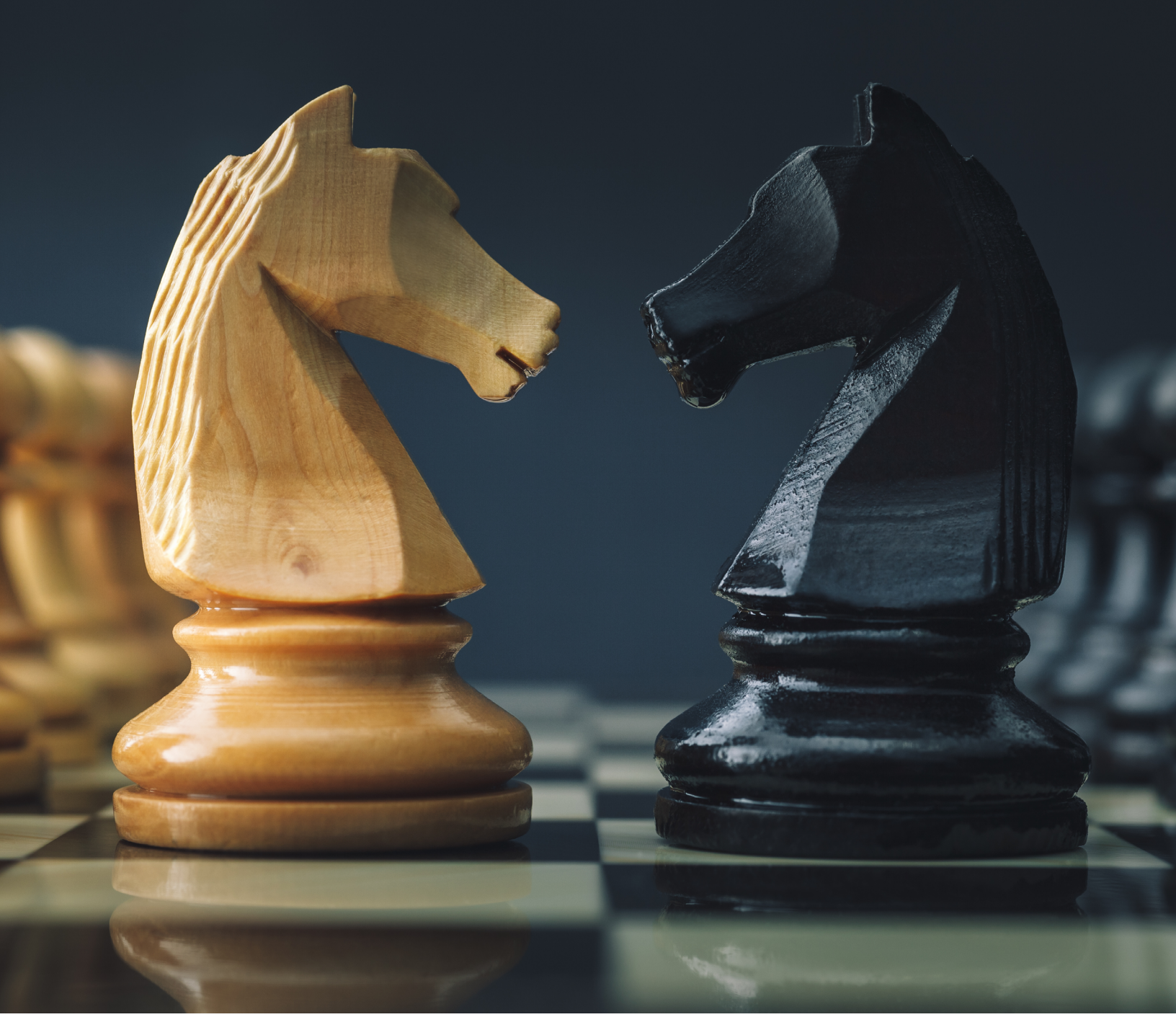

Blakes Guide to Litigation and Dispute Resolution in Canada

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Blakes Guide to Litigation and Dispute Resolution in Canada

Litigation and Dispute Resolution in Canada is intended as an introductory summary. Specific advice should be sought in connection with particular disputes or transactions. If you have any questions with respect to *Litigation and Dispute Resolution in Canada*, please contact our Firm Managing Partner, Bryson A. Stokes, in our Toronto office by telephone at +1-416-863-2179 or by email at bryson.stokes@blakes.com. Blake, Cassels & Graydon LLP produces regular reports and special publications on Canadian legal developments.

For further information about these reports and publications, please contact our Chief Client Relations & Marketing Officer, Stephanie Willson, in our Toronto office by telephone at +1-416-863-5260 or by email at stephanie.willson@blakes.com.

