

## Presentation of the project

Our organization, whose mission is the collective defence of consumer rights, has long advocated a vision of consumer access to justice within a continuum of services accessible from a single window, which would include access to popularized legal information, to legal accompaniment, to a dispute resolution service, and to an adjudicative body specializing in consumer disputes, all at low cost, quickly and efficiently. We think this is the most appropriate way to ensure consumer access to justice.

Our research project seeks to answer the following question: Is online justice the solution to the glaring problems of Canadian consumers' access to justice? We wanted to determine whether the forum chosen by a consumer affects the outcome of his dispute, and to identify the barriers to accessing justice that are overcome by online dispute resolution, but also to identify the principles of fundamental justice that may be affected by non-traditional dispute resolution methods.

Our report includes a review of the literature on access to justice and alternative dispute resolution, a study of online courts in Canada, a survey of 1,000 Canadians who have resolved consumer disputes out of court, interviews with consumers, and a study of court decisions rendered in 2 Canadian provinces on consumer warranty disputes.

We also report the positions of a few Canadian stakeholders specializing or involved in the field, who commented on the data from our literature review, the analysis of decisions, our consumer survey and interviews, etc., and who also commented on the effectiveness of existing remedies, on the perceived advantages of dispute prevention and resolution methods (public or private) and on the pertinence of establishing a consumer tribunal.

## Access to justice in Canada: concept and status

The concept of access to justice has evolved over the past few decades from a simple concern about access to the courts to a broader concept that focuses on the needs of litigants in any dispute resolution method.

### *La force d'un réseau*

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According to data released by the World Justice Project in 2019, 52% of Canadians experienced a legal problem in the previous two years and 19% of those disputes were consumer disputes. However, 49% of respondents experienced a specific difficulty as a result of their legal problem (e.g., loss of income or employment, or a physical or stress-related illness) and 21% gave up on taking any action to resolve the problem.

Indeed, consumers face a variety of barriers when trying to access justice. Those barriers can be of three types: (i) physical and material (e.g., geographic access, hours of operation, etc.); (ii) objective (including costs, the system's slowness, complexity and formalism, etc.); and (iii) subjective (e.g., lack of access to information, poor understanding of applicable law and the workings of the justice system, power imbalance vis-à-vis merchants, social class, language, stress, etc.).

Unfortunately, the measures to improve access to justice that have been adopted in recent years often involve processes in which dispute resolution is based on compromise, which rarely ensure that consumers get what they are entitled to under consumer protection laws – even public policy laws. Some initiatives are access-to-justice measures that facilitate proceedings, others are alternative dispute resolution processes that allow consumers to resolve their disputes without guaranteeing that they will obtain the protections and remedies provided under consumer protection laws.

In our view, measures to improve access to justice cannot be limited to procedural matters; consumers must also have access to substantive law, enforcement, statutory remedies, etc. The justice system, even when dealing with consumer law and with disputes that may be of relatively low monetary value, must serve to develop applicable law and have a presence ensuring a preventive rather than merely curative effect. By a strong presence, the system established should prevent violations of the law.

In our view, consumers' true access to justice involves:

- Access to information on their rights and recourses;
- Adequate accompaniment at the various stages of the process;
- Quick low-cost access to an adjudicative body;
- Access to a simplified procedure;
- Access to an impartial body that makes decisions in accordance with the principles of natural justice (the right to be heard, the right to impartiality, the right to a fair trial, the right to know the reasons for decisions, etc.).

## **Alternative dispute resolution and access to justice**

Alternative dispute resolution (ADR) breaks down some of the traditional barriers and has undeniable benefits for consumers, even more so when such services are offered online. Simplicity and speed of the process, the search for a mutually satisfactory agreement and less time invested are among the elements that have propelled ADR to the forefront as a means of resolving disputes outside the court system, since the latter involves too many pitfalls for consumers and seems ill-suited to their needs.

