JUDGES AS MEDIATORS IN CRIMINAL MATTERS:

THE CANADIAN EXPERIENCE

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PRESENTATION

BY

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Dear friends:

I am pleased to be here today – in magnificent Australia – addressing such an array of distinguished guests.

I have been asked to give an account of the Quebec experience in judicial mediation and more particularly in our facilitation program in criminal matters.

The story begins with the implementation of one of the first systems of civil and commercial mediation ever developed in the modern judicial world at the level of the top court of Quebec, the Court of Appeal.

The story then continues with the extension of the mediation system to all aspects of criminal litigation and this not only at the Court of Appeal, but in all the criminal courts of the province. IN A NUTSHELL: a fully integrated system of civil, commercial and criminal mediation.

The present text is based on a presentation prepared by Justice Louise Otis of the Quebec Court of Appeal.

What does it mean? It means that in addition to the formal adversarial justice system — the so-called trial system — the Province of Quebec has developed and added a powerful system to solve judicial conflicts. A process of voluntary or consensual (non-mandatory) mediation where regular judges act as mediators to help parties to facilitate the attainment of a solution that suits them and that may be sanctioned by the Court.

Thus, trial justice and mediational justice occur under the same roof, are conducted by the same people and, according to their respective vocations, participate in fulfilling the mission vested in courts and other tribunals: **Rendering justice**.

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To understand what happens in Quebec, we need to go back in history. First, a few words on the Canadian judicial system.

The Canadian judicial system exists within a federal political structure. The Federal Parliament (located in Ottawa) and the ten provincial legislative assemblies each enact laws in their respective fields of jurisdiction. According to the Canadian Constitution, each province has exclusive responsibility over the administration of justice.

The Quebec Court of Appeal is the highest court in Quebec. Its twenty judges hold the power to dispose of appeals coming from lower courts. Simply put: the Court of Appeal is a Court of last resort. Very few of its judgments in civil and commercial matters are ever brought to the Supreme Court of Canada. It would not be an overstatement to say that 99% of judgments in all matters rendered by the Quebec Court of Appeal are final.

To complete the picture, allow me to add a few general remarks that will situate the Canadian legal system in relation to the Australian legal system.

Canada and Australia have many important things in common. Both are aggregates of former British Colonies. Both are federal states with written constitutions. Both are parliamentary democracies patterned more or less loosely after the British parliamentary system. Finally, both have roots deeply set into the English common law tradition.

There are also points of difference, in large measure because of our different histories. Canada was founded in 1867 and its constitution still bears the unmistakable imprint of the British Colonial Office's style of drafting. Australia was founded some thirty years later and – in designing the Commonwealth's constitution – the Australian founders took a keen interest in some aspects of the American constitution: notably, a strong idea of separation of powers and a strong idea of plenary powers resting with the States. Thus the “Washminster” factor, which is absent in Canada.

In Australia, Commonwealth legislative powers are enumerated in the national constitution but State legislative powers are not; in Canada, both federal and provincial legislative powers are enumerated. Although in its general pattern the distribution of powers is similar in Australia and in Canada, there are some sharp differences. Criminal law is a State matter in Australia; it is a federal jurisdiction in Canada. Higher education is largely a federal matter in Australia; it is almost exclusively a provincial matter in Canada.

There are two further and rather important systemic differences that I would like to emphasize.

First, before becoming a British Colony in 1760, Canada had been a French colony. And to this day, there are two systems of private law co-existing in Canada: the common law throughout English Canada and the civil law (and a civil code, re-codified in 1994 but still in the French civil law tradition) in Quebec.

Second, for some 23 years now, we have had in Canada a Charter of rights and freedoms entrenched in our constitution and which gives our courts jurisdiction to review the substantive constitutionality of legislation in a manner comparable to, though not identical with, the Judicial Review jurisdiction of American courts. Our Charter bears the influence of the American Bill of Rights, no doubt, but also that of the European Convention on Human Rights. We therefore in a sense come full circle, for your Washminster constitutional culture is not unlike our mid-Atlantic constitutional culture.

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Let us turn now to the introduction of judicial mediation. Eight years ago, in 1997, returning from the Christmas holidays, my colleague Louise Otis met with the then Chief Justice of Quebec and suggested he allows her to implement a pilot program of judicial mediation. Louise Otis proposed myself to act as a mediator to help the parties to solve their cases pending in Appeal. The new system would be consensual, free, fast, flexible. Regular judges would have the opportunity to act as mediators as well as adjudicators. It would be a new modern judicial mission for judges.

