

A COMPARISON OF THE ROLE OF THE JUDGE IN ALTERNATIVE
DISPUTE RESOLUTION IN FRANCE AND BRITISH COLUMBIA

by

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Dess, Université Paris I Panthéon-Sorbonne, 1996

A THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE OF MASTER OF LAWS

in

THE FACULTY OF GRADUATE STUDIES

Faculty of Law

We accepted this thesis as conforming to the required standard

THE UNIVERSITY OF BRITISH COLUMBIA

August 1998

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Abstract

This thesis analyses legal institutions which appear to be developing in a similar way and reveals the significance of historical, legal and cultural backgrounds. ADR processes are perceived and developed as international and necessarily standardized, or simply as culturally neutral institutions. However, this analysis shows that alternative conflict resolution methods remain culturally embedded. This analysis is based on the role of the judge in ADR in France and B.C.

The comparative method seemed appropriate to conduct the analysis as it facilitates a focus on cultural influences which reveals differences in the definition of the judge's role in ADR in both jurisdictions. The first chapter examines comparative law - its nature and objectives, as well as the potential pitfalls.

Courts have been chosen as the institutions on which to base our research of the cultural element in ADR because they appear to be culturally embedded. The second chapter attempts to trace historical evolution and political factors which shaped the judicial institution in both jurisdictions. The role of the judge in proceedings is analyzed with particular emphasis on the process of judging. The professional education of judges in both jurisdictions is also examined. To frame the analysis two of the roles of judges which have often been used in the literature are used, namely the role of dispute settlement and the role of policy maker.

A third chapter outlines the similar development of ADR in France and B.C. and explores the reasons behind this.

Finally, a comparison of the intervention by the judge in enforcing settlement agreements, enforcing arbitration agreements and conducting court mediation is made. The analysis relies on the definition of judges' role as defined by the legislator, and the interpretation of that definition by the courts.

It is concluded that, while no absolute pattern of the influence of cultural and historical background on the shaping of the role of the judge in ADR can be identified, this influence exists nonetheless. The similarities between, and the perceived unification of ADR institutions are therefore superficial, as ADR is molded through institutions such as judges, influenced at the same time by the cultural identity of the jurisdictions in which they operate.

Table of contents

ABSTRACT	ii
TABLE OF CONTENTS	iv
ACKNOWLEDGMENT	viii
INTRODUCTION	1
DEFINING THE SCOPE OF THE ANALYSIS	1
PURPOSE OF THE ANALYSIS	3
CHAPTER 1: CONCEPTUAL FRAMEWORK.....	5
SECTION 1: COMPARATIVE METHOD.....	5
1. <i>What is the purpose of a comparison?</i>	5
Aim of this thesis.	7
Why is the study of the role of the judge in ADR useful to these goals of understanding ?	7
Interest of the thesis in connection with other works on ADR.....	8
2. <i>How to define the comparative method?</i>	10
3. <i>Necessity of a neutral common theme.</i>	12
4. <i>Relativity of the representation.</i>	13
5. <i>Problem of language.</i>	15
6. <i>Temptation of division.</i>	16
7. <i>Conclusion.</i>	18
SECTION 2: ROLE OF THE JUDGE AS DEFINED IN THE LITERATURE.	19
1. <i>Adjudication of disputes</i>	20
2. <i>Policy maker</i>	22
<i>Conclusion</i>	23
CHAPTER 2: THE HISTORICAL CONTEXT FOR THE ROLES OF JUDGES	24
SECTION 1: ROLE OF THE JUDGE IN THE PROCEEDINGS.	24

<i>Preliminary considerations of the adversarial / inquisitorial model.....</i>	24
<i>1. Role of the French Judge in the Proceedings: Rules and Evolution.....</i>	24
Provisions of the New Code of Civil Procedure in France. (NCCP).....	24
Historical evolution of the French procedural system.....	24
Different influences on French procedural rules.....	24
Centralization of the legal system initiated by the French Kings.	24
Influence of feudalism on the French system.....	24
<i>2. Role of the B.C. judge in the proceedings: rules and evolution.....</i>	24
Court guidelines in British Columbia.....	24
Historical evolution of the Canadian system.....	24
Individualism and procedural rules in B.C.	24
SECTION 2: FUNCTION OF JUDGING.....	24
<i>1. "Juger" in France.....</i>	24
Method of interpretation of private civil law by the judge.	24
Historical considerations regarding the role of the judge in France.....	24
<i>2. "Judging" in B.C.</i>	24
Creative role of the common law judge.	24
Considerations of common law history.....	24
SECTION 3: PROFESSIONAL BACKGROUND AND STATUS OF JUDGES.....	24
<i>1. The French Judge.....</i>	24
Training and appointment of French judges.	24
Historical evolution of the status of French judges.....	24
<i>2. The judge in B.C.....</i>	24
Training and appointment of judges in B.C.....	24
Historical evolution of the status of Canadian judges.....	24
<i>3. What does professionalism mean in terms of the role of the judge?</i>	24
<i>Conclusion of Chapter 2.....</i>	24

CHAPTER 3: DEVELOPMENT OF A SIMILAR PUBLIC POLICY SUPPORTING ADR IN FRANCE AND BRITISH COLUMBIA.....	24
SECTION 1: ELABORATION OF NEW RULES SUPPORTING ADR TO ANSWER THE NEEDS OF PRACTITIONERS:	
COMPETITION IN THE ADR MARKET.....	24
1. <i>Amendment of the legislation on arbitration in France.</i>	24
Former legislation in France and emergence of new needs.....	24
Implementation of new provisions.....	24
2. <i>Reform of the legislation on arbitration in B.C.</i>	24
Former rules.....	24
Implementation of a new legislation under the influence of international conventions.....	24
3. <i>Similar answer to the demands of the international business community.</i>	24
Role played by practitioners in the reform of arbitration rules in France.	24
Importance of practitioners' influence on the reform of arbitration rules in B.C.....	24
Choice of public policies made by governments under pressure from practitioners.....	24
SECTION 2. IMPROVEMENT OF JUSTICE SYSTEMS AND CUT-BACKS IN THE JUSTICE BUDGET.	24
1. <i>Progressive development of conciliation and mediation in France.</i>	24
2. <i>Development of domestic ADR in B.C.</i>	24
3. <i>Implementation of a similar public policy in France and B.C.</i>	24
Reform towards an efficient justice system: An answer to the increase in the number of cases.	24
Questioning of the argument.....	24
CHAPTER 4: A COMPARISON OF ADR PROCESSES IN FRANCE AND B.C.	24
Preliminary observation on the importance of judges' professional background.	24
1. <i>Control of settlement agreements by French courts</i>	24
Legal definition of the role of the judge in settlement agreements.	24
Interpretation of their role by the courts.	24
2. <i>Control of settlement agreements by B.C. courts</i>	24

Definition of the role of the courts in settlement agreements in B.C.- comparison with France.....	24
Policy implemented by B.C. Courts - a comparison with France	24
SECTION 2: ENFORCEMENT OF ARBITRATION AGREEMENTS BY THE COURTS.....	24
<i>1. Enforcement of arbitration agreements in France.</i>	<i>24</i>
Interpretation by the French courts of their role when enforcing arbitration agreements.	24
<i>2. The enforcement of arbitration agreements in B.C.</i>	<i>24</i>
Definition of the role of B.C. judges – a comparison with France.....	24
SECTION 3: COURT MEDIATION PROCESSES.	24
<i>1. Court Mediation in France.....</i>	<i>24</i>
<i>2. Court Mediation in B.C.</i>	<i>24</i>
The mediation program proposed by the courts.....	24
The mediation process proposed by the B.C. government: the Notice to Mediate.	24
<i>3. Comparison of the role of the judge in the reforms.....</i>	<i>24</i>
Participation of the courts reforming the law.....	24
Comparison of the role of the courts in the new mediation processes.	24
Conclusion.	24
CONCLUSION.....	24
BIBLIOGRAPHY	24

Acknowledgment

I am grateful to Dr. Pitman Potter for his advice and encouragement and for devoting some of his precious time to me. I thank Lillian Ong for knowing my name before I even arrived at UBC, for her warm welcome to the L.L.M. program and for her help throughout the year, without which I would still be trying to register on Telereg. I have also received invaluable help with the correction of my English from Debby King, Bruce Gailey and especially Lorna Lynch who also helped me to take full advantage of the extra-curricular opportunities this year presented.

Introduction

“This view that things look more like flying apart than they do like coming together (...) opposes, of course, some of the leading doctrines in contemporary social sciences: that the world is growing more dearly modern- McDonald’s on the Champs Elysées, punk rock in China.”¹

In recent decades, the interest of the legal community in Alternative Dispute Resolution (ADR) processes has been increasing in many states. Originally, practitioners sought different means to resolve commercial disputes - means which were cheaper and faster than the traditional court process, or simply more tailored to the needs of the parties, their disputes or their relationships. Public institutions responded to this demand by practitioners and thus important development of the law of ADR occurred in many jurisdictions.

This thesis will compare developments of the law relating to ADR in France and British Columbia (B.C.)² -some recent - and will focus in particular on the apparently similar role given to the judge under the reforms.

Defining the Scope of the Analysis

For the purpose of this thesis, the “judge” studied will be “a public officer, appointed to preside and to administer the law in a Court of Justice”³ or the person empowered by a state to

¹ Geertz, “Local knowledge: Fact and Law in Comparative Perspective”, in *Local knowledge : Further Essays in interpretative Anthropology* (1983).

² France being a sovereign state and B.C. a province part of a federal state, the comparison might seem inappropriate at first sight. However, considering the separation of powers between federal and provincial authorities in Canada and in particular s. 96 of the Constitution Act, when the federal state appoints and pays judges, the creation and organization of judicial institutions and their funding rely on provincial governments. An analysis of the role of the judge in Canada excluding judicial review and focusing on alternatives to the judicial system seems more appropriate at the provincial level. France and B.C. will be referred to as “jurisdictions”.

³ *Black's Law Dictionary*, 6th Ed. (St Paul, Minn.: West Publishing, 1990).

fulfil the function of judging, or *juris dictio*, namely the judicial power⁴. This study focuses on the judge, public officer or *magistrat*, not the judge arbitrator. "Any person appointed to settle a dispute or to decide the relative merits of competitors"⁵, will not be included in this study of the role of the judge.

The term "role" of the judge, will be understood as the practical tasks, duties or official work in court performed by judges during a trial or a trial process. The constitutional role of judicial review or an analysis of the particular role of Supreme Court of Canada judges or French judges from the *Cour de Cassation* will not be studied. The present analysis focuses on judges of first instance - trial judges - and how they implement the law on a practical, day-to-day basis. The "role" studied is the part played by a judge when ADR processes are involved.

ADR includes, for the purpose of this thesis, any extra-judicial methods of resolving civil legal disputes. "Extra-judicial methods" should be understood to mean any method by which parties reach a contractual resolution rather than bring their dispute before the courts or, where the parties through contractual means such as arbitration agreements, determine to resolve their dispute through a non-judicial process.⁶

Analysing the role of the judge in every kind of ADR process would be an overwhelming task. Therefore the most relevant methods of ADR namely arbitration and mediation, will be selected as they are the most commonly used in each jurisdiction studied. Interestingly, mediation and arbitration are also representative of the distinction made between consensual and

⁴ L. Cadet, *droit judiciaire privé* (Litec).

⁵ Webster's Third New International Dictionary (Springfield Mass: G. & C. Merriman Company, 1976).

⁶ The definition given by J. Goss: "ADR (...) refers to the wide variety of methods by which conflicts and disputes are resolved other than through litigation" in "An Introduction to Alternative Dispute Resolution" (1995) 34 Alberta Law Rev. 1.

adjudicative ADR.⁷ However, the entire process of each method chosen will not be studied in details as instead, the focus will be on the role played by the judge in each of the processes.

The focus of this thesis is ADR in the commercial realm. Consequently, ADR processes which apply specifically to non-commercial disputes, such as family law or personal injury law will not be investigated. Further, it must be recognized that the purpose of this thesis is not to catalogue all ADR processes or initiatives which exist in the two jurisdictions, but to choose specific examples which can be used to compare similarities and contrasts differences.

Purpose of the analysis

The purpose of this thesis is to show that despite the fact that the role of the judges in ADR in France and B.C. has been reformed in answer to similar practical needs, this role remains defined and limited according to each jurisdiction's historical legal background and conception of the role of the judge in litigation. Superficial comparison of the function of the judge might lead to the conclusion that the role of the judiciary in ADR in the two jurisdictions is similar as it has been implemented to answer similar needs. However, it appears that although the definition of the role of the judge is similar, the judges' intervention is conditioned by each jurisdiction's legal background and in particular by the history of the role of the judge in litigation in each jurisdiction. At the same time, it is acknowledged that the historical and legal background does not explain all the similarities and differences that might appear in the definition of the role of the judge in ADR in France and B.C., but is only one of the numerous factors that conditions the shape of institutions. Finally, the purpose of this work is not to assert that one system has a superior definition of the role of the judge in ADR, but to determine the extent to which and way in which the legal background influences this role.

⁷ ADR means are consensual when "the disputants themselves decide what to do" while they are adjudicative when "a third party (...) makes a final decision for the disputants". J. Pirie & J. Stanley, *Dispute Resolution and You: What You Need to Know!* (The Law Foundation of British Columbia, 1992) at 2.

Chapter 1: Conceptual Framework

Section 1: Comparative method.

1. What is the purpose of a comparison?

When we question the purpose of a comparative legal study, we assume that a purpose actually exists. Indeed, it appears that the existence of an assigned objective in comparative law is rarely questioned in comparative literature. As mentioned by Frankenberg, “whoever questions the value of comparison is directed to its evident purpose and unquestionable necessity, to its versatility and universality”.⁸

The “increasing relevance of foreign law to the concerns of lawyers and their clients on a shrunken, interdependent globe” and therefore the necessity to be familiar with “other’s people’s law” is presented as a logical response to the demands of international trade relationships.⁹ The aims of comparative law are thus presented as “fostering the ability to communicate with one’s counterparts trained in other legal systems”, or comparative law is said to be “useful in the national law-making process”. Similarly, comparative law is referred to as a method in the process of “harmonization of national laws, and the framing, interpretation and application of supranational laws”¹⁰ and at no point is the validity of such an aim questioned.

⁸ G. Frankenberg, “Critical Comparisons: Re-thinking Comparative Law” 26 Harvard International Law Journal 411 at 412.

⁹ M. Cappelletti, *Preface* to J. Merryman & D. Clark, *Comparative Law: Western Europe and Latin American Legal Systems* (1978).

¹⁰ A. Watson, “Legal Transplants: an Approach to Comparative Law” in *Introduction to the comparative study of law* at 10.

The question as to the aim of comparative law relates to the question of the nature of comparative law, which does not seem to be addressed in academic literature.¹¹ One of the most satisfactory answers however to the question of the nature of comparative law is that comparative law is a method or technique of research. According to the Webster's Dictionary, a comparison is "the placing together or juxtaposition of two or more items to ascertain, bring into relief or establish their similarities and dissimilarities".¹² A comparison of legal systems is therefore no more than a means to an end, a tool to identify the similarities and differences between systems. Thus although comparative law is a useful tool, it does not have a self standing purpose. How and why the information obtained through the application of the comparative method will be used depends on the analyst.

Comparative law can be said to be useful to understand a foreign system, to communicate, or to modify a legal system, but these goals could be reached by using another method. A foreign legal system can be understood without comparing it to another one; the improvement of a system does not always require external comparison. The purpose of the comparison therefore lies in terms of the goal assigned to it by the analyst for the purpose of her or his own work. If comparative law's only purpose is the one ascribed to it, we shall therefore assign an aim to this work.

Aim of this thesis.

This thesis aims to understand a facet of the B.C. legal system through the analysis of one of its central institutions: the judge, within the particular framework of ADR. Several methods of analysis were available, but a comparative method seems particularly appropriate given my background as a French lawyer.

¹¹ Watson, *supra* note 10 at 2.

¹² Webster's Third New International Dictionary, *supra* note 5.

However, the comprehension of a foreign system is not the only aim of this work. It is also directed at presenting a critical overview of the French legal system and institutions. The examination of the foreign system aims to reveal the advantages and disadvantages of the “already known” system, as well as its basic assumptions and intellectual schema. Thus “Comparative Legal Studies might indeed inspire students to learn more about and rethink the bases of their own cultural and legal education”.¹³

This work can be therefore justified as much in terms of my desire to comprehend the B.C. legal system as my attempt to understand better or have a different appreciation of the French system.

Why is the study of the role of the judge in ADR useful to these goals of understanding ?

As it will be discussed in Chapter 3 of this thesis, ADR methods are developing in a similar manner in France and Canada. It seems that the general definition of common ADR processes such as arbitration or mediation are almost identical. Arbitration or *arbitrage* refers, in Canada and France, to a process whereby parties agree to bring their dispute before one or several non-professional judges, instead of before state’s jurisdictions.¹⁴ Similarly, mediation or *médiation* refers to a process by which a person is appointed by the parties to a dispute, in order to help them to reach an agreement.¹⁵

At first sight ADR appears, therefore, as a group of relatively neutral processes. Our comparison will draw on this apparently neutral background.

¹³ Frankenberg, *supra* note 8 at 417.

¹⁴ See Nouveau Code de Procédure Civile, art. 1442 to 1507, for the French definition of arbitration.

¹⁵ See Nouveau Code de Procédure Civile, art. 21 and art.127 to 131, and Loi n° 95-125 du 8 février 1995, J.O. 9 février 1995, art.21 to 26, on French mediation and conciliation.

In contrast, as is examined in Chapter 2, the judge is an essential actor in the legal systems studied. As a consequence, the definition of his role in dispute resolution processes in general and in Alternative Dispute Resolution in particular, is necessarily culturally embedded.

This thesis studies the role of the judge in ADR - that is to say the collision of a culturally embedded actor with a relatively neutral institution. It will attempt to explain how the introduction of a cultural factor affects a neutral institution and how the cultural element "survives" this interplay.

The objective of this thesis therefore will be to identify the cultural background in embedded in similar institutions in different jurisdictions. Learning to differentiate between the two jurisdictions by identifying the specific characteristics of apparently similar institutions will help to comprehend each legal system.

Interest of the thesis in connection with other works on ADR.

A number scholars have dealt with ADR as a whole as an institution common to a certain number of jurisdictions. In "Conservative Conflict and the Reproduction of Capitalism : the Role of Informal Justice", Richard Abel attempts to explain the greater role of ADR in conflict resolution. His study is not limited to United States but rather extends its scope to the "capitalist legal system" without distinguishing between jurisdictions.¹⁶

In "An Introduction to Alternative Dispute Resolution", Joanne Gross makes a list of different ADR processes which are available without differentiating amongst them according to their origins.¹⁷ Although she seems to focus on Canadian and, more precisely, Alberta rules, she refers to American legislation and Chinese and African origins of mediation.

¹⁶ R.L. Abel "Conservative Conflict and Informal Justice" (1981) 9 International Journal of the Sociology of Law 245 at 262.

¹⁷ J. Gross, supra note 6.

These two examples show how ADR is sometimes considered as an international institution, detached from the cultural roots of states. Indeed because of the use of ADR by the community of international practitioners, among other reasons, the tendency is to unify ADR. However, this thesis will attempt to remain aware of the dangers of an excessive assimilation of ADR legislation, in highlighting the importance of cultural backgrounds. In particular, basing our analysis on the role of the judge allows us to approach ADR through one of their most culturally embedded aspects.

A number of scholars consider the differences between ADR processes in different jurisdictions. Fouchard, among others,¹⁸ in his “*Traité de Droit International de l’Arbitrage*” clearly exposes the differences between legislation on international arbitration in a number of jurisdictions.¹⁹ His method of comparison focuses on technical differences, as he mentions, for example differences in deadlines or the extent of the freedom of the parties. The purpose of such a method is to expose differences for professional users. It is therefore not Fouchard’s aim, and indeed no attempt is made, to explain the origin of the differences.

This thesis, while exposing differences between the French and B.C. systems, will attempt to go further in explaining or comprehending certain differences between the two systems of legislation drawing on historical and cultural factors. It aims to attract attention to the importance of the cultural differences, in relation to legal means such as ADR, which are standardized in international conventions and used in one country to the next by practitioners.

It appears that most of the comparative literature on ADR, especially in France, is aimed at practitioners and focuses on practical aspects of ADR and details of the procedures. As mentioned, this thesis attempts to provide for a more theoretical analysis of the existing

¹⁸ See T. Carbonneau, “Etude historique et comparée de l’arbitrage” (1984) *Rev. Int. Dr. Comp.* 727; Y. Dezalay & B. Garth, “The Competition for Transnational Business Dispute” (1995) 29 *Law & Society Rev.* 27.

¹⁹ Fouchard, Gaillard & Goldman, *Traité de Droit International de l’Arbitrage* (Litec, 1997).

differences. However, it does not mean that it is not aimed at practitioners. In fact, it appears that the above mentioned perception of ADR as being standardized causes problems for practitioners. A full understanding of cultural differences in ADR can assist practitioners in dealing with foreign or international questions in a way which is more beneficial than mere exposure of the differences.

2. How to define the comparative method?

The process, which is followed by academics when applying comparative legal methods, is difficult to describe because it is not standardized. Comparative law, or theory on comparative law, is a recent phenomenon. Rigid divisions do not exist between the various schools of thought and the number of different possible methods increases as each scholar advocate his or her own method.²⁰ These different methods of comparison can be listed or categorized, but no global definition is provided by the literature.²¹

Watson defines the comparative method in terms of what it is not. For this author, comparative law is not the simple study of a foreign system as a comparison necessitates the consideration of at least two different elements. Comparative law does not simply describe several different systems. Relationships have to be developed in order to built a comparison. Watson , then, introduces the idea that comparative law is not the mere drawing of a comparison. For him, the simple fact of putting together answers to the same problem which are given by different systems does not provide for a satisfactory comparison. Legal problems are not the same for two different societies. As mentioned by Watson, "Variations in the political, moral,

²⁰ A. Watson, supra note 10 at 3; G. Frankenberg, supra note 8 at 421.

²¹ A. Watson, supra note 10; G. Frankenberg, supra note 8.

social and economic values which exist between any two societies make it hard to believe that many legal problems are the same for both except on a technical level.”²²

This confirms the idea that the comparative method is (and aims to be) what the analyst wants it to be. It is not possible to set standards for this method as it can be used for many different purposes. However, comparison is not impossible. Rather, within any comparative work, the analyst must be aware of certain problems.

