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ENVIRONMENTAL INFRINGEMENTS DISPUTES SOLUTIONS IN BRAZIL AND CANADA

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ABSTRACT

The purpose of this paper is to verify some possibilities applicable in Brazil and Canada, with literature review from both countries, in which the peaceful settlement of disputes is used in the solution of environmental conflicts. The question that arises is whether the two countries apply this formula in order to make a proper justice and whether laws are in accordance with that purpose. In Brazil, Resolution n. 125 of the National Council of Justice and Joint Normative Instruction n. 2 (2020), allow the use of alternative solutions of controversies. Canada also allows the provinces the power to facilitate this practice in order to assist the Judiciary to establish justice more specialized. This research is based on Canadian experiences that are compatible with the Brazilian legal system, and that can offer examples of offense to the environment. In light of the research, the work provides a glimpse of the advantages of alternative means such

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as extrajudicial settlement of disputes, which were resolved as mere "tort" in common law in Canada. In this study there are systemic reflections, with a focus on comparative law. The final considerations highlight how these mechanisms generated better solutions, increasing the efficiency of justice of countries involved.

Keywords: Brazil; Canada; environment; Judiciary Power; mechanisms for non-judicial dispute settlement.

SOLUÇÃO DE CONTROVÉRSIAS EXTRADUDICIAIS AMBIENTAIS NO BRASIL E CANADÁ

RESUMO

Este trabalho objetiva verificar algumas possibilidades aplicáveis no Brasil e no Canadá, com revisão da literatura de ambos os países, em que a solução pacífica de controvérsias é aplicada em conflitos ambientais. A questão que se coloca é se os dois países aplicam esta fórmula para fazer uma justiça adequada e se as leis estão de acordo com esse propósito. No Brasil, a Resolução n. 125, do Conselho Nacional de Justiça e a Instrução Normativa Conjunta n. 2 (2020), permitem o uso de soluções alternativas de controvérsias. No Canadá permite-se também às províncias a competência de viabilizar essa prática com o objetivo de auxiliar o Judiciário a estabelecer justiça mais especializada. Esta pesquisa é realizada a partir de experiências próprias canadenses que têm compatibilidade com o sistema e tradição jurídica brasileira, e que podem oferecer exemplos de ofensas ao ambiente. Em face da pesquisa, o trabalho permite vislumbrar as vantagens dos meios alternativos como solução extrajudicial de controvérsias, que antes eram solucionadas como simples "tort" no common law, no Canadá. Neste estudo há reflexões sistêmicas, com enfoque no direito comparado. Nas considerações finais se sublinha como esses mecanismos geraram melhores soluções, aumentando a eficiência da justiça nos países envolvidos.

Palavras-chave: *Brasil; Canadá; meio ambiente; Poder Judiciário; solução extrajudicial de controvérsias.*

INTRODUCTION

This paper aims to discuss the advantages on the application of alternative solutions to environmental conflicts and to investigate whether this approach could be used by the Canadian and Brazilian legal systems. These solutions may adopt mechanisms for conciliation, mediation, and out-of-court dispute resolution. The discussion now proposed will, in principle, focus on mediation as the correct formulation proposed by the normative systems as an alternative due to the congestion of the Judiciary and the need to create rules in which the parties themselves could resolve their conflicts with extrajudicial solutions.

Despite differences in legal systems around the world, an assessment of existing options available in some Canadian provinces, since the local legislation allows, is studied here. In Brazil, these dispute settlement formulas have been available for a considerable time. These mechanisms can employ mediation, negotiation, and conciliation, consisting of self-imposed methods in which the parties ask for solutions that can arise from a better interpretation of the existing problem.

Environmental infractions can be constituted by means of *commissive* or *omissive* acts that may violate legal norms of use, enjoyment, promotion, protection, and conservation of the environment. There are formulas indicated by law to impose different types of penalties on those who commit infringement in the face of the environment. That is certain that the violations must be investigated under the rules to, afterwards, impose different administrative sanctions, such as services for the provision, improvement and recovery of the quality of the environment based on the conversion of the corresponding monetary value.

The federal administrative process for investigating administrative infractions for conducts and activities (omission- a failure to fulfill the legal obligation) harmful to the environment is guided by the principles that govern Public Administration and the sanctioning administrative law, as well as the technical quality of the procedural instruction. The request must be made in the environmental infraction assessment notices. Given this possibility, here is a question: could this convolution be a way of making the sanction less severe and thus reducing its sanctioning power? Moreover, is it possible to find the method in another country?

This possibility under the above-mentioned regulations does not generate a subjective right to the transgressor, as a rule; however, it depends on

the discretion of the administration to decide or even agree whether or not a simple fine could be converted into the provision of services as a penalty. This decision must meet certain criteria of the authority itself.