However, we are concerned that ADR also has some disadvantages in that it favours compromise over enforcement of the law, even public policy law. These dispute resolution processes may result in consumers often obtaining less than they were actually entitled to, even though they are not able to assess what they are giving up. In exchange for circumventing certain barriers, ADR may well increase the power imbalance between the parties.

When offered online, ADR further lowers barriers to accessing justice and meets some consumer needs. However, online access does not eliminate the disadvantages of traditional ADR, and in fact adds a few more: privacy and confidentiality risks, the widening gap for those without access to the necessary technologies, the absence of human connection (empathy, discussions, decoding of non-verbal, etc.).

While the existence of dispute resolution services outside a public justice system may appear to be advantageous, their existence is also a disavowal of the responsibility of public institutions to administer justice and ensure taxpayers' access to it.

## **Consumer tribunals as a tool to improve access to justice**

In a 2011 study, Union de consommateurs studied nine consumer tribunals established in foreign jurisdictions, the oldest tribunal having been established in India in 1986. We thought it appropriate to update our findings.

Most of those tribunals are administrative and empowered by specific laws. They have common attributes, such as a simplified procedure, prohibition or limitations on lawyer representation. Several have a system in place that encourages out-of-court settlements and consumer accompaniment (assistance, guidance and information, or even representation by a consumer advocate). All provide for a final step that will result in a decision by a judge if necessary.

In general, the jurisdictions studied in 2011 have changed relatively little, with the exception of the Australian tribunal, which has undergone a significant restructuring. While the advantages of the specialized tribunals identified earlier are still present, our study highlights several problems in the foreign tribunals, but that does not negate the pertinence of such tribunals.

In contrast to those jurisdictions, we note that there are no dedicated consumer tribunals in Canada. There are also few ADR services available exclusively to consumers. We have identified a few "traditional" service offerings and a few virtual tools (e.g., the PARLe platform of Quebec's Office de la protection du consommateur and the Mediation Service of the Small Claims Division (Quebec+Ontario)). The service offerings identified are mostly made by public entities.

## **Virtual tribunals: concept and prevalence in Canada**

We have identified only two virtual tribunals in Canada. However, the concept is not embryonic in this country. There is rather a small revolution.

Following a pilot project launched in 2012, the Civil Resolution Tribunal (CRT) became operational in British Columbia in late 2016. This fully online tribunal initially dealt with condominium disputes; its jurisdiction has since been expanded to include any civil claim under \$5,000.

The second tribunal that operates exclusively online in Canada is the Condominium Authority Tribunal (CAT) in Ontario. While this tribunal does not deal with consumer disputes, its operation is transferable to them. In operation since 2017, the tribunal was created in collaboration with the Cyberjustice Laboratory of the University of Montreal and uses the same PARLe platform as Quebec's Office de la protection du consommateur du Québec for its dispute resolution service.

Those online tribunals offer major advantages to users, in a way likely to considerably reduce several barriers to accessing justice – access to the case at all times, simplified procedure, no need to travel, lower costs, assistance and conflict resolution services. However, accompaniment of the litigant seems to be lacking; the barriers to accessing justice that result from the imbalance of knowledge and resources, and are inherent in consumer disputes, are therefore not ruled out.

The fact that opening a case ensures that it can proceed to resolution without the need for the user to make new registrations or notifications is another major advantage.

In sum, online tribunals offer many potential benefits to users, and they succeed in lowering many of the barriers that prohibit or complicate access to justice. To ensure that this increased access leads to justice, however, it is essential that parties who need competent and adequate support and accompaniment have access to them. It has yet to be demonstrated that these dispute resolution methods, however useful they may be in relieving congestion in the courts, are equally beneficial to all users; without the necessary knowledge, information, resources or accompaniment, there is a high risk that some users will only have access to discounted settlements rather than justice.

## **Analysis of the decisions of various courts**

We studied 215 decisions rendered by the small claims court divisions in British Columbia (40) and Quebec (175) regarding disputes over warranties in consumer contracts.

In that analysis, we searched for trends in the courts' application of certain criteria that would give decisions a certain predictability, and for dispute handling standards that would guide the application of procedural justice and the respect of consumer rights.