Making a comparison is not a perfectly neutral study. One must instead be aware of one's own background and respect the differences of the foreign system studied. The requirements and the elements the analyst has to be aware of in order to succeed in the comparison therefore must be identified. Since these requirements are numerous, we will focus on the necessity of a neutral theme for the comparison, the acknowledgment of the relativity of legal representation, the problems raised by language and the danger of using patterns.

3. Necessity of a neutral common theme.

Refusing to draw a comparison between legal systems, on the basis that cultural and social differences make comparison impossible or inappropriate, is to say that any comparison is impossible. If, however, it is recognized that a neutral common theme is necessary in order for a valid comparison to be drawn, the cultural or social differences will in fact make the comparison interesting. Comparison is always possible as long as the “common theme”, the starting point of the comparison, is not culturally embedded. Indeed, explanations of differences or similarities between systems will be culturally embedded. This neutral base for comparison can be an abstract concept such as the judicial function, or a practical question like the different manners in which an international treaty can be enforced.

²² A. Watson, *supra* note 10 at 4.

One of the challenges of the comparative method is, therefore, to find a neutral base for comparison. Watson mentions again that “the investigation will always be primarily on the comparability of the problem, only secondarily on the comparability of the law”.²³ This task can be quite difficult as any element chosen by the analyst might be embedded in her or his own culture. The choosing of a perceived common and neutral theme, and the mere fact that the analyst considers the theme relevant, will be influenced by her or his background. However, recognizing this point does not mean that the comparison is impossible or irrelevant. Since a completely objective analysis of systems is impossible, academics who try to find a perfectly neutral method will find it does not exist, just as “truth” does not. A comparison has to be understood in the light of the background of the individual who draws it.

4. Relativity of the representation.

Drawing a comparison seems, at first sight, straight forward and coherent. The analyst is familiar with at least one of the systems and the approach towards the foreign system can be based on the system already known. However, this method used might limit the understanding of the foreign system, as it is tempting when comparing two systems to think that identical phenomena hide behind different terms. Simply because we recognize some elements of the foreign institution studied which are similar to our native institution, we may want to assume that the whole institution is identical. Even if the “technical level” is similar, the institutions may not be. The new information is much easier to approach in light of what is familiar; identifying the unknown institution to what is known or familiar is easy and reassuring.

It is easy, for example, to assume that the mediation process is identical in France and B.C. as a number of the elements of the process are similar. In both cases a mediator is appointed in order to help the parties to resolve their dispute. However, to fully understand an institution, it

²³ A. Watson, *supra* note 10 at 4.

is necessary to understand what function it has in each jurisdiction, how important it is and how people view it. Any study of institutions requires us to consider factors such as the structure, the function or the position of the institution in society and how these factors are influenced by things such as the history of the state and the geography of the country, to name two.

As mentioned by Geertz, the set of norms established in a system is shaped by and reflects the cultural identity of the people who created them.²⁴ The legal phenomena and the shape of institutions reveals the manner in which a population “imagine the real”, and in any case characterizes only one particular population.

One of the efforts of the analyst is therefore to be aware of the danger of assimilation and to make a conscious effort towards contextualisation while acknowledging that the context is actually difficult to define. The definition of the context in a comparison will have to be limited to certain factors to avoid the risk of an extensive description of the context while never being able to give the full picture.

By acknowledging and studying elements of the context of an institution, the analyst avoids a systematic assimilation of foreign and native institutions while providing her or his analysis with useful information and explaining some differences between the systems. This does not mean that no similarities can be found between systems, but merely that similarities have to be questioned and defined in terms of what they really are.

5. Problem of language.

The problem of vocabulary and translation needs to be mentioned as the vocabulary used reveals in itself the nature of the concept being described and reintroduces the danger of assimilation of concepts.

²⁴ Geertz, *supra* note 1.

For reasons of convenience, and to facilitate effective communication, an analysis has to be in one language. However, the translation of terms can denigrate the real substance and misrepresent the nature of the institutions described. For instance, the term "law" is usually translated in French by "loi". But the term "loi" refers primarily to written law, and even more precisely to statutes. In civil law countries in turn, the term "loi" will be used translated as "law" because the only officially recognized source of law is written law. However the term "law" in common law actually refers to a broad framework of rules, from equity to statute law, and is certainly not limited to written sources of law. We could suggest that a better translation of "law" would be "droit", but again, we must not assume that this refers to the exact same notion in the two languages. A similar argument can be made regarding the term "avocat" in French, which is translated in English as "lawyer". However, French "avocats" and Canadian lawyers do not fulfill the same professional and social functions and do not undergo the same processes of education.

There is no real solution to this difficulty caused by different vocabularies, because to be understandable an entire work has to be written in one language. On a superficial level, the solution might be to define each concept in terms of nationality or native system. For instance, we could use the term French lawyer or B.C. lawyer. But to avoid the temptation of intellectually assimilating institutions referred to in the same terms, only the acknowledgment of the problem and a conscious effort to avoid simple translations and assimilation by the analyst can confront the problem.

6. Temptation of division.

In contrast to the problem of the assimilated representations, is the temptation for the analyst to divide information into set categories. In this case, instead of representing the institutions as identical, the problem is that the analyst continually sets them against each other. No information is grouped together as similar but in order to make the comparison fruitful, the

new information and the existing data are categorized or placed in pre-established patterns which can also eventually be used in comparison with other jurisdictions.

It appears that the patterns constructed by academics are often dichotomic, such as western/eastern, common law/civil law, or developed/developing etc.²⁵ These pre-established patterns misrepresent the new information a analyst receives when studying a foreign institution, and reduce it to what is perceived as fitting in the "eastern" or "developing" category. For instance, if a particular legal system is placed in the "civil law" category, one might assume the importance of codes, the non-recognition of cases as a source of law in that system and more generally incorporate the clichés about civil law formed by her or his cultural background. In this case, the analyst may fail to appreciate the subtle characteristics and nuances of the system studied.²⁶

As Richard Abel states:²⁷

"I will also seek to define concepts so that they are not dichotomous i.e., restricted to polar values. The differences we discern among social actions seem to me to be continuous, and therefore unhappily distorted by such either/or characterizations"

Moreover, these patterns are framed by an intellectual scheme which is molded by the cultural background of their authors and consequently limits the ability to understand of the institution being studied. Similarly, the use of these patterns and their acceptance and comprehension reveals our cultural background and mode of thinking. Indeed, it appears that

²⁵ Many scholars refer these models because they remain useful and easy to use, for example: J. Carbonnier, *Introduction au droit*, (Themis, 1990); S.F.C. Milsom, *Historical Foundations of the Common Law* (Butterwoths, 1969); M. Weber, *Economy and Society, an outline of interpretative sociology*, trans. E.Fischhoff, H. Gertz & A.M. Henderson (Guenther Roth & C. Wittich, 1978); F. Strier, "What can the American adversary system learn from an inquisitorial system of justice?" (Oct.-Nov. 1992) 73 *Judicature* 109; P. Robardet, "Should we abandon the Adversarial Model in Favor of the Inquisitorial Model in Commission of Inquiry?" (1990) 12 *Dalhousie Law Journal* 111.

²⁶ Frankenberg, *supra* note 8 at 422.

²⁷ R. Abel, "A Comparative Theory of Dispute Institutions in Society" (1973) *Law and Society* 217 at 221.

some patterns are completely irrelevant in certain cultures. For example the civil law/common law dichotomy is of no relevance to the study of native American legal systems and reveals a European mode of thinking. If these terms are used to describe systems in America or Asia, they only relate to systems imposed in those continents by European colonizers.²⁸

The tendency to make the information fit into models leads to dualistic pictures of “us” and “them”, the similar and the different. This dualistic approach in some ways assists the work of the analyst but also reassures him or her, that he or she was aware of certain facts before beginning the analysis and thus any new information is not totally new. This dichotomic system of classification of information also prevents a questioning of the analyst’s native system. The new information is either similar to the native system or else different and therefore irrelevant. “The comparatist always returns to the original and prior conception, which is never exposed to criticism from the vantage the new conception allows. The foreign law is conceived of as like or unlike, derivative or opposite”.²⁹

These kind of models are apparent when for instance the French and the B.C. systems are seen as inquisitorial versus adversarial, or civil law versus common law. The civil lawyer might assume that in a common law system the legislature has little power as judges make law, but this is not true in countries with a Parliamentary system like that in Canada. On the other hand, a lawyer in an adversarial system may presume that accused are presumed guilty until proven innocent in inquisitorial system, but this is in fact not the case in France.

The analyst must therefore be careful not to place the institutions studied in the patterns already established. The identification of the true nature of an institution or a concept studied can

²⁸ R. Abel, *supra* note 27 at 222.

²⁹ G. Frankenberg, *supra* note 8 at 423; *J. Derrida Limited Inc./Jacques Derrida* (Evanston IL: Northwestern University Press, 1988) at 66.

fail by ignoring some elements which do not correspond to the pattern but are vital to a complete understanding.

We will therefore be aware of the danger of using patterns and avoid basing our analysis on such patterns. At the same time, because they are so present in the literature we will certainly have to refer to models such as adversarial/inquisitorial or common law/civil law at some point of our analysis.

7. Conclusion.

A comparative legal study is therefore the analysis of any legal system from a comparative angle. Comparative law is therefore not an area of law but rather a technique in the study of law which assists the student in outlining the similarities and differences between different legal systems.

To effectively use this method, one has to be conscious of a number of dangers or difficulties and must (1) try to determine a neutral basis for the comparison (2) be aware that her own knowledge of her native system will inevitably limit the comprehension of the new system and that while she will never be able to be completely neutral, a conscious effort has to be made to “no longer project characteristics of her own way onto the objects of her scholarly attention”³⁰ (3) learn the language of the system studied if it is different from her own and try not to rely on literal translation or at least question any translation and (4) avoid using pre-established patterns but rather try to acknowledge characteristics of each systems.

The analyst has to be aware that comparing is a matter of trying to forget what he or she has learned and question what is established, while acknowledging that this is a difficult goal to reach.

³⁰ G. Frankenberg, *supra* note 8 at 413.

Section 2: Role of the judge as defined in the literature.

This section will attempt to define the role of the judge as described in different works of academics. Two classical conceptions of the role of the judge will be outlined, the “Adjudicative model” and the “Policy maker”. These models have been examined by Paul Weiler, in “Two Models of Judicial Decision-Making” who refers to American scholars’ analysis to distinguish two different conceptions of the role of the judge, namely the “adjudication of dispute” role and the “policy making” role.³¹ The author does not use these two models as strict patterns of behaviors of judges. Rather he outlines the characteristics of each of them while assuming that actual judges’ comportment might be fluctuating between both. As he states : “Our models are “ideal types”, furnishing us with distinctive angles of vision on the same judicial reality, thus allowing us a more profound understanding and evaluation of tendencies within the existing system.” These two models propose an answer to the definition of the expectations of the society regarding judges, their behavior and mode of reasoning.

1. Adjudication of disputes

The “adjudicative” model primarily concerns the dispute settlement function according to an established principle. The author exposes the model through its three steps of functioning: the existence of a dispute, the undertaking of an adversarial process, and the existence of standards available to resolve the dispute. According to this model, the judges’ role is primarily to resolve disputes brought before them in accordance with existing norms. This model is also described by Gény in his “Méthode d’interprétation et sources en droit privé positif” describing the process of

³¹ P. Weiler, “Two Models of Judicial Decision-Making” (1968) 46 Can. Bar Rev. 406.

dispute settlement in two steps: the drawing of a general principle from the law, and its application to the situation in hand.³²

Weiler recognizes the difficulty for advocates of this model to explain the compatibility between the principles of adherence to established rules and permanent adaptation of these rules to cases in hand.³³ However Gény, like Weiler, recognizes the difficulty in stating that the personality and the values of judges do not interfere with the process. In fact, Gény mentions that at both level of the decision process conducted by “adjudicating” judges, their personalities play an important part .

If it is recognized that judges involve their own values when applying a norm to a case, the question remains as to the role of the judge according to this model when no norm is available. Two solutions are offered. Russel refers in this case to the democratic role of the judge, or more exactly to the necessity for the judge to ensure that democratic principles are respected. The judge in this case has to look for “underlying rules of law”.³⁴ This theory is similar to 19th century academics’ conception of the role of the judge which denied any creative role judges and asserted that the law was not made but found.³⁵

Another solution is proposed by Horace Read.³⁶ Although this author affirms the respect which must be accorded to established norms by the judge, he also recognizes that in certain situations, the judge has to act consciously as a legislator. In this case, Read recommends that

³² F. Gény, *Méthode d'interprétation et sources en droit privé positif*, trans. Louisiana State Law Institute (1899) at 28.

³³ Weiler, *supra* note 31 at 428.

³⁴ P. Russel, *The Judiciary in Canada: the Third Branch of Government* (Mc Graw-Hill Ryerson) at 16.

³⁵ See in Gény, *supra* note 32 at 18.

³⁶ H. Read, “The Judicial Process in Common Law Canada” (1959) 37 Canadian Bar Review 265 at 290.

judges make decisions adapted to cases, “respecting” people and other judges. This author implies therefore that judges have to research or know what is an adapted decision. Here we reach the gray area between the two models with the acceptance that an appropriate decision might involve political choices by the judge.

2. Policy maker

The second model refers to the judge as a political actor. According to this conception of the role of the judge, the process of decision making conducted by the judge does not only involve personal judgment but is the result of political choices. It is argued that if decisions by judges have to relate to a dispute and be justified in a reasoned opinion in order to be legitimate, judges thus make policy decisions or legislate through modes of reasoning similar to other actors in the governmental system.³⁷

Phil Harris recognizes that judges are placed in situations where they have to make political decisions.³⁸ However, for this author, these political choices have to be made in accordance with public interest. Weiler goes further in the evaluation of the political aspect of the role of judges, affirming that they are in position to and do protect minority groups. For advocates of this model, these political choices in favor of minority groups are legitimate, as such groups are not represented by other democratic institutions. This attitude is the opposite of the behavior recommended to judges by advocates of the “adjudicative” model.

However, Weiler recognizes that this model presents certain weaknesses, limiting the possible extent of the power of judges as policy makers. First, as mentioned, their decision has to appear legitimate. If it is acceptable that members of the legislature make policy choices

³⁷ Weiler, *supra* note 31 at 437.

³⁸ P. Harris, Chapter 13 in *An Introduction to Law*, 3rd Ed. (Weinfeld & Nicolson).

according to their own values, it is because they have been appointed through a democratic process. Judges are not democratically appointed and therefore political decisions might not be legitimate in the eyes of the society. Second, their choice of policy is necessarily limited to the case in hand and in common law systems, to similar cases. In fact, courts have limited means available to enforce their policies.

Conclusion

Two models are therefore proposed to comprehend the role of the judge. The “adjudicative” model draws on the conception of the judge settling disputes in accordance with existing norms and ultimately creating rules, but in accordance with the legislature’s public policy or respecting democratic principles. In contrast, the “policy maker” role disregards the potential for the judge to establish the majority’s will but instead recognizes in certain decisions a true political action.

The two models mentioned, namely the policy maker and the adjudicative model, propose two different visions of the role of the judge, one being restricted to the settlement of disputes and the other conducting political actions. Both of these models are well developed in the literature, with different nuances. However, neither the French nor the Canadian judge corresponds strictly to these models. Rather from both jurisdiction incorporate some aspects of both. The following chapter attempts to define the evolution of the role of the judge in both jurisdictions. The two models referred to will be used to conduct this analysis.

Chapter 2: The Historical Context for the Roles of Judges

The French and the B.C. governmental systems reflect an identity that has been built through years of history. This “identity” is not of one kind; it is composed of very different elements, from the dominant political ideology to the religions and the geography of the country. The “identity” of the country gives birth to certain conceptions of what should or should not be, of what is valued and what is not, and therefore of what a society consists of. There is, in people’s collective belief, a common conception of what a society should be. In addition, there is an interaction between this conception of society and the shape of the institutions that govern it and, consciously or not, public policy makers create institutions that reflect this interaction.³⁹

This chapter will attempt to define the role of French and B.C. judges in litigation by considering the historical legal background, as history appears to be one of the numerous factors shaping governmental institutions. Because it is impossible to concisely define institutions such as judges, three elements will be used to analyze the adjudicative function of the judge. By comparing the role of judges when handling cases, their importance in the proceedings and their professional training, and by following the evolution of these functions and criteria through the ages, we will analyze different factors shaping the role of the judge and therefore comprehend more generally this role in each jurisdiction studied.

It is acknowledged that considering the importance of the subject of this chapter, the historical or political data will have to be summarized and edited to present only the information which seems relevant to this analysis. It is also recognized that the process of selection of the relevant information is necessarily subjective.

³⁹ Geertz, *supra* note 1.

Section 1: Role of the judge in the proceedings.

Preliminary considerations of the adversarial / inquisitorial model

One of the most commonly used distinctions between the French and the B.C. legal systems of procedure is the inquisitorial / adversarial opposition applied to compare the jurisdictions. The words adversarial and inquisitorial refer to patterns used to classify procedural systems. The two terms were originally used mostly in criminal proceedings by English scholars to compare the English system, which respected the rights of the accused, to the Continental system, where an accused was presumed guilty until proved innocent.⁴⁰ Today, it is used generally to compare Anglo-American systems to Continental European systems for civil and criminal matters. The criterion used to compare the two appears to be centered on the role of the judge and therefore seems at first sight useful to our analysis.

The definitions of inquisitorial and adversarial systems are mainly functional definitions. According to the Oxford Companion to Law: "in all forms [of the inquisitorial system] the judge's investigation is not limited to the evidence put before him, but he proceeds with an inquiry on his own initiative"⁴¹.

Black's Law Dictionary refers to the adversarial system as a system in which "the judge acts as an independent magistrate rather than a prosecutor"⁴².

The Civil Law Dictionnaire de Droit Québécois et Canadien⁴³ also gives definitions focusing on the role of the judge. *Inquisitoire* (inquisitorial) is "said of a legal system according

⁴⁰ W. Holdsworth, *A History of English Law*, Vol. 1 (Methuen Sweet & Maxwell, 1969) at 312; The *Déclaration des Droits de l'Homme et du Citoyen* reversed this principle in France in 1791.

⁴¹ Oxford Companion to Law

⁴² *Black's Law Dictionary*, supra note 3.

⁴³ H. Reid, *Dictionnaire de droit québécois et canadien* (Montréal: Wilson & Lafleur, 1994).

to which the judge directs the trial and exercises a predominant role in the search for facts and for evidence". *Accusatoire* (accusatory or adversarial)⁴⁴ is "said of a procedural system according to which parties are in charge of the direction of the trial, each of them bringing the evidence of its claim before a neutral judge who resolves the dispute according to the evidence brought before him".

The models have been used by scholars who identified features characterizing each system: the existence - or not - of a jury in the civil procedure; the intervention - or not - of the judge in the establishment of the facts; the possibility - or not - for the parties to waive the procedural rules, and the professional training - or not - of the judge.⁴⁵

The adversarial system is often described as a party-controlled procedure, assuming a "dialectical paradigm for truth seeking in which the judge is neutral". Some of the procedural features are reliance on oral testimony, decision making by a jury, and possibility for the parties to waive procedural requirements by agreement. In contrast, an inquisitorial procedure is commonly understood as a state controlled procedure, assuming a scientific paradigm for truth seeking by an active career trained judge. The features of the procedure are reliance on official documentation, rigid state regulations on the procedure, and the absence of lay jurors.⁴⁶

From a more political point of view, the state applying an adversarial process is described as "reactive and laissez-faire" on social and civic matters, emphasizing on the rights and wills of the parties when a dispute is brought before the judiciary. The state applying an inquisitorial

⁴⁴ The French word *accusatoire* will be translated by adversarial instead of accusatorial due to the slight nuance, making reference to criminal procedure.

⁴⁵ F. Strier, *supra* note 25.

⁴⁶ P. Robardet, *supra* note 25; P. Weiler, *supra* note 31 at 412.

system is described as a state seeking the reduction of social problems through the enforcement of state's public policies.⁴⁷

We could assume that because the B.C. system is said to be adversarial, all the criteria above mentioned apply. If, indeed, the conduct of the trial relies on parties who are present to defend their case, the presence of lay jurors in civil cases is an exception and the judge has certain possibilities of intervention during the proceedings. In contrast, the French system is traditionally considered as an inquisitorial system, although it possess some characteristics which are said to be "adversarial".

As Patrick Robardet mentions:

"These ambiguous definitions [of adversarial and inquisitorial system] would have us accept general procedural patterns and the idea that both models can be defined only in contrast to each other without definite clarity or precision. If one must consider that the adversarial model is distinct from the concept of trial, which is but one of the diverse versions of the adversarial model, one is compelled to ask whether this model represents more than simply a paradigm for resolution of issues. Bearing in mind that the inquisitorial model also has as its objective the resolution of issues, I suggest that one look for, in addition to criteria supporting classifications and dichotomies between the two procedural regimes, a core of common, unifying elements."⁴⁸

This traditional opposition of adversarial versus inquisitorial obeys a pattern of distinction which does not take into account the particularity of each system, but rather erases the differences to make the original systems fit into the model. Using such a pattern in an attempt to define the role of the judge might result in the analysis being dichotomic and ignoring some important elements. As our purpose is to comprehend the B.C. and French legal backgrounds, rather than dividing them up in categories, using such patterns could alter our analysis by reducing the system studied to its model. We will avoid this kind of pre-prepared pattern, and try instead to put together political, historical and institutional data, in order to understand the role of judges in

⁴⁷ F. Strier, *supra* note 25; W. Holdworth, *supra* note 40 at 312.

⁴⁸ P. Robardet, *supra* note 4625 at 114.

the proceedings. However, because it has been commonly used, the division between inquisitorial and adversarial might appear at some stage of the comparison.

1. Role of the French Judge in the Proceedings: Rules and Evolution.

The role of the French judge in the proceedings will be defined on three levels: the rules of the code, the historical development and the ideologies governing the state's organization.

Provisions of the New Code of Civil Procedure in France. (NCCP).