The question to be discussed here is how these two countries deal with environmental cases and how mediation and conciliation, as the two most common methods of alternative dispute resolution (ADR), could aid the Judiciary in its duties. Jurisprudence and environmental protection rules were herein mentioned as basic references to this paper. To this end, a search for legislation, documents, political analyzes and articles on the subject will be carried out in the specialized bibliography. The deductive approach method was applied, starting from a broad perspective, in order to investigate possible solutions appropriately.

1 SOME PARTICULARITIES OF BRAZILIAN AND CANADIAN NORMS

Given the fact that the environment is characterized by having a very fragile structure, the deterioration of global life-support systems raises many concerns. Environmental goods have been protected under the provision 225 of the Brazilian Constitution and, according to Morais and Saraiva (2018, 11-31), in view of the order of values that arose at the beginning of this century and in light of the existence of a future, the need for adequate ecological maintenance was realized, whose purpose will establish the foundations of the State of Environmental Law.

The authors also propose a formula capable of rethinking of the social pact and laying the foundations for an entirely new statement: the "*Socio-Environmental Rule of Law"*, capable of promoting inclusive development, also establishing mechanisms aimed at "*eliminating the contradiction between the social and the environmental*".

The protection of the environment included not only the responsibility of the individual but also the companies in face of their acts that they commit against this subject. There are currently a reasonable number of rules to protect local ecosystems. The Brazilian Constitution, in the opinion of Piva (2000, p. 111), must presuppose a convergence between economic interest and the environment. This is where the so-called sustainability resides, which must be seen as essential to the true good consistent in a balanced environment.

It is true that the standards are important in the protection of the

environment. For this reason, Milaré (2013, p. 170) stressed that only laws and regulations are not enough. In this perspective, all humankind has the responsibility to make them effective. It is necessary, as the author reiterates that the norms leave the ecological rhetoric and start to practice. The significant problem of Brazilian legislation remains on its non-applicability. This imposes rules that become effective and those responsible punishable in the face of concrete environmental violations. In this context, it is herein questioned if the possibility of conversion given by the norm is really as a punitive measure in the face of the great imputability observed today in terms of environmental infractions.

The Rio Declaration of 1992, which both Brazil and Canada are parties, is only considered as a non-binding legal instrument with global effects. As Antunes affirms (2016), "it is a political statement". Thus, the principles set forth by it are not binding according to International Environmental Law. Besides, protection of the environment within the context of effective international rules, including soft law, lead to recognition of the judicial and non-judicial precedents which make notable contributions to modelling for the protection of the environment within the context of International Environmental Law (TAYEBI *et al*., 2016). In Brazil, Law n. 6938/1981 was the first step to establish rules and regulations for environmental protection. This law created the National Environment System and the National Environment Policy. It also established the need for environmental licensing and some penalties for those who violate environmental standards. This legal instrument, conceived in terms of the 1972 Stockholm Conference, has a biocentric vision, removing the human from the center of all normative protection and offering protection to all forms of life (RODRIGUES, 2016).

Concerning environmental problems and their possible impunity Bugalho (2005) believes that the simple observation of environmental damage or even the risk of materializing must be a reason for immediate action by public authorities in taking administrative or judicial measures. Although this need exists, coupled with flexible mechanisms for environmental sanctions, it is not improbable, according to the author, to observe that there may be more transcendent reasons that may question the model that avoids the production of environmental damage in view of more accelerated growth. However, this formula, as noted, could be crucial for economic development, but it does not bring wealth without bringing poverty and deteriorating the quality of life.

The protection of the environment is exceptionally peculiar, as it is a necessary asset for present and future generations, it is essential for all human maintenance itself. However, as Milaré (2013, p. 231) rightly underlines, the law cannot stop at inflexible dogmas that can generate unavoidable situations, incapable of producing a solution. According to the author, "the legal system seeks facts; facts seek the protection of the law and thus cannot be separated". In this reasoning, environmental law cannot depart from the factual reality that it intends to order. In environmental management, which the rules are dedicated to the creation of technical, legal, administrative, economic, and social regulations, environmental law could regulate all aspects of life accordingly.

In Brazil, besides the article 225 of the Federal Constitution of Brazil, it could be seen other provisions dealing with the environment. This human right is assured as explained below:

> There is the exclusive competence of the Union to legislate on water, *inter alia*, in Article 22, section IV. The common competence of the Union, States, Federal District, and the municipalities in relation to various matters relating to the natural, artificial and cultural environment, especially section VI, which refers to protecting the environment and combating pollution, as well as the responsibility to protects forests, fauna and flora (section VII). Another competence it to legislate in a concurrently way. This means that the Union, the states and the Federal District, except the municipalities has competence to legislate on "forests, hunting, fishing, fauna, nature conservation, soil protection and of natural resources, environmental protection and pollution control" (item VI). Nevertheless, we cannot disregard the competences of the municipalities, described in article 30 of the Federal Constitution (OLIVEIRA; ESPÍNDOLA, 2015).

