several processes, including trial, we specifically adjusted it to focus on settlement conferences where judges preside. Its second contribution is an empirical assessment of settlement conferences as access-to-justice tools, as used in the 2003 civil procedure reform. The results measure the quality of litigants' and lawyers' senses of access-to-justice after they have participated in settlement conferences overseen by Quebecois trial court judges.[15]

We approach civil procedure reform regulation from a "normative individualism" perspective. In an effort to provide a nor-

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14 *See* Catherine Piché, *La disposition préliminaire du Code de procédure civile*, 73 REVUE DU BARREAU 137 (2014).

15 In Quebec, there are two trial courts, the Court of Quebec and the Superior Court. For more information, see http://www.justice.gouv.qc.ca/english/publications/generale/systeme-a.htm. 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). The empirical research we conducted included both the Court of Quebec and the Superior Court.

mative argument for regulating dispute resolution, Steffek suggests that many legal and political philosophers from the common law and the civil law traditions[16] share this fundamental principle: ". . . [j]ust law requires justification in relation to the individual concerned."[17] He summarizes normative individualism and its implication for dispute resolution regulation as follows:

> Normative individualism is an open concept insofar as the interests of individuals are not imposed by a third party. Instead, the individual person determines his or her interests. The interests of the individuals are the basis on which the justness of a legal rule is determined. This requires weighing and balancing interests . . . normative individualism is the basis of human and constitutional rights . . . Hence, these human rights, in particular as they concern dispute resolution, are oriented towards the individual. Normative individualism has consequences for the regulation of dispute resolution. It places the individual and the conflict perceived by the individual at the centre of regulation. Dispute resolution should be designed from the perspective of the individuals concerned. They should not be regulated by referring to abstract notions like state, public interest or economy without those notions indirectly expressing the interests of individuals . . . Thus the individual determines his or her interests in resolving the conflict and determines which mechanisms serves these interests best . . . The self-determination of the individual as regards the resolution of his or her conflicts places the responsibility for conflict resolution with the individual in the first place.[18]

This paper is innovative in that it is the first to explore litigants' SAJ as a potential target for civil procedure reform. Indeed, it provides a unique measurement tool to assess settlement conference users' perceptions of the quality of procedure, outcome and support as well as the instrumental value of judicial practices using an integrative problem-solving approach. This is a response to a need that has been clearly expressed, in particular, by the Canadian reports of the National Action Committee on Access to Justice in Civil and Family Matters and the Canadian Bar Association

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16 Steffek refers to Thomas Hobbes, John Locke, Robert Nozick, Ronald Dworkin, John Rawls, Immanuel Kant, Jean-Jacques Rousseau, Norbert Hoerster & Dietmar von der Pfordten. *See* Felix Steffek & Hannes Unberath, *Principled regulation of Dispute resolution: Taxonomy, Policy, Topic*, *in* REGULATING DISPUTE RESOLUTION: ADR AND ACCESS TO JUSTICE AT THE CROSSROADS 33, 43 (Felix Steffek & Hannes Unberath ed., 2013).

17 *Id.*

18 *Id.*

published in 2013.[19] It is essential to ascertain users' views before making decisions regarding public or private policies or taking actions in response to the access-to-justice challenge.

II. Previous Empirical Research on Settlement Conferencing and Access to Justice Metrics

The Issue of using Civil Procedure Reform to improve Access-to-Justice is a worldwide one, and alternative dispute resolution methods ("ADR") have long been considered to be promising.[20] Empirical research assessing those practices covers various topics and uses a wide range of methodologies that come to mix-results.[21] More recently, Judicial Dispute Resolution ("JDR") has come to the attention of policymakers and researchers. Even though Judicial Dispute Resolution practices, including settlement conferencing, have emerged in various jurisdictions, this research field is considered to be recent and little empirical research has been conducted.[22] Similarly, empirical measures of access-to-justice issues are garnering increased attention among legal scholars. Measuring Access-to-Justice can take various forms.[23] This section will cover previous empirical research and assess the state of knowledge in these both emerging research fields. What has been empirically

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19 *See Reaching Equal Justice: An Invitation to Envision and Act,* Can. Bar Ass'n (Aug. 2013), http://www.cba.org/cba/equaljustice/secure_pdf/Equal-Justice-Report-eng.pdf; *see also Access to Civil and Family Justice: A Roadmap for Change*, Nat'l Action Comm. Access to Just. Civ. & Fam. Matters (2013), http://www.cfcj-fcjc.org/sites/default/files/docs/2013/AC_Report_English_Final.pdf.

20 *See* Vivek Maru, *Access to Justice and Legal Empowerment: A Review of World Bank Practice*, 2 Hague on R. L. 259 (2010); Klaus J. Hopt & Felix Steffek, Mediation: Principles and Regulation in Comparative Perspective (Oxford University Press, 2012); Steffek & Unberath, *Principled regulation of Dispute resolution: Taxonomy, Policy, Topic*, *in* Regulating Dispute Resolution: ADR and Access to Justice at the Crossroads, *supra* note 16.

21 *See* Hazel Genn, *What is Civil Justice For? Reform, ADR and Access to Justice*, 24 Yale J.L. & Human. 397 (2012); Hopt & Steffek, *Mediation. Comparison of Laws, regulatory Models, Fundamental Issues*, *in* Mediation: Principles and Regulation in Comparative Perspective, *supra* note 20, at 93–109; Carrie J. Menkel Meadow, *Dispute Resolution*, *in* The Oxford Handbook of Empirical Legal Research 597 (Peter Cane & Herbert Kritzer eds, 2010).

22 *See generally* Tania Sourdin & Archie Zariski, The Multi-Tasking Judge Comparative Judicial Dispute Resolution 1 (Tania Sourdin & Archie Zariski eds, 2013).

23 For a summary of diversities in research, see Juan Carlos Botero, Robert L. Nelson & Christine Pratt, *Indices and Indicators of Justice, Governance, and the Rule of Law: An Overview*, 3 Hague J. on Rule L. 2, 153–69 (2011); *Access to Justice Metrics. A Discussion Paper Envisioning Equal Justice Project*, Can. Bar Assoc., Apr. 2013, http://www.cba.org/CBA/Access/PDF/Access_to_Justice_Metrics.pdf.

measured on the topics of settlement conferencing and access-to-justice metrics? What are the actual trends? Because of the scope of our study, we will focus on Canada while providing references to other jurisdictions that are considered leaders in the field.

A. *Previous Research on Settlement Conferencing*

Canada is one of the leading countries in Judicial Dispute Resolution. The use of Settlement Conferences ("SCs"), in which judges help litigants find a negotiated settlement, has developed in all of the provinces. The provinces of Québec, Nova Scotia, and Alberta separate judicial-settlement functions from traditional trial-management functions. When performing SCs, the judge facilitates settlement discussions between parties. In the event that they do not come to an agreement, the judge cannot try the case or decide any incidental application. In Québec, the Civil Procedure Reform of 2003 included SCs processes within the Code of Civil Procedure. Recent amendments to the court rules in Alberta, British Columbia, Nova Scotia, and Saskatchewan were made to provide more formalized processes for judicial intervention in the settlement of pending cases.[24] To date, only two national surveys have been conducted on the topic of JDR.

The first national empirical research was a quantitative study performed by Roberge in conjunction with the National Judicial Institute.[25] In 2005, the researchers explored the diversity of settlement conferencing practices among Canadian judges.[26] The study

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[24] In Alberta, see A.R. 124/2010, November 1, 2010, http://www.qp.alberta.ca/documents/rules2010/Rules_vol_1.pdf; in British Columbia, see B.C.R. 168/2009 Supreme Court Civil Rules, http://www.bclaws.ca/Recon/document/ID/freeside/168_2009_00; In Manitoba, see Man. R. 553/88 Court of Queen's Bench Rules, articles 20A(6) to 20A(23), especially 20A(15), http://web2.gov.mb.ca/laws/rules/qbr1e.php; New Brunswick, NB Reg. 82-73, Rules 50.07 to 50.15, http://www.gnb.ca/0062/regs/Rule/rule_list.htm; Newfoundland and Labrador, see SNL 1986, c 42, (Can.), http://www.assembly.nl.ca/legislation/sr/regulations/Rc86rules.htm; In Nova Scotia, see NS Reg. 420/2008, Rules of Civil Procedure, Rules 10.01 and 10.11-10.16, http://nslaw.nsbs.org/nslaw/index.do; Ontario Rules of Civil Procedure, RRO 1990, Reg. 194, article 50, http://www.e-laws.gov.on.ca/html/regs/english/elaws_regs_900194_e.htm; Prince Edward Island, see Ontario Code of Civil Procedure; Saskatchewan Queens Bench Rules, Sask Gaz Dec. 27, 2013, 2684, July 1, 2013, Rule 191, http://www.qp.gov.sk.ca/documents/English/Rules/qbrules.pdf.

[25] The National Judicial Institute is the main continuing legal education organization for Canadian judges. For more information, see NAT'L JUD. INST., http://www.nji-inm.ca.

[26] Jean-François Roberge, *Could Judicial Mediation Deliver a Better Justice? Supposing We Trained Judges As Expats?*, REVUE D'ARBITRAGE ET DE MÉDIATION OF ARB. & MEDIAT. 3 (2010) ; Jean-François Roberge, Ph.D Thesis, *Typologie de L'intervention en Conciliation*

measured the perceptions of Canadian judges about their practice of JDR. Data was collected via a bilingual (French-English) questionnaire.[27] An exploratory factor analysis was performed and results identified three intervention types: (1) Legal Expert—Risk Manager; (2) Problem Solver Expert—Integrative Solution Manager; and (3) Participatory Justice Facilitator.[28]

The second national study was performed by the *Ontario Bar Association Judicial Mediation Taskforce*.[29] The research report published in 2013 informed us about the JDR landscape in Canada. The qualitative research focused on JDR legislative regimes in every province and was supplemented with interviews and presentations from prominent Canadian JDR specialists.[30] The findings were compiled around three themes, which included separation of the settlement facilitation function, demand and delay, and judicial inclination to foretell results of trial.[31] The Taskforce's recommendations included the formalization of SCs in the Ontario Rules of Civil Procedure[32] as a separate judicial function. The Taskforce concluded that this would make the judicial dispute resolution system in Ontario more transparent and would more adequately respond to the practical realities of the Ontario litigation landscape in conjunction with the mandatory civil mediation enforced in the province.[33]

On the provincial level, the Alberta Court of Queen's Bench engaged in an empirical evaluation of their JDR practices in

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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 (Université Laval & Université de Sherbrooke, 2007), http:www.theses.ulaval.ca/2007/24199/24199.pdf.