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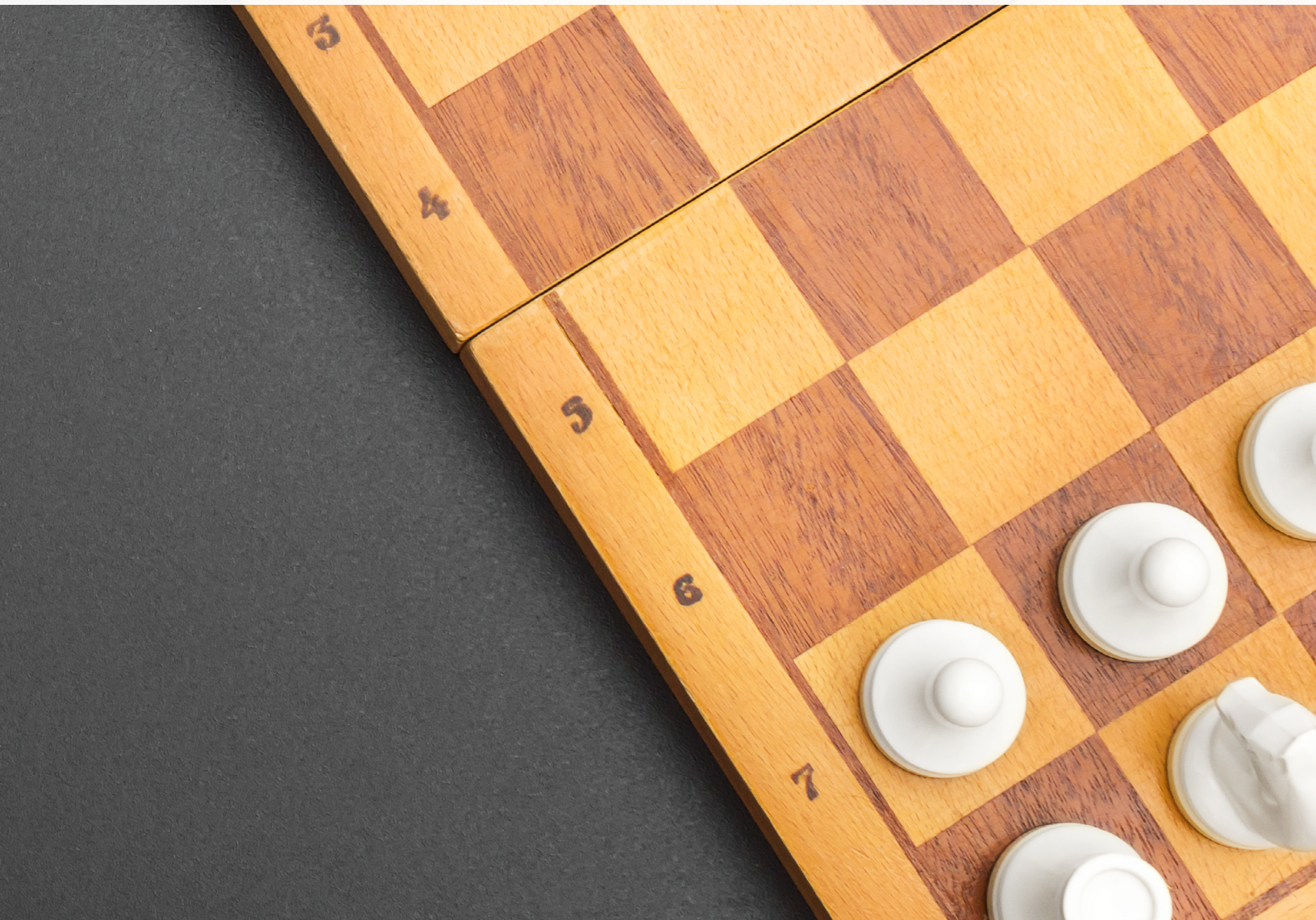


I. Introduction

This guide provides an introduction to Canada's civil litigation and dispute resolution system. It describes the procedures followed in Canada's civil courts and administrative tribunals and discusses alternatives to dispute resolution, with a focus on mediation and arbitration.

The following discussion is intended to provide only general guidance and is not an exhaustive description of all procedures and laws that may apply in any proceeding or dispute. For this reason, the reader should not rely solely on this guide and should seek the advice of qualified counsel for assistance in dealing with any problem or dispute.

The onset of the COVID-19 pandemic in early 2020 bears mention as it has had a big impact on litigation in Canada. Most courts, tribunals and arbitration panels were in the process of modernizing to adopt practices such as electronic filing and virtual (online) appearances when the pandemic arose, but that modernization process has accelerated as a result of the pandemic. The progress of these reforms is uneven across the country and is expected to be a work-in-progress for the foreseeable future. Readers are strongly encouraged to consult experienced counsel in each region or court for current options and practices.