In this scenario, it is essential to note that the environmental standards are not limited to a restrictive position, which does not contemplate possible solutions to concrete reality given the situation. The Brazilian Institute of the Environment and Natural Resources Renewables – IBAMA cannot impose administrative sanctions without express legal provision.

Some federative competences to legislate or impose fines, as in Canada, are divided amongst the federal entities, as indicated below.

There are specific limits to the possibility, for example, of avoiding the imposition of infractions and fines. However, the legislation is clear in this matter, and the rules shall not be only preventive but shall be repressive as well. On the other hand, considering the possibility of factual situations and under the conditions permitted by law, it is possible that there is some flexibility, especially in view of the fact that there are factual situations in

which the solution could face another fundamental human right.

In Canada, it could be verified that the power to elaborate on different laws regarding the environment is shared between federal and provincial governments. "The environment is not named specifically in the Canadian Constitution, which means that neither the federal nor provincial governments have exclusive jurisdiction over it" (BLAKE, CASSELS & GRAIDON, 2019). The Canadian Constitution (2020) gives the federal government competence to legislate about many environmental issues. The federal residuary power to grant "Peace, Order, and Good Government of Canada" also justifies environmental legislation.

There is in Canada the Environmental Violations Administrative Monetary Penalties Act (SOR/2017-109), a regulation that makes feasible enforcement action against those who have failed"[…] to comply with a condition of a permit, license or other authorization issued under an Environmental Act, other than the Canadian Environmental Protection Act, 1999 or the Greenhouse Gas Pollution Pricing Act*"*. It means the imposition of a ticket, penalty, conviction or injunction or the use of environmental protection alternative measures, in the event of non-compliance with these rules. The violation must have resulted in damage to the environment; the amount of environmental damage must be calculated according to many combinations provided in several column called "sand tables" provided in that law; the penalty corresponds to the category of the offender and the type of violation committed.

Blake and Cassels & Graidon (2019) affirm that regarding the environment and the interactions of business "As a consequence of the broad ambit of environmental matters and the concurrent jurisdiction of the federal and provincial governments, there is a proliferation of legislation which regulates different aspects".

The competence to legislate or impose penalties in both countries is granted to the federal existing entities with some particularities. In Brazil, the general rules related to the environment belong to the Union, but subnational entities are entitled to create some rules, as well. In Canada there is a competence distributed among the federated entities. From a legal perspective, it is worth noticing that many activities could be considered harmful to the environment. If a legal norm prescribes the conduct as a criminal act or even subject to penalties, the transgressor will have rights of defense, as will be seen below or even the impact could be object of possible mitigation.

2 THE USE OF ALTERNATIVE DISPUT RESOLUTION (ADR)

When an environmental damage is committed, herein considered as an adverse change in the quality of an environmental good, conflicts could be arisen between the transgressor and the collectivity. This environmental incident considered unlawful or even a crime must be resolved between the polluter and the Public Administration, interested in the repression of this illicit or the crime committed. Brazilian jurisprudence considers that when applying the environmental rule, for instance, it is not acceptable the invention of something that is not, expressly or implicitly, in the legal device or norm; however, if it would be attributed a plurality of possible meanings, it should be chosen the one that best guarantees essential ecological processes and biodiversity (STJ, 2019).

Self-composition as a means of conflict resolution comprises the subsystems of negotiation, conciliation, and mediation. Conciliation is a voluntary dispute settlement process in which a third party seeks dialogue between the parties from their respective points of view and provides a possible solution; the mediation is also an attempt to reach a peaceful resolution, where a third party is looking for it, as well. In conciliation the third party has an active interaction in negotiation. In Brazil, the Environmental Conciliation Center makes a preliminary analysis of the assessment in a reasoned opinion and sent it to the Conciliation Hearings Conduct Team – ECAC. The offender, by his own will, may participate in the hearing (INC 2, 2020).

The need for another kind of access to the civil system has been recognized by the Supreme Court of Canada. This new form of dispute resolution should create an environment that promotes timely and affordable decisions. The court has stated that: "[…] while going to trial has long been seen as a last resort, other dispute resolution mechanisms such as mediation and settlement are more likely to produce fair and just results when adjudication remains a realistic alternative"(2014, SCC 7).