Our research shows that in the majority of cases, when consumers take legal action, they are successful in enforcing their rights and getting what they are actually entitled to. We also note that businesses are likely to benefit in some way from the obstacles consumers face in accessing justice. Merchants' practices often shift the burden of enforcing the C.P.A. onto the consumer, who is thus responsible for knowing the law and his rights and going through the legal process to enforce them. In cases where the merchant denies the existence of a warranty other than a conventional one, the warranty's application depends entirely, in Quebec, on court intervention; the dispute is unlikely to be settled amicably (by ADR) in a manner that respects the consumer's rights. But the problem goes deeper: Why would a consumer go to court if he has been persuaded that he has no rights to assert?

Between the inertia of consumers who are discouraged by the journey and consumers who are more likely to drop out of the recourse, businesses benefit from the difficulties experienced by consumers in the justice system. Businesses, on the other hand, don't lose much by letting cases drag on; they will face up to their responsibilities when the consumer has completed his lawsuit, if he does so. The system thus seems to accentuate an imbalance between the parties that it was intended to correct.

## **The Canadian consumer perspective**

We conducted a survey of 1,233 Canadian Internet users who had encountered a consumer dispute in the past five years and who had used an ADR process to try to resolve the dispute. The purpose of this exercise was to address issues related to the search for information and to the perceived benefits and outcomes of the processes chosen to resolve disputes. We also wanted to learn about the respondents' perceptions of the barriers to accessing justice that they felt had been overcome by using a resolution process. In order to further explore some of the survey items, we conducted interviews with selected respondents.

While the consumer responses provided some interesting insights into their perceptions, they also revealed a certain confusion about the different processes used. Consumers don't seem to make a clear distinction between mediation and negotiation or between a formal and an informal process.

The use of one alternative dispute resolution process rather than another does not appear to be a conscious and informed choice by the user, but rather a reaction to a proposal made by some decision-making body. Although ADR is highly valued by consumers who have used it, many of the reasons given for this are related to the traditional courts' failings (uncertainty of the process, long delays, poor knowledge of the law and remedies, etc.).

We also find that, even when it comes to ADR, consumer accompaniment seems to be lacking.

Online ADR seems to appeal to consumers, who see it as a more suitable method for consumer disputes.

Consumers are therefore satisfied with the process, but also with the results obtained. However, this overall observation needs to be qualified; consumer satisfaction is clearly tinged with a certain degree of defeatism. Users seem to find the outcome of the ADR process satisfactory not because it applied the law or resolved the dispute as required, but due to other considerations: Taking the courts' traditional route was uncertain, time-consuming, costly; consumers don't have the necessary knowledge to go to court, etc. Consumers are satisfied with the ADR process even though they believe they would probably have obtained a more favourable resolution in court.

Some will say that "the worst settlement is better than the best trial." However, the information gaps, the barriers to accessing justice and the deficiencies in the justice system are what make ADR seem preferable, rather than the process itself or the results it generates.

### **Observations of some experts**

To obtain a different perspective, we presented the highlights of our research to some 50 stakeholders from a variety of backgrounds (consumer rights organizations, government consumer protection agencies, experts, private companies and academics). Attempting this exercise in the midst of the COVID-19 pandemic proved to be very challenging and we were unable to obtain a significant number of participants.

Despite a reminder eight weeks after the initial mailing of the consultation document, we only received responses from three stakeholders – Laval University professor Marc Lacoursière, the Cyberjustice Laboratory at the University of Montreal and the Civil Resolution Tribunal. Virtual interviews with those three stakeholders were conducted in the fall of 2021.

Despite the few stakeholders who responded to our consultation, we are able to draw some conclusions.

First, the three stakeholders agree that consumers experience real difficulties in accessing justice. However, what constitutes justice, to which everyone demands access, does not appear to be unanimously agreed upon. For some, it's a litigant's feeling that he has access to adapted tools and to a quick resolution of his dispute without having to go to court. Others have a more holistic approach to the concept of access to justice. In that perspective, the human-centred approach is central – litigants' needs are taken into account at every stage of the process adopted to resolve disputes, a process that must ensure great flexibility and lower as many barriers as possible so that the litigant can have the best chance of obtaining what he is entitled to.