At the beginning, the then Chief Justice was very skeptical. Somehow, though, he found the whole idea fascinating. He accepted that the Court launch a pilot program of eighteen months. As he told Justice Otis then, if it works it will be the Court's success and if it fails it will be her own fault.

Well, judicial mediation is now fully integrated into our system of justice at all levels – Appeal Court and trial Courts – and for almost all matters including – more recently – criminal law.

First, we will have a quick glance at the general system as it has existed since 1997 and then we will turn to the brand new system of criminal mediation implemented in 2004.

WHAT IS THE NATURE OF JUDICIAL MEDIATION?

First, it is important to point out that the adversarial system — in which a Court decides a case because redress is sought by the parties — is and remains the judge's principal function. Judicial mediation does not seek to replace the traditional judicial process by an alternative form of dispute resolution. It recognizes, however, that the tools for dispute resolution are readily available to judges when a just solution for the parties can be reached without the need for a final judgment on the merits.

In short, the Court of Appeal has integrated the two mechanisms into a harmonious and functional dispute resolution system. Quebec thus now has a hybrid system of justice.

WHAT ARE THE PROGRAM'S FEATURES?

Very simply, judicial mediation offers litigants an opportunity to withdraw — voluntarily and temporarily — from the formal adversarial process. It allows them to attempt to settle their differences with the active support of a judge. The recourse to mediation is a risk-free proposition for the parties. They remain free to return to the formal system should a settlement not be achieved.

The process of judicial mediation is entirely voluntary; it is flexible, often informal, and adaptable, and is invoked only when the parties show they are ready to reach a settlement. In other words, the Courts do not impose mediation upon the parties. Rather, the parties choose to enter the system and ask a judge to act as a facilitator to help them solve the case. That is to say that a judge does not exercise his or her authority as an adjudicator, but acts instead as a facilitator to help the parties clarify contentious issues and find a solution to the litigation.

At all times the parties and their attorneys remain fully empowered with the solution of their conflict: they choose to enter the mediation system, they choose the ground

rules of mediation, they choose to settle or not and, finally — at any stage of the mediation — they may choose to re-enter the formal process.

Finally, because of the duty of confidentiality, we put up a wall between the mediation system and the formal system. The files are kept apart in the office of the judge-mediator and will eventually be shredded after the mediation. If the case is not settled at the close of a mediation session, the judge mediator is obviously excluded from the panel in charge of the hearing. If the parties reach a settlement, the Court of Appeal – composed of a panel of three – will ratify the agreement that will become final and binding as any other judgment of the Court.

Well, eight years have already passed since the inception of this system of judicial mediation in appeal and the results have been very encouraging. Over 500 cases have been mediated in civil, commercial, family and criminal matters, and over 80% have been settled successfully after one or two mediation sessions of 3 hours.

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Let us turn now to the introduction of criminal mediation.

I will begin with a brief history of the development of the program and then will continue with an outline of its main characteristics. Finally, a few cases that have been successfully resolved through criminal mediation will be described.

After witnessing the success of judicial mediation in civil, family and commercial matters, we – at the Court of Appeal – began to reflect on the possibility of establishing a similar system in criminal matters and to consider its potential benefits. However, considering the public nature of the criminal law and its widespread coverage in the media, we felt it was essential this time to involve all the main actors in the judicial criminal system, namely the Court of Appeal, the Superior Court and the Court of Quebec. It was essential as well to involve prosecutors and defense attorneys.

Accordingly, an extensive meeting was held in February 2003. That meeting was prepared for carefully. Representatives of the three Courts of criminal jurisdiction and

members of the bar association, including both prosecutors and defence attorneys, attended the meeting.

This event can be understood in the context of a larger evolutionary process through which the role of judges is steadily increasing in importance. For example, the *Code of Civil Procedure* explicitly empowers judges to mediate or conciliate and allows the court to ensure efficient case management in order to simplify and focus disputes and speed up the judicial process. Recent amendments to the *Criminal Code* authorize the judge presiding over a preliminary inquiry to hold a preparatory hearing in order to assist the parties in identifying the issues in dispute and to encourage them to consider any matters that would promote a fast and efficient inquiry (as stipulated by section 536.4 of the *Criminal Code*).

The courts have also acknowledged the significance of the role of judges in the administration of judicial procedure.

So, the participants ***at the February 2003 meeting*** reflected on this tendency. They agreed that there was no legal impediment to conducting a judicial criminal mediation session in order to smooth out some of the problems inherent in a fundamentally adversarial proceeding. They saw no impediment to recognizing mediation as a means to identify a solution acceptable to the two opposing parties.