The current time supports the use of this form of dispute settlement. In this regard David Outerbride (2020) understands that due to a material change in many essential aspects, in Canada, associated with pursuing a litigated outcome, there are situations that a litigation could take considerable time to be resolved. Besides, there is no guarantee of a good outcome for the parties involved […]. This would be the right moment to decrease

legal spending and postpone litigation activity with the employment of these alternative mechanisms.[4]

In Brazil, this procedure was indicated as the best extrajudicial solution, and it should be adopted in a complementary way to the process (VASCONCELOS, 2008). The author pointed out six essential characteristics of ADR: it is a procedure that could be adopted by a judge himself or by an authorized person of the court. The second point was that this model seeks an agreement, a satisfactory way to end the dispute. The third characteristic is revealed in the fact that the conciliators are not chosen by the parties since they are part of the board and perform this function. The fourth would be the posture adopted by them in order to adopt a hierarchical ancestry during the sessions. The fifth peculiarity is that in conciliation there are no previous or incidental interviews; the sixth and last one refers to the particularity of the conciliators to advise, warn and induce the parties to an agreement.

Otherwise, in mediation, the perception of the parties and the problem under dispute becomes the central point. The decision will be taken by the parties in a consensual and joint manner. It has nothing to do with the waiver of rights or any other way that any submission by one of the parties can be envisaged. This formula is based on dialogue in order to expose what happens in the face of litigants. It also indicates in an objective way, the restoration of the relationship and the harmonization of interests. Third-party intervention is punctual, and the legal decision comes from the parties themselves.

According to Bacellar (2016), the mediator has a passive position concerning dispute settlement. Its action aims to expand the range of options and interests to make the parties understand the common benefits and, in this way, find consensual solutions based on the proposals presented to obtain a mutual understanding and exchange of advantages.

The Resolution CNJ 125 (BRASIL, 2010) gives priority of the Judiciary to ensure that all citizens have a peaceful solution of conflicts by appropriate means, according to their peculiarities and nature. Besides, it must maintain an answer to already established conflicts and also offer ways of conciliation and mediation and provide adequate guidance to all.

4 Considering France as possible paradigm for Canadian legislation to solve environmental issues, according to Desdevises and Suaud (2015), the terms mediation and conciliation are used. Mediation would be a conventional, non-decision-making process in which an impartial and independent third party's mission is to establish conditions of communication between the parties so that they can resolve the dispute by themselves. Conciliation is treated as the method by which a third party, considering the subjective aspects of the parties involved and the legal rules, will propose solutions for the parties.

Alternative Disputes Resolution are highly recommended by the Civil Procedure Code (BRASIL, 2015) in force to establish a solution through a prior hearing before the start of the process. This step is mandatory; however, it may be waived by the parties in the first phase, given the particularities of the situation. This stage, if it succeeds, should contain decisions by those involved. In this sense (DIDIER, 2015) there is no reason to consider this stage as a diminish freedom in the process, especially given the reality that freedom is the foundation of the Democratic Rule of Law. In this context, there is a tendency to expand the limits of private autonomy in the procedural regulation itself and why not in the resolution of disputes involving unavailable rights. In fact, in the international context, environmental rights have individual and group perspectives. An individual right gives each environmental destruction victim the right to prevent all environmentally destructive actions and abstain from such actions himself. A group right is that which includes governmental duties in international cooperation or aid to solve global environmental issues (POURHASHEMI *et al*., 2012).

The inter-party regulation of the process, according to Barros, Caula and Carmo (2016), brings new possibilities to mediators; in the sense, that it is possible to establish innovative procedures because of the conventional standard methods. However, this possibility, which may even bring new subjects and deals in the process, should not be overlooked in observance of the principles of reasonableness, legality, proportionality, as well as meeting the social ends and requirements of the common good. From this general procedural negotiation clause, the parties gain authority to decide how the process should proceed. Procedures regarding environment conciliation in Brazil the transgressor may waive the right to participate in a conciliation hearing, by written declaration (INC 2, 2020).

Didier (2015) emphasizes that the Civil Procedure Code (BRASIL, 2015)was established in order to stimulate the solution of the conflict by self-composition, because:

> a) dedicates an entire chapter to regulate mediation and conciliation (arts. 165-175); b) structure the procedure in such a way as to make an attempt at self-composition as an act prior to the defendant's offering of the defense (arts. 334 and 695); c) it allows judicial ratification of an extrajudicial agreement of any kind (art. 515, III; art. 725, VIII); d) allows, in the judicial agreement, to include matters foreign to the litigious object of the process (art. 515, §2); e) allows atypical procedural agreements (on the process, not on the subject of the dispute) (art. 190).

Another sociocultural movement pointed out as an incentive for the adoption of alternative means was the so-called "counter-culturalism" (FARIA, 2007) observed in the sixties, in which the authorities were challenged, preaching values of individualism, populism, laissez-faire and egalitarianism. This cultural environment proved to be a facilitator of "community means" for conflict resolution, encouraging mediation and conciliation. The anti-authoritarianism, anti-intellectualism and community realization verified in the movement generated disgust with the imposed decisions, added to the idea that formal legal institutions, including the State Courts, would be mechanisms for maintaining the power of the elites.