Although respondents seem to feel that ADR is a viable option for improving access to justice – or at least for facilitating the resolution of a dispute – it seems clear from the comments of two of the respondents that ADR must be part of a process that can, in the absence of a settlement, result in a binding decision.

Lastly, the establishment of a tribunal dedicated to consumer disputes does not appear to convince all the stakeholders. While a system similar to the CRT but specializing in consumer disputes is proposed in our research, we note that this specialization seems to create a certain unease from the outset. There are also concerns about the effects and costs of such a project. On the other hand, all the stakeholders consider that a tribunal's online operation is a major attraction that could lower a multitude of barriers to accessing justice.

## **In conclusion**

The situation regarding access to justice remains dismal despite the many improvement measures that have been implemented over the years. While those measures have had a significant impact, it is clear that there is still a long way to go. The various waves of reflection on access to justice have helped shape this concept and have led to the adoption of innovative measures such as small claims divisions and class actions. It appears that a new era of access to justice is taking shape. This new definition seems to favour quick resolution of litigation, even if that resolution must take place outside the courts or is a compromise on the rule of law.

Access to justice, even in its most hackneyed conceptions, cannot be seen only as the road to a good destination where one can obtain a resolution to a dispute. Access to justice is a continuum, and each part of that continuum, in addition to being well-oiled, must satisfy the principles of natural justice.

In our view, it is important to be wary of processes that undeniably break down barriers but that will not necessarily lead to a solution that respects consumers' rights. It is true that a settlement can be obtained more quickly through a facilitated negotiation, breaking down the barriers of time, intimidation in the



face of a complex process, etc. Has a consumer who has obtained a settlement obtained justice? Or did this consumer, in order to remove barriers to accessing justice, also have to forego justice in favour of a settlement? A settlement that may have forced him, whether he knew it or not, to do what a public policy statute prohibits, i.e. to waive certain rights conferred to him under that statute in order to protect him.

We also think it important to be wary of the "consumer satisfaction" variable. By explicitly refocusing the concept of access to justice on the user and his experience in the justice system, there is a risk that the ways of measuring access to justice initiatives will shift from the objective to the subjective. The satisfaction level of a consumer who did not know exactly what he was entitled to or what the chances of success were should never be considered a step forward in access to justice, if it is also known that the consumer has been cheated and that the only real winners in the process are the merchant who has kept his advantages to the end and the justice system that has been relieved of its burden by the consumer's uninformed satisfaction. While it is essential to take into account the user's feeling, we think that's only one of the elements to be taken into account, but not the intended end.

The benefits of alternative dispute resolution are clear. The private sector is also interested in this emerging service. However, we have identified few private mediation or negotiation services offered exclusively and tailored for consumer disputes. This may confirm a hypothesis we had posed: The generally low monetary value of consumer disputes is not very profitable for a private company that withholds a portion of the eventual settlement amount to finance itself.

The public sector appears to be making the same bet – the provision of expeditious, out-of-court, fully virtual dispute resolution services. The benefits of alternative dispute resolution are thus combined with the advantages of digital technology, so that a multitude of barriers to accessing justice are likely to be lowered when ADR services are offered online. Others have gone even further, offering tribunals that operate entirely online, and so far appear to be meeting the needs of litigants and breaking down a significant number of barriers while ensuring that the principles of natural justice are respected.

The idea of a specialized consumer tribunal, similar to small claims divisions and occupying physical space in the justice system, does not seem appealing to Canadian provincial governments responsible for administering justice. But we hypothesize that the advantages of ADR could be made available to consumers by integrating those advantages into the legal proceedings of a specialized consumer tribunal that would be entirely online. In some provinces, this may be a feasible option; ADR pilot projects appear to be meeting consumer needs and the legal community's concerns, and there is legislation in place that would allow for the experimentation of a virtual tribunal<sup>1</sup>.