Of course, since approximately 80% of criminal prosecutions are settled through plea negotiation, criminal mediation is contemplated only for cases where there is likely to be a trial and a verdict. In other words, criminal mediation is absolutely not intended as a way to modify the rules or encourage parties to abandon the established and accepted practice of plea negotiation.

At the **2003 meeting**, consensus was reached on *a few critical points*. It was agreed that participation in criminal judicial mediation would be voluntary, not mandatory. In addition, only judges who had undergone training in mediation would be permitted to conduct a session. It was also determined that judicial mediation would be a supplementary service offered by the courts and funded through its general budget.

The judges later agreed that, due to the public nature of the criminal law, the process must not be identical to private law mediation. Since criminal mediation is oriented more toward *facilitating* exchanges between the parties than necessarily finding a solution to the dispute, the term *facilitation* was preferred. This is particularly appropriate since criminal mediation has a restorative goal, involving the direct participation of the victim. However, the term *mediation* is used in this document for reasons of clarity.

At this point – with the collaboration of the University of Sherbrooke – Louise Otis designed a training program in criminal mediation. In January 2004, a three-day training conference took place, during which fifteen judges – from the three Courts – discussed the applicable ethics, standards and rules. They also received skills training in mediation. The broad lines of a pilot program were thus outlined. Then, Louise Otis drafted the protocol and sent it to the three chief justices for review and comments.

In March 2004, the three Chief Justices of the Quebec courts issued a statement informing the legal community of their intention to support an 18-month pilot program in criminal mediation. The program will be evaluated every six months, and a decision regarding modifications would be reached at the end of the term. I met with the media on numerous occasions in order to explain the main features of the program and to describe its benefits for the population.

The primary rules governing the program are grounded in flexibility. The chief justices described them in the following terms:

- The parties may make a **voluntary and joint request** for the intervention of a judge for assistance in resolving the dispute;
- A mediation session may be held **with respect to any issue**, including sentencing;
- All exchanges are **confidential** and all parties undertake to ensure that they remain so;
- If mediation does not lead to a settlement, the judge-mediator is **excluded from the judicial hearing**, and the other members of the Court are not informed of the prior attempt at mediation.

PARTICULAR FEATURES OF CRIMINAL MEDIATION

As previously noted, **the rules of criminal mediation are not modeled on those of civil mediation,** even if the process and the skills called for are comparable.

1) Judicial motivation

In private law, the fundamental goal of judicial mediation is to enable the parties to identify a solution to their dispute with the help of a judge-mediator. When an agreement is reached by the parties at the end of the mediation process, the Court will generally confirm and homologate the agreement without giving any judicial motivation.

In criminal law, because it is an area of public law, the situation is very different. The primary goal of criminal mediation is to encourage discussion and agreement between counsel for the parties in order to ensure a better use of resources. This goal can be reached either by restricting the debate to the essential issues or by resolving the dispute. Unlike private law, however, the public nature of the criminal law does not permit the court to confirm an agreement without providing reasons.

Indeed, there is a double aspect to the public nature of criminal law: **first**, the hearings must be public, subject to the occasional exception; **second**, the court acts as the guardian of the public interest.

As a result, mere homologation by the court of an agreement reached though criminal mediation is not sufficient. Not only must the public be told what was decided, it must also be informed of the reasons underlying the decision.

The parties must publicly inform the court of the nature of their agreement and their reasons supporting it. The court must also be satisfied that this proposal complies with legal and jurisprudential standards, in order to ensure the protection of the public interest.

For example, if the parties have agreed that the accused will plead guilty and that they have a joint submission for a specific sentence, they must publicly explain to the court why

their proposal is reasonable. The court must be satisfied that the proposed sentence complies with the relevant objectives and principles.

If the court accepts the parties' proposal, the judgment must include an explanation of why it believes the sentence to be appropriate. In this way, the public will not have the impression that the matter was settled in secrecy and will understand the reasons why the proposed sentence was accepted. The transparency required in criminal matters is a constant concern in criminal mediation.

The agreement reached is not necessarily final. The court that hears the matter after the mediation session may dismiss the proposal, just as it may reject any plea bargain. This is rare, since the courts have stated that a proposed sentence may be rejected only if it is unreasonable or likely to bring the administration of justice into disrepute.