Nevertheless, conciliation and mediation have proved to be adequate to resolve certain types of controversies. These forms are taken depending on the nature of the conflict, especially for its peculiarities. The Judiciary could not itself bring social peace to many relationships, as the solution is based on facts collected and conducted by the judge. It does not mean pacification, as there will always be an unsatisfied part.

From Bacellar's point of view (2016), access to the just legal order, in its most authentic sense, is found in the solution of conflicts, whether outside or within the Judiciary. The author assumes the existence of innumerable doors in the solution of a conflict composed in a structured way so that the opening of one of them does not compete with the opening of another. Therefore, in today's reality, it is important to employ the most appropriate methods, those that best fit the existing conflict of interest.

The environment is a right, in principle, considered unavailable. The Law n. 13,140 (BRASIL, 2015) prescribes that it may be the object of these peaceful forms of dispute settlement that it is a conflict characterized by available rights, also those that admit some kind of transaction.

As Passos de Freitas, Yaguissian and Cardoso (2018, p. 82-83) stated, once rights are available, the parties certainly have much greater freedom in building a solution. Furthermore, it does not remain bound by legal criteria, and the mediator has greater freedom to conduct a solution. Unavailable rights, once mediated, must be taken with greater care to obtain a final solution to the dispute. Regarding the right to environment, which involves several rights and complexities; mediation can prove to be of better application than the traditional judicial process, as long as there is a consideration in the solution and environmental protection is positioned as a fundamental element in the solution.

As mentioned above, the Resolution n. 125 (CNJ, 2010), the primary

function of this normative act would be the creation of alternative methods of dispute settlement, with a focus on the definitive resolution of conflicts. Several alternatives were promoted through this standard; in art. 6th, the Judiciary Power has granted the creation of public policies in favor of the consolidation of that policy. It was suggested that the Permanent Nucleus of Consensual Conflict Resolution Methods be created, composed of magistrates (retired and active) and civil servants, all with the competence to train magistrates and civil servants to manage procedures for the composition and to enable mediators and conciliators. In this sense, the courts were given the duty to create the CEJUSCs – Judicial Centers for Conflict Resolution and Citizenship. These would be units of the Judiciary specialized in serving the citizen, as well as conducting and administering the conciliation and mediation sessions.

On the other hand, it is possible to the transgressor request the conversion of a fine to the Environmental Conciliation Center, during the environmental conciliation hearing; or to the judging authority, until the first instance decision; or even to the higher authority, until the second instance decision (INC 2, 2020). For Moore (2014), mediation is the process in which a third party, as a rule not involved in the dispute, provides new perspectives of dispute settlement in order to help the parties to resolve the dispute.

Based on the Brazilian experience on extrajudicial settlement of controversies on environmental conflicts and considering the normative, the environmental infraction procedure can be carried out before a conciliation nucleus. However, under the terms of the normative act, as mentioned above, conciliation makes it possible to commute the penalty not only before the Environmental Conciliation Nucleus but also before the first or second-degree authority. The experience of Canada in this kind of resolution will be object of the next chapter.

3 CONCILIATION AND ENVIRONMENTAL PROCEDURES IN CANADA

In Canada, the dispute settlement system exists and may be used in terms of dealing with nature in peculiar situations and it was pointed out just one single method that could be adjusted with this same procedure and context. One of the main regulations regarding the recognition of the dispute settlement in the environmental matter is the Environmental Protection Act of 2002. According to article 105 (9):

> The member of the executive council and a person who is a party to a compliance agreement may, as a term of that agreement, agree to an alternative form of dispute resolution where a term or condition of that agreement is in dispute, provided that the alternative resolution method shall occur and be completed within the time during which that agreement is in effect, and(a) where a resolution of the matter occurs within the required time, the terms of that resolution shall be incorporated into the compliance agreement; and(b) where a resolution of the matter does not occur within the required time, the compliance agreement shall be considered not to be in force (SNL 2002).

If private individuals have to find a way to resolve by negotiation pollution problems, according to Canadian law, that follows the major UN Charts and documents, the system of Common Law develops two key principles to solve such problems. The system provides "a tort" in a way that environmental law is the "nuisance action". It is the solution found long before Confederation. It could be understood that the landowner is entitled to sue another who injures him or create some kind of annoyance, that could cause "physical injury to neighboring land or substantially and unreasonably interferes with the use and enjoyment of neighboring lands". The second kind of tort has brought from the leading case *Rylands* v *Fletcher* (FRASON; HUGHES, 2013). In this case, it was established the principle that "people who bring dangerous substances onto their land and allow them to escape are strictly liable for resulting damages".