27 The study was conducted in 2005. There were 500 respondents (N = 500) on a total of 1500 judges throughout the country. The results indicate that the questionnaire is accurate because the total items have a very good reliability coefficient (Cronbach's alpha = 0.83). More specifically, 83% of the variance in scores can be attributed to participants' attitudes about judicial conciliation while 17% is attributable to measurement error.

28 A principal factor analysis and a varimax rotation were used. Factors were constructed from a moderate correlation of 0.40 ($p < 0.01$). For the expert in risk analysis, the correlations of the variables used are between 0.40 and 0.78. For the expert in problem solving, the correlations of the variables used are between 0.41 and 0.71. For the participatory justice facilitator, the correlations of the variables used are between 0.41 and 0.68.

29 *A Different 'Day in Court': The Role of the Judiciary in Facilitating Settlements,* ONT. BAR ASSOC. JUD. MEDIATION TASKFORCE (2013), http://www.oba.org/getattachment/News-Media/News/2013/July-2013/A-Different-%E2%80%98Day-in-Court-The-Role-of-the-Judiciar/ADifferentDayInCourt7122013.pdf.

30 *Id.* at 8.

31 *Id.* at 12, 25.

32 *Id.* at 23.

33 *Id.* at 23–27.

2007.[34] The Court opted for a multi-faceted approach to SCs. It ranges from facilitative mediation to evaluative mediation. Mini-trials and binding mediation, in which parties agree in writing to accept the judge's opinion in the event that a facilitated settlement fails, are also possible. Settlement conferencing is flexible. It meets parties' needs and is oriented towards finding a voluntary settlement based on the interests of the parties and the legality of their rights. The approach attempts to balance fairness and legality. The empirical research, conducted by Rooke, surveyed litigants', lawyers', and judges' perceptions and used descriptive statistics regarding the collected data.[35] The main results showed the following: 89 percent of the cases were successfully resolved, there were tendencies towards increasing the demand for binding mediation, decreasing the number of trials, and decreasing the time needed to obtain a trial date, and there was a high level of satisfaction among users of JDR services. For these reasons, the JDR program has become, and is still, the norm in Alberta.

In Québec, the provisions about SCs are in the Québec Civil Code of Procedure as a result of the Civil Procedure Reform of 2003.[36] SCs are voluntary and are engaged with at the request of any of the parties, with their consent, at any stage of the proceeding.[37] It is encouraged that SCs be explored before a date for a trial has been set, to avoid the costs and delays caused by the proceedings. A judge presides over a SC and a SC may last an entire day. Parties must attend the SCs and it is their choice to be accom-

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[34] SOURDIN & ZARISKI, *supra* note 22. Associate Chief Justice John D. Rooke, *The Multi-Door Courthouse is Open in Alberta: Judicial Dispute Resolution is Institutionalised in the Court of Queen's Bench*, *in* THE MULTI-TASKING JUDGE COMPARATIVE JUDICIAL DISPUTE RESOLUTION, *supra* note 23, at 160.

[35] Associate Chief Justice John D. Rooke, *Improving Excellence: Evaluation of the Judicial Dispute Resolution Program in the Court of Queen's Bench of Alberta* (Evaluation report) (June 1, 2009), http://cfcj-fcjc.org/sites/default/files/docs/hosted/22338-improving_excellence.pdf.

[36] CCP, Art. 151.14–151.23; NCCP, Art. 161–65.

[37] At any stage of the proceeding, the chief justice or chief judge may, at the request of the parties, designate a judge to preside a settlement conference. At their request, the parties must present a summary of the questions at issue. The chief justice or chief judge may, on his or her own initiative, recommend the holding of such a conference. If the parties consent, the chief justice or chief judge designates a judge to preside the conference. CCP, Art. 151.15. At any stage of a proceeding but before the scheduled trial date, the chief justice or chief judge may assign a judge to preside over a settlement conference if the parties so request, briefly stating the issues to be examined, or if the chief justice or chief judge recommends that a settlement conference be held and the parties concur. The chief justice or chief judge may also do so even after the scheduled trial date, if exceptional circumstances so warrant. Presiding over settlement conferences falls within the conciliation mission of judges. NCCP, Art. 161.

panied by a lawyer or not.[38] In 2003, the Code of Civil Procedure outlined that judges' intervention should assess both of the parties' interests and positions, with a view "to negotiate and explore mutually satisfactory solutions."[39] The new Civil Code of Procedure adopted in 2014 reinforces guidance regarding the judge's intervention, suggesting a facilitative approach "to help them better understand and assess their respective needs, interests and positions, and explore solutions."[40]

An empirical research project has been conducted by Noreau in 2009 in the judicial district of Longueuil to evaluate the efficiency of a combined early case management and settlement conferencing pilot project. Researchers used questionnaires to collect litigants' perceptions and performed descriptive and comparative analysis. Results were positive and supported the notion that early judicial initiatives promote settlement and better administration of justice.[41]

In many countries outside of Canada, judges are facilitating negotiations between parties in order to explore the likelihood of a settlement. Settlement conferencing is practiced in different forms. These variations of judicial dispute resolution practice are informed by domestic and cultural differences.[42] Empirical, qualita-

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38 A settlement conference is held in the presence of the parties, and, if the parties so wish, in the presence of their attorneys. With the consent of the parties, the presiding judge may meet with the parties separately. Other persons may also take part in the conference if the judge and the parties consider that their presence would be helpful in resolving the dispute. NCCP, Art. 151.17. A settlement conference is held in the presence of the parties, and, if the parties so wish, in the presence of their lawyers. It is held in camera, at no cost to the parties and without formality. NCCP, Art. 163, para. 1.

39 The purpose of a settlement conference is to facilitate dialogue between the parties and help them to identify their interests, assess their positions, negotiate and explore mutually satisfactory solutions. A settlement conference is held in private, at no cost to the parties and without formality. NCCP, Art. 151.16.

40 The purpose of a settlement conference is 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. NCCP, Art. 162.

41 Pierre Noreau, *Les Conférences de Conciliation et de Gestion Judiciaire*, Court of Québec, Pilot Project, Longueuil 2009; Research report, June 2010 (on file with author); *see also* Pierre Noreau & Mario Normandin, *L'autorité du Juge au Service de la Saine Gestion de l'instance*, 71 REVUE DU BARREAU 207 (2012).

42 SOURDIN & ZARISKI, *supra* note 22. Judicial Dispute Resolution developments could be enhanced in a legal context where innovation is possible through courts rules of practice. *See* Nadja Alexander, *Harmonization and Diversity in the Private International Law of Mediation: The Rhythms of Regulatory Reforms*, *in* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE, *supra* note 20, at 153. As an example, German judges began to run a certain number of pilot projects at regional levels and some jurisdictions received support towards

tive or quantitative studies to assess and improve settlement conferencing practices have been conducted mainly in USA,[43] Netherlands,[44] Finland,[45] Norway,[46] China,[47] Japan,[48] and Singa-

enhancing judicial mediation through their ministries of justice. Ss. 278(5), 632 ZPO was employed by way of analogy to justify such practice. For more information, see PETER TOCHTERMANN, *Mediation in Germany: The German Mediation Act—Alternative Dispute Resolution at the Crossroads*, *in* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE, *supra* note 20, at 153.

43 Settlement conferencing is practiced in many states under FED. R. CIV. P. 16. *See* SOURDIN & ZARISKI, *supra* note 22, at 59–65; Nancy Welsh, Donna Stienstra & Bobbi McAdoo, *The Application of Procedural Justice Research to Judicial Actions and* Techniques, *in* THE MULTI-TASKING JUDGE COMPARATIVE JUDICIAL DISPUTE RESOLUTION, *supra* note 22. *See, e.g.*, Peter Robinson, *An Empirical Study of Settlement Conference Nuts and Bolts: Settlement Judges Facilitating Communication, Compromise, and Fear*, 17 HARV. NEGOT. L. REV. 97 (2012); Peter Robinson, *Adding Judicial Mediation to the Debate about Judges Attempting to Settle Cases Assigned to Them for Trial*, 2006 J. DISP. RESOL. 335 (2006); Bobbi McAdoo, *A Report to the Minnesota Supreme Court: The Impact of Rule 114 on Civil Litigation Practice in Minnesota*, 25 HAMLINE L. REV. 401 (2002); Bobbi McAdoo & A. Hinshaw, *The Challenge of Institutionalizing Alternative Dispute Resolution: Attorney Perspectives on the Effect of Rule 17 on Civil Litigation in Missouri*, 67 MO. L. REV. 473 (2002); Roselle L. Wissler, *Court-Connected Mediation in General Civil Cases: What We Know from Empirical Research* 17 OHIO ST. J. ON DISP. RESOL. 641 (2002); JONA GOLDSCHMIDT & LISA L. MILORD, JUDICIAL SETTLEMENT ETHICS. JUDGE'S GUIDE (American Judicature Society, 1996); Edward Brunet *Judicial Mediation and Signaling*, 3 NEV. L.J. 232 (2002-3); James A. Wall, Jr. & Dale E. Rude, *Judicial Involvement in Settlement: How Judges and Lawyers View It*, 72 JUDICATURE 175 (1988); Dorrise Marie Provine, *Settlement Strategies for Federal District Judges*, FED. JUD. CTR. (1986); Wayne D. Brazil, *Settling Civil Suits: Litigators' Views About Appropriate Roles and Techniques for Federal Judges*, AM. BAR ASSOC. (1985); Wayne. D. Brazil, *Settling Civil Cases: Where Attorneys Disagree about Judicial Roles,* 23 JUDGES J. 20 (1984); James A. Wall*, Judicial Participation in Settlement*, 1984 MO. J. DISP. RESOL. 25 (1984); Peter Robinson, *Settlement Conference Judge—Legal Lion or Problem Solving Lamb: An Empirical Documentation of Judicial Settlement Conference Practices and techniques*, 33 AM. J. TRIAL ADVOC. 113 (2009).