This information is current as of July 2020.

1. Overview

Canada is a federal system comprised of 10 provinces and three territories. In addition to a federal government, each province and territory has its own government. At the federal level, the seat of government is in Ottawa, where members of Parliament from across Canada convene. Additionally, the people of each province elect members to a Provincial Legislative Assembly or a Provincial Parliament.

Canada's *Constitution Act, 1867* specifies the areas in which each level of government can enact legislation. The federal government has authority over the regulation of trade and commerce, banking, patents, copyrights, criminal law and taxation, among other matters. The most noteworthy areas over which the provinces have authority are property and civil rights and the administration of justice. As expected, there are areas of overlap. The division of powers between the federal and provincial governments has been a long-standing source of contention.

Due to Canada's federal structure, depending on the subject matter, both federal and provincial legislation may need to be considered. Because the provinces have authority over the administration of justice, there may be instances when it is more advantageous or appropriate to bring or defend an action in a particular province.

2. Court System

There are three types of courts in Canada. Selecting the court in which to commence or respond to an action is a critical step in the litigation process.

The Superior Court of each province and territory is the court that most commonly decides cases involving commercial litigants. These are courts of general and inherent jurisdiction that hear both civil and criminal matters.

The Superior Court of each province and territory is the court that most commonly decides cases involving commercial litigants. These are courts of general and inherent jurisdiction that hear both civil and criminal matters. Depending on the province, the trial level is referred to as the Court of Queen's Bench, the Supreme Court or the Superior Court. Each province has its own appeal court, which is referred to as the Court of Appeal of the particular province. Appeals from the Court of Appeal of any province are heard by the Supreme Court of Canada.

The second type of court in Canada is the provincial court, which obtains its jurisdiction from provincial legislation. Typically, the provincial court will have jurisdiction over some civil, criminal, family and provincial law matters. The provincial court's jurisdiction over civil disputes is significantly restricted as compared to the Superior Court's jurisdiction. For instance, in Alberta, the provincial court has no jurisdiction over land disputes, and it can only hear disputes where the value of the claim does not exceed C$50,000. Appeals from the provincial court generally go to the Superior Court of the particular province or territory.

The third type of court, the federal courts, have jurisdiction over federal legislation, such as the *Income Tax Act* and the *Trademarks Act,* certain issues under the purview of the federal government pursuant to the division of powers and, importantly, over all federally administered administrative boards, commissions and tribunals. The Federal Court of Canada and Tax Court of Canada are both trial level courts that can be appealed to the Federal Court of Appeal. Appeals from the Federal Court of Appeal are heard by the Supreme Court of Canada.

The final appellate court is the Supreme Court of Canada, Canada's highest court. In certain circumstances, predominantly in criminal law, appeals to the Supreme Court of Canada are as of right. In most circumstances, however, litigants in civil cases can only appeal if they obtain permission — or leave — from the Supreme Court of Canada.

3. Common Law and Civil Law

Understanding the hierarchy of the courts in Canada is important for understanding the role of precedent in Canadian law. With the exception of Quebec, all Canadian provincial jurisdictions follow the "common law."

In a common law system, the principle of *stare decisis* applies, which means that precedents, or prior decisions from higher-level courts, are binding on all lower-level courts within the same jurisdiction. A decision of the Superior Court of one province is persuasive in the Superior Court of another, but it is not binding. Similarly, a decision of the Court of Appeal in one province is only binding in its own province, although it may be persuasive in other provinces. There are many instances in which two provincial Courts of Appeal have made different determinations on similar points of law. A decision of the Supreme Court of Canada, however, is binding on all other courts in Canada, no matter the type or level.

In Quebec, there is a "civil law" system that is derivative of the *French Civil Code* of 1804. The *Civil Code of Québec* (CCQ) establishes the law in Quebec pertaining to disputes between individuals in society. The principle of *stare decisis* is not as influential since the CCQ itself is intended to be clear and easy to apply. While integration into the federal system poses some difficulty when decisions applying the CCQ are appealed, the Supreme Court of Canada maintains full jurisdiction over cases decided pursuant to the CCQ.

4. Alternatives

Apart from the court system, litigants can resort to alternate dispute resolution methods, such as mediation or arbitration, to resolve disputes. In many cases, parties can agree by contract to resolve all of their disputes through arbitration. In most cases, Canadian courts will enforce a pre-dispute arbitration clause in a contract by prohibiting the parties from litigating the dispute in court and requiring them to arbitrate. Typically, parties wishing to arbitrate or mediate disputes are required to do so by agreement, although it is sufficient if that agreement is a provision in a pre-dispute contract.