One level of definition of the role of the judge in the proceedings can be found in France in the articles of the codes and in particular in the NCCP. The legislative provisions do not reflect the reality of the role of the judge because they do not give us a "living" picture of the relationships between the judge and the parties during the proceedings. However, the NCCP's provisions define what the role of the judge "ought to be" in the proceedings according to the legislature or how the legislature defines the role of the judge. The provisions of the NCCP may therefore be understood as the legislative characterization of the role of the judge.

In private matters, the French procedure is governed by the principle of "co-operation" between the parties and the judge. Articles 2 and 3 of the NCCP provide for co-operation between the judge and the parties. It is stated that the parties "lead the proceedings" while the judge ensures "good process". The following articles give a clear definition of what relates to the "leading of the proceedings" and "good process".

Article 6 of the NCCP states that the parties put forward their version of the facts and provide evidence supporting these assertions. During the trial, the judge will only review the evidence put forward and if necessary, interrogate witnesses or parties. In addition, Article 16 of the NCCP obliges the judge to hear the arguments of both parties on questions of law and facts. The parties are under a duty to ensure that the procedural forms are properly drafted and fall within the deadlines set out by the judge or provided by the NCCP.

We can observe here that the fact that in private matters it is actually up to the parties to put forward their case and to bring the evidence in support of it, challenges the common idea that the French system is inquisitorial.

The judge can request more information from the parties under Article 3 of the NCCP and the judge is free to base his or her decision on any element of the case, and not particularly on the facts raised by the parties. He or she can also appoint an expert to obtain further information, sets deadlines for the organization of the trial, and ultimately “demands necessary measures”.⁴⁹

Article 3 of the NCCP also gives the judge the discretion to end the hearings or to reschedule them. The parties have no means to appeal these decisions. Therefore, while the parties put forward and prove the facts of the case, the judge maintains control over the proceedings as he or she supervises the trial and is not limited to the facts presented by the parties.

The NCCP gives a very precise definition of the role of the judge in the proceedings and of the co-operation between the judge and the parties. These legal provisions shape a system which, while respecting the rights of the parties, gives the judge a supervising role. He or she is able to impose his or her view on the conduct of the proceedings and may apply public policy in relation to, for instance, the reduction of the length of trials in order to limit expenses.⁵⁰

Historical evolution of the French procedural system.

It is acknowledged that this section is not a comprehensive analysis of French history on procedural rules but rather a review of the main developments of judicial procedure in France, focusing on the evolution of the role of the judge.

⁴⁹ Nouveau Code de Procedure Civile, art. 3: “Le juge veille au bon déroulement de l’instance; il a le pouvoir d’impartir les délais et d’ordonner les mesures nécessaires.”

⁵⁰ L. Cadet, *supra* note 4.

According to Tigar and Levy, the shape of the French legal system is the result of the influence of six different bodies of law, namely Roman law, Feudal law, Canon law, King's law, Customary law and Merchant law.⁵¹ We will focus on the first four to study the evolution of procedural rules and the organization of civil courts.

- Different influences on French procedural rules

The Roman law influence was not only exercised directly through the creation of schools of Roman law in the 12th century and its use as an authority⁵² but also indirectly through Canon law which was itself inspired by the formalism established by the Romans. This formalism appears in contract law where the written form is a condition of validity of a number of contracts and in procedural rules which require certain written documents as evidence.⁵³ In particular, the 1258 A.D. royal order of Saint Louis⁵⁴ established written form for evidence and proceedings by inquiry of the judge.⁵⁵

Canon law borrowed this formalism, in particular in the organization of the Catholic Church's tribunals. "Canon courts" co-existed with Royal courts and were often used by people, not only because of the important authority of the church at the time but also due to their effective

⁵¹ E. Tigar & M. Levy, *Law and the Rise of Capitalism* (Monthly Review Press, 1977) at 13.

⁵² J.-F. Lemarignier, *La France Médiévale, institutions et société*, 1st Ed. (Armand Colin, 1989) at 236. This author divides the sources of law in France in the 18th century in two parts: learned sources (canon law and roman law) and official sources (customary law and royal law).

⁵³ E. Tigar & M. Levy, *supra* note 51 at 13.

⁵⁴ Saint Louis was actually the King Louis IX who reigned in France from 1226 to 1270. He is said to have governed with wisdom and authority. His reign was relatively quite, which let him undertake important administrative reforms. He participated actively in the process of centralization of justice in assuring the superiority of royal justice over other jurisdictions. His reputation of saint and wise man helped him to impose a system of justice centralized in the hands of the Kings. He was canonized in 1297.

⁵⁵ J.-F. Lemarignier, *supra* note 52 at 135.

organization.⁵⁶ The organization of the Royal courts, copied from the organization of the church, was very hierarchical. The authority came from the top and each individual component of the pyramid below was assigned a precise task. The task of judges was not only to adjudicate the disputes presented before the courts but also, in accordance with the catholic duty, to undertake the conversion of people and to catch offenders in order to convert them more so than to punish them. This role inspired by the catholic doctrine could be seen as the origin of the inquisitorial system.⁵⁷ Because the role of the courts was not only to adjudicate disputes but also to convert people, judges and their assistants had to be educated people. This could be one of the factors which explains the early disappearance of a jury in procedural rules.⁵⁸

Since the feudal regime formed the original political organization of the state, feudal law also played an important part in the shaping of the institutions. Feudal courts were maintained until the 14th century and implemented the principle that the society is divided into classes, each having a particular role and therefore being subjected to different rules of law.⁵⁹ The role of handling justice was attributed to the lord who judged according to his own principles of justice or "God's judgment".

- Centralization of the legal system initiated by the French Kings.

Royal justice became more and more important through the centuries and finally supplanted the other systems of justice, while incorporating some of their characteristics.

The kings of France sought to establish their authority by centralizing powers in their hands. They progressively denied other institutions any authority, including the authority to

⁵⁶ E. Tigar & M. Levy, *supra* note 51 at 102; J.-F. Lemarignier *supra* note 52 at 235.

⁵⁷ J.-F. Lemarignier, *supra* note 52 at 354.

⁵⁸ W. Holdsworth, *supra* note 40.

⁵⁹ See the development of this doctrine p. 17.

adjudicate disputes. With the passing of the centuries, we can observe a centralization of the French legal system, the disappearing of feudal courts (14th century) and the subordination of canon courts to the King's courts (15th century).⁶⁰ The judges named by the king were eventually the only institutions in charge of handling justice.

At the same time, the influence of the different systems remained, in particular in the procedural rules which implemented the Roman and Canon formalism. Moreover, under the influence of the Church, the jury system disappeared, and judges were permitted to conduct inquiries in civil and criminal matters.⁶¹ The judge appears therefore as a professional adjudicator of disputes, inserted into a hierarchical organization under the authority of the King.

One of the important steps in this evolution was a Royal Order of 1667, prepared by Colbert. This order was also one of the first steps towards the codification of procedural law, establishing long, formal and expensive proceedings.⁶²

However, this formalism together with the complexity and diversity of law at this time, encouraged people to use the State's jurisdictions only in extreme situations. Most of the time, private disputes were resolved by private arbitrations, where the priest of the parish or the lord of the land was the arbitrator. The state justice was reserved for important private matters, and public or criminal matters.⁶³

Revolutionaries sought to reverse this trend and efforts were made towards more State control over the adjudication of disputes. The 1667 Royal Order remained applicable but reforms

⁶⁰ J.-F. Lemarignier, *supra* note 52 at 347.

⁶¹ W. Holdsworth, *supra* note 40.

⁶² P.-C. Timbal & A. Castaldo, *Histoire des institutions publiques et des faits sociaux*, 8th ed. (Dalloz).

⁶³ G.-R. Ikni, "La Loi du dix juin 1973 et la sentence arbitrale: une procedure d'expropriation revolutionnaire?" in M. Vovelle, *La Révolution et l'ordre juridique privé, rationalité ou scandale?*, vol. 1 & 2 (Orléans: Université d'Orléans PUF, 11-13 Septembre 1986).

were implemented. Although arbitration was still commonly used, more private disputes were submitted to the State's judicial system.

The Napoleonic Empire⁶⁴ marked the return to relative civil peace and a committee was appointed for the drafting of the codes. It aimed to unify the legislation in many areas, including civil procedure. The influence of the Revolution on the Code of Civil Procedure is undeniable and its committee of drafting recognized the importance of the *Ancien Regime* heritage, and took most of the new provisions from the 1667 Order.⁶⁵

During the revolution and the Napoleonic Empire efforts were directed towards centralizing the power of adjudicating disputes in the hands of a unique State's court system where the judge exercises his or her functions within a hierarchical frame under the authority of the head of the state.

At the same time, the revolutionary influence and its challenge to the church's institutions was also reflected in the provisions of the Code of Civil Procedure with the implementation of a system in which the judge's role was limited to the adjudication of disputes. As the catholic duty of converting people was denied, the *inquisitio* system was suppressed, but the principle of written evidence was maintained. Under the original provisions of the Code of Civil Procedure, the judge had almost no authority in the conduct and control of the proceedings of private trials while the parties had a wide scope for action.

However, at the end of the 19th century, the increase in the number of trials and the length of proceedings forced the legislature to give more power to the courts to permit them to limit the length of the proceedings. In 1965, the above mentioned article 3 of the NCCP was introduced,

⁶⁴ Government of France from 1804 to 1814. It is the last step of the French Revolution of 1789. The Constitution of Year XII (revolutionaries years) is a compromise between the *Ancien Regime* and revolutionaries ideologies.

⁶⁵ Portalis, "Discours préliminaire" in *Discours et rapports sur le Code Civil*, rev. ed. (Caen: Bibliothèque de philosophie politique et judiciaire, 1989).

officially putting the judge in charge of the “good process” of the proceedings and establishing the principle of co-operation between judges and parties.⁶⁶

The French legal system can therefore be characterized by its diversity of origins -Roman, Canon, Feudal, Royal, and its systems of adjudication including frequent use of arbitration. This diversity was progressively suppressed by the successive Kings, the Revolutionaries and finally the Napoleon Codes, implementing the principle that it is the State’s role to adjudicate disputes. The French procedural rules reflect the original diversity and its historical evolution. A limited inquisitorial procedure reflects both Canon law influence and the reaction of Revolutionaries. Similarly, the formalism of the proceedings reflects Roman law principles. In the following section, we will study the feudal influence in particular.

Influence of feudalism on the French system.

According to Otto Kajn-Freund: “The legal order of feudalism deliberately allocated the control of the land and goods, established the hierarchy of power, and imposed the duty to work in accordance with the social functions of possession, power and labor.”⁶⁷

The feudal system applied in France in the 12th century was based on a separation of powers between the king and his “vassals” who were granted aristocratic status because they owned land. A pyramidal and hierarchical organization was then developed due to the importance of the property. The vassals, because of their ownership of property, were granted legislative and judicial powers by the King.⁶⁸

⁶⁶ Nouveau Code de Procédure Civile, article 3, supra note 49.

⁶⁷ O. Kajn-Freund, “Introduction” to K. Renner, *Institutions of private law and their social function* (London: Routledge & Kegan Paul) at 7.

⁶⁸ Glasson, *Histoire du droit et des institutions de la France*, Vol. 4 (Pichon, Paris, 1891).

A feudal system incorporates men and women into an organic whole. Individuals are not considered as such but are, first, part of an organization in which they have a precise place. The organization and the separation of roles are based on a tacit contract⁶⁹ or the principle of mutual obligations.⁷⁰ The vassals provide for the lord's food, well being and troops in exchange for his protection and the right to cultivate the land. However, parties to the contract are not considered on an equal basis as one of them, the lord, has a power of regulation and control over the other.

This system does not negate individuals, but maintains them in an assigned social function. They are recognized through the benefit they give to the society. Moreover, the feudal system implements the idea that the obligation for the protection of individuals is at the head of the pyramidal structure: the lord, the King etc. The adjudicative role is attributed to the "protector" implementing the idea that handling justice is part of the role of protection.

The influence of feudalism in French procedural law can be seen in the organization of the procedure. The judge, who is the representative of the French republic, has the task to ensure that individual rights are respected while adjudicating disputes.⁷¹

This theory of the organization of the society based on a contract is reminiscent of the "social contract" theory proposed by Rousseau. According to this philosophy, the relationship between the government and the people is based on the duty to perform mutual obligations.

The adjudicative function in France can be viewed as one of the obligations owed by the State to the people under a virtual social contract. Thus, the French judiciary's role is considered

⁶⁹ J.-F. Lemarignier, *supra* note 52 at 135.

⁷⁰ E. Tigar & M. Levy, *supra* note 51 at 28.

⁷¹ Nouveau Code de Procédure Civile, art. 14: "Nulle partie ne peut être jugée sans avoir été entendue ou appelée." And art. 16: "Le juge doit, en toutes circonstances, faire observer et observer lui même le principe de contradiction."

a “public service”.⁷² The French judge appears to be in charge of a service performed by the State in favor of the people.

2. Role of the B.C. judge in the proceedings: rules and evolution.

Court guidelines in British Columbia.

Without considering all procedural rules in B.C., a number of characteristics will be identified.

In B.C., rules of procedure are of legislative and jurisprudential origins and are grouped in the B.C. Annual Practice.⁷³ None of them is absolutely mandatory as rule 1(11) states that “upon application and if all the parties to a proceeding agree, the court may order that any provision of these rules does not apply to the proceedings”.⁷⁴ This rule gives the parties a control over the procedure, since they can change it by agreement. The organization of the trial is decided upon by the parties and the judge with the priority being the parties coming to an agreement. Only when the parties cannot agree does the judge intervene.

Before the trial, it is the responsibility of the parties to prepare the evidence for their case. That evidence can consist of written interrogatories, oral questioning of witnesses, etc. During the trial, the judge is not supposed to intervene but to listen to the evidence presented by the respective parties. However, some provisions or practices of the court temper the authority of the parties, giving the judge the power to control the procedure to a certain extent.

⁷² E. Gigou, Ministre de la Justice, “Débat sur la réforme de la justice”, address to the Assemblée Nationale (January 1998).

⁷³ Bouck, Dillon & Turriff, *British Columbia Annual Practice 1996-97* (Western Legal Publication, 1996-97).

⁷⁴ Bouck, Dillon & Turriff, *supra* note 73 at 15.

Under rule 32 of the Courts Rules, the court “may direct an inquiry, assessment, or accounting to be held by a master, registrar or special referee”.⁷⁵ The court can therefore request more evidence, even if the parties do not ask for it. This rule is not frequently used, but it allows the judge to have a certain control over the procedure when he or she needs to in order properly to dispose of the case. It is also the case under rule 32A, which states that the court can appoint independent experts on request by the parties or “on its own initiative”. This rule is very rarely used as most of the time the parties produce their own experts. It nevertheless gives the court the opportunity to intervene when required.

Finally, the Supreme Court Rules 39(24) (25) (26) provide for the organization of trials by jury. The principle is that civil trials are conducted without a jury but a party can opt for trial by jury by notifying the other parties. However, some cases cannot be tried by jury (rule 39(25)) and judges may refuse jury trials when “the issues are of an intricate or complex character” and when there is no method of simplifying the technical explanations or testimonies.⁷⁶ The right to be tried by jury is therefore limited, and the right to have a jury trial has not been recognized as a principle of fundamental justice within the meaning of section 7 of the Canadian Charter of Rights and Freedoms.⁷⁷

The judicial procedure is therefore mainly controlled by the parties while the judge appears more as a neutral referee with some means to intervene in the procedure if needed. In contrast with the French procedural rules, the judge is not able to enforce public policy principles on judicial organization at the procedural level.

⁷⁵ Bouck, Dillon & Turriff, *supra* note 73 at 153.

⁷⁶ For example in *McDonald v. Inland Natural Gas Co. Ltd.* [1966] 57 W.W.R. 87 (C.A.) 95.

⁷⁷ See *United Service Funds v. Richardson Greenshields of Canada Limited* [1987] 16 B.C.L.R. 196 (2d) 197, 201.

It seems that the balance of power between the parties and the judge is not as clearly defined to in the B.C. Court Rules as it is in the NCCP, but we can observe in the provisions and in the practice of the courts in B.C. a tendency to give more power of decision to the parties, while the judge's main role is to provide for a solution to the dispute. In this way, B.C.'s system has been called an "adversarial" system, even if, as mentioned, this description is nuanced.

Historical evolution of the Canadian system.

Canadian court rules can be analyzed by looking at their origins, that is to say, English law. During the 11th century, the counties were still the most important administrative divisions of England. The justice system was organized locally and the main source of law was local customs. However, the King was already the "source of all justice", and his power was exercised county by county, through local representatives.⁷⁸

The process of centralization developed as a result of a growing tendency for the people to consult with the King's justice directly, and due to the important number of cases being brought before him, the King had to delegate his judicial power to the Curia Regis. This institution was still presided over by the King and made administrative or political decisions. However, itinerant judges were necessary to bring the King's justice to each county. Under Henry II (12th century), the English court system was already centralized and standardized by the institution of permanent courts and professional judges, the frequent missions by itinerant judges, and the introduction of formal procedural means, such as writs.⁷⁹

It seems that this early process of centralization of justice limited the influence of the feudal organization on the development of the English legal system. The feudal judicial system

⁷⁸ Lederman, "Independence of the Judiciary" (1956) 34 Canadian Bar Rev. 769; F. Pollok & F. W. Maitland, *The History of English Law*, 2nd ed. (Cambridge University Press, 1898) at 153.

⁷⁹ S. Milsom *supra* note 25 at 24.

as it existed in France in which the judge is the Lord, who receives his powers at his birth as a property right, was replaced at an early stage by itinerant judges appointed by the King.⁸⁰

At the same time juries were more commonly used in England than in France. The origin of the institution of the jury is uncertain. It seems that it was used at a very early stage in many European countries, but there is no fixed date of emergence. Nonetheless, it was used in England in the 11th century in the form, initially, of a group of neighbors called to decide a case considering its facts. The King's central power was established earlier than in France so it seems that the church in England did not have the opportunity to impose its view on the process. Lay juries were maintained and were operated all over the country by the king himself. This could have limited the influence of roman and canon law as these two sources of authority were known only by professionals, while laymen were more sensitive to customs.⁸¹

By the end of the 13th century we can already see in the English system the features of what we call today an adversarial procedure: the use of juries to decide upon the facts, the exchange of pleadings between the parties and professional judges chosen by the central power from amongst men of letters.

Of course, this system has evolved, but its main features have been retained. At the end of the 19th century, because the evolution created certain anomalies and confusions, the system was reformed, with the enactment of the Judicature Acts. However, these statutes aimed to simplify the procedure, and no codification was attempted nor important substantive changes made.⁸² This system was enforced throughout the British Empire, including Canada where the

⁸⁰ S. Milsom, *supra* note 25.

⁸¹ W. Holdsworth, *supra* note 40 at 312; F. Pollok & F. W. Maitland, 78 at 150.

⁸² W. Holdsworth, *supra* note 40 at 633.

common law provinces, including B.C., followed the English precedents, even after the abrogation of the right of appeal in civil matters to the Privy Council in 1949.⁸³

One of the characteristics of the English evolution, compared to the French evolution, is that it happened slowly, as there was no major turning point such as the French revolution or the codification. As in France, the feudal system existed, but the process of centralization happened earlier in England, and feudal law, canon law or roman law did not have the same influence over this process.

English and Canadian judges appear therefore as representatives of the king, whose function is to explain the law rather than to deal with the facts or the proceedings of the case in hand. These tasks are left to the parties or the jury. It is not the task of the judge to protect the rights of individuals, who are themselves considered the best people to protect their own rights.

Individualism and procedural rules in B.C.

Similarly to the French context, a number of different political or ideological factors are reflected in the definition of the judge's role in B.C. However, we will focus on individualism as a determinant factor of the separation of roles between the parties and the judge in the proceedings.

Schwartz characterizes the political ordering in Canada with the three levels of a recognized social entity, namely individuals, groups and society, and notes that if the Canadian Charter of Rights and Freedoms establishes the protection of individual rights, it also recognizes and protects particular rights for certain groups.⁸⁴

According to this author:

⁸³ G. Gall, *The Canadian Legal System*, 3rd ed. (Carswell) at 49.

⁸⁴ B. Schwartz, "Individuals, Groups and Canadian Statecraft" in R. Devlin, *Canadian Perspectives on Legal Theory* (1991) at 39.

"Canadian constitutional law is marked by the tension between "liberal individualism" and "history-based groupism". Liberal individualism is the ultimate unit of moral account, that individuals should be treated as morally equal, and that there should be respect for the right of individuals to choose freely their own ends in life. History based groupism holds that Canada is composed of constituent groups (...) and that special rights may be assigned on the basis of their special place in history."

However, private procedural rules in British Columbia are applicable to any individual regardless of his or her belonging to a group.⁸⁵ Moreover, the proceedings as we described them rely mainly on the will of the parties while the judge deals with questions of law as a "neutral arbitrator". The tension described by Schwartz between groupism and individualism seems to have been resolved in B.C. procedural rules in favor of individualism, enhancing the idea that all individuals have the right to be tried according to the same rules of law and are the best people to defend their own rights. As a consequence, the role of the judge in the procedure in B.C. is limited to the role of "neutral arbitrator", while the parties are supposed to ensure themselves the protection of their own rights.

It is worth noting that even if, according to Schwartz, liberal individualism is "a more coherent, more egalitarian, more easily applicable and more widely acceptable political philosophy than history based groupism"⁸⁶ such procedural rules still create a distinction between individuals who can afford to use the system of procedure and those who can not.

The role of the judge in B.C. is therefore limited in principle. To refer to the distinction mentioned above between adjudicator of disputes and policy maker, we could conclude that in the

⁸⁵ Sentencing Circles programs have been developed by judges in a number of northern native communities in B.C. Family and community circumstances underlying the case are addressed during a meeting between the offender, the victim, their families, friends and members of their communities. It has been developed in parallel to the criminal court system and can be used by the trial judge as a consultation, but it does not replace the court system. See B. Galaway, "Circle Sentencing: Turning Swords into Plowshares" in B. Galaway & J. Hudson eds, *Restorative Justice: International Perspectives*, New York (Criminal Justice Press, Monsey, 1996) at 193.

⁸⁶ B. Schwartz, *supra* note 84 at 41.

proceedings, the judge in B.C. is more of an adjudicator of disputes since the strategic decisions regarding the proceedings are made by the parties rather than by the judge.

Section 2: Function of judging.

If we refer back to the definition of judges given in the first section, we note that they are mainly functional and refer to the role of “administering the law”⁸⁷, or to the “power of juris dicta”⁸⁸ as to the verb “to judge” or *juger*. The following section considers the meaning of these verbs in France and B.C. in order to comprehend this particular function of judges.