44 Settlement conferencing in the Netherlands has been developed within pilot projects and is being furthered pragmatically through experiencing. *See, e.g.*, SOURDIN & ZARISKI, *supra* note 23; Machteld W. de Hoon & Suzan Verberk, *Judicial Conflict Management: What brings Litigants to the Court*, *in* THE MULTI-TASKING JUDGE. COMPARATIVE JUDICIAL DISPUTE RESOLUTION, *supra* note 23; Rob Jagtenberg & Annie de Roo, *Frame for a Dutch portrait of Mediation*, Customized Conflict Res.: Court-connected Mediation in the Netherlands 1999–2009 7–23 (R. Jagtenberg, A. de Roo, M. Pel, L. Combrink, A. Kljn & S. Verberk eds, 2011), http://www.rechtspraak.nl/English/Publications/Pages/Judiciary-Quarterly.aspx; Machteld W. de Hoon & Suzan Verberk, *Towards a More Responsive Judge: Challenges and Opportunities*, 10 UTRECHT L. REV. 4, 27–40 (2014); Rick J. Verschoof, *What is it all about? An Overview of the Dutch Research and a Plea for Change*, 10 Utrecht L. Rev. 4, 41–55 (2014), citing Jan Van Der Linden studies; M. PEL & S. VERBERK, THE PILOTS CUSTOMIZED CONFLICT RESOLUTION. REFLECTION ON RESULTS AND IDEAS FOR THE FUTURE [De Pilots, Conflictoplossing op maat, Reflectie op Resultaten en Ideeën voor de Toekomst](M. Pel & S. Verberk eds, 2009); Bert Niemeijer and Machteld Pel, *Court-based Mediation in the Netherlands: Research, Evaluation and Future Expectations*, 110 PENN. ST. L. REV. 345 (2005).

45 Court-connected mediation in Finland is modeled on the experiences of Norway and Denmark. Court-connected mediation was introduced with the Act on court-connected mediation (663/2005) and the Act on settlement certification in court (amendment Act 664/2005). In 2011,

the Act on Mediation in Civil Matters and Con?rmation of Settlements in General Courts (394/2011) entered into force. According to the Finnish legislation, a judge is required to investigate the prospects for settling a civil case during its preparation and pursue an amicable resolution of the matter. An empirical research done by the Research Institute of Legal Policy was based on court documents of the court-connected mediation cases in the years 2006–2009, a total of 412 cases. For more information on the empirical research, see Ervasti K (2011) Utvecklingslinjer för rättsmedling i Finland. Tidskrift utgiven av Juridiska Föreningen i Finland 3/2011, s, pp 267–89; KAIJUS ERVASTI, *Court-Connected Mediation in Finland: Experiences and Visions*, *in* THE FUTURE OF CIVIL LITIGATION: ACCESS TO COURTS AND COURT-ANNEXED MEDIATION IN THE NORDIC COUNTRIES 121, 128–34 (Laura Ervo & Anna Nylund eds, 2014), https://tuhat.halvi.helsinki.fi/portal/en/publications/utvecklingslinjer-f(c06fe36b-99bf-49ba-98f7-e3961f1b612b).html.

46 Judicial mediation in Norway is enacted in the Dispute Resolution Act of 17 June 2005 no. 90 relating to mediation and procedure in civil disputes (The Dispute Act), Sections 8–3, 8–4. Prior to this Act, a qualitative and quantitative evaluation of judicial mediation was launched in 2000. The research found that judicial mediation is used in twenty to twenty-five percent of civil disputes and that a settlement is reached for seventy to eighty percent of the cases. Based on the statistics, the research found that legal proceedings for cases that have not been settled through judicial mediation were sixty to sixty percent of the average for civil disputes. Surveyed participants reported that mediation was less stressful and there was a broad consensus among them that the quality of the settlements were at least balanced and fair. *See* the Report by Richard H. Knoff, *Raskere? Billigere? Vennligere? Evaluering av Prøveordningen med Rettsmekling*, RHKNOFF, 2001, http://www.rhknoff.no/Rapporter/R157JD.pdf; *see also* HOPT & STEFFEK, *Mediation. Comparison of Laws, regulatory Models, Fundamental Issues*, *in* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE, *supra* note 20, at 1159–160; Anna Nylund, *The Many Ways of Civil Mediation in Norway*, *in* THE FUTURE OF CIVIL LITIGATION: ACCESS TO COURTS AND COURT-ANNEXED MEDIATION IN THE NORDIC COUNTRIES 97, 116–17 (Laura Ervo & Anna Nylund eds., 2004).

47 Settlement conferencing has been introduced as a routinely practiced procedure within the adjudication process. This customary practice has been entrenched in the Civil Procedure Law of the People's Republic of China 991, Article 9 that provides: "The people's courts shall carry out conciliation in accordance with the principles of voluntariness and lawfulness, it conciliation efforts are ineffective, they shall render judgements without delay." There has been little empirical research on judicial dispute resolution in China. A study based on ethnographic observations of more than twenty civil trials was done at a district court in City Z in southern China in 2011. The data was collected through trials' observations and interviews with judges. The authors conclude that the judicial mediation practiced at the City Z's district court remains too similar to adjudication and should be improved by making it more mediatory. The authors make a policy suggestion to make judicial mediation strictly a pretrial exercise even if the judge and the mediator can be the same person. For more information, see, e.g., Kwai Hang Ng & Xin He, *Internal Contradictions of Judicial Mediation in China*, 39 L. & SOC. INQUIRY 285, 285–312 (2014). A pilot scheme was introduced at the Chaoyang District Court of Beijing in 2004 by the *Experimental Reform of Mediation*. Its outcome is claimed to be a success, yet the empirical data (statistics and other information) has not been released yet. This pilot scheme offers three categories of mediations: mediation by court-appointed mediators, pretrial mediation by judicature secretary, and attorney-managed conciliation. For more information, see SOURDIN & ZARISKI, *supra* note 22, at 103; Sarah E. Hilmer, *Theory and Practice of Court-Annexed Mediation in China: Quo Vadis?*, *in* THE MULTI-TASKING JUDGE. COMPARATIVE JUDICIAL DISPUTE RESOLUTION, *supra* note 22, at 103–19. *See also* the theoretical comparative perspective on judicial settlement activities between the Alberta Court of Queen's Bench in Canada and the Yantai Intermediate Court in the Shandong province in China by SOURDIN & ZARISKI, *supra* note 22, at

pore.[49] The research topics explored cover a broad range of issues, for example: which judicial actions enhance or reduce parties' and lawyers' perceptions of procedural justice or substantive justice, which judicial actions make settlement more or less likely, judges' roles and techniques that support settlement discussions, ethics of judges' judicial techniques, impact of settlement conference programs on case processing and its contribution to a better administration of justice, etc. There is a need in the literature to go further than merely evaluating the acceptability or inappropriateness of settlement conferencing techniques. The literature should strive to

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121; Archie Zariski & Shi Chang-qing, *Settlement Judges East and West: A Comparison of Judicial Settlement Activity in China and Canada*, *in* THE MULTI-TASKING JUDGE. COMPARATIVE JUDICIAL DISPUTE RESOLUTION, *supra* note 22, at 121–38.

48 In Japan, civil conciliation conducted by judges is allowed under the Civil Conciliation Act of 1st October 1951 (CCA). For an English translation, see Minji Chôtei-hô, Law no. 222/1951 at EHS Vol. II., Ma, no. 2360 (as of 2004). Judicial conciliation in civil matters is considered a success. Data reveals that between the period of 1980 to 2000, litigants applications for judicial conciliation quintupled while the number of ordinary actions increased by a factor of 2.5 over the same period of time. The ratio for the settling of cases through civil conciliation increased from one-to-three to one-to-two from the beginning of the 1990 to 1999. In recent years, the research found an increase in settlements reached pursuant to Article 17 of the CCA under which parties accept the settlement proposed by the judge, over settlements reached by the parties themselves. This tendency creates concerns for parties that civil conciliation resembles court procedures. For more information in the empirical research, see Hopt & Steffek, *supra* note 21, at 1079; Harald Baum, *Mediation in Japan: Development, Forms, Regulation and Practice of out-of-Court Dispute Resolution*, *in* MEDIATION: PRINCIPLES AND REGULATION IN COMPARATIVE PERSPECTIVE, *supra* note 20, at 1079–86.