On the contrary, given the frequent use of these environmental goods by a human, there would be no reason to prohibit the use of certain products due to their inevitable impact on the environment. Otherwise, limitations on its use must be established in order to maintain adequate conditions for the management of this human activity, making the exploration of the natural environment rational and sustainable, in order to make it possible, at all times, to safeguard the environment. And allow the maintenance of this economic production on a sustainable basis.

Whether in conciliation or mediation there is the use of a special technique in which the participants lead different options provided by someone previously trained for this role. Mediation agreements "[…] often prescribe that a binding settlement must be reduced to writing and signed by the parties, or by their authorized representatives. Such a formality clause also governs acceptance of an offer made during the conclusion of the mediation meeting" (ANDREWS, 2012).

To solve possible controversies regarding environment could be used the mediation and conciliation, by express provision of the Canadian Law.

In the environmental issue, there is an authority vested in its conciliatory function with discretionary power affected through criteria of convenience and opportunity, supported by a standard that enables the use of conciliation as a legitimizing process for commuting the fine penalty in services.

Another detail that deserves attention regarding the consensual forms of dispute settlement refers to the issue of consensus. It is undeniable that these formulas must be accepted by the parties involved, as it is a technique that aims to resolve the dispute (GONÇALVES, 2016). The objective would be to induce them to find solutions capable of providing mutual satisfaction. It is possible for a magistrate to end a case without resolving the merits, as he understands that the case is submitted to mediation or conciliation, would be resolved with greater justice and proportionality. Wouldn't that defy consensus? In this case, the problem could be solved more easily, the judge would not need to suspend the process, and this would enable the parties to, in the future, if there is no agreement, they can propose the same action again.

4 CANADIAN ENVIRONMENTAL JURISDICTION

Canada consists of thirteen political divisions: ten provinces and three territories. According to its traditional colonization, nine of the provinces follow the Common law, and the only French province (Quebec) follows the Civil Law. In this perspective, judicial decisions have a double role in environmental matters because, in addition to resolving a dispute, it also works as a judicial precedent.

In the Canadian legal system, for many years, access to justice has been a major issue. Despite numerous efforts made by legislators, legal administrators and public policymakers, Canada is not ranked among the best in the world in terms of fostering access to civil justice (ROBERGE, 2013) and alternative dispute resolution.

Canada was one of the first countries in the world to adopt a Model Law of the United Nations Commission on International Trade Law on International Commercial Arbitration; the objective is to develop a uniform rule in order to harmonize the disparities contained in domestic norms, especially in view of their situation, and which did not fit in international cases. For instance, British Columbia became the first to adopt legislation on arbitration. Later Ontario, Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, and Nova Scotia joined in the same

direction. This resulted in the creation of the 1991 Arbitration Act in Ontario. Due to the mixed system of Canada, several factors stand out: the transformation of the role of precedents; multicultural and multifactorial treatment of common solutions and not law based on the administration of justice; search for differentiated solutions from those offered by socio-legal positivism; "Prerogatives won by the courts to release statutory provisions through principles, while judicial update and constitutionalize matters"(ALMEIDA, 2013, p. 56).

Canada is a federal system. Some of its provinces have been joined the arbitration procedure. In these provinces, domestic law applies, unless subject to the discipline of international arbitration. What can be seen from Canadian law is that arbitration presupposes a dispute. On the other hand, it is possible to exist what is called "evaluation," which would have as its basic function the analysis of specific damage, subdividing itself into what an opinion presupposes. Arbitration is a quasi-judicial procedure that admits several categories. What is generally required is an agreement to reject the jurisdiction of the courts.

Regarding another mechanism applicable to the environment, in a specific way, is ADRCM – the Alternative Dispute Resolution and Conflict Management or Conflict Management and Resolution as a decision formula to solve conflicts. Mediation started to take place in Canada in 1980. It started in the public sector. The results achieved, given its speed and efficiency, made several provinces consider the institute, especially in the family sphere. This practice became a preliminary process for judicial decisions (LAGO; LAGO, 2002, p. 87).

Among the existing common formulas used in this specific subject matter, below is indicated an appropriate path to follow when any kind of misunderstanding arises:

> Collaborative planning: parties agree to work together to resolve differences. This is usually possible where stakeholders are more or less equal and have similar goals and interests. Disputes are management 'problems' and often resolved through communication and information exchange. A neutral third party may be needed to ensure meetings are open and productive. Negotiation: parties meet face-to-face, with a facilitator to keep channels of communication open to clear up misunderstandings and misperceptions as the process moves along. Agreement on acceptable solutions or at least consensual understanding of the dispute is anticipated. A 'track-two' approach of unofficial negotiations plus formal meetings are sometimes used if there are constraints in official bargaining. Another approach can be a 'problem-solving' workshop to attempt to shift individual self-interest to the more basic needs of the larger constituency (Burton and Dukes 1990). Mediation: a more formal process but

> similar to negotiation, usually necessary where positions remain inflexible. A neutral third party is given the power to intervene directly to make recommendations or, in the case of arbitration, to make a binding or advisory decision. Mediation has become common in resolving resource-related disputes, especially in North America (AYLING; KIMBERLY 1997, p. 182-185).