Most of the definitions of the function of judging, whether French, English or Canadian, appear very similar. However, we must not assume that “to judge” in English and *juger* in French refers to the exact same function. In fact, France and B.C. have a rather different concept of what to judge or *juger* means, and these different conceptions have shaped the role of the judge in quite different ways in both jurisdictions.

Because France is called a “civil law” system, the role of the judge is usually considered secondary and rather limited. The common idea is that rules of law are provided in the Code, and judges only have to determine which rule is applicable to the case, apply it, and by doing so resolve the dispute at hand. In a “common law” system like B.C., judges are usually recognized as having a different and more important role, as they are entitled to create a rule of law if no precedent governs the dispute being considered.

The usual or common descriptions can reduce a system to clichés which do not reflect the reality. In this section, we will try to avoid these kinds of “ready to use” descriptions in order to be as accurate as possible and attempt to understand each system.

⁸⁷ *Black's Law Dictionary*, supra note 3.

⁸⁸ L. Cadet, supra note 4.

As mentioned in the first section, we will use the approach taken by different scholars to study the role of the judge, distinguishing between the role of settling a dispute and the role as a public policy maker.

1. “Juger” in France.

While acknowledging the numerous factors shaping the “judging” role of the judiciary, this function will be defined through different methods of interpretation proposed by French legal scholars, on one hand, and through the history of the creation of codes which are recognized as the main source of private law in France on the other.

Method of interpretation of private civil law by the judge.

Because the only official sources of law in France are statutes and government regulations, excluding judgments, judges are never said to “make” the law but to “interpret” or “apply” it. The existence of a Civil Code in France which was originally intended to simplify and synthesize the law, substantively affects the role of judges and their method of adjudication. In fact, it is commonly perceived that due to the existence of inflexible rules established in the codes, French judges only resolve disputes and enforce public policies established by the government or the legislature.

This section aims to understand the process followed by the judge in France when making a decision in a case, in order to evaluate the nature of the role of the judge and to situate this role in the adjudicator/policy maker scheme mentioned above.

Different scholars have proposed different methods of interpretation.⁸⁹

⁸⁹ F. GénY, supra note 32; J. Carbonnier, supra note 25; M. Weber, supra note 25; Portalis, supra note 65.

During the second half of the 19th century, classical doctrine developed a method of interpretation strictly based on the text. “Only legislative law, subject to an inherent interpretation, can and must be sufficient to meet all the requirements of legal practice.”⁹⁰

French Modern commentators were fascinated by the codification and thought that the codes would ensure a complete fulfillment of legal requirements. “Whenever the statute is well understood and interpreted, it will provide all the required rules.”⁹¹

The method of interpretation developed by the doctrine in the 19th century can be summarized by the following:

- The first principle is the application *stricto sensu* of the text. The exegetic method is used for the application of the text word by word, by researching the meaning of each word.
- If words cannot be interpreted using that method, one must use the logical method: searching for the meaning of the statute, and the intent of the author, without paying too much attention to the words. A search can be conducted by consulting legislative records, and even in traditions or customs in order to place the statute within its original environment.
- If this technique is not sufficient to give meaning to the statute, then one can use indirect means, i.e. equity, because it is considered as one of the sources of inspiration of the legislator.
- If this search still does not provide the interpreter with an answer, the method of analogy should be used. It consists of drawing a parallel to or an extension of the scope of application of an existing rule. This method is based on the idea that the legislator neglected something he intended to express.

⁹⁰ F. GénY, supra note 89, citing Blondeau, *Essais sur quelques points de législation et de jurisprudence* (1850).

⁹¹ F. GénY citing Blondeau, supra note 90.

At the beginning of the 20th century, scholars questioned this method of interpretation by going back to the intent of the drafters of the codes. It appeared that Article 4 of the Civil Code allowed academics to question the assumption made by 19th century scholars, and in particular the prohibition on judges from interpreting articles of the codes.⁹² This article states that “the judge who refuses to judge, under the pretext that the law [written law] is silent, obscure, or insufficient, shall be sued for denial of justice”.⁹³ The French judge therefore is under a duty to resolve a dispute even if the law is not clear, and enjoys a limited margin of interpretation.

Francois GénY in *Méthode d'interprétation et Sources en Droit Privé Positif* concluded that the process of judging is not the mere enforcement of written rules but a whole process of adaptation and interpretation involving the personal culture and background of the interpreter. Not only has the judge the right to fill in the gaps in the codes but also his interpretation of an existing rule will involve some creative input.⁹⁴

For this author, a general principle is drawn by the judge from the text and then applied to the situation at hand. The result can be far from what equity or custom would provide, and the personality of the interpreter is very influential in adapting the solution to what he or she considers to be just.

To demonstrate his interpretation, GénY refers to the drafters of the codes themselves. In particular he refers to Portalis, who participated in the drafting of the initial Code in the early

⁹² To interpret is literally “to make something understandable, to explain it, to comment it” *Grand Dictionnaire Encyclopédique Larousse*, vol. 8 (Larousse, 1988) at 5641. However, the scope of an interpretation varies significantly. In French Public Law, to interpret is not only to determine the exact meaning of a text, but also to determine its scope of application in time and space and therefore its place in the hierarchy of norms. In French Criminal Law, the judge must respect the principle of strict interpretation of texts for the qualification of criminal behaviors. It means that the text has to refer clearly to the specific behavior in hand in order to qualify it of criminal act. R. Guillien & J. Vincent, *Lexique de termes juridiques* (Dalloz, 1990) at 281.

⁹³ Code Civil, Art. 4: “Le juge qui refusera de juger, sous prétexte du silence, de l’obscurité ou de l’insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice” (Litec, 1990) at 28.

⁹⁴ GénY, *supra* note 32.

1800, who mentions in his *Discours préliminaire* that “when the provisions of the code are clear, they have to be enforced; if they are obscure, they have to be searched; if there is a lack of provision, custom or *équité* have to be applied; *équité* is going back to natural law, when positive rules are silent, contradictory or obscure”.⁹⁵ The potential for intervention by the judge is also recognized by Portalis who mentions that: “many things are necessarily left to the direction of customs, the discussions of men of letters, the arbitrations of judges”.⁹⁶

The existence of an “original” decision by the judge in any interpretation has been recognized by scholars.⁹⁷ The classic example given is the problem of car accidents, which was not dealt with in the Civil Code. In the 1930’s with the development of the car industry, the need for rules on the liability for car accidents and the compensation for victims’ injuries appeared. French judges resolved the problem by applying a general article of the Civil Code on liability, while creating a whole regime specific to the recovery of damages by victims of car accidents⁹⁸. Since then, the legislator has intervened and enacted the rules set up by the jurisprudence, giving them official recognition, since they were originally judge made.

In rare cases, the judge will create a rule without even using a general article of the Code. It is said that the judge will decide *en équité*.⁹⁹ Because *équité* is not an official source of law, there is a chance that a judgment in accordance with the judge’s own principle of *équité* will be reversed by the French *Cour de Cassation* if the case is brought before it. In the majority of the

⁹⁵ Portalis, supra note 65 at 12.

⁹⁶ Portalis, supra note 65 at 4.

⁹⁷ J. Carbonnier, supra note 25; Gény, supra note 32.

⁹⁸ J. Carbonnier, supra note 25.

⁹⁹ The translation of this word by the English word “equity” is avoided as the French *équité* does not have the same meaning as in common law systems. It mostly refers to the judge’s own sense of justice or fairness. There is no equitable rules or courts in France as in common law systems.

cases; small disputes judged *en équité* are not brought before the *Cour de Cassation* and the judge will have created law according to his own philosophy or notion of justice.

Despite this actual creation of rules by the courts, judges' decisions in France do not have the value of precedents. The Civil Code denies judgments authority as sources of law and it is forbidden for judges to draft their decisions as general and abstract rules.¹⁰⁰

In practice, important decisions of the *Cour de Cassation* on problems often brought before the courts are followed by lower courts. Even if the authority is not quoted or referred to in the decision, the interpretation adopted by the higher court will appear word for word in the text of the judgment of the lower or same level of court.

Although French judgments are not official sources of law, judges still have the power to interpret and even create the rules needed. Through creations of these rules, they make political decisions by choosing the appropriate answer to a given problem. In doing so, judges will enforce either their own principles and views or establish the principles of public policy determined by lower courts. Despite the fact that French courts are not official public policy makers because case law is not officially a source of law, their role cannot be limited to the resolution of disputes and the enforcement of codes' provisions. French judges have a certain power to decide what is the appropriate solution to a problem. This power of decision is not limited, for higher courts, to a particular case as they can create rules of law and therefore make public policies decisions.

¹⁰⁰ Code Civil, Art. 5 "Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises" (Litec, 1990) at 29.

Historical considerations regarding the role of the judge in France.

The refusal to recognize judgments as sources of law in France, which constitutes the main difference with common law systems, can be explained with reference to the historical evolution of the French political system.

The discretionary power developed by Parliaments under the Ancien Regime provoked a reaction during the Revolution. Parliaments were originally national and local courts to which the royal power of justice was delegated. They were accorded the right to judge cases on appeal, to pronounce regulations when needed, and to comment on the King's policy. They were originally the King's courts, as opposed to the Feudal or Canon courts. With the establishment of the central power of the King, they became the main appeal jurisdictions in France.¹⁰¹ Parliaments were mainly composed of members of the bourgeoisie as the positions could be bought and was not granted by the King. Their power varied through the dynasties, but under the reign of Louis XVI, just before the revolution, they formed a strong opposition to the King's policy and expressed more concern for their own interests.¹⁰²

The different governments during the period of the revolution aimed to modify the role and the importance exercised by the judiciary in reaction to the discretionary and abusive power of the Parliaments. The doctrine implemented was the principle of separation of the three powers, namely executive, legislative and judicial, advocated by Montesquieu in *L'Esprit des lois*.¹⁰³

¹⁰¹ J.-F. Lemarignier, *supra* note 52 at 357.

¹⁰² Tocqueville, *L'Ancien Régime et la Révolution* (Gallimard, 1967) at 299.

¹⁰³ Montesquieu, *De l'esprit des lois*, vol. 1 & 2 (Flammarion, 1980).

According to this doctrine, only direct representatives of the people were allowed to make choices concerning public policy and therefore to make law. The judiciary's role was only to resolve disputes by a strict enforcement of the law. Montesquieu stated:

"The courts must not be inflexible but their judgments must be, so that they would never represent anything but the precise text of the law. If they were merely individual opinions of the judges, one would live in a society without knowing precisely what obligations one has contractually assumed (...) the judges are simply the mouth which pronounces the words of the statute, inanimate agents who can neither moderate its force nor its rigor."¹⁰⁴

The implementation of this political doctrine is reflected in the above mentioned provisions of the code, restricting the authoritative force of judges' decisions. Written law was identified by revolutionaries as the primary means to maintain freedom and equality in society.

The drafters of the code in 1806, respecting the constitutional state of France at this time, affirmed the ideal of a written law directing every aspect of social life but recognized the practical difficulties with such a doctrine.¹⁰⁵ They therefore followed Rousseau's doctrine, which advocates the power of judges to interpret the provisions according to the "light of uprightness and discernment".¹⁰⁶

The different political and philosophical influences affecting the drafters of the codes created a tension in their definition of the role of the judge who, on one hand cannot create rules of law but, on the other hand is authorized to interpret the codes' provisions.¹⁰⁷ Since the first

¹⁰⁴ Cited by Gény, *supra* note 32.

¹⁰⁵ Portalis, *supra* note 65.

¹⁰⁶ C. Bloch & J. Hilaire "Nouveauté et modernité du droit révolutionnaire: la procédure civile" in M. Vovelle, *supra* note 63.

¹⁰⁷ According to O. Khan-Freund "The code is the fruit of a philosophy or of an ideology but not its roots", *supra* note 67.

publication of the Codes, the understanding of the function of judging has evolved depending on the political climate, according either more or less importance to the power of interpretation. However, at no point were judgments recognized as a source of law and the interpretations made by judges are still limited to particular cases.

2. "Judging" in B.C.

Creative role of the common law judge.

The common law system can be defined in terms of the value given to precedent: the *ratio decidendi* of higher courts' decisions are binding upon lower courts, and trial judges are recognized as one of the authorities permitted to create rules of law. This rule is flexible; the lower courts judges can always adapt a particular doctrinal rule according to the particular aspects of the case before them.

Different theories have been proposed considering the process of judging in a common law system and the actual role of the judge in this process.

According to Horace Read, classical English academics had a notion of the nature of the judicial process minimizing the law making role of the judge and contending that the judge does not create the law but brings to light rules of law which have always existed.¹⁰⁸

This interpretation of the common law legal system was challenged during the 19th century and it was suggested that judges were creating rules instead of "finding" them. Holmes, in *The Path of the Law*, questioned the conception of "natural law", taking into account the

¹⁰⁸ See Hobbes, Bentham, Austin cited by H. Read, *supra* note 36.

importance of the historical and sociological context of judges when reaching a decision and therefore enunciating a rule.¹⁰⁹

More recently, Ben Cardozo has mentioned the influence of the personality and experience of the judge on the rules he or she makes, and concludes that "the law which is the resulting product is not found but made".¹¹⁰ Recent academics have also debated the importance of the political factor in judges' decisions. They assert that because the appointment of judges is wholly in the hands of politicians, judges are a part of the states' organization and cannot avoid making political decisions.¹¹¹

These academics have suggested that the structure of judgments varies according to the level of the courts, but also according to the personality of judges.¹¹² The judges have a real choice in deciding what is important and worth developing and what is not. Different techniques can be used by judges. Depending on their choices and preferences, they may focus on a particular definition or interpretation raised by one aspect of the case or, on the practical consequences and social implications of their decision.¹¹³

It is also argued that the common law judge's role when judging is to justify his or her decision by reasoned arguments, consistent with the existing law, and to achieve a just and fair result, acceptable by a majority of people. The choices made by the judge could rely in fact on

¹⁰⁹ O. Holmes "The path of the Law " in *The path of the Law after one hundred years* (1997) 5 Harvard Law Review, 110.

¹¹⁰ B. Cardozo, *The Nature of the Judicial Process* (New Haven, Yale University Press, 1921) at 115.

¹¹¹ P. Harris, *supra* note 38.

¹¹² M. Weber, *supra* note 25.

¹¹³ P. Harris, *supra* note 38.

his or her conception of what is just and fair or what he or she thinks the "majority" considers to be just and fair.

In so doing, the judge collaborates with other institutions for the development of the law. Judges affect how legal rights are enjoyed in practice through their day to day decision making - it is the way they influence public policy.¹¹⁴

The creative role of common law judges such as B.C. judges is recognized as cases are sources of law. Moreover, it now seems recognized that because of this creative role, common law judges are in a position to make choices as to what seems to them an appropriate answer to a problem raised. In other words, they are in a position to make public policy choices.

Considerations of common law history.

Without discussing the entire history of common law, we will highlight its main characteristics as well as some Canadian peculiarities.

The early presence of juries in English courts and the lesser importance given to Roman and Canon laws seem to have encouraged the participation of judges in the law making process. The presence of juries composed by people who were not specialized in law contributed to the development of a case by case law, in which particular facts of cases are considered instead of the application of a general neutral rule.¹¹⁵

Formerly English jurisprudence was very influential in Canadian law as the Canadian courts were bound by the British decisions for a long time. Until 1949 it was still possible to appeal private judgments of Canadian courts before the Judicial Committee of the Privy Council

¹¹⁴ P. Weiler, supra note 31; P. Russel, supra note 34 at 15.

¹¹⁵ F. Pollok & F. W. Maitland, supra note 78 at 150.

which in turn considered itself bound by the House of Lords. Moreover Canadian courts considered themselves bound by British precedents for a period even after 1949.¹¹⁶

However, Canadian jurisprudence appears to have become more creative and independent in recent decades. This can be explained in terms of the reduction of the authority of British courts over Canadian courts but also in terms of the peculiarities of the Canadian constitutional system.

As in England, Canada has a parliamentary system. It incorporates a constitutional organization in which the government is responsible to the Parliament, which has the authority to modify and create new rules of law, while the judiciary is said to be independent.¹¹⁷ Without debating the issue of the independence of the judiciary in Canada, we note the definition of political independence given by Lederman. For him, it means that the judiciary is not subject to the authority of the legislature or the executive as it is not responsible before the Parliament, and has separate autonomous powers.¹¹⁸

Considering the common law legal system, the judiciary and the legislature are both recognized as having the power to create rules of law, but rules made by the legislature prevail over the judiciary's rules.

The Canadian parliamentary system also presents certain characteristics. According to Horace Read, the separation of legislative powers in Canada between provincial and federal legislatures limits their authority, increasing the importance of courts' creative powers.¹¹⁹ Russel

¹¹⁶ H. Read, *supra* note 36 at 312.

¹¹⁷ P.H. Russel, *supra* note 34.

¹¹⁸ Lederman, *supra* note 78.

¹¹⁹ H. Read, *supra* note 36; P Hogg, *Constitutional Law of Canada*, Vol. 1 (Loose Leaf, 1997) at 5.14.

mentions also that the increasing independence of Canadian courts, which appear more and more as a counter power, is "a vehicle for challenging the government's power".¹²⁰

The role of judges in B.C. is marked by, amongst other influences, the English common law legal system and the Canadian federal parliamentary constitutional organization. Judges have a rather extended creative power while assuming the adjudication of disputes. This power to create rules of law facilitates the possibility to develop, to a certain extent, public policies.

While French judges have a limited power to create policy in interpreting and applying the rules stated in codes, B.C. judges make freer choices regarding the appropriate rule and ultimately public policy to be applied. However, in both jurisdictions in different proportions, judges both resolve the disputes and make public policy. We could say that the French judiciary tends to enforce legislative rules and resolve disputes more than create public policy, while the B.C. judiciary also adjudicates disputes, but is in a better position to make public policy choices.

Section 3: Professional background and status of judges.

The role of judges in France and B.C. can be defined by their role in determining the procedure and judging but it can also be understood by analyzing who judges are and what kind of training they receive. This section focuses on professional training and status of judges as a factor influencing their conduct in relation to serving a political system, making public policy or simply settling a dispute.

¹²⁰ P.H. Russel, *supra* note 34.

1. The French Judge.

Training and appointment of French judges.

In France, the judiciary is not recognized in the Constitution as a “power” as the executive or the legislature but as an “authority”. It is therefore placed under the authority of the other two and the organization of justice is not organized by the Constitution but by statutes or decree.¹²¹

To pursue a career as a judge in France, one has to pass an exam and complete two years training in the national magistrate school. The school is managed by a panel of judges and academics and the program includes legal classes, training sessions on judgment handling and on the different functions of the bench, such as inquiry judge, prosecutor or member of a civil tribunal. The program also includes a one year training period assisting judges in their jurisdictions and three months of “external” training in a different law environment such as law firms, European courts or a ministry government office. The training received by future judges is therefore focused on the traditional functions of judges. The contact with the “practical” is limited, as the program of the school includes few sessions with lawyers or company managers.

The appointment to the bench is made after graduation by the President of the Republic and the Minister of Justice. As in the case of any public officer, a judicial career develops on a seniority basis, even if (because the appointments are made by the executive), some political consideration might be involved. During his or her career, a judge will have the opportunity to change jurisdiction and function a certain number of times. He or she might be an inquiry judge or a prosecutor in a criminal jurisdiction, and later a member of a civil tribunal. It is only late in their careers that judges might stay several years in the same function and eventually become specialized.

¹²¹ Constitution Française du 4 Octobre 1958, Titre VIII, Article 64.

Historical evolution of the status of French judges.

During the *Ancien Régime*, the King had to delegate the power of justice to the King's advisers, which he appointed. Through the centuries, the status of these people was defined, and by the 17th century we have a fairly precise idea of who judges were. Any member of the bench was appointed by the King. By this appointment they became public officers, if they were not already. Some of them had to buy the right to hold the position which could be transmitted to their children. Most of the time the King took into consideration the capacity or the knowledge of the person, but ultimately the appointment of these judges was discretionary.¹²²

As mentioned earlier, Canon and Roman law influenced the shaping of the judicial system and the society was organized initially on a feudal model.¹²³ In the 13th century, once the central power of the King was established, the Capetians¹²⁴ began to develop a corpus of professional officers, loyal to their king, and in charge of asserting and reinforcing the royal power while dispensing justice. In the 16th and 17th centuries a centralized institution of justice, detached from the individuals that composed it, appeared, made up of career professionals.¹²⁵

However, on the top of the hierarchy of the jurisdictions were the Parliaments whose members were aristocrats or rich middle class members who bought or inherited their positions. While they were supposed to be a counter to the power of the King and represent the population, it appeared that they served their own interests first and most of the complaints about the system during the Revolution were directed at the discretionary and unlimited nature of their powers.

¹²² P.C. Timbal & A. Castaldo *supra* note 62; J.F. Lemarignier, *supra* note 52 at 349.

¹²³ See p. 17.

¹²⁴ The Capetians are one of the longest dynasties of French Kings. It includes several sub-dynasties: the Direct Capetians, the Valois, the Valois-Orléans, the Valois-Angoulême, and the Bourbons, from 941 to 1793. We refer here to the Direct Capetians from Hugues Capet (from 941 to 996) to Charles IV (from 1294 to 1328).

¹²⁵ J. Hudault, *Histoire du droit et des institutions* (Les cours du droit, 1990).

The reaction of Revolutionaries was to limit the powers of the judiciary¹²⁶ and to change the process of appointment of judges. In 1791, the *Constituante* instituted the election of judges, as democratic representatives of the people.¹²⁷

However, this system of election to the bench appeared to be unsatisfactory. Elected judges were more open to corruption and were not always qualified for the work. Napoleon reformed the system again by instituting the appointment of judges for life by the executive which is still in force today.

Napoleon returned to the procedure of appointment initiated by the Ancien Regime. This system is marked by the centralizing policies applied by the Kings as well as by Napoleon. It confirms that judges in France are placed under the authority of the head of the State. This subordination of judges reflects the above-mentioned doctrine that judges derive their powers from the head of the State, as handling justice is one of the duties owed by the State or the governmental organization to the people. In this conception, judges are integrated as a part of the State's organization, which is confirmed by their status as public officers.