49 Singapore is taking a leadership role with the creation in March 2015 of the State Courts Centre for Dispute Resolution established to consolidate Court-ADR services, with the view of providing an integrated and holistic approach to resolve conflicts. Prior to this development, Singapore courts expertise has been built in the recent years through empirical assessment of settlement conferences practices. In 2013–14, Singapore State Courts' Primary Dispute Resolution Centre has surveyed users' opinions on time and costs reductions and outcome satisfaction through court-mediation within the Magistrate's Court jurisdiction. For an overview of the results, see *Joint Launch of the State Courts Centre for Dispute Resolution and "Mediation in Singapore: A Practical Guide"*, JOINT MEDIA RELEASE OF THE STATE CT. SINGAPORE AND THOMSON REUTERS, Mar. 5, 2015, http://www.statecourts.gov.sg/NewsAndEvents/Documents/Media%20Release%20Joint%20Launch%20of%20the%20State%20Courts%20Centre%20for%20Dispute%20Resolution%20and%20Mediation%20in%20Singapore.pdf. In addition, a Court User Survey was conducted by an independent evaluation firm in 2013 on the topics of confidence in the fair administration of justice, fairness, accessibility, independence, integrity, impartiality, and responsiveness. The survey also quantified users' satisfaction of courts' personnel on each of the following items: Courteous, helpful, knowledgeable, efficient, responsive, empathetic and able to communicate well. The results demonstrate satisfaction rates above 94% for all of the items evaluated. *See State Courts News*, Issue 01, June 2014, 10–11, https://www.statecourts.gov.sg/Resources/Documents/State%20Courts%20New%20Issue%2001_June2014.pdf; *generally* GEORGE LIM SC & DANNY MCFADDEN, MEDIATION IN SINGAPORE: A PRACTICAL GUIDE (Sweet & Maxwell, 2015) (overview of both the development and current practice of mediation in Singapore).

understand the impact of such techniques and define "best practices" to improve the perception of fairness from the litigants' and lawyers' views.[50]

In summary, Canada is one of the leading countries in SCs. Understanding Canada's diversity of models experienced within both civil law and common law traditions could be instrumental for civil procedure reform initiatives. Canadian empirical research, described previously, has been conducted with the objective of developing a better understanding of SC practices and judges' and litigants' perceptions. Other countries that are leaders in SCs have empirically evaluated their practices to improve techniques and processes, primarily seeking better administration of justice. Despite the promising research, there is still a need for assessing SCs' contributions to the improvement of access-to-justice for citizens in order to increase their adherence to the rule of law.

B. *Previous Research on Access to Justice Metrics*

Access-to-Justice Metrics is an emerging research field that responds to the need to build an evidence-based approach to support reform and continuous improvement of the justice system. Metrics are quantifiable measures of activities and performance that can be combined in an index providing an overall measurement of an organization's operation. In Canada, the need for access-to-justice metrics is clearly recognized and is integral for the support of reform initiatives.[51]

> We have only fragmentary data and no capacity to pull it together to get a complete picture of access to justice in Canada. The absence of an evidentiary base for action, and shared views on what to measure and how to measure it are serious obstacles to achieving equal justice. We all know the maxim 'you can only manage what you can measure.' We are far from having access to justice metrics to measure justice system performance. The development of metrics is an important pillar supporting justice innovation. Metrics serve a range of purposes, from informing

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50 SOURDIN & ZARISKI, *supra* note 22, at 65; Nancy Welsh, Donna Stienstra & Bobbi McAdoo, *The Application of Procedural Justice Research to Judicial Actions and Techniques in Settlement Sessions*, *in* THE MULTI-TASKING JUDGE COMPARATIVE JUDICIAL DISPUTE RESOLUTION, *supra* note 22, at 57, 65.

51 *See Access to Justice Metrics, A Discussion Paper: Envisioning Equal Justice Project*, *supra* note 23; *see also Reaching Equal Justice: An Invitation to Envision and Act*, *supra* note 19, at 142–45.

> the public about the justice system and grounding the day-to-day decision making of justice system participants, to supporting policy making processes and change processes. Metrics enhance people's choices, enable comparison and learning, increase transparency and create incentives for improving access to justice.[52]

In the Justice sector, there are four initiatives that stand out as leaders: the World Justice Project Rule of Law Index ("WJP"), the Hague Model Measuring Access to Justice project ("MA2J"), The Australian Access to Justice and Legal Needs Program ("A2JLN"), and the Justice Index of the National Center for Access to Justice at Cardozo Law School ("NCAJ"). We will highlight their characteristics in order to assess how they contribute to the development of knowledge in the field, and in order to position our own study regarding the measurement of access-to-justice.

The World Justice Project "WJP Rule of Law Index" ("Index")[53] offers a quantitative assessment tool that measures countries' adherence to the rule of law. These annual index reports have been published since 2010. The latest Index uses forty-seven indicators, organized around eight themes, including civil justice. Within the topic of civil justice, the Index measures the extent to which ordinary people can resolve their disputes in a peaceful and effective manner. This articulation is based on around fifty-seven variables, all of which form seven sub-factors. The sub-factors include whether people can access and afford civil justice, whether civil justice is subject to unreasonable delays, and whether ADR is accessible, impartial, and effective. The measurement is based on experts' questionnaires and surveys of the general public,[54] which comprise both experience-based questions and perception-based questions.

The Hague Model Measuring Access to Justice project[55] is a methodology that measures the costs and quality of paths to justice from the perspective of the user. The model measures three 'pil-

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52 *Reaching Equal Justice: An Invitation to Envision and Act*, *supra* note 19, at 142.

53 *World Justice Project Rule of Law Index*, *supra* note 3.

54 For more information on the methodology used to build the WJP Rule of Law Index, see Juan Carlos Botero & Alejandro Ponce, *Measuring the Rule of Law*, *The World Justice Project - Working Paper Series*, THE WORLD JUST. PROJECT (Nov. 30, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1966257.

55 *A Methodology that Measures the Cost and Quality of Justice*, ACCESS TO JUSTICE (2009), http://www.measuringaccesstojustice.com. The MA2J project was developed by Tilburg University, the Tilburg Institute for Interdisciplinary Studies of Civil Law and the Conflict Resolution Systems ("TISCO") and the Hague Institute for the Internationalisation of Law ("HiiL").

lars' of experience that comprise the costs of justice including monetary costs, opportunity costs and intangible costs—specifically noting the quality of the procedure and the quality of the outcome. Each of the pillars is assessed through indicators and sub-indicators.[56] The methodology uses surveys of random samples of persons who have engaged in various paths to justice.[57] Based on the data collected, the indicators are summarized and make an access-to-justice index that provides feedback to providers of justice system services.

The Australian Access-to-Justice and Legal-Needs ("A2JLN") research program is aimed at assessing the legal and access-to-justice needs of disadvantaged people and the broader community.[58] The definition of legal needs and access-to-justice needs includes the ability to obtain legal assistance, participate effectively in the legal system, obtain assistance from non-legal advocacy, and support and participate effectively in law reform processes. The research uses a range of qualitative and quantitative methodologies and is based on data collected from legal service providers, surveys and targeted qualitative studies.[59] Other complementary research projects in Australia include the Australian initiative to build an evidence base for the civil justice system[60] and a review of

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56 For more information on the indicators, see Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems/TISCO, Martin Gramatikov, Maurits Barendrecht, Malini Laxminarayan, Jin Ho Verdonschot, Laura Klaming & Corry van Zeeland, *A Handbook for Measuring the Costs and Quality of Access to Justice*, ACCESS TO JUST. 29–39 (2009), http://www.measuringaccesstojustice.com/wp-content/uploads/2011/03/Handbook_v1.pdf [hereinafter *A Handbook for Measuring the Costs and Quality of Access to Justice*].

57 For more information on the methodology used to build the MA2J methodology, see Martin Gramatikov, Maurits Barendrecht, Jin Ho Verdonschot, *Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology*, 3 HAGUE J. ON RULE L. 349 (2008), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1269328 [hereinafter *Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology*].

58 Christine Coumarelos et al., *Legal Australia-Wide Survey: Legal Need in Australia*, ACCESS TO JUST. (AUG. 2012), vol. 7, http://www.civiljustice.info/access/25.

59 *Id.*

60 The Australian initiative to building an evidence base for the civil justice system is a long-term project aimed at remedying the lack of consistent and comparable data across the civil justice system. The overarching objective of the initiative is to offer a civil justice system that contributes to the well-being of the Australian community by fostering social stability and economic growth and contributing to the maintenance of the rule of law. A framework is being developed by a working group composed of civil justice system stakeholders and data experts. For more information, see *An Evidence Base for the Civil Justice System*, AUSTL. GOV'T, ATT'Y GEN. DEP'T, http://www.ag.gov.au/LegalSystem/Pages/Anevidencebasefortheciviljusticesystem.aspx.

the National Partnership Agreement on Legal Assistance Services.[61]

In the USA, the Justice Index[62] is a project of the National Center for Access to Justice at the Cardozo Law School ("NCAJ"). It aims to measure how state-based justice systems provide access-to-justice. The Justice Index is based on data collected and consolidated for each state under four categories: attorney access, self-representation, language assistance, and disability assistance. The majority of the data is not quantitative in nature, except for the civil legal aid data. Each question is assigned a weight. The Justice Index is developed as an ongoing and evolving tool to create a comparative measure for overall accessibility to justice.

In addition, we highlight two different promising projects developed in the USA. One is the "Integrated Access to Justice Model" ("IA2J") that aims at empirically evaluating the accessibility of civil legal aid services.[63] The research explores quantitative data based on spatial, social, and organizational accessibility determinants. It explores the interchangeability of legal service aid providers and the spatial relationships between clients and providers. Another project is the "CourTools" initiative, supported by the National Center for State Courts.[64] The CourTools project is aimed at supporting efforts towards improved court performance and is organized around 10 themes, including access and fairness. Court performance includes the measurement of perceptions regarding court accessibility and fair, equal and respectful treatment of customers.[65]

In summary, Canada has needed to empirically measure the lack of access-to-justice and monitor progress over time. Previous worldwide research regarding access-to-justice metrics has focused

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61 The Australian study on Legal Aid effectiveness has been initiated to inform the development of future policy for legal assistance services. Based on document review and stakeholder consultations measures, the assessment review the quality, the efficiency and the cost effectiveness of legal assistance services of the National Partnership Agreement on Legal Assistance Services. For more information, see http://www.acilallen.com.au/projects/23/justice/126/review-of-the-national-partnership-agreement-on-legal-assistance-services/.

62 JUSTICE INDEX, http://www.justiceindex.org.

63 For more information, see Eric W. Schultheis, *The Social, Geographic, and Organizational Determinants of Access to Civil Legal Aid Services: An Argument for an Integrated Access to Justice Model,* 11 J. EMPIRICAL LEGAL STUD. 541, 541–77 (2014).

64 *See* COURTOOLS, http://www.courtools.org.