Parties can agree by contract to resolve all of their disputes through arbitration.

In some Canadian jurisdictions, the court offers judicial mediation or dispute resolution procedures, which allow parties to attempt to resolve a dispute off the litigation track after a formal action has been commenced.

In addition to the court system, Canada has a wide range of regulatory and administrative tribunals that have jurisdiction over a variety of commercial activities. These tribunals often have the power to impose penalties and make mandatory orders.

5. Jurisdictional Issues in Canadian Courts

5.1 Jurisdiction of Canadian Courts

5.1.1 When Will a Court Entertain an Action Brought by a Foreign Plaintiff?

A Canadian court will entertain an action brought by any legal person, provided such person has an address for service in the province in which the action is brought. A foreign plaintiff, however, may be required to post security for the defendant's costs to defend the proceeding, the amount of which will vary from province to province and depend on the circumstances.

5.1.2 When Will a Court Take Jurisdiction Over a Foreign Defendant?

A Canadian court will take jurisdiction over a foreign defendant if the defendant resides or is served within the court's jurisdiction, or when the defendant voluntarily submits to the court's jurisdiction. A court will also take jurisdiction over a foreign defendant when the defendant is served outside the jurisdiction, but there is a real and substantial connection between the subject matter of the litigation, the parties and the court's jurisdiction.

5.1.3 When Will a Court Decline to Exercise Jurisdiction in Favour of a More Convenient Forum?

In Canada, a court may decline to exercise jurisdiction if there is another forum that is clearly more convenient and appropriate for the pursuit of the action and securing the ends of justice.

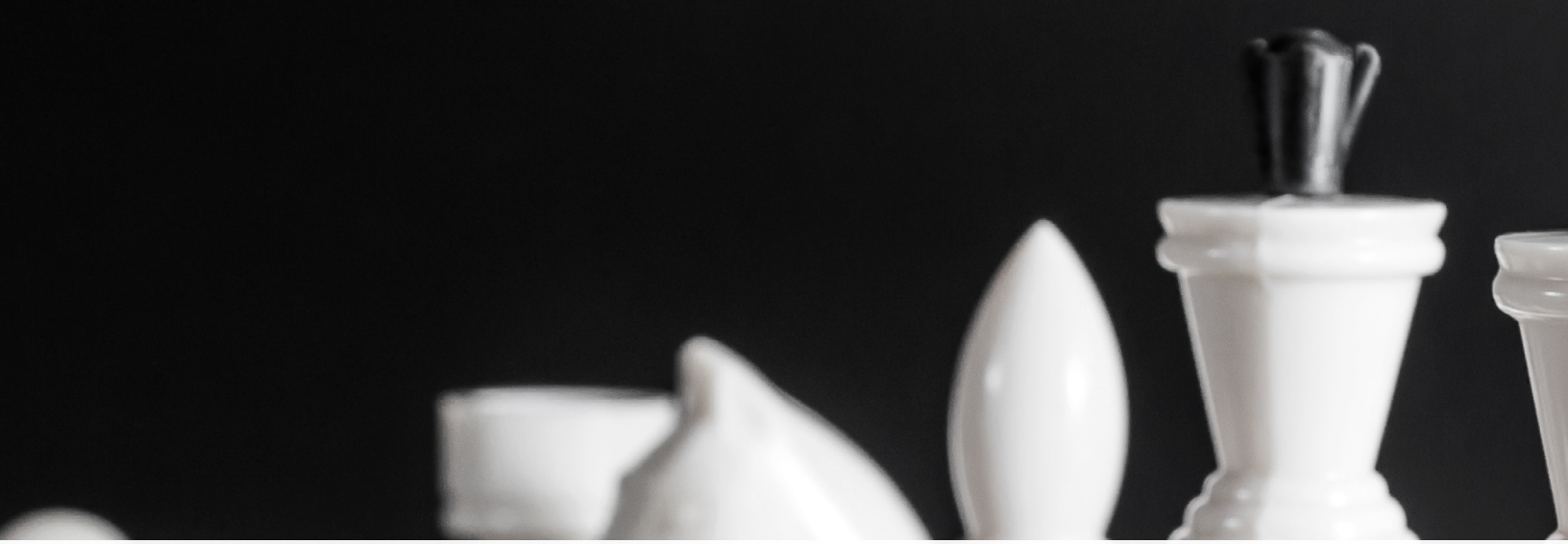
Foreign defendants will often seek to have the Canadian court decline jurisdiction in favour of their home territory. Canadian courts look to a number of factors to determine which jurisdiction has the closest and most substantial connection to the case. For example, while a court may have jurisdiction over a defendant served within the court's territorial jurisdiction, the court will likely decline to exercise jurisdiction if the defendant has a mere fleeting presence in the territory of the court.