The French judge is therefore a public officer, integrated in the State's organization and placed under the power of the executive. In most of the situations, he or she has no other professional training other than a law degree or a judge's training and is not necessarily specialized in a particular area of law.

¹²⁶ See p. 25.

¹²⁷ C. Bloch & J. Hilaire in M. Vovelle, *supra* note 106.

2. The judge in B.C..

Training and appointment of judges in B.C.

The appointment of judges and organization of courts is shared between the federal and the provincial authorities. Under Section 92(4) of the Constitution Act of 1867, the provinces regulate the organization of provincial courts and the appointment of provincial court judges. However, under Section 96 of the same Act, the federal government appoints and pays provincial judges of "higher courts" (superior courts). The contradiction between these provisions has been explained by the aim to protect provincial appointment from local political pressure, or by the fact that the jurisdiction of superior court judges includes general subjects such as constitutional questions.¹²⁸

Federally appointed judges, that is to say judges of superior courts, are appointed and paid by the executive branch of the government, the federal cabinet, which is responsible to the legislature. Under the *Judges Act*, one has to be member of the bar for ten years to be eligible for appointment as a superior court judge. In contrast, there is no particular requirement for provincially appointed and paid judges.¹²⁹

When appointed, judges usually complete a short training program on judgment drafting and other professional functions and during their career as judges, they will also receive continuing training according to their needs.

The system of appointment depends to some extent on the personality of judges. Although it only applies to superior court judges, the fact that they must have experience as lawyers ensures that judges are older than in France, where they begin their judicial careers

¹²⁸ P. Hogg, *supra* note 119 at 7.5.

¹²⁹ P. Hogg, *supra* note 119 at 5.19.

immediately after their studies. Thus B.C. judges are older and also have more professional experience than French judges and a different viewpoint regarding courts and proceedings. It is possible also that the fact that B.C. judges are former lawyers make them closer to lawyers than are French judges. Moreover, in contrast to French judges, B.C. judges have not been integrated as part of the State's hierarchy throughout their career which might facilitate a certain independence from the State. Finally, because they are appointed by the federal government, we can suppose that local political considerations are of lesser importance for higher courts' judges. In contrast, "inferior" courts' judges may have more connection with provincial governments.¹³⁰

B.C. superior court judges appear to be older and to have more professional experience than French judges. As a consequence, but also because they are federally appointed, B.C. superior court judge appears to have a certain independence from provincial governments, contrary to "inferior" court judges who are provincially appointed.

Historical evolution of the status of Canadian judges.

Before the 13th century in England, judges were royal clerks, appointed at the discretion of the King. Unlike in France, they were not seen as having a property right to their function but were delegates of the King's power. They were paid partly by the King and partly by the parties, which encouraged the spread of corruption. No special qualification was required initially and many judges were ecclesiastics. With the development of the judicial system, the recruitment of professionals became necessary and Edward I appointed mainly lawyers as judges.¹³¹

The importance of the influence of the King's power and the political nature of the appointments varied according to the period and the kings. At the end of the 17th century, a "revolution" took place as the Houses of Parliament took charge of making appointments and

¹³⁰ P. Weiler, *supra* note 31 at 439.

¹³¹ S. Milsom, *supra* note 25; Pollock & Maitland, *supra* note 78 at 153; Lederman, *supra* note 78 at 775.

eventually “lawfully removed” judges for incapacity or serious misconduct. This marked the end of the Royal discretion over judicial appointments. At this stage, judges were paid by the King who could not reduce the salary fixed each year by the Parliament.¹³²

In Canada, the appointment of judges was originally in the hands of the British authorities, as a matter of royal prerogative. In the 18th century, the authority was delegated to the governors even if it was still symbolically a “royal pleasure”. With the appearance of a responsible local government and then the development of the Canadian state, although the Governor General was still appointing judges, it was under the advice of Canadian ministries and the influence of the British government disappeared. Judges were all former members of the bar, appointed by the federal government.¹³³

3. What does professionalism mean in terms of the role of the judge?

In France and B.C., judges are placed in situations where they often have to make political choices and have to define what is in the public interest, which they will do in part according to their own experience. The professional status of French judges makes them the servants of the political system while B.C. judges are in a position to some extent to direct their own policy.

In France, judges are devoted to the judicial institution, and because of the position of the judiciary under the 1958 constitution, they are subject to the policy implemented by the executive and the legislative. Career trained judges engaged in a profession for their whole life, they therefore may be more committed to the institution of justice than former lawyers.

Justice is a public service, and judges are public officers in charge of the service. This notion of public service implies a number of legal duties on judges, such as the duty to make the

¹³² Lederman, *supra* note 78.

¹³³ B. Laskin, “The British Tradition in Canadian Law” (1969) 21st series of Hamlyn Lectures 38.

service available any day, any time to citizens. This explains why French judges do not have the right to strike. But the notion of public service is also charged with French republican emotion as providing a public service is considered, in the French social subconscious, as a lifetime commitment. Judges appear to be delegates of a duty owed by the State to the people due to a virtual "social contract". In this sense, French judges are part of the State's organization.

In contrast, B.C. judges are former lawyers appointed by the federal government. Because they are appointed by an authority external to the province and because they are not responsible to any provincial authority, B.C. judges have a certain independence in handling justice. B.C. judges, as former lawyers, may be less receptive to and more suspicious of government policy.

French judges' long term commitment also brings a kind of habit or "routinisation"¹³⁴ of the work. Frequently, they are faced with the same types of cases and therefore similar solutions are given, under the influence of the same factors. The career trained judge becomes emotionally detached from cases. The court is not conceived as a group of human beings but as an independent entity, having its own will, or capacity to decide. This emotional and personal detachment of judges leads them to pronounce their decisions in what they perceive to be the best interests of the institution.

However, the receptivity of French judges to the enforcement of public policy has to be tempered. On one hand it is true that the career path of French judges ensures that they are not always in charge of the same kind of cases or else they intervene at different stages of the procedure, which limits them from developing their own view and policy in an area of law.

¹³⁴Damaska, *The faces of justice and State Authority; a Comparative Approach to the Legal Process* (Yale University Press, 1986).

However, judges, as members of the Bench, also develop a sense of belonging that marks them apart from the executive and the legislature and encourages them to develop their own views on problems.

In contrast, without denying B.C. judges' commitment to the State's interest, we could say that they probably have a different way to handle problems as compared to French judges. They might be more concerned with practical questions and are often familiar with problems faced by parties and lawyers.

French judges are receptive to the government public policy, but their decisions will reflect their judicial oriented training and lack of practical experience. In contrast, B.C. judges, as former lawyers, may be less receptive to the government's policy. Their decisions might be more practical and reflect the demands of practitioners.

Conclusion of Chapter 2

To conclude, we note that even if judges have, in both jurisdictions, a central role in adjudication of disputes, they differ significantly. We can roughly summarize these differences to underline the characteristics useful for our analysis. Their role is derived from different historical developments and results from influences of different legal systems. Because they have no recognized law making power, French judges are more strictly subject to the government's policies than are Canadian judges. French judges are in charge of the "service of justice" and have to promote individual rights, while B.C. judges act more as "neutral arbitrators". Finally, French judges are professional public officers who are trained to be judges while B.C. judges are former lawyers chosen by the federal government for the higher positions.

Although judges in France and B.C. continue to play a central role in formal adjudication of disputes, new policies supporting the use of Alternative Dispute Resolution have given judges new roles in handling dispute settlement.

Chapter 3: Development of a Similar Public Policy Supporting ADR in France and British Columbia.

This chapter explores how and why France and B.C. have been implementing a similar public policy supporting ADR during recent decades. We will not analyze the substance of the reforms emanating from these public policies, but rather examine their origins and goals, and the mechanisms governing the implementation of these policies by both governments.

The emergence and the development of the ADR phenomenon is due to a number of factors: sociological, historical, political and legal. While acknowledging this, we will not analyze each of them but will focus on the practical demands that led the governments to support ADR processes.

Two primary concerns can be identified in the legislation and in the government declarations as being at the heart of the public policy encouraging ADR, namely the demands of practitioners and the improvement of the justice system. We will show how, in both France and B.C., those demands have been stated as leading to the development of new legislation supporting ADR.

In analyzing the reforms and how they are officially justified in terms of these “needs”, we will encounter non-disclosed factors that influenced developments. The similarity of the needs, the non-disclosed factors and the political orientation of the governments of two countries explains the similarity of approach in answering the demands.

Section 1: Elaboration of new rules supporting ADR to answer the needs of practitioners: Competition in the ADR Market.

The international influence on ADR legislation is evident in both France and B.C. Because the most common dispute resolution means used by parties to an international agreement is arbitration, this section will focus on the amendment of the international and domestic arbitration legislation in both jurisdictions.

1. Amendment of the legislation on arbitration in France.

Former legislation in France and emergence of new needs.

Formerly, the French legislation on arbitration was very concise. Indeed, arbitration agreements were not even mentioned in the Civil Code in the *contrats spéciaux* section. Only a few articles of the NCCP regulated arbitration clauses providing for the resolution of existing disputes. Under these provisions, including an arbitration clause in a contract, regulating the resolution of future disputes was forbidden. Moreover, no provision dealt with international arbitration and the enforcement of their awards.

It was only in 1925 that arbitration clauses providing for the resolution of possible future disputes were permitted, but only in relation to commercial dealings.

Because of the development of trade and commercial exchange all over the world, the need for new provisions was very apparent at the turn of the century. As a result of pressure from practitioners and on the advice of academics, it was the courts which developed a substantial body of arbitration law in France. The whole regime of arbitration, both domestic and international, was therefore created by the courts during the first half of the century.

With the increasing importance accorded to arbitration in practice, the government finally became concerned with the process and implemented the regime developed by the courts under the influence of the doctrine in the Civil Code and the NCCP.

Implementation of new provisions.

A first decree was issued on May 14, 1980 relating to private arbitration but without distinguishing between domestic and international arbitration.¹³⁵ The decree incorporated the rules established by the jurisprudence and formalized them to respect of arbitration agreements.

¹³⁵ Décret n° 80-354 du 14 mai 1980, J.O., 18 mai 1980, 1238

The new articles favored arbitration and included terms such as “judicial cooperation and assistance” instead of “control”.

On May 12, 1981, a second decree was issued to codify the provisions of the first decree by incorporating them into the NCCP and to introduce the first French provisions on international arbitration.¹³⁶ It included an entirely new section, book IV, of the NCCP titled “arbitration” and several articles in the Civil Code outlining general principles and, most importantly, giving the first symbolic recognition to arbitration.

Even though most of the rules were created by the courts, the amendment of the legislation on international arbitration was also influenced by numerous international conventions, in particular the *Protocol of Geneva on the Enforcement of Foreign Arbitral Awards* of September 24, 1923, the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* of June 10, 1958 and finally the *European Convention of Geneva on International Commercial Arbitration* of April 1961. These conventions are still referred to, to assist in interpreting the rules of the NCCP where the latter are unclear or incomplete.

The provisions in the two decrees are very supportive of arbitration, in restricting the role of the judge and focusing on the will of the parties. Arbitration clauses governing future disputes are permitted and there is a set of rules dealing with such clauses. The jurisdiction of the arbitral tribunal is extended, as it has the power to rule on its own competence. The provisions on international arbitration implementing the New York Convention, which are in some instances more liberal than the Convention itself, give a precise definition of international arbitration and the parties themselves have power regarding the organization of the procedure.¹³⁷ The courts have more power in the domestic sphere than in the international one, but their role is limited in

¹³⁶ Décret n° 81-500 du 12 mai 1981, incorporated in the NCCP under “Livre IV, l’arbitrage” (Dalloz, 1996) at 613.

¹³⁷ T. Carbonneau, *supra* note 18.

many cases to merely assisting the parties with, for example, the appointment of the arbitral tribunal when the parties cannot reach an agreement.

The reforms were implemented before the UNCITRAL Model Law on arbitration (the Model Law) was drafted and adopted by the United Nations in 1985.¹³⁸ It was not considered necessary to modify the French legislation after 1985, and therefore the French legislation does not implement the Model Law.

The 1980 and 1981 reforms were warmly received by practitioners. Although the rules implemented were not new, they officially recognized and encouraged an institution which was becoming increasingly important in practice, and this increased the confidence amongst practitioners regarding international and domestic arbitration in France.

The French reform of the arbitration law was clearly necessary due to the silence of the codes and the lack of other legislative provisions on the subject. However, the decisions by the courts preceded the reforms and helped develop arbitration law, within the limits of courts' jurisdiction, to answer the demands of the legal practice. In contrast, the B.C. courts when ruling on arbitration did not engage in innovative moves in favor of the arbitration process but rather maintained a degree of opposition to the process. Thus the recent legislative provisions enacted in B.C. marked a complete change in attitude.

¹³⁸ The Model Law on Arbitration was adopted on June 21, 1985 by the General Assembly Resolution A/40/17, 40 GAOR Supp. No. 53, A/40/53. It has been drafted by the United Nations Commission on International Trade Law.

2. Reform of the legislation on arbitration in B.C.

Former rules.

Before 1986, domestic and international arbitration in B.C. was governed by the 1889 English *Arbitration Act*,¹³⁹ central to which was the exclusion of questions of law from the jurisdiction of arbitral tribunals and turning them over to the courts. The *Arbitration Act* of 1889, as in most common law provinces of Canada, but in contrast to England, had not been amended since its enactment.

The development of the law was therefore a matter for the courts which viewed arbitral tribunals as subject to their supervision. The open-ended language of the act allowed the courts to interpret it to their advantage. For instance, "where complex issues of law or facts were concerned, where the sole matter to be determined was a question of law, where the sole issue was one of the interpretation of the agreement, and where arbitration would lead to a multiplicity of proceedings," the courts traditionally refused to enforce the arbitration agreement.¹⁴⁰

Moreover, as Canada did not ratify the New York Convention, arbitral awards awarded in Canada were not enforced within the jurisdiction of most of its trading partners which had implemented the reciprocity reservation. Practitioners therefore advised their clients to avoid basing an arbitration process in Canada. A task force of 7 members was set up in B.C. by the Attorney General in association with the Faculty of Law, in order to examine the potential for reform. At the same time, the government of B.C. supported the federal government in its compliance with the New York Convention, and an International Commercial Arbitration Center was opened in Vancouver. The task force recommended the implementation of the Model Law within new B.C. legislation on arbitration.

¹³⁹ R.S.B.C. 1979, c. 18.

¹⁴⁰ H. Alvarez, "The Role of Arbitration in Canada - New Perspectives" (1987) 21 U.B.C. Law Rev. 250.

Implementation of a new legislation under the influence of international conventions.

In 1986, the New York Convention and the Model Law were implemented together in a new *International Commercial Arbitration Act* (ICAA).¹⁴¹ The international legislation reform was followed with the *Commercial Arbitration Act* (CAA)¹⁴², the drafters having taken the option to separate the domestic and international legislation. The domestic legislation was originally based on the old legislative provisions. However, the government revised the domestic act the following year, following the Model Law to a greater extent as a result of pressure from the arbitrators' associations of B.C.

The Model Law is based on the principles of the autonomy of each party, limited court intervention and the independence of the arbitral tribunal. The new statutes in B.C. adhere to these principles by restricting the grounds upon which the courts can refuse to enforce the arbitration agreement or the arbitral tribunal. The courts can ultimately be a part of the process if either party requires it, by taking interim measures or appointing the arbitral award, but the arbitral tribunal has the competence to decide on the scope of its own jurisdiction, and the parties themselves determine the precise details of the procedure.

The new arbitration statutes were welcomed in B.C. by practitioners and academics alike, as a step towards the standardization of arbitration law in Canada. Indeed, it appears that both the French and B.C. governments bowed to the demands of the practice in enacting new statutes.

¹⁴¹ R.S.B.C. 1996, c. 233.

¹⁴² R.S.B.C. 1996, c. 55.

3. Similar answer to the demands of the international business community.

By reading the governments' declarations, but mostly by judging the reaction to the new statutes in France and B.C., we can appreciate the pressure exerted by practitioners on governments to reform arbitration law.

Role played by practitioners in the reform of arbitration rules in France.

Unfortunately, the *travaux préparatoires* of the French arbitration decrees and the Assembly's discussion are not available for review. However, the actions by the courts in creating a regime illustrates the demands they faced; the courts created rules because rules were needed. Academics who commented on the new enactment also referred to the needs of the business community.

In "French Domestic Arbitration Law", M. Seppala concludes: "The changes that have been effected have generally been welcomed by French legal practitioners and should promote greater confidence and wider use of, arbitration for the resolution of private domestic and international disputes in France".¹⁴³ Professor Carbonneau refers to the former French legislation stating that it was "far from satisfying the modern needs in arbitration".¹⁴⁴

Importance of practitioners' influence on the reform of arbitration rules in B.C.

In 1982, an inquiry by the B.C. Law Reform Commission recommended the amendment of statutes on arbitration in order to encourage arbitration processes in B.C., but no reform was carried out. The reply given by the Canadian Department of Justice to the report of the

¹⁴³ C. Seppala, "French Domestic Arbitration Law" (1982) 16 International Lawyer 749.

¹⁴⁴ T. Carbonneau, *supra* note 18.

Commission, which questioned Canada's failure to ratify the New York Convention, was the lack of interest within the Canadian business community.¹⁴⁵

Any previous lack of interest certainly disappeared with the subsequent economic development in B.C. The International Exposition in 1986 and, more importantly, the development of the East Asian Market sparked the demand for more efficient and more sophisticated dispute resolution mechanisms.

The preamble of the ICAA speaks for itself in relation to the needs driving the modification of the legislation:

"Whereas British Columbia, and in particular the City of Vancouver, is becoming an international and commercial center;

Whereas disputes in international commercial agreements are often resolved by means of arbitration;

And whereas British Columbia has not previously enjoyed a hospitable legal environment for international commercial arbitrations;

And whereas there are divergent views in the international commercial and legal communities respecting the conduct of, and the degree and nature of judicial intervention in, international commercial arbitrations;

And whereas the United Nations Commission on International Trade Law has adopted the UNCITRAL Model Arbitration Law which reflects a consensus of view on the conduct of, and degree and nature of judicial intervention in, international commercial arbitrations;"

In the Preface of *UNCITRAL Arbitration Model in Canada*¹⁴⁶, Professor Paterson from U.B.C. and Ms. Thomson stated that, "Once Canadian business began to take international trade and investment opportunities more seriously, not surprisingly its attitude changed towards the need for more effective means of resolving disputes arising in this international business environment."

¹⁴⁵ R. Paterson & B. Thompson, Preface in Paterson & Thompson *Uncitral Arbitration Model in Canada*.

¹⁴⁶ R. Paterson & B. Thompson, *supra* note 145.

In his article "The role of arbitration in Canada - New perspectives", Henri Alvarez mentioned that "This remarkable new legislation, perhaps best exemplified by a series of new British Columbia statutes, should lead to a more extensive and effective use of arbitration by providing a more flexible mechanism better adapted to the needs of business people".¹⁴⁷

Choice of public policies made by governments under pressure from practitioners.

The analysis of the process and the motives for the reform of arbitration law in France and B.C. illustrates the importance accorded to practitioners' needs. The reforms adopted by the governments are, in fact, an answer to the demands of practitioners and traders and reveal similar liberal public policies. France and Canada, by implementing these new provisions, created the environment the private sector demanded in order to expand. In encouraging arbitration by restricting the courts' power to intervene, the French and the B.C. governments transferred disputes, usually submitted to the courts, to the jurisdiction of the private sector, willing to obey the needs of trade to develop a liberal economy.

The demands of the international business community are indeed very real. International trade is encouraged through standardized legislation as legal tools are simplified. Moreover, international exchanges demand speedy but efficient dispute resolution mechanisms, avoiding the jurisdiction of domestic judges where possible. The recent reforms in France and B.C. aimed to answer these needs by providing for a system limiting interference by the courts while respecting the will of the parties.

By international business community, we refer to the international corporations which are interested in the development of international ADR in order to avail themselves of useful and secure means to resolve conflicts arising from international contracts. These corporations have the ability to lobby governments to sign international agreements and amend legislation.

¹⁴⁷ H. Alvarez, *supra* note 140.

This pressure by the international business community was also exerted at the domestic level. Indeed, the amendment of the international legislation was followed or accompanied by a reform of the domestic rules on arbitration in France and B.C.

The reasons behind the domestic reform are probably explicable solely in terms of the influence of practitioners and international corporations. The substantial uniformity of domestic and international legislation, even if not absolute, facilitates the avoidance of problems with conflicts of law or confusion regarding the applicable law. Moreover, the states may have decided that if international legislation were being amended, they should amend the domestic legislation at the same time and thus encourage domestically the development of arbitration, as it serves the interests of the state by reducing court expenses.

We can sum up the process of amending legislation as follows: the influence of the international trade practitioners materializes first in the development and drafting of international agreements and international legislation. These international agreements are drafted subject to the direct influence of the practitioners or as a result of the influence of the states which are in turn influenced by practitioners. The states most interested in signing such agreements are those which are heavily pressured by practitioners and are willing to enter into the competition market for ADR. The states which are parties to the agreement have to modify international legislation, and at the same time choose to modify domestic legislation.

However, the pressure is not exerted solely by corporations. According to one commentator, there is a limited number of lawyers, retired judges, or law professors in the world, who are members of an elite club of those who make money from arbitration. Through a system of appointments from within the club as either arbitrators or representatives of the parties, these individuals have been able to control a large section of the arbitration "market".¹⁴⁸ Through institutions such as the International Chamber of Commerce in Paris, or independent associations

¹⁴⁸ Dezalay & Garth, "Competition for the Transnational Business Disputes" (1995) 29 Law & Society Review 27.

these individuals directly or indirectly, pressure governments to amend the law and develop arbitration.

Another reason for the legal development of ADR could therefore be explained in terms of the pressure coming from the arbitration "club". The disputes resolved by arbitration were traditionally based in Europe, which explains the development of an arbitration center in Europe, and the success of the ICC. However, during the last thirty years, with the expansion of the North American economic powers, and consequently the growth of large Anglo-American business law firms, many disputes are now based in North America. Even if the original institutions such the ICC survived the changes, a real competition in the arbitration sphere has appeared. Having more arbitration taking place within a jurisdiction obviously means more work for the practitioners in that jurisdiction. That is why, probably as a result of pressure by practitioners, many states are now trying to secure a portion of the arbitration "market" by implementing clear and standardized arbitration legislation.