65 Many states used and adapted CourTools empirical measurement instruments. *See* statewide reports from California, Michigan, Minnesota, New Jersey, Montana, Oregon, Ohio, Pennsylvania, Utah, Wisconsin at *Reports from Courts*, COURTOOLS, http://www.courtools.org/Trial-Court-Performance-Measures/Reports-from-Courts.aspx.

on different objects, including adherence to the rule of law, the quality of paths to justice, legal needs in terms of assistance, and legal service providers. The Sense of Access-to-Justice Index that this paper suggests is inspired by the Hague Model MA2J. It is an adaptation that is tailor-made to settlement conferences and adds new variables in order to assess the support role of a conciliating judge. No previous research has studied litigant's SAJ as a composite index. Therefore, this paper is distinguishable from previous studies in that it offers a comprehensive framework for the assessment of the quality and value of SC from the perspective of litigants and lawyers, and in that it suggests SAJ as a target for civil procedure reform.

III. What Is a "Fair-Minded" Process?

In its preliminary provision, the new Quebec Code of Civil Procedure affirms that processes must be "fair-minded." This is an important interpretive guiding principle that provides coherence to the dispute resolution mechanisms under the Code.[66] Therefore, one relevant question is "what is a fair-minded settlement conference?" What might be an appropriate framework to assess fairness of settlement conferencing practices?

A theoretical framework, invoking the perspective of litigant and lawyer users, answers this question. Our approach addresses needs expressed by the Canadian legal community and is in line with emerging trends towards access-to-justice metrics. To understand a user's experience with "paths to justice" that address that user's "justice needs, an evaluation of "fair-minded" "senses of access to justice" is necessary. A path to justice is ". . . [a] commonly applied process that users address to cope with their legal problem."[67] A justice need is defined as ". . . a need of a person for

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[66] NCCP, Preliminary provisions, para. 2, *supra* note 9.

[67] *A Handbook for Measuring the Costs and Quality of Access to Justice*, *supra* note 56. Gramatikov et al. adds to the definition of a path to justice:

> Under this definition a process is defined in a broad sense. A path to justice could be adjudication or arbitration but also a negotiation since it takes place because the parties use it to cope with a legal problem . . . According to our definition *a path to justice begins when a person takes steps to resolve his/her legal problem through external norms or intervention* . . . In reality the moment of reaching justice is largely a function of subjective valuation. In order to substitute such a subjective assessment with more objective criteria *we define the end of a path as the moment of a final decision by a neutral, joint agreement of the parties, or an end to the process because one of the parties quits the process.*

protection by outside norms or interventions that structure the conduct of another person that he may encounter or has a relationship with."[68] The settlement conferencing process is a preferred path towards justice and provides the context the framework and measurement instruments herein.

The theoretical reference framework for SAJ has three pillars: (1) the user's feeling of fairness with respect to the outcome and SC process; (2) the user's feeling of usefulness with respect to the cost-effectiveness of the SC; and (3) the user's sense that professional support was available from the judge mediator during the SC. These pillars reflect the "justice needs" that are addressed in the "path of justice" that is a settlement conference. Our study measures the user's own assessment of the quality and value of the outcome, process, and judge's actions during the SCs. Details regarding the proposed "sense of access to justice index" and references to the new innovation appear below. A questionnaire, based on the framework of these three pillars, serves as a measurement instrument.[69] This questionnaire could be adjusted for use by other dispute resolution mechanisms, such as early neutral evaluation.

A. *Feeling of Fairness*

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.[70] They also want to do what is right, appropriate, and fair. The ways in which they are treated and the ways in which the courts manage their problems are as important towards informing their feelings of satisfaction as the out-

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Id. at 358–59.

[68] *See* Maurits Barendrecht, Peter Kamminga & Jin Ho Verdonschot, *Priorities for the Justice System: Responding to the Most Urgent Legal Problems of Individuals,* TISCO Working Paper No. 001/2008, http://ssrn.com/abstract=1090885; *Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology, supra* note 57.

[69] Questionnaire available on request.

[70] *See* 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, PSYCHOL. BULL. 139, 5, 1090 (Dec. 2012); Tom R. Tyler, *Justice Theory*, *in* HANDBOOK OF THEORIES OF SOCIAL PSYCHOL. (Sage, 2011) [hereinafter *Justice Theory*]; Paul A. Van Lange, David De Cremer, Eric. Van Dijk & Mark Van Vugt, *Self-interest and Beyond*, *in* SOCIAL PSYCHOLOGY: HANDBOOK OF BASIC PRINCIPLES (Arie W. Kruglanski & E. Tory. Higgins eds., 2d ed. Guilford Press, 2007); Russell Cropanzano, David E. Bowen & Stephen W. Gilliland, *The Management of Organizational Justice*, 21: 4 ACAD. MGMT. PERSP. 4, 34–48 (2007).

comes of their cases.[71] If, for example, people perceive that the process used to resolve a dispute or to make a decision is fair, they will be more likely to find its outcome fair, even if it is not in their favor. In addition, people who perceive a process as being fair will be more likely to abide by the result.

With respect to settlement conferences, the parties are also concerned with both the quality of the *outcome* and the quality of the *process* leading to the outcome.[72] The parties compare their outcomes on the basis of a standard of what they feel to be fair under the circumstances.[73] In other words, they have an idea of what they think they are entitled to receive, and assess the outcome on the basis of that standard. The parties will also compare the process to the expected standards of behaviour for social interactions and decision-making.[74] 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; and (4) *transparent fairness*—the outcome is transparent because it is substantiated and comparable to the outcome achieved in similar situations.[75]

The quality of the *process* may be assessed using three principles of fairness, namely: (1) *fair process*—the decision-making pro-

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71 *See* Nancy Welsh, Donna Stienstra & Bobbi McAdoo, *The Application of Procedural Justice Research to Judicial Actions and Technique in Settlement Sessions*, *in* THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL RESOLUTION, *supra* note 22, at 57; Tom R. Tyler, *Court Review: Volume 44, Issue ½ - Procedural Justice and the Courts*, AM. J. ASSOC., 26 (2007); TOM R. TYLER, PSYCHOLOGY AND THE DESIGN OF LEGAL INSTITUTIONS (2007); TOM R. TYLER, WHY PEOPLE OBEY THE LAW (Princeton University Press, 2006); Tom R. Tyler, *Social Justice: Outcome and Procedure*, 35 INT'L UNION OF PSYCHOL. SCI. 2, 117 (2000); Tom. R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERSONALITY & SOC. PSYCHOL. 850 (1994); E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (Plenum Press, 1988).

72 We developed a questionnaire that measures the quality of the SC outcome and process using the typology of fairness in this sub-section.

73 *Justice Theory*, *supra* note 70; ELAINE WALSTER, G. WILLIAM WALSTER & ELLEN BERSCHEID, EQUITY: THEORY AND RESEARCH (Boston, Allyn & Bacon, 1978).

74 TOM R. TYLER, *supra* note 70.

75 *Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology*, *supra* note 57.

cess 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.[76]

B. *Feeling of Usefulness*

Research focusing on the economic analysis of legal conflicts has highlighted the importance of a utilitarian assessment of the cost-effectiveness of individual and group choices.[77] In a judicial context, the parties assess the potential costs and gains of the dispute resolution processes available to them.[78] As one of their criterion, the solution negotiated during a SC may be compared to the known, probable constraints associated with trial. The costs that the parties bear in order to obtain justice may be placed in three categories:[79] (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.).[80]

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76 *Id.*; *See generally Justice Theory*, *supra* note 70; Tom R. Tyler, *Justice and Effective Cooperation*, 25 SOC. JUST. RES. 4, 355–75 (2012).

77 *See* Bruno Deffains, *L'analyse économique de la Résolution des Conflits Juridiques*, 12 REVUE FRANÇAISE D'ÉCONOMIE 3, 57 (1997); Robert D. Cooter & Daniel L. Rubinfeld, *Economic Analysis of Legal Disputes and their Resolution*, 27 J. ECON. LIT. 3, 1067 (1989); Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973); John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1971); William L Landes, *An Economic Analysis of the Courts*, 14 J. LAW & ECON. 61 (1971).

78 *See* ALEXANDRE DÉSY, L'EFFICACITÉ DE LA MÉDIATION JUDICIAIRE (Wilson & Lafleur, Montréal, 2014); Éric Langlais & Nathalie Chappe, *Analyse économique de la résolution des litiges*, *in* ANALYSE ÉCONOMIQUE DU DROIT: PRINCIPES, MÉTHODES, RÉSULTATS (Bruno Deffains & Éric Langlais eds, 2009); Steven Shavell, ALTERNATIVE DISPUTE RESOLUTION: AN ECONOMIC ANALYSIS, 24 J. LEGAL STUD. 1, 10 (1995).

79 The questionnaire in our SAJ study measured the value of the costs and potential benefits of the SC, based on this typology of usefulness.

80 *Measuring the Costs and Quality of Paths to Justice: Contours of a Methodology*, *supra* note 58; *A Handbook for Measuring the Costs and Quality of Access to Justice*, *supra* note 56.

C. *Feeling of Professional Support*

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.[81] In many countries, there is a trend for judges to adopt facilitative and problem-resolution approaches during hearings and settlement conferences,[82] and Canada is one of the leaders in the field.

A previous Canadian study has identified three approaches used by judge-mediators to help the parties obtain justice in SCs: (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.[83]

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81 At the national level, *see e.g.*, *Futures: Transforming the Delivery of Legal Services in Canada*, CAN. BAR ASSOC. (Aug. 2014) http://www.cbafutures.org/The-Reports/Futures-Transforming-the-Delivery-of-Legal-Service; *Access to Civil and Family Justice: A Roadmap for Change*, *supra* note 20; *see also*, *Reaching Equal Justice: An Invitation to Envision and Act*, *supra* note 20. At the international level, *see e.g.*, *World Justice Project Rule of Law*, *supra* note 3; Conseil National des Barreaux de France, *Livre Blanc: Justice du XXIe siècle: Les Proposition des avocats Portées par le CNB,* VILLAGE DE LA JUST.*,* Feb. 12, 2014; Institut des Hautes Études sur la Justice, *La prudence et l'autorité: l'office du juge au XXIE siècle*, IHEJ, July 10, 2013; Pierre Delmas-Goyon, *Le juge du 21e siècle : un citoyen acteur, une équipe de justice,* 2013; *Analysis of Data from the European Commission for the Efficiency of Justice*, EUR. COMM'N FOR THE EFFICIENCY JUST. (CEPEJ), June 2013; Maurits Barendrecht et. al., *Towards Basic Justice Care for Everyone: Challenges and Promising Approaches*, HAGUE INST. FOR INTERNATIONALISATION L. (2012); Access to Justice Taskforce Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*, AUSTL. GOV'T, ATT'Y-GEN. DEP'T, Sept. 2009.