5.2 Enforcement of Extra-Provincial Orders

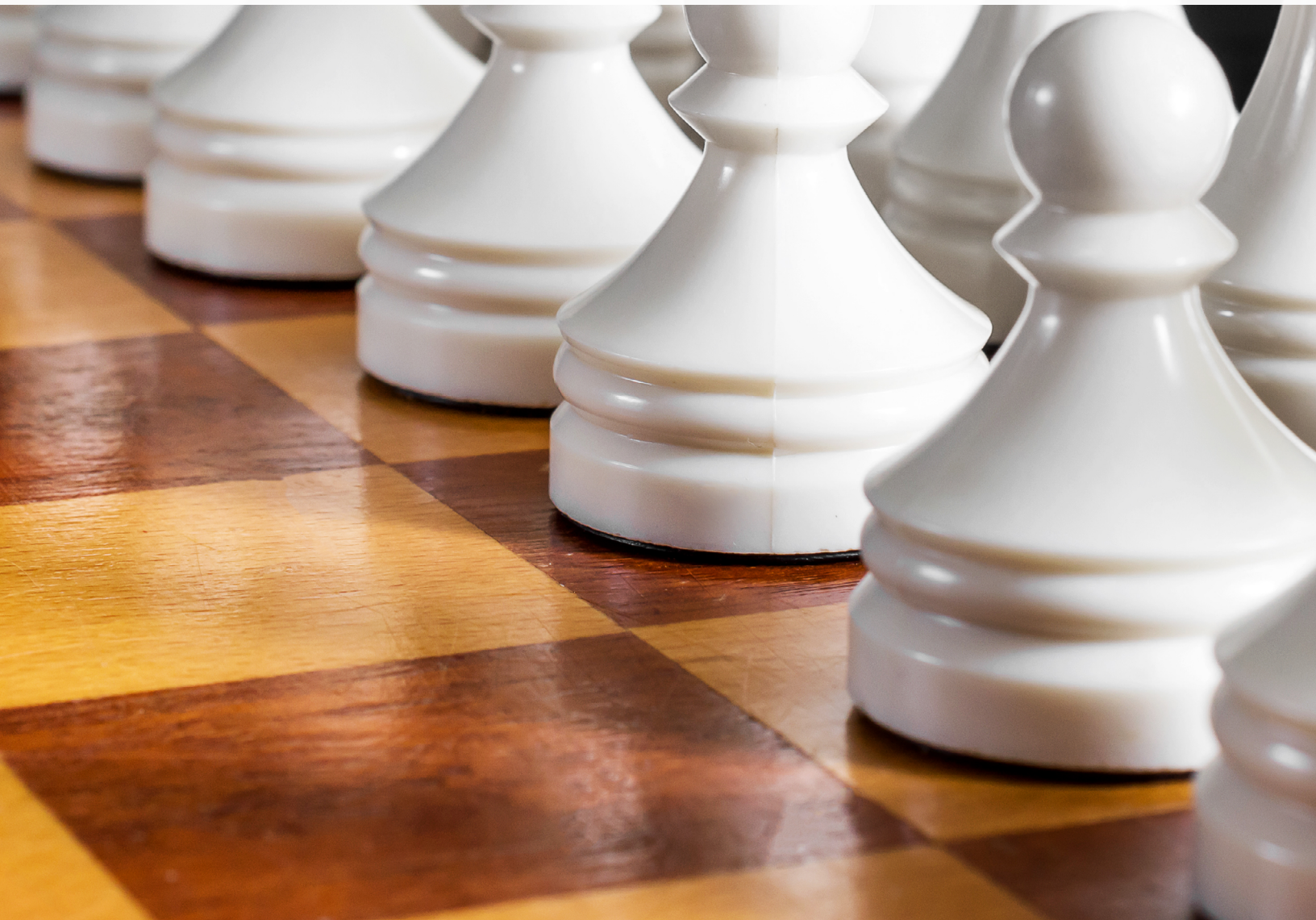
A judgment given in one Canadian province is entitled to recognition and enforcement in another Canadian province if:

- There is a real and substantial connection between the original province and the subject-matter or defendant,
- The defendant submits to the jurisdiction of the original court, or
- There is some other basis on which the original court took jurisdiction, such as a presence or ordinary residency of the defendant.

All common law provinces have reciprocating legislation that facilitates the recognition and enforcement of judgments from other provinces. There is similar reciprocating legislation between some Canadian provinces and certain American states.