2) Presence of the accused and the victim

There is another feature of criminal mediation worth highlighting. In civil, family or commercial matters, the primary goal is to encourage the parties, supported by counsel, to find an appropriate solution to their dispute. Therefore, the parties themselves generally attend the mediation sessions. However, for the purposes of the pilot program in criminal matters, it has been agreed that mediation sessions should not involve the direct participation of the accused and the victim. This decision is based on the likelihood of animosity between the participants as well as the risks associated with a private meeting of this nature in the presence of a judge. Therefore, **in criminal facilitation only the lawyers are invited to take part in the process**. Of course, defence counsel will keep the accused informed and may even require his or her presence in a room annexed to the mediation room. On the other hand, the prosecution also has the option of discussing the session with the victim, even though the victim is not a client of the Crown prosecutor. It must be added that in criminal litigation involving the presence of experts, experts may be present at the mediation session. I refer, for example, to economic crimes involving the presence of accountants, or even criminal negligence involving experts such as engineers or architects.

3) Confidentiality

As mentioned earlier, it is essential that criminal mediation be **confidential**. It is well established in Canada that plea discussions between defence counsel and prosecutors are privileged. The same principle is applicable to a criminal mediation since public policy encourages full and candid discussions between the parties, and what has been revealed during those discussions is inadmissible at trial. However, there may be circumstances when the privilege of confidentiality must be set aside. I will list three such exceptions.

1. **The right to effective assistance of counsel**

   An example is the case where counsel – against the client's wishes – discusses an insanity plea during plea bargaining. In such a case the client would be entitled to allege denial of the right to effective assistance of counsel.

2. **The Court cannot be misled**

   Confidentiality cannot be allowed to lead the Court into error. The Crown is generally not entitled to prove guilt on the basis of what has been disclosed during a mediation session. When the accused proposes to give false evidence, however, the Crown is entitled to cross-examine on what has previously been disclosed during the session. Examples include fabrication of false evidence and perjury.

3. **The public safety exception**

   This can arise for instance if counsel confides to the judge that the client has made serious threats to the victim and that there are strong reasons to believe that the victim's security is at risk. In that case, the judge may be in a position to disclose the information if counsel refuses to do so. This last exception is unlikely to happen.

SOME EXAMPLES

A proper understanding of the following examples requires drawing a distinction between cases that come before the Court of Appeal and those that come before a court of first instance.

During trial proceedings at first instance, the court hears witnesses, the parties are present, and the hearing may last up to several days or even weeks. When a mediation session takes place at first instance, no verdict has yet been delivered on the case.

By contrast, an appeal is based on the record. Witnesses are not heard again, the parties are rarely present, and the hearing is much shorter. Also, of course, a judgment has previously been rendered at first instance. As a result, the mediation session must deal not only with the dispute but also with the soundness of the judgment on appeal. This exercise is therefore quite delicate.

At first instance, the judge or jury, depending on the type of charge or the choice of the parties, renders the verdict. The judge always imposes the sentence. In appeal, it is not open to a single judge to allow or dismiss the appeal after a hearing on the merits; only the Court, sitting in a panel of three or, in rare cases, five judges may render a final decision in the form of a judgment. Therefore, any agreement reached following mediation at the appellate level must also be submitted to a panel of three judges.

Because the appeal is heard from the record, the parties are generally required to submit a factum summarizing their main arguments. Transcripts of the evidence and exhibits produced at first instance must also be submitted. The time and energy required can quickly lead to astronomical costs. It is safe to say that this is one of the major considerations for parties who choose to opt for mediation, since the mediation process allows them to avoid some of the fees of the appeal.

Let me give you four examples:

Case 1:

The first file dealt with in the pilot program at the appellate level was a relatively simple case. Following a guilty plea, the trial judge convicted the appellant on a charge of possession of a firearm. Shortly after the guilty plea, however, it was revealed that the weapon in question did not meet the statutory definition of a firearm. This was something the trial judge could not have known.

If the file had been handled according to regular procedure, the appellant would have been required to submit new evidence regarding the characteristics of the weapon, along with a factum and a joint record.

However, a meeting of counsel with a judge of the Court of Appeal led to a quick solution. The Attorney General admitted the absence of an element of proof essential to a finding of guilt, and counsel for both parties consented to proceed without a formal oral hearing before the Court. The matter was settled simply, with a judgment rendered by a panel of three judges of the Court. Of course, the judge-mediator, who sat on the panel with the consent of the lawyers, was required to inform his two colleagues that the appeal should be allowed. The judgment therefore acquitted the accused.

Case 2:

The trial judge imposed a prison sentence based on facts submitted by the parties. A few days after sentencing, it became obvious that the judge had been misled with regard to the facts of the case. Neither of the parties, however, was in bad faith.
In the presence of the judge-mediator, the two parties admitted that unfortunately erroneous information had been transmitted to the trial judge. The remaining questions involved the degree of impact of this erroneous information on the sentence that was imposed, as well as the quantum of the sentence that should have been imposed.