The authors state that there is a formula applicable in terms of dispute settlement for environmental dispute resolution. The International Model Forest Network, for instance, offers a model of a conflict management mechanism. This program started in Canada in 1991. The objective was to "address the challenges of sustainable forest management whereby economic, environmental, social and cultural needs could be taken into consideration". This model expanded with Canadian financial support to include model forest initiatives in Mexico and Russia under the UNCED Earth Summit in 1992. The United States also joined this Network (AYLING; KIMBERLY 1997, p. 182-185).

Besides, the "green crime" offenses are the way of prosecuting environmental offenders (FOGEL; LIPOVSEK, 2013) in Canada. The authors affirm that few environmental or "green crimes" are reported, fewer still result in criminal trials, and rarely do convictions result. This is the way how crime or regulatory infractions against the environment are treated. The offenses against the environment consist, "such as air pollution, water pollution, deforestation, wildlife poaching, and the unlawful dumping of hazardous waste". In Canada, environmental law is very complicated; those crimes are considered "regulatory offenses" or "quasi-crimes" as they violate municipal, provincial, national, and international policies. They are not a violation of the Canadian Criminal Code. So, the first step is to examine which regulations have been violated, and in instances of legislative overlap, which regulation should be first to be observed.

It could be observed that there are no clear legal provisions regarding alternative dispute settlement in environmental matters. There are many sparse norms that enable this extrajudicial form of controversial composition, depending on the subject matter regarding environment, as explained below.

4.1 Mediation and environmental decision-making process in Canada

Canada, more recently, has become to appreciate the mediation mechanism as a method to resolve environmental issues. Adopting the mediation as a form of alternate dispute resolution, allowing participants to achieve

an ideal resolution of an appeal, without going through a formal process, or judicial resolution. The Country is as an important example on this topic.

In federal laws and regulations, the "Environment Act" Chapter 1 of the Acts of 1994-95, under article 14, recognized the alternate dispute resolution, including, but not limited to, conciliation, negotiation, mediation, or arbitration in Canadian legal system. In this perspective, when the government decides to use a form of alternative dispute resolution to resolve a dispute, the Minister, in consultation with the parties concerned and using the criteria prescribed or adopted by the Department, the Environment Act determines the form of dispute resolution in this regard (CANADA, SNS 1994-95).[5]

The crucial element found in mediations is that participation is free for all competitors. It is designed to offer a fair solution for all parties. For these reasons, it is imperative that all competitors participating in mediation do so in good faith, and understand that, since they will have an external proposal for the formation of their own resolution, the final result will be more significant in meeting their own needs (EAB, 2020).

As a result, then, environmental assessments, per example, are screened by mediation, available as an alternative to a review panel, involving all interested parties in negotiating the outcome of an environmental assessment. Second Boyd, over 99.9 percent of the twenty-five thousand federal environmental assessments conducted between 1995 and 2000 were screenings (2014, p. 152-154).[6]

As mentioned by MULDOON *et al*. (2020, p. V), using administrative decision-making processes to protect the environment is one of the relevant tools used in Canadian environmental law.

One decision taken by the Ontario Land Courts brings a joint decision of the region's judicial bodies: "[…] which adjudicate matters related to land use planning, environmental and heritage protection, land valuation,

5 In provincial laws and regulations, in Alberta, per example, cases like the "Paul and Mary Davis v. Director, Alberta Environment and Parks (18 June 2020)", "Andrew Reiffenstein et al. v. Director, South Saskatchewan Region, Operations Divison, Alberta Environment and Parks (28 April 2020)", and "Hochhausen et al. v. Director, Regional Compliance, Red Deer-North Saskatchewan Region, Alberta Environment and Parks (7 April 2020)", demonstrate that Canada is looking for alternative resolution mechanisms that allow the participants to find a resolution in order to repair the environmental damages in the park, as those situations (EAB, 2020).

