MEDIATIONSOPHILEX

MEDIATION
What are the differences between a mediation and an amicable settlement conference?

Since 2003, when Quebec law was changed to authorize judges to preside over Amicable settlement conferences (ASC), it has been desirable for the administration of justice in general, and the benefit of individuals in particular, for common-law judges to be able to offer this service within the framework of their duties. I would go so far as to say that these judges are the ones who, for a few years now, have been actively promoting this type of meeting, making this form of participatory justice much more popular in Quebec than it had been in the 1990s, when mediation was already quite widespread elsewhere in Canada and the United States.

In both ASC and mediation, the objective is to involve the parties and their attorneys in a meeting enabling them to settle the dispute themselves, with the help of an impartial third party who presides over the meeting. In the case of an ASC, this third party is a judge and, in the case of a private mediation, a professional. In both instances, we are dealing with a voluntary process, that is confidential and without prejudice, and in which the third party administering the process has no decision-making power.

The main difference between the two processes lies in the fact that ASCs can only be held within the framework of legal proceedings, while mediation can take place as soon as a conflict arises, either before judicial proceedings have been initiated, or at any other time between the originating petition and the trial, and even following the latter.

An ASC involves no fees for the parties (other than lawyers' fees) as it is part of the services provided by the courts of justice. Also, in the case of an ASC, the settlement can be ratified by the judge and be as binding as a ruling. In mediation, the parties also pay the mediator's fees, prorated according to their number, and the resulting agreement is a transaction concluded by the parties like any settlement negotiated between lawyers. This transaction can be homologated according to Section 2633 of the Quebec Civil Code.

In an ASC, the judge is designated while, in mediation, the parties and their attorneys can choose the mediator, to ensure that he meets a number of criteria, which they deem to be pertinent: these can be his mediation expertise, his model and style of mediation, his knowledge of the field involved in the conflict, or his reputation.

Apart from these distinctions, at this point in time and from a practical viewpoint, it is impossible to compare these two processes in a systematic manner. Indeed, the model and style of a mediation or ASC depend on the approach and personality of those who conduct it, the model and tools they favour, as well as their comfort zone with regards to the emotions, which often play a role in these processes. When dealing with a conflict involving widely divergent positions, bringing the parties to define on their own, in a collaborative manner, the way in which they can claim justice for themselves is both a science and an art. This role is not exclusive to any profession or function, nor to any single theoretical model.

Analysis of the theoretical models of mediation and ASC

With regards to the analysis of the theoretical models of these processes, literature tells us that there are several different types of mediation:

1) classic (focused on the process and the resolution of problems, and based on interest-based negotiation)
2) facilitative (focused on participatory justice and assisted positional negotiation)
3) evaluative (focused on law and/or the mediator's opinion)
4) soft (focused on people and emotions)
5) transformative (focused on internal and relationship repair).

Each of these models has its own well-defined dynamics and structure, helping users select the process best suited to their needs. No model is better than another, since the advantage of alternative models of conflict resolution lies in the flexibility that allows them to adapt to the needs. Mediation experts are even quite capable of integrating the various components of these models in their mediations.

A recent analysis by Professor Jean-François Roberge, and published in *La Revue de prévention et de règlement de différends* (Éditions Yvon Blais, 2007, vol. 5, no 3), addresses the theoretical models of ASCs in Canada and in Quebec. This analysis reveals that, as drafted, legislation in both Canada and Quebec allows judges to use either the evaluative, facilitative or classic model. According to Professor Roberge, it is the writings made on ASCs, which describe the specific parameters of the process advocated in each jurisdiction. In Quebec, these writings emanate from material produced, notably, by the honourable judges Louise Otis of the Quebec Court of Appeal, Susanne Courteau and Ginette Piché of the Quebec Superior Court, as well as literature produced for the training of judges. Generally speaking, the theoretical model advocated therein resembles the facilitative or classic models. Ultimately, the choice will depend on the orientation adopted by the judge: assisted negotiation targeting settlement in the first instance, or assisted interest-based negotiation leading to a settlement in the second. It is also possible for it to be a bit of both.

Analysis of the differences regarding the evaluative models in mediation and in ASC

One topic of discussion in legal and university circles deals with whether or not a judge in a settlement conference can use the evaluative model and give his opinion on the merits of the case or the outcome of the dispute. In the above-mentioned writings, Quebec courts have adopted a clear position against judges addressing these issues, while in practice, we note the existence of contradictory schools of thought. In my view, this situation has created a degree of confusion among users.

These different schools of thought may originate from the experience of mediation over the past fifteen years or so. Field experience reveals that, in mediation, the parties and their attorneys want feedback from the mediator, as they wish to benefit from the special position and detachment of this impartial third party and be party to his impressions. Understandably, as the latter is the first neutral person to have the opportunity of hearing, *viva voce* both sides of the issue, his impressions can be invaluable without being compromising, since he has no decision-making power. Although his role is not to issue a legal opinion or replace the parties' attorneys, he can easily provide relevant feedback on some of the matters discussed before him as well as their inherent difficulties. He must offer this feedback in an ethical and professional manner that is respectful of the positions of the parties. Since he is no more than a legal professional, his feedback will carry whatever weight the parties and their lawyers choose to give it, and will serve simply

as an additional analysis tool — one of the many offered by the process. For this reason, in private mediation, we often favour the use of the evaluative model or of a hybrid that adds feedback to the classic model.

We can easily imagine that the same expectation is prevalent in an ASC. However, the use of the evaluative model does raise delicate questions within the framework of ASCs. In his analysis, Professor Roberge informs us that there are profoundly divergent views on this subject, both in the theoretical models and in practice. Indeed, in Alberta and British Columbia, theoretical models authorize the use of the evaluative model while in Quebec, they are not recommended. However, Mr. Roberge reveals through an empirical study that, paradoxically, in practice, the facilitative or classic models are favoured in Western Canada, while the evaluative model is in Québec. Professor Roberge invites to conduct further research into these differences and paradoxes, notably through an examination of the motivations of judges and/or users with regards to these processes.

In my view, this matter warrants analysis by legislators and the courts, as well as by the Bar and users of the judicial system, given the ethical issues it raises. In fact, the primary function of a judge, as it has always been and as it is perceived by laymen, is to rule on a conflict after hearing the evidence presented in court. In an ASC, because of this function of the judges, feedback by the judges on the merits of the parties' positions or the outcome of the conflict could exert considerable influence on them, without giving them the opportunity of presenting their case, as they would have done at trial. Even if the judge is not the one who would be hearing the case, there is a risk of confusing the roles, or of giving individuals the impression of expeditious justice based on equity and not consistent with the established model. However, the idea of this process is to restore the parties' control over the outcome of their dispute as well as the feeling that, through the process, justice has been done. In my opinion, this risk is even greater in Quebec where, given its history and culture, the impact of an individual representing authority and moral values has remained etched in the collective subconscious.

Obviously there are different schools of thought among both judges and users. Indeed, it is not uncommon to hear a lawyer say that he is going into an ASC to allow his client to benefit from a judge's opinion. Just as real is the discomfort relayed by some lawyers regarding the comments the judge made on the merits of the case. Clearly, much more extensive analyses will be needed to properly define, understand and evaluate all together, the individual needs of users and the systemic interests of the judicial function. The different definitions and expectations that currently exist regarding ASCs create a situation that must be addressed to ensure that services proposed by the courts are coherent and consistent, providing users with specific markers for identifying the various models available to them. To be followed.