Discussions during the mediation session allowed the two lawyers to come to a specific agreement regarding the appropriate sentence, and they presented to the Court of Appeal clear means for resolving the technical issue at hand.

Once again, the dispute was settled simply and quickly. What is more, the accused, who was detained in custody, was not required to request judicial interim release while awaiting the decision of the Court of Appeal.

Case 3:

This is the most complex case dealt with so far in the mediation program at the Court of Appeal.

After a long trial, four guilty verdicts were rendered for four accused. Prison sentences were imposed and an order of forfeiture (*confiscation*) of the profits of crime was issued.

All the accused appealed the verdict. Two of them also appealed the sentence and the order of forfeiture (*confiscation*).

The size of the task required that two judge-mediators preside over the mediation session, which also involved the participation of five lawyers. Much preparation was required for the judges to become familiar with the evidence and to take part in discussions with the lawyers.

The lawyers proposed the following: each of the accused would discontinue (stop) their appeal of the guilty verdict and the order of forfeiture (*confiscation*). Moreover, the two parties appealing their sentences proposed reduced sentences.

The offer to discontinue the appeal was made despite the soundness of the grounds of appeal. The proposed sentences were also reasonable from the perspective of a global settlement. The Court issued a judgment, acknowledging the discontinuance of the appeal, accepting the proposed sentences, and providing reasons for the acceptance. The two judge-mediators consented to sit on the panel at the request of the parties.

This matter would otherwise have required voluminous written submissions and a long hearing. It should be pointed out that, since there was no oral hearing, the judge-mediators asked the lawyers to file written arguments in support of their proposals in order to ensure the transparency of the process.

Now, let us look at an example from first instance.

Case 4:

This was a complex case requiring detailed accounting evidence. The accused was present but remained outside the mediation room so that his lawyer could consult him if need be. All the evidence had been submitted to the judge-mediator prior to the session.

Before mediation, negotiations between the lawyers had led nowhere. The positions of the parties appeared irreconcilable.

The Crown prosecutor summarized the evidence of the prosecution and defence counsel provided explanations. The judge suggested that defence counsel meet with the accused in order to answer the submissions of the prosecution, and this was done. The discussions that followed resulted in an agreement with regard to a guilty plea and a proposed sentence. According to the lawyers, it was clear that the judge's participation in the mediation session enabled the parties to break the deadlock.

WHAT IS TO COME

Does criminal mediation have a future? Clearly, the answer is yes.

In January 2005, the judges participating in the program held their first meeting with the aim of sharing the information collected over the course of the various sessions. Their goal was also to assess the pilot program.

They quickly reached a consensus: while a few modifications to procedure may be beneficial, it was clear that the pilot program has produced more than satisfactory results and should be employed to its full potential. For instance, the judge coordinator of the Criminal Chambers in the Superior Court has estimated that the settlement of 12 trials by jury, within the last eight months, has resulted in a savings of at least 16 months of hearing time.

Over the coming months, members of the Bar Association will once again be asked to participate in consultations in order to share their reactions and provide comments in order to improve the process. Their active participation is to be encouraged, since it appears that the pilot program is not yet very well known among members of the Bar. It will therefore be necessary to provide more information to lawyers. Some lawyers may be reluctant to become involved in a process so dramatically different from the traditional adversarial system of the Canadian criminal law.

Success in this undertaking requires a change of attitude. In light of what has been accomplished in private law, there is no reason to believe that this is an obstacle

impossible to overcome. Though it might seem that implementing a system of judicial mediation was an easy task and that the whole judicial community had been expecting it for a long time, this was far from the case. A strong reluctance—if not opposition—was present in the early days. Such resistance to change was understandable, since the whole community was being asked to adapt in a dramatic way. Through patience, perseverance and education, judicial mediation has found its rightful place within the traditional system.

The judicial mediation system that was established in 1997 at the Court of Appeal of Quebec has expanded and now operates throughout the entire Quebec judicial system. The Superior Court and the Court of Québec both feature mediation systems similar to that of the Court of Appeal but which each follow their own procedural rules. This new system of hybrid justice is now spreading throughout the rest of Canada and is developing in some European and African countries such as Belgium, France, Mali, Madagascar and Morocco. Training courses, specially designed for judges and influential members of civil society, have been given — under the direction of the Quebec Court of Appeal and the University of Sherbrooke — for more than five years. Hundreds of judges and non-judges have followed these training courses in order to integrate the principles of negotiation into their mission of justice.

Let me add that it was a great honour to welcome to Montreal for one of these training programs in October 2005, many Australians and a number of representatives from the Council of Europe.

Thank you

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