6 In the same way, British Columbia offers the same kind of mechanism to achieve solutions under the mediation process. Likewise, we can to mention several cases as "GFL Environmental Inc. v. District Director, Environmental Management Act (25 June 2020)", "Canadian National Railway Company; Canadian Pacific Railway Company; BNSF Railway Company v. Delegate of the Director, Environmental Management Act (29 May 2020)", and "Delfresh Mushroom Farm Ltd. v. Director, Environmental Management Act (14 April 2020)".

mining, and other environmental matters". To give an illustration of that mechanism it could be herein mentioned the case *Kebick v Ontario – Environment, Conservation and Parks Can LII 41732* (EAB, 2020). It is an appropriate jurisprudence, because the appeal sought by David Kebick (applicant), residing south-east of the property of American Iron & Metal Company Inc., was confronting substantial noise impacts caused by AIM Recycling Hamilton operations. The applicant sought some kind of action from the environmental authority of his resource, due to the licensing of an impacting activity (*Approval of environmental change n*o*. 9738-BFVH-QK*), pursuant to s. 38 of the Environmental Bill of Rights, 1993 ("EBR"). On December 13, 2019, the Director of the Ministry of Environment, Conservation and Parks, issued a special license to operate the company, in accordance with Part II.1 of the Environmental Protection Act (EPA), declaring that, since the company was already causing substantial noise impacts, the supplementary license would further aggravate the problem. Therefore, it should offer an alternative to reduce noise. This decision was obtained by means of a well formulated ADR from applicant.

As stated in the above case, the Ontario Court of Environmental Review provides an important example of how to properly enforce the peaceful resolution of non-judicial environmental disputes in Canada (WOOD, 2019, p. 123-127).

FINAL CONSIDERATIONS

This paper is focused on the legal systems based on Brazilian and Canadian law to treat environmental cases. Both have strong enforcement laws to protect this precious good for all mankind. Canada, with two different systems and having common law as the principal system, admit, in many cases, the extrajudicial mechanism to resolve disputes. Brazil has increased the possibilities of alternative dispute resolution, offering many possibilities for converting penalties into simple warnings or other less severe punishments, often in prejudice of environmental protection.

Brazil and Canada have two different legal systems. They have separate policies for the application of dispute resolution mechanisms relating to environmental issues. The Brazilian legal system has a greater focus on the non-judicial dispute settlement mechanisms in environmental cases in a more permissive use of its resources for this purpose; there is in the Constitution a special chapter for the environment. On the other hand,

Canada, which has the common law as the principal legal system, has no mention of the environmental protection on the Constitution. The power to elaborate environmental laws are shared by and provincial governments. Canada has been involved gradually in this kind of non-judicial dispute settlement mechanisms in environmental matters, in order to offer a more efficient treatment on these controversies.

In Brazil, self-composition is a formula for the peaceful settlement of disputes between the parties. There are many regulations in this regard. It establishes conciliation and mediation as ADR. Conciliation, as proposed by the Environmental Fines Conversion Program (PCMA), under the terms of Normative Instruction No. 3, of January 29, 2020, from MMA, IBAMA and the Chico Mendes Institute for Biodiversity Conservation, allows the conversion of environmental fines for services providing, improving and restoring the quality of the environment. This discretionary process by the authority offers extrajudicial solution of controversies, enabling the dialogue between the parties so that, based on the proposals and solutions offered, they may elect a possible solution. In addition, the CNJ Resolution 125, of 2010, makes it possible for all citizens to resolve conflicts by alternative means of resolving disputes peacefully. The Judiciary must create Judicial Centers for Conflict Resolution and Citizenship to hold conciliation and mediation sessions and hearings to provide a solution to already established conflicts and also offer means of conciliation and mediation, as well as providing adequate guidance to citizens. Under the terms of the Decree, there must be an Environmental Conciliation Center, in which an environmental conciliation hearing is established.

It is important to note that this procedure is adopted by the laws and norms are not a subjective right; under the terms of them, it could be used if the law expressly admits. It is not a discretionary measure. It shall be clear that it does not mean impunity to offenders but a form of decrease the court cases and make feasible a better and coordinate justice for all.

Canada is a federation in which Common Law and Civil Law apply. Some procedures could be adopted in situations where there is the implementation of public policies in environmental terms or even socio-environmental conflicts. In Canada, environmental law has peculiarities. The offenses against the environment bring considerable problems like an adverse impact against nature and public health. They are considered "regulatory offenses" or "quasi-crimes" as they violate municipal, provincial, national, and international policies, reason why here is offered

some jurisprudences from the Canadian provinces. They are not a violation of the Canadian Criminal Code. Some researches about Green Crimes indicate that appropriate strategies should be taken in order to control and prevent such kind of events in Canada. They could not be considered a trifling matter, as many lawyers have stated. The consequences of green crimes are considerable. They can harm the present and future generations. Unfortunately, many green crimes remain free of any penalties. This situation generates cases of impunity, and there is no room to talk about alternative dispute settlement methods if unclear laws treat green crimes. New strategies should be taken to prosecute green crimes in that country.

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