II. Overview of Canadian Court Process



II. Overview of Canadian Court Process

Canada is governed by two different legal systems: common law and civil law. In the common law system — used in all provinces and territories, except for Quebec — the courts interpret the meaning and application of legislation and thereby develop the law, rather than relying on government legislation alone. Court decisions set precedents for future decisions in similar cases. The common law system is based on the term *stare decisis*, meaning "to stand by decisions" and on the hierarchy of courts; higher courts' decisions are binding on lower court judges. Common law is subject to the *Constitution Act, 1867* and the *Canadian Charter of Rights and Freedoms*. The civil law system — used only in Quebec — is based on the CCQ**.** Under this system, the CCQ is the primary source of law and court decisions are used as guides on how to interpret the CCQ. That said, the common law system has had a strong influence in Quebec, and previous decisions are often treated as authoritative with respect to their interpretation and application of the CCQ. In Quebec, there are no jury trials for civil matters.

1. General Court Procedures

1.1 Time for Commencing Proceedings

Deadlines for commencing actions are the subject of provincial law, with limited exceptions for matters within federal jurisdiction. If a party does not commence legal proceedings within the applicable limitation period, that party may be prohibited from asserting its claim.

If a party does not commence legal proceedings within the applicable limitation period, that party may be prohibited from asserting its claim.

Limitation periods vary from province to province, and often vary within each province, depending on the type of action. Alberta, British Columbia and Ontario have a general two-year limitation period for most civil actions, but in certain limited circumstances, the limitation period is much shorter. For example, in British Columbia, the limitation period to give notice of a claim to a municipal body is only two months.

In addition to the limitation periods set out in statutes, there are certain common law doctrines — such as laches and acquiescence — that give the courts discretion to dismiss a claim if the plaintiff does not pursue its rights within a reasonable time.

It is recommended that persons with potential actions seek legal advice as soon as they become aware of a claim to avoid falling outside a limitation period and being barred from bringing the action.

1.2 Pleadings

In civil actions in Canada, the nature and scope of the dispute to be resolved by the court is defined by the pleadings filed by the parties. Pleadings are a concise statement of the facts that each party must prove to the court to establish its position. The plaintiff is required to plead all of the facts necessary to establish a valid cause of action against each defendant, and each defendant is required to plead all of the facts necessary to refute that cause of action. The pleadings are intended to define the facts and issues that will be relevant at trial.

1.2.1 Commencing Proceedings

To commence a civil action, an originating document must be filed with the court and served on the opposing party. The Rules of Court in each common law province and *Code of Civil Procedure* (CCP) in Quebec set forth the specific form required. Most provinces require that an action be commenced by way of a Statement of Claim (in Quebec, an originating application) setting out the particulars of the claim and the relief sought.

A more skeletal originating document — namely, a Notice of Action — is permitted in New Brunswick and Ontario. A Notice of Action gives a general notice of the claim. Pursuant to the Rules of Court, a Statement of Claim is either appended to the originating document or filed and served at a later date.

1.2.2 Statement of Defence

After being served with a Statement of Claim, each defendant has a certain number of days to deliver a formal legal response (generally called a Statement of Defence) to the Statement of Claim. If the Statement of Defence is not served on the plaintiff and filed with the court by the applicable deadline, the plaintiff may be able to apply to the court for default judgment against the defendant without any further notice to the defendant. See section II, 1.5.1 “Default Judgment.”

If the defendant has a claim for relief against the plaintiff, the defendant can file a counterclaim against the plaintiff. The defendant can also make claims against other defendants in a cross-claim, or the defendant can join other parties in the action by way of a third-party claim or action in warranty in Quebec. See section II, 1.2.4 “Joinder of Parties.”

1.2.3 Amending Pleadings

The Rules of Court in each province generally permit parties to amend pleadings. However, there are significant differences pertaining to the timing and method of making such amendments. Leave of the court may be required in certain circumstances.

Generally, a party has the right to amend its pleading before the close of pleadings (typically defined as after all parties have filed their pleadings and the time for a reply has expired). In certain provinces, the opposing party may apply to the court to set aside such amendments. In other provinces, unless the amendment necessitates the addition, deletion or substitution of a party, the amendment is generally allowed without leave. In British Columbia, for example, parties are permitted one free amendment before the notice of trial is served, after which they will need leave of the court or consent of the other parties.

1.2.4 Joinder of Parties

The court may add or substitute a person as a party under the Rules of Court in the common law provinces and the CCP in Quebec where (1) that person ought to have been joined as a party, or that person’s participation in the proceeding is necessary to ensure that all matters in the proceeding are effectively adjudicated, or (2) it is just and convenient to do so. Thus, the court has discretion to join not only “necessary parties,” but also parties where there is a common question of law or fact arising in

the proceeding, the claim to relief arises from the same transaction or occurrence, and it appears that joinder may promote the convenient administration of justice.