82 Machteld W. de Hoon & Suzan Verberk, *Towards a More Responsive Judge: Challenges and Opportunities*, *supra* note 44, at 27; Machteld de Hoon & Suzanne Verberk, *Judicial Conflict Management: What brings Litigants to Court?*, *in* THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION, *supra* note 22, at 87; Tania Sourdin, *Why Judges Should Not Meet Privately With Parties in Mediation but Should be Involved in Settlement Conference Work,* 4 REVUE D'ARBITRAGE ET DE MÉDIATION J. OF ARB. & MED. 2, 91–109 (2014); Tania Sourdin, *Facilitative Judging: Science, Sense and Sensibility, in* THE MULTI-TASKING JUDGE: COMPARATIVE JUDICIAL DISPUTE RESOLUTION, *supra* note 22, at 231; Tania Sourdin, *Five Reasons Why Judges Should Conduct Settlement Conferences*, 37 MONASH U. L. REV. 2, 145 (2011); *An Empirical Study of Settlement Conference Nuts and Bolts*, *supra* note 43.

83 *Could Judicial Mediation Deliver a Better Justice? Supposing We Trained Judges As Expats?*, *supra* note 26; Jean-François Roberge, Trial court Canadian judges intervention types in judicial conciliation and their impacts on justice, law and the judicial System. Judge's perception

To complement the above, an exploratory empirical study with Québec citizens documented their vision of "participatory justice," as in, their involvement in the process to define and settle their dispute in a way that generates a feeling of justice for them.[84] 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.[85] Our findings suggest that participatory justice based on these qualities has the potential to improve access-to-justice.[86]

IV. Empirical Testing of Settlement Conference as a "Fair-Minded" Process

This section reports on the empirical study conducted from 2013–2014 to assess the Quebec settlement conferences' potential as a tool to provide access to justice. Sub-section A provides the context of the study by presenting its scope and the methodology we used. Sub-section B explores the empirical application of the SAJ framework to settlement conferences. The results are presented as an index of user's satisfaction with regard to quality of results, procedure, judge's support, and cost-benefit value in settle-

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study, (2007) (Ph.D dissertation, Université Laval & Université de Sherbrooke, Canada), http:www.theses.ulaval.ca/2007/24199/24199.pdf.

84 *See* Jean-François Roberge, *The Future of Judicial Dispute Resolution. A Judge Who Facilitates Participatory Justice*, *in* The Multi-Tasking Judge Comparative Judicial Dispute Resolution, *supra* note 22, at xx, 21–32. 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).

85 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 ($p < 0.01$).

86 The determination coefficient for the probability that participatory justice will improve access to justice is 42%, if it is practiced with an emphasis on the four qualities of collaboration, respect, proactiveness, and creativity.

ment conferencing. This will help us undertand what a "fair-minded" process on the path to justice is, from a user's perspective. These results allows us to draw conclusions about the promises of Quebec Civil Procedure Reform of 2003 that introduced settlement conferences with the goal of improving access-to-justice. It can also be seen as a test-case methodology for monitoring the 2014 civil justice reform initiative, as fairness of process is a guiding principle stipulated in the new code of civil procedure's preliminary provision. The results provide a baseline for measuring the progress of litigants' access-to-justice perceptions over time, data that has been missing from the current Quebec and Canadian legal landscape. Sub-section C presents and discusses results about the factors that have a determining influence over the SAJ reported by settlement conference users.

A. *Scope of the Study and Methodology*

Ten years from the 2003 legal reform establishing SCs, Québec's courts have decided to evaluate whether progress has been made in improving access-to-justice. 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' perceptions of the justice offered by the SCs. Do SCs users feel that they have had "access to justice?"

This research was carried out with assistance from the Superior Court, the Court of Québec, and the bar associations in many judicial districts.[87] The questionnaire built was based on the theoretical framework described in the previous section.[88] An expert committee composed of seasoned settlement conferencing judges and a sample of fifteen lawyers and litigants pre-tested the questionnaire in order to improve its reliability and validity. A self-administered questionnaire (French and English), that was completed in a single session following the settlement conference, gathered information about the experience of each participant.[89] The parties

[87] The bars of the following judiciary districts participated to the study: Arthabaska, Bedford, Laurentides-Lanaudière, Laval, Longueuil, Montréal, Outaouais, Québec, Saint-François and Saguenay-Lac Saint-Jean.

[88] Available on request addressed to the author.

[89] In the original research design, we planned to pass questionnaires before SCs in order to assess user's expectations as well as after SCs to measure their satisfaction. This would have allowed us to correlate expectations and satisfaction. However, we had to give up on the first

and lawyers could either complete and submit the questionnaire at the conference location, or mail it back in a pre-paid envelope. Because each settlement conference experience is unique, the parties and lawyers could complete a questionnaire every time they took part in a settlement conference. Every participant using SCs was given the opportunity to answer the questionnaire. Therefore, the study reached the total population of SCs users during a full year between April 2013 and 2014.

In total, 740 participants completed the settlement conference process assessment questionnaire. 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 were lawyers (49% of the sample, with 210 respondents for the Superior Court and 150 for the Court of Québec). The questionnaire had sixty-seven items in total. It measured the methods used during the settlement conference[90] and assessed their quality and value once the settlement conference was over.[91] The questionnaire included questions to establish the degree of conflict between the parties.[92] Respondents were asked to indicate their degree of agreement using a six-point Likert scale (1 = completely disagree; 6 = completely agree). It included questions to group respondents by socio-demographic category (type of case, sex, educational level, etc).[93] The questionnaire had a high level of psychometric fidelity.[94]

There were two research objectives. The first objective was to assess users' perceptions of the quality and value of the settlement conference. To process the answers to the questionnaire, a descriptive approach measured frequency in terms of means and standard deviations. Independent ANOVA analysis then informed a better understanding of the differences between citizens and lawyers regarding their SAJ. The results formed a composite SAJ index for

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data collection due to our field research partners' limited capacity to ensure the representativeness of the sample of respondents. This is a limit of our study. Assessing users' expectations before SCs would have strengthened the validity of our SAJ framework and deepened the potential of our statistical analysis.

90 Section 3 composed of 34 items.

91 Section 4 composed of 11 items.

92 Section 2 composed of 9 items.

93 Section 1 composed of 13 items.

94 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. We obtained an alpha coefficient 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 overall sense of access to justice was 0.87.

litigants and lawyers. The second research objective was to identify the factors that had a determining influence over the degree of the SAJ. Correlation analysis offered a better understanding of the relationship between the offer of justice during the settlement conference and the sense of justice at the end of the settlement conference. Lastly, t-test and Oneway ANOVA comparative analysis helped explain 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 offered an opportunity to check whether any differences existed between these categories and whether or not they were due to chance. The statistics software SPSS (version 21) was used for the analyses.

B. *SAJ Index*

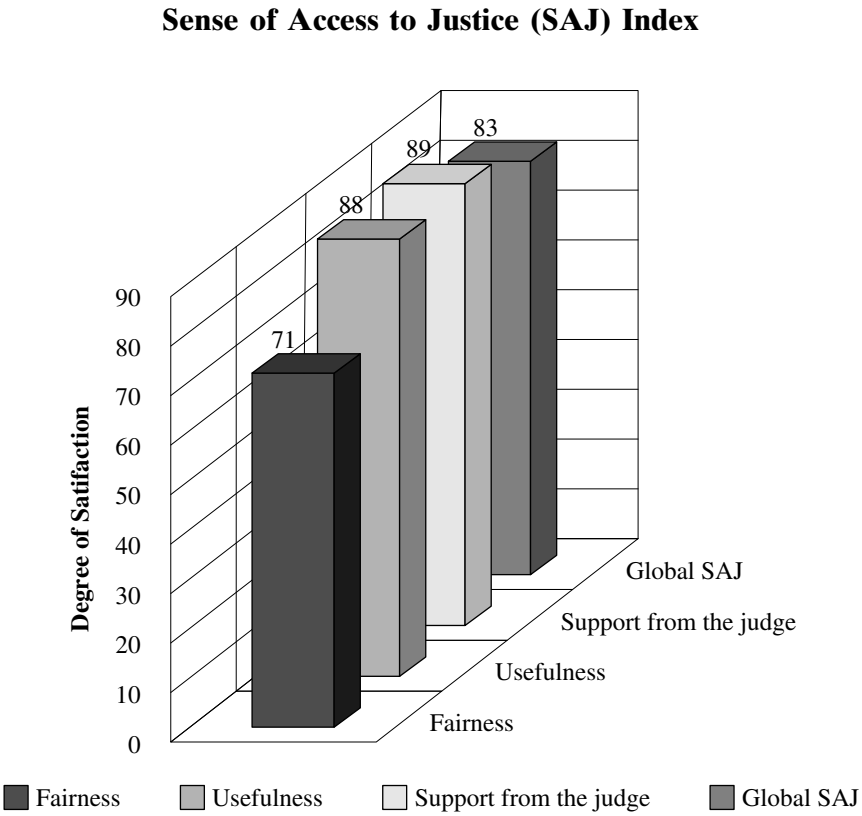
The first objective of the research was to see how users assessed the quality and value of the settlement conference. Their SAJ measurements (Figures 1 and 2) can be interpreted as their degree of satisfaction based on their justice needs. The SAJ is a combination of three of the user's feeling from 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 3). Our results distinguish between the experience reported by litigants and lawyers. The index is calculated using the respondents' mean response. Each of the three feelings (fairness, usefulness, support) was given equal weight 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 that the overall sense of access-to-justice reported by settlement conference users is 83 out of a possible score of 100 (Figure 1).[95] The assessment of the quality and value of the

[95] Our sample included 518 respondents (N=518) composed of 255 parties and 263 lawyers. Only respondents who answered all questions (section 4) were retained for the analysis of the sense of access to justice index.

settlement conference is slightly higher among lawyers than among citizens (Figure 2). 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%). The feeling of fairness reported by settlement conference users could be improved, especially among citizens (satisfaction rate of 65%).