The development of arbitration law in France and B.C. may have been initiated by both lawyers and corporations, and it now reflects the similar approach by the two governments in response to the same kind of pressure.

Section 2. Improvement of justice systems and cut-backs in the justice budget.

Aside from arbitration, the French and B.C. governments have recently been developing other kinds of ADR processes such as mediation and conciliation. These processes are consensual devices aimed at encouraging settlement agreements between parties to a dispute instead of having the dispute resolved by a third party. In recent developments, in both France and B.C., the governments or the courts have been trying to use these processes in a mandatory way, sometimes imposing a conciliation process, or offering the alternative of mediation in court even when the judicial procedure has already begun. In this section, we will focus on the very

recent developments of mediation and conciliation in the courts, and the public policy underlying these development in both France and B.C..

1. Progressive development of conciliation and mediation in France.

Article 21 of the NCCP, states that it is part of the role of the judge to conciliate the parties. Conciliation in courts has always therefore been part of the French system but because the NCCP does not specify the procedure to be followed, the practice on conciliation in courts was rather confusing. Judges failed to clearly differentiate between conciliation and mediation,¹⁴⁹ and the procedures varied according to the jurisdiction. The Parisian jurisdiction, for instance, developed the practice of appointing an independent conciliator or mediator,¹⁵⁰ whereas in other jurisdictions the judge himself acted as mediator.

In a number of specific areas, mandatory mediation or conciliation has been imposed by the legislature. In divorce matters, if one of the spouses applies for divorce without the consent of the other spouse, a conciliation is mandatory. The judge who will eventually rule on the divorce is the conciliator.¹⁵¹

In labor disputes, the parties have to bring their case to the conciliation office before being able to bring the case before the labor courts.¹⁵² The conciliation office consists of employers and employees, like the courts, but they do not ultimately resolve the case if the conciliation fails.

Finally, in bankruptcy law, a mandatory *reglement amiable* has been put in place before a company can officially be declared bankrupt. The judge who decides on the bankruptcy

¹⁴⁹ Paris, 16 Mai 1988, D. 1988 Somm. 328 (Annot. Langlois).

¹⁵⁰ Paris, 17 December 1987, Gaz. Pal. 1988. 1. 206.

¹⁵¹ Code Civil, article 251 - 252(3).

¹⁵² Code du Travail, article R. 516-8 to R. 516-20-1.

supervises the whole process and appoints a conciliator who aims to reach an agreement acceptable to all the main creditors.

In 1978, the government tried to encourage the conciliation of disputes by organizing a system of conciliation which was available at any time and free of charge at the court house. Former judges or lawyers were appointed to be conciliators, and parties to a dispute were free to ask them at any time to assist them in reaching an agreement. The process was not as successful as anticipated and ceased in 1982.

The failure of this system was attributed to the fact that the process was not mandatory and since the parties to a dispute did not want lose time they went to the courts directly. The government deduced from this experience that the parties would have to be pressured to use mediation or conciliation. A mediation or conciliation taking place when the judicial procedure has already been started appeared to be the way to encourage the settlement of the dispute before judgment. A first bill of law "instituting mediation in front of the jurisdiction of the judicial order" was voted on the National Assembly in 1989, but did not go through the whole process of promulgation.¹⁵³

Finally, in 1995, a general statute relating to the organization of the courts implemented a new system of conciliation and mediation in courts.¹⁵⁴ The provisions implement the provisions created under article 21 of the NCCP but reorganize and simplify them. The process is still in principle consensual, as the courts must obtain the consent of the parties to initiate a mediation or conciliation process. The trial judges do not intervene directly as conciliators or mediators but instead appoint an independent person and merely supervise the process. Moreover, a clear distinction is drawn between a conciliator and a mediator. Although even if neither of the two is

¹⁵³ Project n° 636 A.N., voted 5 April 1990 n° 258.

¹⁵⁴ *Loi n° 95-125 du 8 février 1995*, J.O., 9 February 1995, 2175.

mandatory, the fact that the trial judge supervises the process is seen as a way to put pressure on the parties to settle.

2. Development of domestic ADR in B.C.

In contrast to France, the courts did not lead the reforms of conciliation and mediation in B.C. However, they have been closely associated with the reform projects.

The government's eagerness to develop domestic ADR, and in particular mediation and conciliation, surfaced in 1988 with the creation of the Justice Reform Committee which specifically mentioned Alternative Dispute Resolution in its report as one of the ways to make the justice system of B.C. "accessible, understandable, relevant and efficient".¹⁵⁵ However, no fundamental reform of ADR processes was proposed at this stage.

Many provincial statutes referred to mediation, facilitation or arbitration as a means of dispute resolution in specific areas. In particular the *Small Claims Act* has provided since 1991 for a mandatory Settlement Conference, conducted by judges specially trained in mediation.

In 1995, the Ministry of the Attorney General for B.C. officially implemented a policy supporting ADR, which included a large consultation with practitioners and judges on the subject. The official objective of this new public policy was to develop not only traditional ADR processes but also to consider other methods of dispute resolution. It was considered that it might be possible to improve the efficiency of traditional ADR such as mediation and conciliation by making them mandatory or by forcing the parties into a settlement process.

¹⁵⁵ *Access to Justice: Report of the Justice Reform Committee*, (Victoria: 1988)

This interest in ADR was also reflected in the governments' 1996 *Financial Plan for British Columbia* which considered ADR as a "preferred method for achieving cost savings while maintaining fairness and increasing efficiency".¹⁵⁶

In November 1996, a Dispute Resolution Office (the DRO) was set up to continue implementing the public policy supporting ADR initiated by the government. The efforts by the DRO focused on the development of the mediation process, other ADR processes in civil cases before the Supreme Court and settlement opportunities in family law cases. The DRO also acts as the institution of liaison between all public or private bodies involved in developing ADR.

Pilot Projects have been set up with varied success. The government began a pilot project on January 1, 1998 called "Notice to Mediate" whereby a party to a motor vehicle action in the Supreme Court of B.C. can serve the other with a notice to mediate. The other party is then under an obligation to mediate and a mediator is appointed jointly. A release from this obligation is possible by going to the court, where the party served can apply to be released from the mediation process. Despite some opposition from the courts which considered that mediation should not be mandatory in every case, the DRO implemented on April 14, 1998, a "Notice to Mediate" Regulation.¹⁵⁷

Other initiatives have originated in the courts. The Case Management Program has been put in place to give the judge the opportunity to familiarize the parties with ADR where appropriate. Before the trial date is set, the judge meets the parties to prepare the case and encourages them to settle. This process reduces the number of cases tried as the judge is in position to put direct pressure on the parties.

¹⁵⁶ J. McHale, "ADR-The Future in BC", in *ADR for Litigators* (CLE, March 1997).

¹⁵⁷ Order of the Lieutenant Governor in Council N°0490, April 14, 1998.

Another pilot project called the Trial Overflow Project has been put in place in the courts. When a case is postponed because there are not enough judges available to hear the case, arbitration is proposed as an alternative. A list of arbitrators is made available to the parties through the Vancouver International Commercial Arbitration Center. A list of mediators may also be provided at a later date. This project aims to reduce the waiting period for the resolution of a dispute and also to reduce the number of cases brought to court.¹⁵⁸

On the initiative of the courts of B.C., a court mediation process was put in place in June 1997.¹⁵⁹ It aimed to answer a perceived demand by practitioners for recourse to ADR processes just before or at the beginning of a judicial procedure. It was announced by Chief Justice Bryan Williams that the mediation would be conducted by judges who completed mediation training. The court Notice specified that the parties to the dispute to be mediated had to be parties to a proceeding before the Supreme Court.

The consent of the parties has to be obtained under this process, and the parties themselves choose the mediator from a list posted in each courts' registry, but depending on the circumstances, the court can also assign a judge to act as a mediator.

Some concern was expressed due to the fact that judges were acting as mediators, and there were also questions about how the program interacted with rule 35 of the Court's Rules on settlement conferences. On September 22, 1997, Chief Justice Williams suspended the process.¹⁶⁰ The courts are now reconsidering the project and the role of the judge. In particular, using the official list of mediators that the DRO is creating is being considered. At the same time, the

¹⁵⁸ Williams C. J., Address (U.B.C., 27th Annual Workshop on Commercial and Consumer Law, 17 October 1997) [unpublished].

¹⁵⁹ Supreme Court Mediation, note 06.

¹⁶⁰ Supreme Court Mediation, note 09.

courts are encouraging the development of settlement conferences under rule 35 of the courts' rule, as another, but different ADR process.¹⁶¹

In France, the reform was initiated by the courts and then controlled by the legislator. In contrast, in B.C., the initiative originated in different institutions in Canada and are somewhat experimental in nature. Even if the reforms vary in their substance, they always aim towards the development and the encouragement of ADR and mediation and conciliation in particular. Both jurisdictions are attempting, while respecting the consensual nature of mediation and conciliation, to encourage or even force parties into the processes, and the role of the judge is essential in achieving this objective.

We shall see in the next section why the development of domestic ADR at the court level is encouraged by governments in France and B.C.

3. Implementation of a similar public policy in France and B.C.

Reform towards an efficient justice system: An answer to the increase in the number of cases.

The argument used is based on the statistic that the number of cases brought to court is increasing each year, which lengthens the delays for trials and appeals. The French Minister for Justice mentioned, while advocating her project for reform before the National Assembly,¹⁶² that the number of cases brought before the *Tribunaux de Grande Instance*¹⁶³ has risen by 75% in twenty years, and the number of cases brought before the Court of Appeal has doubled. Indeed,

¹⁶¹ Supreme Court Mediation, note 10.

¹⁶² E. Guigou, *supra* note 72.

¹⁶³ First trial court in the hierarchy of courts, equivalent to Provincial Supreme Courts.

according to the statistics released by the French Minister of Justice, during 1996, the number of cases brought before the *Tribunaux de Grande Instance* increased by 2% compared to 1995, and the number of decisions in the *Tribunaux* increased by 1.5%, and by 2.6% in the Court of Appeal.

Unfortunately, B.C. does not keep statistics on cases brought before the courts or on the decisions handed down. However, the delay in setting trial dates and the increasing number of trials is still viewed as the origin of the reforms. Chief Justice Williams mentioned during the 27th Annual Workshop on Commercial and Consumer Law,¹⁶⁴ that the waiting period to obtain a judge to sit in a civil case in B.C. was 2 years before the beginning of the Courts Overflow Program, and has been reduced to 18 months since the program began.

With or without relying on statistics, the argument by the governments in both jurisdictions is that the justice system had to be improved in order to make it more accessible to citizens. In this regard, a more accessible justice system is understood to mean a faster one. ADR processes are therefore being integrated as part of a much larger justice reform program, and are being presented as one of the methods to reach ambitious objectives.

In B.C., the task assigned to the British Columbia Justice Reform Committee involved in the recent domestic reforms was: "The goal of the Justice Reform Committee is to cause the justice system of the Province of British Columbia to be accessible, understandable, relevant and efficient to all those it seeks to serve."

In France, ADR reforms appear under the title of "a justice serving the citizens" in the project for reform of the justice system. The Minister for Justice mentioned in her presentation in front of the National Assembly that ADR would be used to make the justice system more

¹⁶⁴ Williams C. J., *supra* note 158.

accessible and more efficient.¹⁶⁵ In his public statement on the justice reforms, President Chirac asserted that: "Justice has to be modernized to be faster, clearer, and closer to your needs."¹⁶⁶

Questioning of the argument.

However, none of the government declarations have specified what constitutes "more accessible justice." This term can be understood in very different ways and raises many questions.

The governments of France and B.C. seem to assume that accessible justice means a faster justice system. Despite the fact that ADR processes are faster, it is not certain that they facilitate "justice." Moreover, it is not clear that the needs of the people referred to by President Chirac include "justice" concerns.

First of all, the reforms of ADR in both countries are adhering to the same public policy, assuming that parties to a dispute are merely seeking a solution to their dispute which conflicts notions of justice and dispute resolution. Both governments assume that "People attend lawyers with problems they want resolved, not with problems they want litigated. A trial is only one way to resolve a case, yet a trial is the only option offered by the court administered legal system. Lawyers and their clients deserve better."¹⁶⁷

This assumption can be questioned. People do not go to court only to resolve their disputes. The trial can have a perceived function very different from the dispute resolution process. A trial may be a means of revenge, it may be a way to gain recognition from society, and its formal procedure may be necessary to the parties' objectives. In these cases, imposing or

¹⁶⁵ Supra note 72.

¹⁶⁶ J.Chirac, Président of the French Republic, Address (20 January 1997) [unpublished].

¹⁶⁷ R. McMurty C. J., Address (Law Society of Upper Canada, June 1994).

putting pressure on the parties to submit to an ADR process before the trial, is useless and has the effect of increasing the length of the process while failing to meet specific demands.

If the main objective of the government was to make the justice system more accessible - understood as faster - then another solution would simply be to appoint more judges, and increase the number of court houses. It seems in fact that both governments are trying to avoid putting more money into the courts system.

Secondly, the definition of "justice system" by the governments can be questioned. Although ADR can provide a resolution of a dispute faster than the courts, it is not guaranteed to provide for justice. Developing ADR is taking jurisdiction away from the state's judicial system and transferring it to another non-formal dispute resolution system. Like the transfer of disputes to the arbitration process, the encouragement of ADR represents the privatization of the dispute resolution process. Both France and B.C. include a broad range of ADR process under the term "justice system", processes which do not guarantee any kind of justice, but only a resolution of the particular dispute. Whether or not the solution reached is fair, complies with the law, or the public policy of the country does not matter, as long as a solution is found.

The encouragement of ADR in both jurisdictions studied is viewed as making the justice system more accessible. However, it seems that primarily it transfers the court's jurisdiction in order to reduce the costs of the judicial system. The financial concerns of the governments are no secret and are mentioned by many commentators.¹⁶⁸ Few of the official declarations regarding the public policy encouraging ADR refer to this concern. However the B.C. government's 1996 *Financial Plan for British Columbia* considers ADR as a "preferred method for achieving cost savings while maintaining fairness and increasing efficiency."¹⁶⁹

¹⁶⁸ H. Alvarez, "Alternative Dispute Resolution in the Courts: Recent Canadian Developments" (27th Annual Workshop on Commercial and Consumer Law, UBC, 17 October 1997) [unpublished].

¹⁶⁹ J. McHale, *supra* note 156.

The French and B.C. governments are now trying to reduce their budget deficit while reducing taxes. ADR presents a way to transfer the cost of the litigation from public funding to the private sector, which means reducing or at least not increasing the funding of the courts.

The government policies, and the question as to whether the private sector should handle part of the cost of the dispute resolution process could be questioned, but it is not the purpose of this section. I merely want to note the similar public policy announced and applied in France and B.C. Indeed, both governments have affirmed that they are willing to improve the accessibility of the justice system, and both are concerned with budget deficits and reducing taxes.

To conclude this Chapter we shall note the similarities between the public policies of the French and the B.C. governments at the domestic and international level. This public policy reflects the similar concerns of the two states which are in a similar economic situation, and are governed by liberal governments eager to encourage business and reduce taxes and budget deficits. ADR is considered in both states as one of the ways to reach these goals, which explains the similar legal development in the two jurisdictions.

Chapter 4: A Comparison of ADR Processes in France and B.C.

This chapter compares some of the ADR processes which have been implemented in both jurisdictions. Three issues will be studied in order to examine the state of evolution of the law on ADR in France and B.C.

First, the enforcement of settlement agreements reached at the end of a mediation or conciliation process will be studied as an example of provisions on ADR which, in both jurisdictions, failed to be addressed in recent reforms. Second, the enforcement of arbitration agreements will be examined as a product of recent legislation, moving towards the restriction of court intervention. Finally, a similar ADR reform implemented in France and B.C. will be studied namely, the creation of a court mediation process.

This chapter attempts to comprehend both differences and similarities in ADR processes in France and Canada with reference to cultural similarities and differences. The aim of this section is to trace the cultural identity of each jurisdiction, case by case, rather than attempt to establish an overall pattern. Because historical and cultural identities alone cannot explain every difference between legislation, it would be futile to trace patterns of the influence of these factors on contemporary legislation.

The role of the judge is defined at various levels of a society's organization, from the citizens' point of view to the definition of the constitution. Our analysis will be limited to the role of the judge as defined by the legislator and by the courts themselves in each jurisdiction.

First, the importance of the professional background of the judge should be mentioned.

Preliminary observation on the importance of judges' professional background.

Before beginning our analysis, it is submitted that the professional background of judges may influence the attitude of the courts towards ADR in general and their role in the ADR process in particular.

The career oriented background probably has an impact on the way French judges view and use ADR. Their lack of practical experience, and the fact that they don't specialize might explain the confusion or the diversity in the jurisprudence on mediation and conciliation before the 1995 enactment. It might be more difficult for French judges to evaluate when a case can or cannot be mediated or settled, and this will be reflected in the way courts perceive, accept, and regulate an ADR process.

In contrast, B.C. judges are former lawyers appointed by the federal government on their merits and reputation. Judges are more likely to have practical experience and significant contact with clients. They also complete training sessions on different subjects. For instance, a number of B.C. judges completed mediation training before the court mediation project was put in place.

Judges in B.C. might be more receptive to ADR as their experiences are not limited to courts. They might have previously experienced, directly or indirectly, conciliation or mediation. They probably undertook some negotiations during their careers as lawyers and can evaluate when a case can be mediated.

The professional background of judges can therefore be an influential factor in relation to how receptive judges are to ADR. This "factor" should not be considered in isolation, as many other factors influence the opinion of judges.

1. The Control of Settlement Agreements by The Courts.

Parties to a dispute may be willing to resolve their dispute without going to court and without relying on a third party to make a final decision. The alternative means commonly used for dispute resolution in such situations are the mediation or conciliation processes. The parties agree to appoint a third party, the mediator or the conciliator, who does not impose a solution on the parties, as arbitrators do, but rather encourages the parties to negotiate in order to reach an agreement. Unlike the conciliator, the mediator suggests possible solutions. The agreement

reached following a successful mediation or conciliation can include any kind of obligation, from money payment to the creation of a new contract. No matter what the precise terms are, the agreement reached is a settlement agreement.

Even if the mediation process has been strongly encouraged and incorporated as part of the recent public policy favoring ADR in France and B.C., the control of the courts in enforcing settlement agreements has not been reformed at all in the last decade. The legal principles applied to these agreements has not changed in recent years in either jurisdiction and it appears that the courts' view of their role in controlling the process is, in both France and B.C., in contrast to the recent reforms which have sought to limit court control.

1. Control of settlement agreements by French courts

The legal provisions on mediation and conciliation only refer to an "agreement"¹⁷⁰ when referring to the solution reached at the end of the process. As the definition of settlement agreement by the Civil Code in Article 2044 is: "*a contract by which the parties terminate a lawsuit already begun, or prevent future litigation*", the definition includes the agreement reached at the end of a mediation or conciliation.

Settlement agreements are mentioned in the "special contracts" section of the Civil Code, that is to say contracts which are not subject to the general regime. The object of the contract is to renounce the right to go to court in exchange for some advantages. As the right to bring a case before the courts has a particular value, its renouncement in a settlement agreement is submitted to a special regime reducing the control of the courts.

French settlement agreements are, according to the Code, uncertain contracts whereby the parties have to evaluate what they think they are entitled to in the dispute and negotiate on this

¹⁷⁰ Nouveau Code de Procedure Civile, art. 21, and art. 127 to 131; Loi n° 95-125 du 8 février 1995, art 21 to 26 (J.O. 9 février 1995)

basis.¹⁷¹ The courts are not allowed to revise the amount negotiated or set aside the agreement because one of the parties did not get what it would have received before the courts. The consideration is not constituted by what is recognized legally but what the parties expected to be fair.

The control of the courts on the contract is limited by the Civil Code. First of all, the courts have jurisdiction to determine the validity of the agreement. However, unlike regular contracts, settlement agreements are valid even if one of the parties made a mistake or if the contract is obviously unfair.¹⁷² Secondly, Article 2052 of the Civil Code states that settlement agreements have the value of *juris dictio*, like a court's decision which could not be appealed, which implies that the courts cannot revise the solution reached.

Thus, the drafters of the Code limited strongly the possibility of interference of the courts with the enforcement of settlement agreements, and placed great emphasis on respect for the will of the parties. This respect for the will of the parties can be seen as a positive element from a commercial perspective; as there is less risk that the courts refuse to enforce settlements, there is more certainty for the parties. On the other hand, the primacy accorded to the will of the parties can be dangerous where the dispute involves, for example, an economically weak party.

The objective of defending such weak parties is pursued by the courts, as they interpret widely their powers of intervention in order to ensure fairness in settlement agreements.¹⁷³ The courts extended the scope of their control of the enforcement over settlement agreements by strictly controlling the definition of the contract. Under the provisions of the Civil Code, settlement agreements are characterized by the existence of a dispute or future dispute resolved

¹⁷¹ Code Civil, art. 2044 and following articles.

¹⁷² Code Civil, art 2052.

¹⁷³ Cass. soc., 26 March 1996, JCP éd. E, pan. n° 598; Cass soc., 27 February 1996, *Les Echos* (26 June 1996) 53.

by the agreement. On the sole basis of Article 2044 of the Civil Code, stating that the object of settlement agreements is to resolve an existing dispute or to prevent a future dispute, the courts added the requirement of the existence of reciprocal concessions from the parties.¹⁷⁴ Moreover, they equated a minimal concession as an absence of concession.¹⁷⁵ This addition to the definition of the contract allowed the court to refuse to enforce some settlement agreements which were obviously unfair, by denying them status as settlement agreements.

Recent decisions have gone further in the control of the fairness of settlement agreements when controlling the qualification of the contract and the existence of mutual concessions.¹⁷⁶ This control is aimed at verifying whether the parties obtained through the settlement agreement what they would have received had the dispute been submitted to the courts. This analysis was applied in particular in relation to settlement agreements reached after dismissal of an employee which resolved a dispute between an employer and employee. The court examined whether the employer paid a higher indemnity than what it would have been required to pay as a result of a regular dismissal procedure.

This jurisprudence was strongly criticized by academics who considered that the original nature of the contract was not being respected.¹⁷⁷ Practitioners also complained that the control of the courts was becoming discretionary as the court was attempting to determine the fairness of the contract instead of limiting their control to the setting up of negotiation.¹⁷⁸

¹⁷⁴ Cass. soc., 17 March 1982, Bull. civ. V, No 180.