The Rules of Court in many provinces provide that the court may relieve parties from the requirement of joinder. Such relief may be granted if it appears that the joinder of multiple claims or parties may unduly complicate or delay the hearing or cause undue prejudice. Relief may take the form of separate hearings or an order that a party be compensated for having to attend — or be relieved from attending — any part of a hearing in which the party has no interest.

1.2.5 Joinder of Issues

A party may join several causes of action against the opposite party in the same proceeding.

1.3 Discovery Process

1.3.1 Particulars

The Rules of Court in the common law provinces and the CCP in Quebec set out the requirements for pleadings in a proceeding. If a pleading fails to provide the information necessary for the case to be met or a pleading is vague or overly general, a party may demand "particulars" of that pleading. Particulars provide a more detailed explanation of the facts or legal issues of the claim. If the opposite party fails to provide particulars within a given time, a motion may be brought asking the court to order that particulars be delivered.

1.3.2 Discovery of Documents

After pleadings have been exchanged, parties to an action in common law provinces are required to exchange a list of all documents in their possession, power or control that are relevant to the issues raised in the pleadings, with the exception of documents that are privileged. In some provinces, these materials are accompanied by an affidavit of documents sworn by a representative of each party.

The definition of "documents" in Canada includes paper documents, emails, computer files, tape recordings, videos and electronic media. The definition of "relevance" is also broad.

The opposing party is entitled to receive a copy of every document contained in the list of documents that is not privileged. Privileged documents are generally those created for the purpose of giving or receiving legal advice ("solicitor-client privilege") or mainly in anticipation of litigation, even if no lawyer is involved. In the former case, where legal advice of any kind is sought from an individual in their capacity as a professional legal adviser, the confidential communications relating to the giving or receiving of that advice are permanently protected from disclosure, unless the client waives such protection. Solicitor-client privilege extends to communications in any form but does not extend to facts that may be referred to in those communications if they are otherwise discoverable and relevant. While they are not provided to the other side, privileged documents are to be separately listed in the list of documents.

If a third party holds relevant documents, any party to an action may bring a motion seeking an order requiring the third party to produce such documents for inspection. Again, there is an exemption for privileged materials.

With certain limited exceptions, the parties to an action are not permitted to use the evidence or information elicited from documentary discovery and discovery by oral questioning from the other parties to the litigation for any purposes, other than for use in the court proceeding for which the evidence was obtained.

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This document discovery process has not been adopted into Quebec law. In order to obtain documents from another party, a litigant must either send a subpoena *duces tecum* (for documents), specifically identifying the documents of which it seeks the communication or demand communication of specifically identified documents as an undertaking during an examination for discovery.

1.3.3 E-Discovery

The process of collecting, reviewing and producing relevant emails, computer files and other electronic records is known as "e-discovery." At the outset, or even prior to, litigation, a party should establish a litigation hold to preserve and collect relevant electronic files. Failing to do so can hurt a party's case or, in extreme circumstances, could even lead to a claim being dismissed.

At the outset, or even prior to, litigation, a party should establish a litigation hold to preserve and collect relevant electronic files. Failing to do so can hurt a party's case or, in extreme circumstances, could even lead to a claim being dismissed.

E-discovery can be time-consuming and expensive. That is especially the case in litigation resulting from large or complex projects or transactions, where relevant electronic documents can number in the millions. In an attempt to make e-discovery more manageable, the Ontario Rules of Court have adopted the Sedona Canada Principles Addressing Electronic Discovery, which are now in their second edition. The Sedona Canada Principles encourage parties to cooperate in establishing a joint discovery plan that defines the scope and process of e-discovery, such as by implementing document-coding protocols and the use of technology-assisted review. The overarching purpose of the Sedona Canada Principles is to ensure that the e-discovery process is proportionate to the nature and amount involved in the litigation.

Outside of Ontario, few provinces have changed their Rules of Court to directly address the challenges of e-discovery. However, courts in most Canadian jurisdictions have shown an increasing willingness to focus on proportionality in e-discovery, rather than a strict adherence to the ordinary rule that all relevant documents must be produced. That is especially the case where the parties have reached an agreement on the scope and process of e-discovery.

1.3.4 Examinations for Discovery

Following the exchange of relevant documents, the parties are entitled to conduct an examination for discovery of the opposing party. In some provinces, such as Ontario, there is no automatic right to conduct a discovery of more than one representative of a corporate litigant, nor is there an automatic right to conduct discovery of persons who are not parties to the litigation; a party must obtain leave of the court to do so.