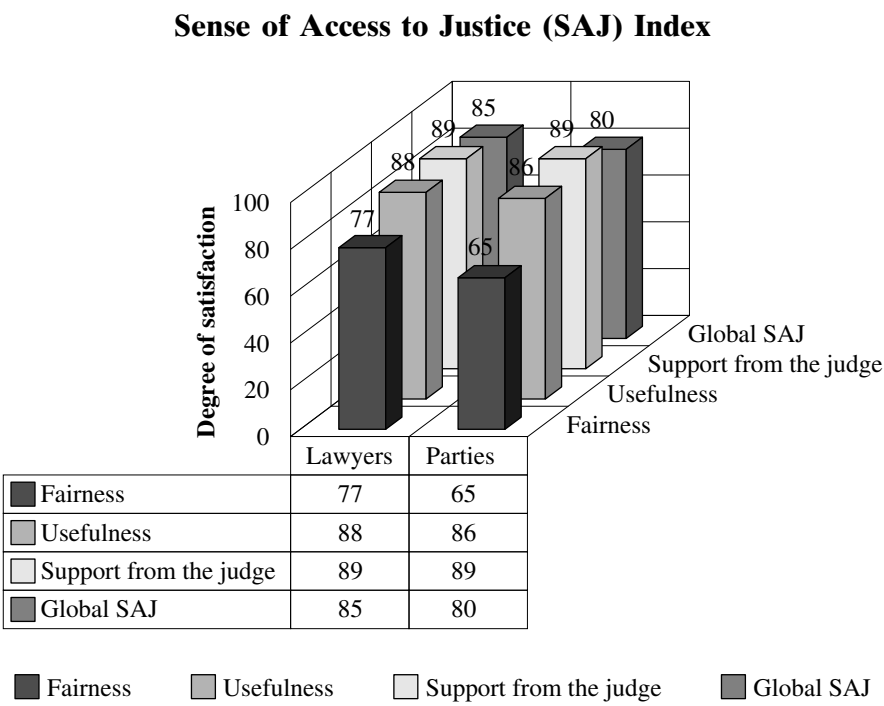
Figure 1: SAJ Index (all Settlement Conference's users).



NOTE: The degree of the sense of access-to-justice among all settlement conference users (litigants and lawyers combined) based on the feeling of fairness, feeling of usefulness and feeling of support from the judge (on a scale of 0 to 100)[96]

[96] Fairness: mean of .71 and standard deviation of .22. Usefulness: mean of .88 and standard deviation of .17. Support from the judge: mean of .89 and standard deviation of .22. Global SAJ: mean of .83 and standard deviation of .16.

Figure 2: Sense of Access to Justice ("SAJ") Index (differences between litigants and lawyers)

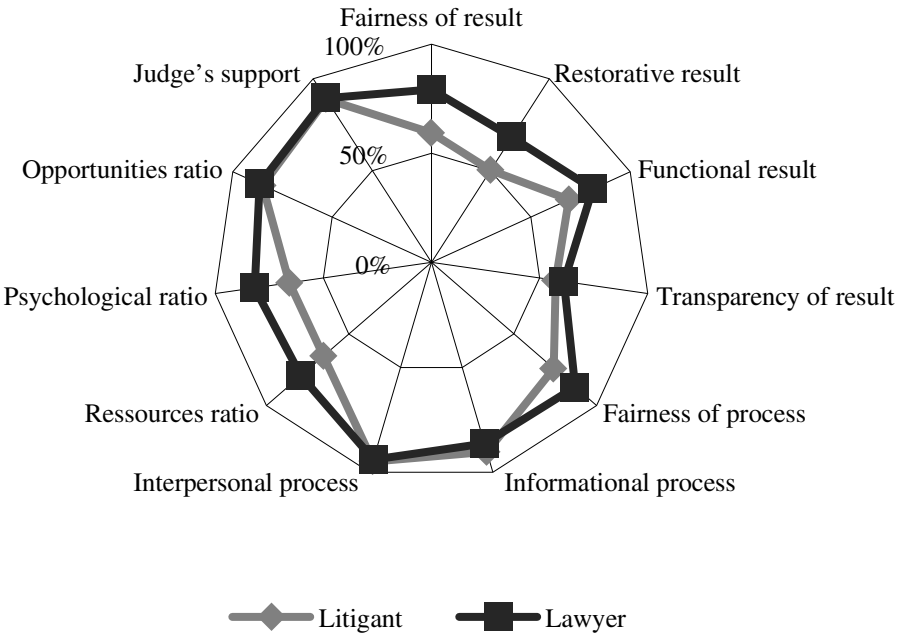


	Lawyers	Parties
Fairness	77	65
Usefulness	88	86
Support from the judge	89	89
Global SAJ	85	80

NOTE: Degree of the sense of access-to-justice among litigants 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).[97]

[97] For parties. Fairness: mean of .65 and standard deviation of .24. Usefulness: mean of .86 and standard deviation of .18. Support from the judge: mean of .89 and standard deviation of .23. Global SAJ: mean of .80 and standard deviation of .18. For lawyers: Fairness: mean of .77 and standard deviation of .17. Usefulness: mean of .89 and standard deviation of .16. Support from the judge: mean of .89 and standard deviation of .20. Global SAJ: mean of .85 and standard deviation of .15.

Figure 3: SAJ Index
(Variables and differences between litigants and lawyers)



NOTE: Degree of satisfaction expressed by litigants 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).

More specifically, our results show that lawyers assess the quality of the outcome and cost-effectiveness ratio more positively than parties (Figure 3). 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 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 mandatorily trained in the settlement conference process, with a focus on facilitative mediation and integrative problem solving. This means that the judges intervene more in order to facilitate communication and an understanding of interests than to assess the merit of the parties' legal positions.

Despite the fact that no baseline is available because this study is the first one to measure user's SAJ, the results seem highly posi-

tive. Therefore, it can be concluded that the settlement conference approach has proved itself able to promote access-to-justice, fulfilling the objective that was introduced into Québec's *Code of Civil Procedure* in 2003. In addition, these favourable results indicate that settlement conferencing is a "fair-minded" path to justice. In addition, the results confirm the choice of a facilitative approach in settlement conferencing where 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."[98] 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 performances over time and to ascertain whether the quality of the justice provided by settlement conferences has increased or decreased over the years. These results can be used as a baseline to measure the impact of future changes of direction or practice that the courts wish to implement.

C. *Factors Influencing the SAJ*

The second objective of this research was to identify the factors that have a determining influence over the SAJ reported by settlement conference users. The factors can be practices or patterns of behaviour during the settlement conference, which were measured using the questionnaire[99]. The measurement of users' perception of the presence and importance of these patterns is connected to the outcome sought at the settlement conference, the process and communication, the judge's actions, and the role of lawyers. Perceptions were measured with respect to the criteria of distributive justice,[100] procedural justice,[101] interactional justice,[102]

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98 NCCP, Art. 162.

99 *See* Section 3 of the questionnaire.

100 Morton Deutsch, *Equity, Equality, and Need: What Determines Which Value Will Be Used as the Basis for Distributive Justice?* 31 J. Soc. Issues 3, 137–49 (1975); Morton Deutsch, Distributive Justice: A Social-Psychological Perspective (Yale University Press, 1985).

101 Steven L. Blader & Tom R. Tyler, *A Four Component Model of Procedural Justice. Defining the Meaning of a "Fair" Process*, 29 Personality & Soc. Psychol. Bull. 6, 747 (2003); Gerald S. Leventhal, *What Should Be Done with Equity Theory? New Approaches to the Study*

the instrumental motivation for the negotiated agreement,[103] the actions of the judge,[104] and the support offered by the advising lawyer.[105] This was effectuated via Pearson correlation analysis.

The results identify which factors have a determining influence over the level of the SAJ reported by SCs users. The results are presented under the three headings of the reference framework for the sense of access-to-justice, namely, the feeling of fairness, the feeling of usefulness, and the feeling of professional support. The scale of 0 to 1 that was used 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. The factors are presented in order of decreasing importance, from the most to the least influential. Only the factors with the most significant influence are shown in Figures 4 to 6; the factors found to be statistically significant, but with a lesser influence, are listed in footnotes. Other factors were found to be non-significant in terms of influencing the SAJ.

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of Fairness in Social Relationships, *in* SOCIAL EXCHANGE THEORY 27–55 (K. Gergen, M. Greenberg, R. Willis, eds, 1980).

[102] *A Four Component Model of Procedural Justice. Defining the Meaning of a "Fair" Process, supra* note 102; R. Bies & J.S. Moag, *Interactional Justice: Communication Criteria of Fairness*, *in* RESEARCH ON NEGOTIATIONS IN ORGANIZATIONS, vol. 1 43–55 (R. J. Lewicki, B.M. Sheppard & M.H. Bazerman eds Greenwich, JAI Press, 1986); Robert. Bies & Tom R. Tyler, *Beyond Formal Procedures: The Interpersonal Context of Procedural Justice*, *in* APPLIED SOCIAL PSYCHOLOGY IN BUSINESS SETTINGS 77–98 (J. S. Carol, L. Hillsdale & NJ. Erlbaum eds., 1990).

[103] Rebecca E. Hollander Blumoff, *Just Negotiation*, 88 WASH. U. L. REV. 2, 381 (2010); Russell Korobkin, *The Role of Law in Settlement*, *in* The HANDBOOK OF DISPUTE RESOLUTION 254–76 (Michael L. Moffit & Robert C. Bordone, Jossey-Bass eds., 2005); Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1 (2002); Robert Cooter, Stephen Marks & Robert Mnookin, *Bargaining in the Shadow of Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982).