¹⁷⁵ Cass. civ. I, 4 May 1976, Bull. civ. I, No 157.

¹⁷⁶ Cass. soc., 26 March 1996, JCP éd E, pan. No 598.

¹⁷⁷ D. Corrigan-Carsin, "La transaction: dernier développements jurisprudentiels" (1996) RJS 407.

¹⁷⁸ "Transaction: la fin d'une époque tranquille" *Les Echos Management* (18 June 1996); "Départs négociés: la transaction dans le collimateur" *Les Echos* (26 June 1996).

Most recently, the courts appear to have stepped back as the *Cour de Cassation* upheld a decision stating that by analyzing the merits of the dispute to verify the existence of mutual concessions, the Court of Appeal contravened the *juris dictio* attached to the agreement.¹⁷⁹ However this decision has not yet been followed.

The role given to the courts by the legislature to control settlement agreements is limited in order to respect the will of the parties. However, French courts have broadly interpreted this control to ultimately extend its scope. This expansion of control was strongly criticized by French academics, and courts appear to have stepped back in recent decisions. We can distinguish the “official” definition of the role of the courts from the definition thereof by the courts themselves

Legal definition of the role of the judge in settlement agreements.

The role given to the judge by the drafters of the Civil Code to control settlement agreements is rather limited, requiring the judge to respect the nature of the contract and the will of the parties. In this respect for the will of the parties, we can identify the remains of the influence of feudalism or the influence of Rousseau’s “social contract” mentioned in Chapter 2 of this thesis.¹⁸⁰ Indeed, these theories established the existence of mutual obligations between people and governments. According to these theories, justice is perceived as a “service”, part of the obligations owed by the State to the people. People are therefore free to use the public justice system or not, which is not viewed as an obligation but merely an available service.

In this scheme, ADR is a dispute resolution option, at the same level as the courts. The process and the agreement reached at the end, such as settlement agreements, have to be respected

¹⁷⁹ Cass. soc., 21 May 1997 (1997) D. IR 146.

¹⁸⁰ See Chapter 2, Section 1, 1: *Influence of feudalism on the French system.*

by the courts and their control over the process must be restricted. This conception of ADR as an equivalent to the public system will be identified throughout our analysis.

Interpretation of their role by the courts.

As no reform of the settlement agreement regime has been made, modifications have come from the courts. The courts' interpretation of their role expanded considerably the Code's provisions, allowing the judge to control in a discretionary manner the perceived fairness of the agreements.

Because of the absence of reforms, the courts had to intervene to fill the gaps. As we have seen, the Civil Code authorizes the judge to interpret existing rules or to use equity where necessary.¹⁸¹ Their intervention is therefore legitimate under the French legal system.

However, the legitimacy of their choice of interpretation can be questioned. The French system is governed by the principle that law can only be reformed through a democratic process and that judges' role is to settle disputes, implementing the adjudicative model mentioned above.¹⁸² The creative role of the judge is therefore limited to the elaboration of norms corresponding to the legislative policy or the perceived will of the majority.

Therefore, the question is whether a majority of people would accept the extension of the courts' control, or the protection of the weak parties. Another issue is how to determine the majority's will or define a democratic decision. If, however, we consider that the courts' role is to engage in political actions in favor of minorities who are not democratically represented, then such decisions by the courts are legitimate.

¹⁸¹ See Chapter 2, Section 2, 1: "*Juger*" in France.

¹⁸² See Chapter 1, Section 2, 1: The Adjudication of Disputes.

In this case, the control exercised by the courts is in contrast to other recent developments in ADR made by the legislature, aimed at reducing court control and giving the parties more freedom in negotiations even if the solution reached is not "fair". This public policy corresponds to a perceived need amongst practitioners for more efficiency in ADR processes. The French courts' decisions in relation to settlements are therefore not following the adjudicative model, but rather the political model. The courts are engaged in political actions to defend a minority, the weak party. This might explain the criticism of court decisions by academics and the recent shift in the jurisprudence.

2. Control of settlement agreements by B.C. courts

There are no legal provisions in B.C. relating specifically to the court's enforcement of, or power over, the agreements reached at the end of a mediation. The rules on mediation of the International Arbitration Center of Vancouver mention settlement agreements, stating that: "All settlement agreements reached should be reduced to writing, signed by the parties. If the parties are not represented, the mediator may suggest that the parties seek independent legal advice before a settlement agreement is signed."¹⁸³ The article does not deal with the courts' enforcement of or power over the agreement. As there is no statute dealing with the enforcement of settlement agreements, rules are established by the courts.

In *Robertson and Robertson v. Walwyn Stodgell Cochrane Murray Limited and Hadley*¹⁸⁴, a settlement agreement was signed in a dispute concerning a breach of fiduciary duty and negligence. The plaintiffs later refused to comply with the agreement on the ground that they had not been adequately represented by their counsel and that the settlement was unfair. The Court of

¹⁸³ British Columbia International Commercial Arbitration Center, "Commercial Mediation Rules of Procedure" (BCICAC, 1994).

¹⁸⁴ (1988), 24 B.C.L.R. (2d), 385 (C.A.).

Appeal stressed that "the effectiveness and the enforcement of settlement agreements does not constitute a separate field of law to which the ordinary principles of contract law, agency, and equity, and the ordinary rules of procedure, do not apply." The court therefore reiterated the point that settlement agreements have to be treated like regular contracts. However, Mr. Justice Lambert also recognized that "a stay of proceedings may be refused notwithstanding that a settlement has been reached about the claim that forms the basis for the action, if the interests of justice are best served by refusing the stay".

This principle of "serving the interests of justice" is very open-ended and grants judges the opportunity for broad interpretation. Even though the same judge stated that the settlement agreement had to be considered as a regular contract, it appears that the rules set to control and enforce this contract are rather vague. They give the judge a wide discretion to intervene, wider than in relation to regular contracts.

In *Hawitt v. Campbell and Cameron*,¹⁸⁵ the parties reached a settlement agreement awarding damages to the victim of a motor vehicle accident. The victim himself did not participate in the negotiations but his solicitor had a general retainer without limitation of authority. It appeared, after the settlement, that the harm suffered by the victim was more serious than the solicitor had thought. The victim sued for damages and the defendant requested a stay of proceedings pursuant to the settlement agreement. The trial judge refused the stay on the grounds that the agreement was unfair to the victim. Justice Macfarlane stated: "It appears to me that once the matter is before the courts (e.g. for a stay) the judge has a discretion - it being a summary application - to refuse or grant the stay." This means that if one of the parties is not satisfied with the contract after having agreed on it, this party can try to avoid the binding nature of the agreement by bringing the matter before the courts.

Justice Macfarlane went on to state that:

¹⁸⁵ [1983] 5 W.W.R. 760 (B.C.C.A.)

"The judge may refuse the stay if:

1. there was a limitation on the instructions of the solicitor known to the opposite party;
2. there was a misapprehension by the solicitor making the settlement of the instructions of the client or of the facts of a type that would result in injustice or make it unreasonable or unfair to enforce the settlement;
3. there was fraud or collusion;
4. there was an issue to be tried as to whether there was such a limitation, misapprehension, fraud or collusion in relation to the settlement."

Finally, citing himself in a 1977 case,¹⁸⁶ Justice Macfarlane stated that: "I do not consider that the discretion of the court to withhold its approval of a settlement is restricted to a case where there has been mistake." The judge concluded by finding that the agreement was unreasonable and unfair because the victim's representative did not have all the information in hand at the time of the settlement.

The courts therefore, interpret their powers broadly, and check not only the formal validity of the agreement but also whether it is fair and reasonable considering all the facts. This opens the door to significant control over the contract.

The *Hawitt v. Campbell and Cameron* case was referred to in *Goodger v. Goodger*¹⁸⁷, where the settlement was reached following a mediation process. The underlying dispute related to division of assets following the death of Mr. Goodger. The settlement agreement divided the assets between the second wife of the deceased, and his adult children from a previous marriage. However, the children refused to comply with the agreement, stating they were not aware of an alleged tax liability attached to their portion of the inheritance. It appeared that the solicitor acting on behalf of the children failed to review the document disclosing the tax liability. Mr. Justice Edwards extensively reviewed all the grounds available to refuse the stay before finding

¹⁸⁶ *Bank of Montreal v. Arvee Cedar Mills Ltd.* (31 October 1977), (B.C.C.A.) [unreported].

¹⁸⁷ (11 December 1997), C954052 (S.C.B.C.).

that there was no reason for refusing the enforcement of the agreement. He cited and affirmed the principles set out in *Hawitt v. Campbell and Cameron*.

The courts tend to refuse the enforcement of a settlement agreement and therefore interfere with the ADR process in a significant manner by treating the agreement settling the dispute as a regular agreement, or even sometimes by exercising stricter control over settlement agreements.

Definition of the role of the courts in settlement agreements in B.C.- comparison with France.

The fact that the settlement agreements are not particularly regulated by statutes in B.C. is not uncommon in a Common Law system. Courts are entitled to define the regime to be applied, and their decisions from sources of law.

What is more surprising is the attitude adopted towards settlement agreements. The courts exercise an important control over these contracts. Several explanations of this reinforced control can be given and we will only deal with some of them.

The reinforced control of the courts reveals the value given to this type of contract, as a "more serious" or more "dangerous" contract. This shows that the commitment not to submit a dispute to court has such a value that courts have to make sure "fairness" is respected in pursuing the alternatives. Considering the flexibility the courts allow to parties to come before the courts despite the existence of a settlement, it could even be said that the choice to use ADR process is rarely irrevocable. This reinforces the idea that the B.C. courts' jurisdiction cannot be denied, at least concerning settlement agreements.

In contrast to France, settlement agreements can therefore always be submitted to the jurisdiction of B.C. courts. While the French justice system is understood as a service, B.C. courts are omnipresent or "omnicompetent" in matters of settlement agreements.

Policy implemented by B.C. Courts - a comparison with France

As mentioned, B.C. courts refuse to enforce a settlement agreement when "the interest of justice are best served by refusing the stay."¹⁸⁸ In *Hawitt v. Campbell*,¹⁸⁹ the courts considered that it was "in the interest of justice" to protect a victim who did not correctly evaluate the loss suffered and had been inadequately represented by counsel. In *Robertson and Robertson*,¹⁹⁰ the courts refused the stay in favor of the victim of a breach of fiduciary duty who had not been adequately represented either. In both cases, it appears that the judges refused to enforce the settlement agreement since the settlement did not correspond to what relief the parties would have obtained before the courts, according to the judge.

The definition of "in the interest of justice" appears therefore, to be a subjective one depending on each judge. Thus the attitude of the courts is, in this situation, close to the "policy maker" model mentioned by Weiler,¹⁹¹ as the judge is determining what is "fair", according to his own opinions. The defense of the victim, or the "minority group" mentioned by Weiler, seems to be preferred over ensuring the security of settlement agreements.

The attitude of B.C. courts in this area is similar to that of French courts. Despite the fact that French judges are still bound by the provisions of the NCCP and of the Civil Code, in the last decade they have implemented a policy to protect weak parties, disregarding policies favoring ADR implemented by the legislature. If a similar attitude by the B.C. courts has not been criticized by academics as much as in France, it is because the legal system in the province permits, if not authorizes, this kind of decision. Indeed, the B.C. judges have acted in a legislative role in relation to settlement agreements since no statute provided for a special regime in this area. However, problems remain if the courts maintain their control over settlement

¹⁸⁸ *Robertson and Robertson v. Walwyn Stodgell Cochrane Murray limited and Hadley*, supra note 185.

¹⁸⁹ Supra note 184.

¹⁹⁰ Supra note 185.

¹⁹¹ Supra note 31.

agreements. This attitude or policy would be in conflict with the "pro-ADR" policy implemented by the legislature.

This analysis reveals the characteristics of the B.C. political organization. In France the actions of the courts are quickly criticized and thus altered by the courts themselves or by the implementation of new provisions. The French legal system restricts political activity by the courts but it does not completely prohibit it, which reveals a system where the courts are part of, but subject to, the government. This is in contrast to B.C. where the jurisprudence of the courts, although in conflict with the government position, does not provoke widespread criticism and is accepted. This can be interpreted as indicative of a political system where the courts are independent institutions, not subject to the legislature.

The attitude of the courts and the acceptance of this attitude by other institutions reveals differences in the French and the B.C. political system. Even if the French judiciary can act as a policy maker, the policy implemented will be reversed¹⁹² if it is beyond the scope of government policy. On the contrary, B.C. courts appear more as a reactive power, or political actors, as they are able to implement policy in conflict with governmental positions.

Section 2: Enforcement of arbitration agreements by the courts.

As we have seen, both France and B.C. have recently developed new legislation favoring arbitration in order to satisfy the demands of practitioners and to encourage this mode of dispute resolution. The role given to the courts under the statutory provisions and the enforcement of the legislation by the courts will be studied, focusing in particular on the enforcement of arbitration agreements and the referral of parties to arbitration by the courts.

¹⁹² We are not referring only to formal reversal, constituted by the promulgation of an act clearly forbidding the decision of the court, but also to more informal academic criticisms which play an important role in France in influencing judgments.

1. Enforcement of arbitration agreements in France.

Provisions enacted in 1790 in France state that: "because arbitration is the most reasonable means to terminate disputes between citizens, the legislature shall not decide on any provisions aiming at reducing (...) the efficiency of the arbitration agreement."¹⁹³ A few years later, the *Cour de Cassation* held that: "arbitrators do not have the qualities always possessed by judges: probity, objectivity, competence, consideration, necessary to deliver judgments."¹⁹⁴ This illustrates the difference of the conception of arbitration by the judiciary and the legislature.

Recently, two decrees, issued in May 1980 and May 1981, express the clear intention of the legislature to encourage arbitration by limiting interference by the courts.¹⁹⁵

Article 1458 of the NCCP, implemented by the last decree, states that when a case which has already been brought before an arbitral tribunal, or relating to an arbitration agreement, is brought before the court, the court must declare itself not competent to hear the matter unless the agreement is void. This article is applicable to both domestic and international arbitration agreements.

The role of the courts' intervention is limited to the circumstances in which the court could refuse to enforce the arbitration agreement because it is "obviously void". Although the term "obviously void" is not defined by the decrees, it has been understood as being analogous to a void contract.

According to one author, the term "obviously void" means "...the literal contravention of one of the legal conditions imposed for the validity of arbitration agreements, and not requiring any interpretation to be established."¹⁹⁶ The validity of the arbitration agreement would therefore

¹⁹³ Loi du 16-24 Août 1790, sur l'organisation judiciaire, art. 1.

¹⁹⁴ Civ. 10 juillet 1843, D.P. 43.I.143.

¹⁹⁵ Décret du 14 mai 1980, supra note 135 and Décret du 12 mai 1981, supra note 136.

¹⁹⁶ C. Seppala., supra note 143 at 762 citing Robert.

be tested by reference to the general provisions on void contracts, relating to the capacity and consent of the parties and the legal character of the object and the cause of the contract, as applies to any contract in French law.

Courts adopted a "middle" position on the question of the enforcement of arbitration agreements. On one hand, they fully respect the will of the parties to submit their dispute to arbitration. They will not declare an agreement void if the parties did not apply for such a declaration¹⁹⁷ and any evidence as to the validity of the agreement will be accepted.¹⁹⁸ Moreover, once the object of the agreement is determined, the courts have no jurisdiction to deal with any action connected, even slightly, to this object.¹⁹⁹

However, on the other hand, the courts are not particularly liberal in determining the extent of the object of the agreement. Under article 1448 of the NCCP, the object of the dispute must be clearly stated for the agreement to be valid. Judges interpret this provision strictly. First, they do not hesitate to declare an agreement void where the object of the dispute is not clearly stated.²⁰⁰ Second, they strictly interpret the object defined by the parties to limit the jurisdiction of the arbitral tribunal.²⁰¹

Interpretation by the French courts of their role when enforcing arbitration agreements.

The interpretation by French judges of their role in the enforcement of arbitration agreements seems divided between respect for the will of the parties and the limitation of the

¹⁹⁷ Cass. Com., 21 janv. 1992, Sté Bay Line Shipping Cie c. Sté Recofi, Bull. Civ. IV. n° 30.

¹⁹⁸ Cass. Com., 13 nov. 1972, Rev. Arb., 1973 150, note Fouchard.

¹⁹⁹ Cass. Com., 11 oct. 1954, Rev. Arb. 1955 58.

²⁰⁰ E. Lecuyer, *Arbitrage*, fasc. 10 (Juris-Classeur Procedure, Editions Techniques, 1993) at 18.

²⁰¹ CA Paris, 30 mars 1962, JCP 1962 ed G. II, 12843, note Level.

arbitral tribunal's jurisdiction. Acknowledging that many factors intervene in shaping the judges' opinions, an explanation of this attitude can be traced in light of French legal history.

Indeed, as we saw in the preceding section on settlement agreements, the will of the parties plays a major role in the French legal system. The feudal influence provides for a conception of the state's justice system as being a service given by the state to citizens. The parties are free to use this service or not, and if they do not, the judge must respect their will. The medieval justice system was composed of several jurisdictions including canon, royal and feudal, offering different conceptions of parallel justice to people. During this time, to bring a case before the canon courts was to submit it to the "arbitration" of the canon courts, which reveals the character of the parallel justice system still maintained in relation to arbitration in France.²⁰² The decision by the parties to bring their case before an arbitral tribunal is therefore respected by the courts.

However, the determination of the scope of the jurisdiction of the tribunal is vital. As in the above-mentioned 1843 case²⁰³, French judges do not consider arbitrators as competent as they themselves are, and even if the will of the parties must be respected, it will be confined to a strict interpretation of an arbitral tribunal's jurisdiction. French judges are therefore considered, or more accurately consider themselves to be, the most competent individuals to handle cases. This could be interpreted as a remnant of the theory according to which the judge is the best qualified person to protect individual rights. As revealed in Chapter 2, section 1, this theory has shaped the nature of French proceedings where the judge plays a central role.

It is difficult to tell here whether or not the courts are following the legislature's public policy as there is no strong opposition with the policy implemented in the new legislation. What we can observe though, is that the courts are actually interpreting the provisions. Their cultural

²⁰² Vincent & Guichard, *Procédure Civile*, 24th Ed. (Précis Dalloz) at 986.

²⁰³ See supra note 194

and historical background influences therefore the legislation on arbitration which was, at first and before its application, very close to other foreign legislation on arbitration.

2. The enforcement of arbitration agreements in B.C.

In B.C., Section 15 of the *Commercial Arbitration Act*, substantially similar to Section 8 of the *International Commercial Arbitration Act*, implements the Model law and states that:

“(1) If a party to an arbitration agreement commences legal proceedings in a court against another party to an agreement in respect to a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, to that court to stay the legal proceedings.

(2) In an application under subsection (1), the courts must make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative, or incapable of being performed.

(3) An arbitration may be commenced or continued and an arbitral award made even though an application has been brought under subsection (1) and the issue is pending before the court.”

This legislation enforces the provisions of the Model Law²⁰⁴ with some differences, but the purpose and the spirit remain the same. It limits the circumstances in which the judge can refuse to enforce the arbitration agreement, and recognizes the importance of the will of parties.

The previous provisions regarding the enforcement of the arbitration agreement, Section 5 of the 1889 *Arbitration Act*, did not place many limits on the judge's discretion. The provision stated that the enforcement of the agreement had to be raised “*after appearance and before delivery of any pleadings or taking any other step in the proceedings*”. The main difference with the new legislation is in relation to the grounds which can be used by the judge to refuse enforcement. The old legislation states that the judge could refuse to enforce the agreement if “*there is no sufficient reason why the matter should not be referred in accordance with the*

²⁰⁴ See Chapter 3.

submission” and that the party who asks for enforcement is “*ready and willing to do all things necessary to the proper conduct of the arbitration*”; in this case the court only “*may*” grant a stay of proceedings. The former legislation was permissive, not mandatory.

This provision gave a wide power to the judge in defining what is a “sufficient reason”, and considering the traditional reluctance of common law courts to consider arbitration as a real alternative dispute resolution process, it is not surprising that the courts found a large number of “sufficient reasons”²⁰⁵.

Regarding the grounds under which the court might refuse to enforce the agreement, the terms used in the B.C. statute come from the former British legislation and are interpreted by the judge in accordance with British texts or cases. The Court of Appeal of B.C., in *Prince George (City) v. McElhanney Engineering Services Ltd.*²⁰⁶, interpreted the terms “inoperative, and incapable of being performed”. The court followed an Alberta case, *Kaverit Steel & Crane Ltd. v. Kone Corp.*²⁰⁷, stating that “the provision about “null and void, inoperative, and incapable of being performed” simply preserves the rule in *Heyman v. Darwins Ltd.*²⁰⁸, a 1942 British case.

The authorities referred to by the B.C. judges are previous cases and academic articles interpreting general contractual terms. The cases do not contain specific references to the objectives of the legislature in implementing the *Commercial Arbitration Act* and the *International Commercial Arbitration Act*. The sources used by the judges in B.C. to interpret the words “null and void, inoperative, and incapable of being performed” derive from principles of general contract law.

²⁰⁵ H. Alvarez, *supra* note 140.

²⁰⁶ [1995] 9 B.C.L.R. (3rd) 368.

²⁰⁷ [1992] 3 W.W.R. 716, 85 Alta. L.R. (2d) 287.

²⁰⁸ [1942] A.C. 356 (H.L.)

However, B.C. courts implement the public policy underlying the acts, encouraging arbitration agreements and expanding the jurisdiction of the arbitral tribunal which limits their own jurisdiction.

In particular, the court considered the phrase "*in respect to a matter agreed to be submitted to arbitration*" which appears in the *Commercial Arbitration Act* and the *International Commercial Arbitration Act* in B.C., in *Sandbar Construction Ltd. v. Pacific Parkland Properties Inc.*²⁰⁹. The Supreme Court held that the dispute arising from a building contract which included an arbitration clause and a builder's lien action were sufficiently related to submit the latter to the arbitration process. The court based its decision on several precedents, not related to arbitration law, but recognized the connection between a builder's lien action and any action arising from a construction contract. The decision made by the judge on the question is a broad interpretation of the articles of the new legislation.