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<sup>1</sup> See for example article 28 of Quebec's new Code of Civil Procedure (*Code of Civil Procedure*, CQLR, c. C-25.01), which provides that the Minister of Justice "may amend a rule of procedure, or introduce a new one, for a specified time not exceeding three years, for the purposes of a pilot project conducted in specified judicial districts."

According to a well-known principle, justice must not only be done but must be seen to be done. An emerging trend is that the satisfaction level of a litigant who has resolved his case through ADR, or his sense or perception of justice being done, should be a key factor in assessing the success of this approach to improving access to justice. We think this trend calls for great caution. One might paraphrase that justice must not only be seen to be done but must be done. If the road being paved for the consumer while removing obstacles in his way does not lead to justice, then we may be on the wrong road, whatever he thinks.

It should be unacceptable to us that a consumer still has to choose the solution to a dispute on the basis of barriers to enforcing his rights rather than on the basis of the case's strengths and weaknesses. It should be unacceptable to us that merchants, for whom those barriers do not apply or are often not as significant, still have an advantage in these dispute resolution processes.

Only in a process that further reduces the imbalance of resources and means between consumer and merchant can we consider that we have promoted access to justice. A consumer who has to choose between, on the one hand, agreeing to settle a dispute without knowing as much as the other party about his rights, his remedies, his chances of success, etc., and, on the other hand, struggling to win his case while facing the barriers he was trying to avoid, is too much at risk of making a fool's bargain.

In our view, only by ensuring that a single adjudicating body takes charge of the case that a consumer has taken the trouble to file – from the moment of filing to a complete resolution – will we offer the consumer a truly useful recourse. To ensure true access to justice in such a forum, we should also ensure that obstacles are minimized at every stage and that the consumer is accompanied at all times so that he can make informed decisions based on available options.

The following recommendations pertain to the establishment of such a tribunal.

## RECOMMENDATIONS

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- Whereas significant limitations on access to justice remain for consumers;
- Whereas the various measures adopted over the years to improve access to justice have failed to substantially and effectively reduce the constraints posed by those barriers;
- Whereas, despite their well-identified benefits, ADRs have significant limitations and are likely to impose compromises on the consumer that may be ill-advised;
- Whereas ADRs provided by a public entity and integrated into the justice system appear to better apply the principles of natural justice, ensure the participation of litigants and be more responsive to the needs of consumers;
- Whereas a consumer who fails to reach an ADR agreement will face barriers to accessing justice that will be amplified by the process already undertaken;
- Whereas the accumulation of those barriers is likely to exert undue pressure for settlement;
- Whereas, for ADRs to function optimally, it is essential that an integrated process allow for an independent third party to be called upon, in the event of failed negotiation/mediation, to adjudicate the dispute by rendering a decision that ensures the application of the law and the principles of natural justice;
- Whereas foreign experiences demonstrate that tribunals dedicated to consumer disputes promote consumer access to justice, despite the difficulties inherent in the "traditional" justice system;
- Whereas information alone is not sufficient for the consumer and the latter needs to be accompanied throughout the process;

**Union des consommateurs recommends that the provincial governments responsible for ensuring access to justice study the possibility of setting up a tribunal dedicated to consumer disputes that integrates alternative dispute resolution methods into a process that will ultimately allow the consumer to obtain an enforceable decision and that will guarantee him an accompaniment throughout the process;**

- Whereas ADR offered online appears to break down more barriers to accessing justice;
- Whereas virtual tribunals appear suitable for the settlement of consumer disputes;
- Whereas the experience of the first virtual tribunals in Canada seems promising;

**Union des consommateurs recommends that provincial legislators consider launching a pilot project to create a virtual tribunal dedicated to consumer disputes;**

**Union des consommateurs recommends that various stakeholders – academics, the judiciary, consumer rights organizations – be invited to participate in the development of such a tribunal.**

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**Version française disponible.**

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