[104] *Could Judicial Mediation Deliver a Better Justice? Supposing We Trained Judges As Expats?*, *supra* note 27.

[105] 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 (Yvon Blais, 2011).

Figure 4: Factors influencing the feeling of fairness.[106]

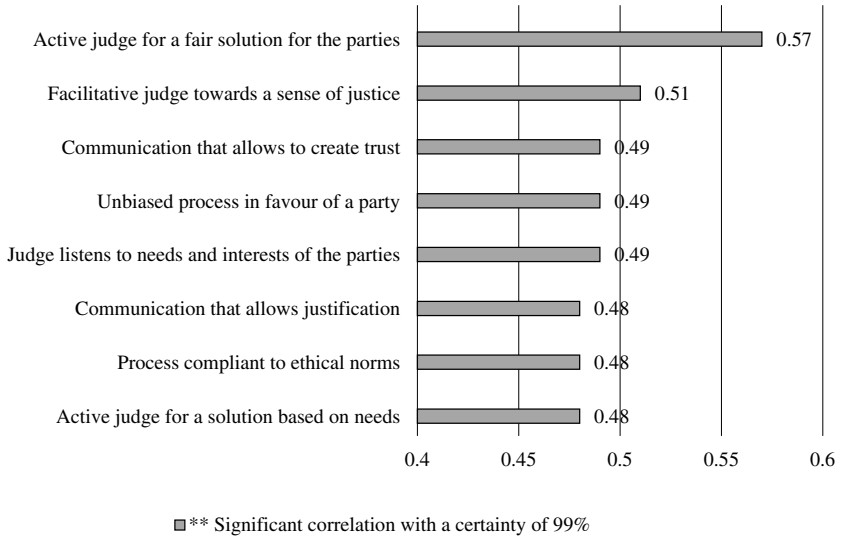
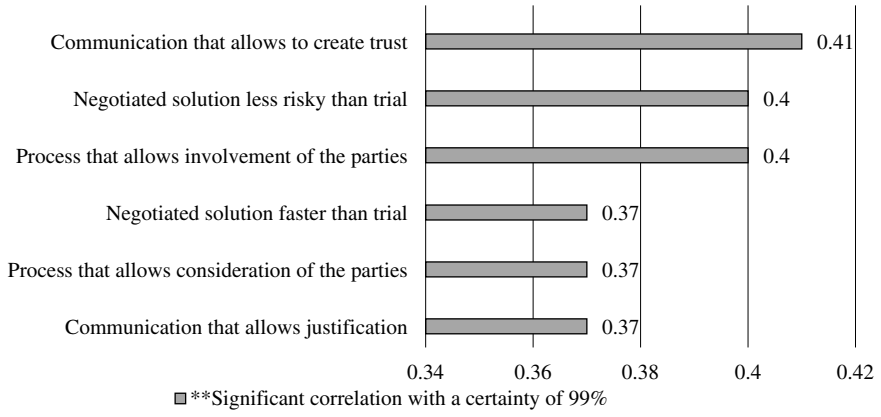


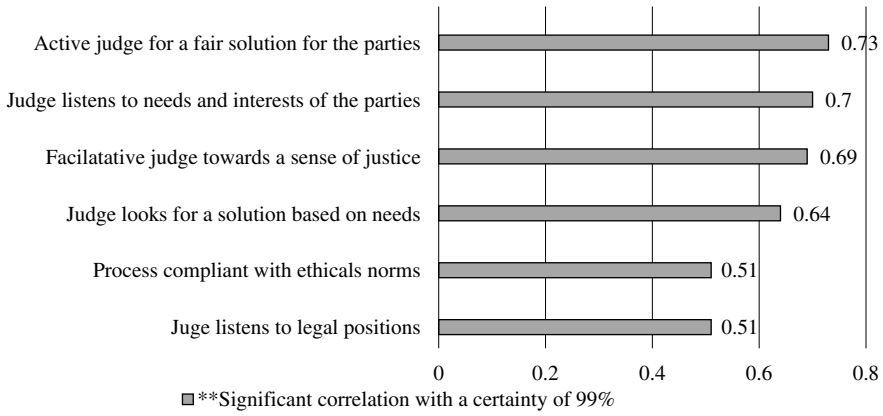
Figure 5: Factors influencing the feeling of usefulness.[107]



[106] 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).

[107] 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

Figure 6: Factors influencing the feeling of professional support from the judge.[108]



In addition to analyzing the correlations, as presented above in Figures 4 to 6, the study also compared groups of respondents and noted statistically significant differences concerning their satisfaction with the settlement conference process. Lawyers were, on average, more likely to be satisfied with the settlement conference process than citizens.[109] A significant difference was noted between the assessment of defendants, which was higher, and plaintiffs, which was lower.[110] The results also show that parties and lawyers were more satisfied with the settlement conference experi-

(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).

[108] 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).

[109] 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).

[110] 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).

ence when an agreement was reached.[111] In addition, there was a significant difference between the satisfaction reported by participants in a civil settlement conference and a commercial settlement conference, with the civil participants reporting greater satisfaction.[112] 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.[113] Satisfaction was also lower among those who lost more than $10,000 in opportunity costs[114] or spent more than 100 hours resolving the problem.[115]

The correlations presented in the figures above range from 0.37 to 0.73.[116] For an initial study of the sense of access-to-justice, the correlations are high. Factors between 0.6 and 1 have a strong influence over the SAJ, because their presence during the settlement conference are 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.

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

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111 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).

112 The difference was statistically significant with 95% certainty. N = 429 (345 respondents in civil cases and 84 in commercial cases).

113 The difference was statistically significant with 95% certainty. N = 396

114 The difference was statistically significant with 95% certainty. N = 177

115 The difference was statistically significant with 95% certainty. N = 321

116 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.

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 could have been predicted. The results 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 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, one can refer to the psychological phenomenon of "excess confidence."[117] 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. The results also noted that an increase in previously-incurred costs (resource costs, opportunity costs, time) has 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,[118] because 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.

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[117] Jennifer K. Robbennolt & Jean R. Sternlight, Psychology for Lawyers: Understanding the Human Factors in Negotiation, Litigation, and Decision Making, 68–77, 224–26 (American Bar Association, 2013); La justice participative - Changer le milieu juridique par une culture intégrative de règlement des différends, *supra* note 105.

[118] Robbennolt & Sternlight, *supra* note 117, at 129–30.

Given the high correlations obtained during this research project, researchers are now 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 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. The results demonstrate the potential of settlement conferences as a tool for access-to-justice and offer a critical look at the "new judicial culture,"[119] introduced by the reform of Québec's *Code of Civil Procedure* in 2003, of which settlement conferences are a key element.

V. Conclusion

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 develops an understanding of the factors that influence it. The impact of these results has been discussed from the perspective of evaluating the Quebec Civil Procedure Reform of 2003 on access-to-justice. In addition, discussions regarding the results focused on developing a better understanding of what a "fair-minded" process is according to the preliminary provision of the Quebec 2014 new Code of civil procedure. The SAJ index methodology provides a benchmark to measure progress regarding access-to-justice from the litigant's perspective in the context of settlement conferences. It could be adapted in order to be replicated for a different paths of justice such as as court-connected mediation or trials.

This work is an innovative monitoring strategy that reflects on the Quebec's current civil procedure reform, which led 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 fairness. Article 1 of the Code states that the parties "must consider private prevention and resolution processes

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119 Québec, Comité de révision de la procédure civile, *Une nouvelle culture judiciaire* (2001), http://www.justice.gouv.qc.ca/francais/publications/rapports/pdf/crpc/crpc-rap2.pdf. *See also* Noreau & Normandin, *L'autorité du juge au service de la saine gestion de l'instance*, *supra* note 42; Jean-Guy Belley, *Une justice de la seconde modernité: proposition de principes généraux pour le prochain Code de procédure civile*, 46 McGill L.J. 317 (2001).

before referring their dispute to the courts," which confirms the legitimacy of these processes' use in regulating social relations.[120]. Comparisons on the basis of SAJ results regarding different paths to justice (private mediation, settlement conference, trial, etc.) could help parties consider different dispute resolution mechanisms and could help lawyers fulfil their ethical duty to inform and counsel their client's about the appropriateness of amicable dispute resolution mechanisms throughout legal procedure.[121]

For the future, the results drawn from the past experiences of citizens will, hopefully, be of benefit to the private and public sectors. The results could also make the private sector more aware of the value of the settlement conference (over 80% satisfaction level and agreements achieved) and could lead to more extensive use of this public service and enhance companies' productivity and social responsibility. Additionally, these results can help lawyers involved in negotiations and the organizations they work for (law firms, corporate legal divisions, insurance companies, unions, etc.) improve their reputation and brand image by using a "problem-solving approach"[122] that matches the realities faced by their customers and allows them to develop new markets and new partnerships. For the public sector, these results can provide input for discussions and decisions within the legal community and could guide public decision-makers in their efforts to improve access-to-justice for citizens and impact citizens' support of the rule of law. In the current context, in which private and public resources are precious and limited, this 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 improve their effectiveness.[123] Lastly, this study can provide sub-

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120 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, 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.

121 Article 42 Quebec Bar Professional Code of Conduct (adopted in Feb. 2014 and enforced in Mar. 2015), Décret 129-2015, Feb. 25, 2015 in Gazette officielle du Québec, March 11, 147th year, no 10.

122 *See*, *e.g.*, 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); *Futures: Transforming the Delivery of Legal Services in Canada*, *supra* note 81.

123 See in particular the recommendations made by the Auditor General of Québec in his 2009–2010 report (Nov. 18, 2009) and the follow-up concerning resource optimization in his

stantial input for the work of academics, public decision-makers and courts in connection with best practices to improve access-to-justice, a crucial objective pursued in civil procedure reforms.

2012-2013 report, Rapport annuel du Vérificateur général du Québec à l'Assemblée nationale (Nov. 29, 2012), http://www.vgq.gouv.qc.ca/fr/fr_publications/fr_rapport-annuel/fr_index.aspx?Annee=2012.