In *Gulf Canada Resources Limited v. Arochem*²¹⁰, the plaintiff made a contract for the sale of oil with the two defendants, which included an arbitration clause. A dispute arose between the contractors. One of the defendants stated that he was not party to the contract yet joined the other defendant in an application for a stay of proceeding. The plaintiff challenged this defendant's application for a stay, stating that he was not party to the agreement and therefore there was no dispute between them or, if there was one, it did not fall within the jurisdiction of the arbitral tribunal. The court held that

"It is not for the court, on a stay application, to reach a final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the agreement. Those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute falls outside of the agreement, or that a party is not a party to it, or that the application is out of time, should the court make a final determination".

²⁰⁹ *Sandbar Construction Ltd. v. Pacific Parkland Properties Inc.* [1992] 66 B.C.L.R. (2d) 225.

²¹⁰ [1992] 66 B.C.L.R. 2d.

Definition of the role of B.C. judges – a comparison with France.

The legislature's definition of the role of the courts in B.C. in enforcing arbitration agreements is relatively clear. The courts are supposed to limit their intervention as much as possible, in order to make the arbitration process as secure as possible and to encourage parties to use arbitration. These provisions have been inspired, as mentioned in Chapter 3 of this thesis, by provisions in a number of international instruments.²¹¹

The interpretation of this role by B.C. courts is, in contrast, more problematic. Indeed, B.C. courts are faced with clear legislation which restricts the scope of their jurisdiction. However, the courts retain the ability to make a subjective interpretation of the rules. It seems here that the courts have opted to follow, more closely than French judges, the policy implemented by the legislature.

As we have seen in relation to settlement agreements, it does not appear to be in the culture of B.C. to view ADR as on the same level as court jurisdiction but rather to always place it under the control, or at least subject to the hierarchical structure, of the courts. Of course, the courts only grant a "stay of proceedings" when enforcing the agreement, instead of declaring that the issue is beyond their jurisdiction as the French courts do. Thus, the B.C. courts always consider the matters to be within their jurisdiction. However, they effectively limit their control on the process, and their interpretation of their role complies with the legislature's will.

It is submitted that the fact that judges are former lawyers may have influenced their attitude here. In France traditional decisions, embedded in the cultural background, have been given by judges. In contrast, B.C. courts adhered to the legislation, perhaps because they have

²¹¹ See Chapter 3. We can refer to the *UNCITRAL Model Law* adopted on June 21, 1985 by the General Assembly Resolution A/40/17, 40 GAOR Supp. No. 53, A/40/53, the *Protocol of Geneva on the Enforcement of Foreign Arbitral Awards* of September 24, 1923, the *New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards* of June 10, 1958 and finally the *European Convention of Geneva on International Commercial Arbitration* of April 1961.

accepted the importance of the matter and agree with the overall policy objectives. This is a proposition and it must be acknowledged that many other factors may have influenced these decisions.

Finally, Court Mediation processes implemented in France and B.C. will be studied as another example of ADR methods.

Section 3: Court mediation processes.

Court Mediation processes have formed part of recent reforms implemented by different authorities in order to reduce the number of cases which go to trial. In both France and B.C. it has been considered that putting a mediation process in place which is available even where the judicial proceedings have already begun would encourage the parties to settle. Although the role of the judge is central in both jurisdictions, the differences in the process relate to each jurisdiction's legal background.

These differences will be analyzed through the definition of the role of the judge in the legislation. In both cases, the reforms are recent and thus no relevant case law exists.

1. Court Mediation in France.

The initial process of mediation in court was created by case law. Under Article 21 of the NCCP, it is part of the role of the judge to conciliate parties to a dispute. In applying this article, the President of the *Tribunal de Grande Instance* of Paris, equivalent to the B.C. Supreme Court, appointed a mediator for the first time in 1968 to resolve a workers' conflict. This decision met with strong criticism from academics who considered, despite Article 21 of the NCCP, that the courts did not have jurisdiction to make such a decision. However, the case established a practice and many courts, especially in the Paris jurisdiction, recognized and used this possibility to facilitate mediation.

Because this practice by the courts exposed a need for a Court Mediation process, and because the rules created by the courts needed to be standardized, intervention by the legislature was necessary.

An act was enacted on February 8, 1995 organizing the mediation process in courts.²¹² On July 22, 1996 a government regulation was approved, which has been included in the NCCP in articles 131-1 to 131-15, providing the details of the procedure to be followed.²¹³ The new legislation applies to any matter brought by any court, including in summary procedure, with the exception of criminal cases. The mediation process can also be initiated at any time in the action. Even if it is clear that the judge cannot act as a mediator, his or her role is essential throughout the process. The new process is not mandatory, and both the legal provisions and the government regulation make it clear that the judge must obtain the consent of the parties before initiating the mediation process. In most of the cases, the judge will propose mediation to the parties and seek their consent. However if the parties apply for their case to be mediated, the judge can take the decision about whether or not to begin it, as article 131-1 of the NCCP states that “when a case has been submitted to it, the court *can*, after obtaining the consent of the parties”[emphasis added] initiate the mediation process.²¹⁴

Moreover, it is up to the court to choose between mediation or conciliation, by proposing one or the other to the parties. If the mediation process is chosen, the court also determines the details of the procedure. The court determines the scope of the mediation, which can relate to the whole or part of the matter, as well as its length, which can be up to 3 months. The court can choose the mediator who may be an individual or a society. Article 131-5 of the NCCP provides

²¹² *Loi No 95-125 du 8 février 1995 relative à l'organisation des juridictions et à la procédure civile, pénale et administrative*; J.O., 9 février 1995.

²¹³ *Décret No 96-652*, 22 juillet 1996.

²¹⁴ Art. 131-1 N.C.proc. civ., trans.

for the qualification and skills an individual must possess to be appointed as a mediator. Finally, the judge fixes the remuneration of the mediator. None of the decisions taken by the judge in the mediation process can be appealed.

In principle, once the mediator is appointed, the judge is not supposed to intervene in the process and the progress of the mediation is kept secret from him or her. However, the government regulation introduced some provisions which undermine this principle. First of all, if the judge stays the proceeding during the mediation, the judge can at that stage "take other action that appears to be necessary". This means that the judge can still take interlocutory measures during the mediation. But, more importantly, the secrecy of the procedure is not completely guaranteed. Although Article 131-14 of the NCCP states that "the findings of the mediator and the declarations he hears cannot be produced or brought to the court in the following procedure without the consent of the parties" [trans.], Article 131-9 states that "the individual which is in charge of the mediation, keeps the judge informed of the difficulties confronted in the carrying out of his or her task". As the judge has the discretion to terminate the mediation, it is logical to keep him or her informed as to the progress of the process. As the judge who initiated the mediation will be the one to hear the case if the mediation fails, the information provided by the mediator may have influenced the judge's decision at a later stage. It will all depend on what the mediator understand to be "difficulties", but for example, the lack of cooperation of one of the parties may be considered a difficulty in the process and thus may be brought to the attention of the judge.

As the enactment of these provisions is recent, there is no case law yet. However, we can see the extent to which the courts are active throughout the procedure. They have the power to initiate the process or not; they determine the details of the procedure; they supervise the process and they are able to terminate it subject to their discretion. The success of the Court Mediation process in France will very much depend on the eagerness of the judges to encourage it.

2. Court Mediation in B.C.

The mediation program proposed by the courts

As a result of a court initiative in B.C., a court mediation process was put in place in June 1997²¹⁵. It was supposed to answer a perceived need amongst practitioners for ADR processes just before or at the beginning of a judicial procedure.

The reform was announced by Chief Justice Williams by a "Notice to the Profession". The mediation was to be provided by judges who had completed mediation training. The notice specified that the parties to the dispute have to be parties to a proceeding in the Supreme Court, which means that a legal procedure had to be pending before the courts. It limited the scope of the mediation to cases brought before the Supreme Court and excluded, for instance, criminal cases, labor disputes and family cases, for which a special mediation process is provided.

Because the process remained contractual, the consent of the parties had to be obtained. Mr. Justice Williams also accompanied his note with a Mediation Protocol form, to be signed by the parties willing to go to mediation. The parties themselves chose the mediator from a list posted in each court registry or, depending on the circumstances, the court could assign the mediator. Mediation could be booked by the trial coordinator and would take place at the court house.

The mediation, even if conducted by a judge, was completely independent of any eventual subsequent judicial procedure, and there was no risk that any difficulties met during the mediation would become known by the trial judge.

It was made clear by the Supreme Court mediation note that the statements made by the parties during the mediation could not be used for the purpose of cross examination at trial. The

²¹⁵ Supreme Court Mediation, note 06.

mediators had a duty not to reveal any discussions between the parties to the trial judge. The trial judge was therefore kept separate from the whole process except, "depending on the circumstances" to appoint the mediator.

However, some concerns were expressed, mostly by members of the Bench, as to the fact that judges themselves were acting as mediators, and as to how the program might overlap Rule 35 of the Rules of Courts which dealt with settlement conferences.²¹⁶ On September 22, 1997, Chief Justice Williams suspended the process, but the courts are currently reconsidering it, including the role of the judge in the process.²¹⁷

The discussion about judges acting as mediators tends to mask the role of the trial judge in the procedure. Assuming that mediators are going to be, in the future, independent mediators, the question remains as to how much the trial judge should participate in the process. The interesting aspect of the process and what can make it rather efficient is that, unlike a purely contractual mediation, it takes place when a judicial procedure has already been started, and therefore when the judge is in a position to encourage its use. The judge has to be able to evaluate when a case is eligible for mediation and when the application is purely a "time buying" device. There also should be some sort of cooperation between the mediator and the judge to estimate when the case must be resubmitted to the courts.

The mediation process proposed by the B.C. government: the Notice to Mediate.

The government of B.C. has recently enacted a "Notice to Mediate Regulation" (the "Regulation") which came into force April 14, 1998. The Regulation only applies to actions arising out of motor vehicle accidents (typically personal injury cases) and therefore does not include commercial cases which are the focus of this thesis. However, since the government is

²¹⁶ Bouck, Dillon & Turriff, *supra* note 73; L. McKenzie in *The Lawyers Weekly* (August 15, 1997).

²¹⁷ Supreme Court Mediation, note 09

considering extending the Regulation to other types of actions in the near future if the program is a success, we will look at the Regulation a little more closely.

The process is called "Notice to Mediate" and allows any party to an action relating to a motor vehicle accident, including insurance companies, to compel the other parties to participate in a mediation process. However, as mentioned by Kate Thompson, of the Ministry of Attorney General of B.C.: "While participation in mediation is mandatory, settlement is not".²¹⁸ The process does not require a court order unless one of the parties to the case fails to comply with the Regulation's provisions.²¹⁹ One party simply delivers a notice to the other parties.

According to section 2 of the Regulation:

"Any party to a motor vehicle action referred to in the Schedule to this regulation may initiate mediation in that action by delivering a Notice to Mediate in Form 1 to

(a) every other party to the action, and

(b) the Dispute Resolution Office in the Ministry of the Attorney General."

The mediator is either appointed jointly by the parties or chosen according a special procedure from a roster of independent mediators put in place by the Dispute Resolution Office of the Minister.²²⁰ In both cases, unlike the mediation program proposed by the courts, the mediator is not a judge.

The court does not play any part in the appointment of the mediator but is not completely excluded from the process. The Regulation states in detail the role of the trial judge when a Notice to Mediate is delivered from one party to another. Section 4 of the Regulation gives the court the power to exempt a party from participating in a mediation. The court has a wide

²¹⁸ B.C. News Release of the Ministry of Attorney General, April 14, 1998, "B.C. Provides Right to Require Mediation in Motor Vehicle Cases"

²¹⁹ Section 11 & 12 of the Notice to Mediate Regulation.

²²⁰ Section 7 of the Notice to Mediate Regulation.

discretion to allow an exemption as it can do “if, in the court’s opinion, it is materially impracticable or unfair to require the party to attend at mediation”.²²¹

The court can also intervene (upon the application of a party) in the organization of the mediation session by adjourning the mediation session for a variety of reasons including, among other reasons, if examinations for discovery are necessary before the mediation or simply if, in the court’s opinion, it is “just” to adjourn the mediation.²²² The court can order that different mediation sessions will be conducted in cases where there are several different plaintiffs.

Finally, we can note that Section 13 of the Regulation states that the mediation is a strictly confidential process. Information obtained during the mediation must not be disclosed - not just in the action that gave rise to the mediation, but also in any other civil, criminal, regulatory or similar proceedings. The only exception is for information obtained in the mediation which would be otherwise predicable or comparable in the proceedings.

In the process provided by the B.C. government, the court does not initiate the process or conduct it. Neither does the court supervise it, but rather plays a role only to help the process when necessary, and then only when one of the parties applies to the court.

As mentioned, this program might be extended to commercial disputes. It is, at the time this thesis is being written, limited to motor vehicle accident actions which are not the focus of this analysis. We will therefore focus our comparison on the first mediation process discussed, bearing in mind that an alternative program could be applied to commercial disputes in the near future.

The court mediation process put in place in France and the court initiated process which was briefly experienced in B.C. are rather similar. As both aim at reducing the number of trials,

²²¹ Section 4(2)c of the Notice to Mediate Regulation.

²²² Section 5(2)a of the Notice to Mediate Regulation.

they can propose a mediation process to reach an agreement at any time during the action. The court can encourage the parties to take part in the process, while stepping away from the mediation procedure itself. However, we have seen there are some technical differences in the procedures actually put in place and in their elaboration in the two jurisdictions. These differences reflect the legal background of each jurisdiction.

3. Comparison of the role of the judge in the reforms.

This section analyses the participation by the courts in the reforms and their role in the new process.

Participation of the courts reforming the law.

The French implementation of a Court Mediation occurred as a result of a court initiative; judges had to provide for the details of the procedure because Article 21 of the NCCP only stated a principle and a need for a detailed process was left to the judiciary. The intervention by the legislature is a recognition of the process originating in the case law.

This process of implementation of reform is typical of the French system where the judiciary is not an official policy maker, but only attempts to answer practical needs, while the official public policy maker is the legislator and the government. This corresponds to the “adjudicative model” proposed by Weiler.²²³

In contrast, the B.C. Court Mediation project initiated by the courts was conducted entirely through the courts. The project was coordinated by Mr. Justice Williams and his pilot project was put in place by a simple “Notice to the Profession” in B.C. The notes were not very detailed as to the exact formality of the process and as we mentioned some questions remain.

²²³ See Chapter 1, section 2, 1.

This pilot project was put in place while the government was conducting other experiments with ADR such as the Notice to Mediate process mentioned earlier. The process which was followed for the implementation of the Notice to Mediate Regulation is similar to the process followed in France, as the government is answering a perceived practical need after the courts initiated the reforms.

The project implemented by the courts, even though unsuccessful, illustrates the potential for the courts in B.C. to implement a policy just as the government might. Indeed, the Court Mediation process is not the result of a long evolution and maturation of decisions of the legislature, but of a decision to implement such a process by a group of judges. The Court Mediation Notes set up rules just as the government or the Parliament would. The fact that the Court Mediation process studied in this thesis was short lived is not the point. The point is that the court did, on its own initiative, institute such a program.

The conduct of the reforms in both France and B.C. followed processes typical to each jurisdiction. It shows that both systems are capable of answering practical needs, but in different ways. In both cases, the need for a new legal institution was felt first by the courts. The French system required intervention by the legislature to implement an official and organized reform, whereas in B.C. the system has been able to provide for an organized answer directly through the actions of the courts.

Comparison of the role of the courts in the new mediation processes.

In the French Court Mediation process, the trial judge is not supposed to intervene in the process, but has broad powers to supervise the procedure and can take over the control of the case if necessary. The trial judge also decides on the details of the procedure by appointing the mediator or setting deadlines.

In contrast, in the court mediation proposed by Mr. Justice Williams, and according to the Notice to Mediate Regulation, the trial judge does not organize the procedure. The flexible terms

of the Court's Notices gives significant freedom to the parties. They certainly could appoint the mediator themselves and could possibly set up the details of the mediation procedure.

The Court Mediation process is therefore closely controlled by the French judge. Contrary to what was observed in relation to settlement agreements and arbitration agreements, mediation is not considered as an equivalent to court dispute resolution. The ADR process of mediation is subject to the authority of the courts.

The influences identified in the two first sections and in particular feudalism, should not be considered as shaping the rules or patterns. It is possible that Court mediation does not in fact reflect the French political background but more so practical needs of a process which closely involves judges.

However, we can observe that both of the ADR processes studied in previous sections (arbitration and settlement agreements) take place outside the courts. The judicial system is used only at the request of the parties and when needed. Court Mediations are different because they take place from the outset in front of the courts. It is possible that the fact that one of the parties initially brought its case before the courts entitles the courts to a different role in this ADR process, closer to their "usual" judicial role. The extensive power of control of the French courts in the Court Mediation process therefore reflects the principle of the defense of individual rights by the courts rather than by individuals themselves.

In contrast, in B.C. the trial judges for a particular case are excluded from the Court Mediation process. Following the same kind of reasoning, we could say that this reflects the individualistic influences examined in Chapter 2, limiting the role of judges to the one of "neutral arbitrators", letting the parties promote the defense of their own rights.

It appears therefore that the French judges' role in Court Mediation is to protect individual rights while B.C. judges are "neutral arbitrators"²²⁴ of parties' disputes. These definitions of the judge's role reflects the French and B.C. judicial background. Court Mediation processes are not considered in either jurisdiction as a "regular" ADR process. In both jurisdictions, in terms of the role of the judge, the process is closer to the judicial system than to the more classical ADR methods.

Unfortunately, at this stage of implementation of the reforms, it is too early to tell how judges will interpret their role in relation to mediation.

Conclusion.

French and B.C. Court Mediation processes have been created by the legislature and the courts respectively, which characterizes each jurisdiction's approach in answering legal needs. Court Mediation is a unique ADR process as courts are associated with it from the beginning, even in the Notice to Mediate Regulation where the court is given a supervisory role. As a consequence, the judicial identity of each jurisdiction is reflected in the definition of the role of the judge in the reforms implemented. Despite very similar processes, the intervention by judges incorporates a strong cultural identity to the processes.

²²⁴ In this context a "neutral arbitrator" is not an arbitrator in the sense of a binding decision maker: See the definition of "neutral arbitrator" in Chapter 2.

Conclusion

The comparative method can be understood as the canvassing of a precise question on a common and relatively neutral theme, in the context of two or more entities. The aim of this method has to be defined by comparatists themselves because comparative law is merely a tool of analysis. This thesis is aimed at understanding the French and the B.C. legal systems through an analysis of the role of the judge in ADR. At the same time, it provides a historical and cultural analysis of the role of the judge in ADR, which reveals the importance of cultural backgrounds in institutions which have been "internationalized" and are mistakenly perceived as "standardized".

The French judge begins his or her career immediately after a specialized education. He or she has wide powers, in the conduct of the proceedings, because he or she is in charge of the defense of individual rights. However, his or her decisions are not recognized as a source of law; only the legislature, democratically elected is accorded the official power of law making. Still, French courts are in position to, and must, interpret legal provisions, which allows them to make decisive choices on legal questions.

The role and the powers of the French courts today is the result of a long process of evolution involving many different factors including historical and cultural elements. From the Middle Age with its multiplicity of jurisdictions, to the centralization of institutions under the King, to the impact of the Revolution, each of these have left traces on the French conception of the court's role.

B.C. courts present a different profile similarly influenced by history and cultural elements, and other factors. B.C. judges are former lawyers appointed, to the highest level courts, by the federal government. They do not have the same degree of power as French judges in the proceedings due to a system which gives a primary role to the parties in the defense of their rights. However, court decisions are recognized as official sources of law. Courts have therefore the same role in decision making as the legislature, but the latter remains the official body of policy making, due to the Canadian Parliamentary system.

Historical and cultural factors are reflected in the role of the judge in B.C. Amongst other, we have referred to the early centralization of the English system, the federal parliamentary system, and the relative individualism in Canada.

These two different conceptions of the role of the judge in each of the jurisdictions can be analyzed in light of two models of judicial decision making exposed by Weiler,²²⁵ namely the role of adjudicator of disputes and the role of public policy maker. However, the role of the courts cannot be limited to these two models which are just a reference point to assist the analysis. Both jurisdictions have legal systems which permit the judge to act as both an adjudicator of a dispute and a policy maker, although in different ways and proportions.

On one level, it appears that ADR means have been developed in very similar ways in France and B.C. This evolution has been explained by two factors: First, the influence of the international business community which requires a more uniform means of dispute resolution. This influence has been reflected in the drafting of international agreements and the implementation, in France and B.C., of new legislative processes encouraging arbitration. The second factor is the necessity perceived by both governments for judicial systems closely connected to citizens and easier to access. This relates to a demand by French and B.C. governments, whose courts are facing increase in the number of trials, for a cheaper means of conflict resolution. These demands have led to the implementation of public policies encouraging domestic ADR and in particular mediation and conciliation.

In both jurisdiction, the role of the judge under the new provisions appears very similar as the control of the judge is restricted and his or her role as a mere assistant to the parties during the process is reinforced. However, the legal historical and cultural background of each jurisdiction shaped the intervention by the judge in ADR which thus takes different forms.

In analyzing systematically the conception of the role of the judge by the legislature and by the courts themselves, we can appreciate the importance of cultural backgrounds and historical

²²⁵ Weiler, supra note 31.

institutions. The enforcement of settlement agreements by French judges reveals the limits on the exercise of political power French courts enjoy while asserting the value of ADR as a parallel conflict resolution system. In comparison, the enforcement of settlement agreements by B.C. judges reveals their political power and the limited value ascribed to ADR which seems subject to the hierarchical structure of courts. The enforcement of arbitration agreements by French judges reveals again the value ascribed to ADR means and to the will of the parties, although it is always interpreted strictly. In comparison, the enforcement of arbitration agreements by B.C. courts adheres exactly to the recent policy implemented by the legislature. Finally the extent of the powers of French trial judges in Court Mediation processes reflects the powers of French judges in proceedings, who are in charge of the defense of individuals rights. In contrast, trial judges are separated from the Court Mediation processes in B.C., whether initiated by the courts themselves or by the government, as parties are supposed to protect their rights themselves, the judge operating only a neutral arbitrator.

Through this study of the role by judges in different ADR processes, the importance of different backgrounds to institutions, perceived on a superficial level as similar or uniform has been exposed. However, it would be incorrect to exaggerate this influence as many other factors also influence the definition of the role of the judge. Although no systematic pattern of influence of these forces can be drawn, traces of influence can nonetheless be identified on a case by case basis.

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