The discovery witness produced on behalf of a corporate litigant must inform themself of the corporation's knowledge. If the witness does not know the answer to a specific question, the witness may be required to make inquiries and provide the answer at a later date in writing. For example, a corporate representative may be required to find out what another corporate employee said or did with respect to a particular issue. In complex cases, it is common to have numerous requests to provide information and documents.

With certain limited exceptions, such as when information is deemed privileged, the person being examined must answer every question at the examination for discovery. All answers are taken under oath or affirmation in the presence of a court reporter; no judge is present. The examination typically takes place in an office setting. The party asking the questions may use the transcript from the examination later at trial.

With certain limited exceptions, such as when information is deemed privileged, the person being examined must answer every question at the examination for discovery.

Before a party can serve a notice of examination, the party must have delivered its list of documents, unless the parties have agreed otherwise. Conducting examinations for discovery can be a lengthy and expensive step in the litigation, and many cases settle at this stage in the proceeding. Some provinces, such as Ontario, Quebec and British Columbia, have a limit on the length of time for an examination of discovery. This period can be extended by consent or court order.

In Quebec, a defendant may examine the plaintiff — or the representative of a corporate plaintiff — either before or after the filing of the defence, while the plaintiff will usually examine the defendant — or the representative of a corporate defendant — only after the filing of the defence, to ensure the efficiency and proper management of the proceedings. During these examinations, the plaintiff may seek the communications of documents to be provided as undertakings at a later date. Examinations of third parties may only be conducted with their consent and that of the other party or with leave of the court.

1.3.5 Examinations Before Motion or Trial

In addition to provisions addressing examinations for discovery, there are provisions in most provinces for oral examinations of witnesses out of court, with leave of the court or consent of the parties. Attendance can be required by summons, which may also require the person to bring all relevant documents in their possession to the examination.

As with examinations for discovery, examinations of witnesses before motion or trial are conducted under oath or affirmation in the presence of a court reporter, typically in an office setting. The transcript is used at the motion hearing or at trial.

1.4 Interlocutory Motions and Applications

1.4.1 General Procedural Motions

Canadian courts devote significant time and resources to provide litigants with a fair, balanced and timely pre-trial procedure. Court applications of this nature generally seek directions or decisions "between steps" in the litigation and, as such, are known as interlocutory motions or applications.

The Rules of Court and the CCP allow interlocutory motions to be scheduled on relatively short notice to parties adverse in interest. However, in some select registries, there are significant scheduling delays and it may take several weeks to obtain a motion date for non-urgent motions.

On interlocutory motions, counsel argue their respective positions based largely on evidence put forward in affidavits that may be tested by cross-examination. Most Canadian jurisdictions use privatized court reporting services so that cross-examination of affiants occurs at a law office, rather than in the courthouse.

Interlocutory motions are often brought to:

- Determine whether the court should assume jurisdiction over the matter in issue.
- Compel a plaintiff to post collateral as security for a defendant's litigation costs where it appears likely that the plaintiff will be unable to pay the defendant's allowable costs, if unsuccessful.
- Strike out a party's pleadings, or request another form of relief, where that party has failed to meet procedural requirements in the action.
- Consolidate multiple actions where there are common facts and issues that ought to be dealt with together, or split one lawsuit into multiple actions where the opposite is true.
- Enforce the Rules of Court and other procedural protections by, for example, compelling a party to attend a cross-examination or examination for discovery, answer questions or provide requested records that are likely to be helpful in the litigation.
- Oversee court-supervised processes, such as the appointment of a receiver, receiver-manager or liquidator.
- Dispute a judgment or a step taken without providing appropriate notification to parties adverse in interest.

In most cases, Canadian counsel tend to be courteous and respectful in the courtroom, while advocating their client's interests in as compelling a manner as possible.

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1.4.2 Injunctions

1.4.2.1 General Test

An injunction is an order of the court impeding the commission or continuance of a wrongful act, restraining a pending or existing breach of contract or seeking to preserve rights or assets pending the outcome of litigation. Injunctions prohibiting a party from undertaking or continuing certain conduct are the most common type of injunction. However, injunctions may also impose an obligation on a party to undertake or continue to act in a certain manner.

Since the court is asked to restrict the legal rights of another party, applying for and obtaining injunctive relief is a complex process and the requested relief will only be awarded in circumstances where the party seeking the injunction can demonstrate all of the following:

1. **There is a serious issue to be tried:** The court will assess the merits of the case on a preliminary basis to determine that the claim is not frivolous or vexatious.
2. **Refusing to grant the requested relief will cause irreparable harm to the applicant's interests:** "Irreparable" in this context means that the applicant must convince the court that the resulting harm is probable and of such a nature that it cannot be remedied by monetary damages.
3. **The "balance of convenience" favours granting the injunction:** The court must compare the parties' respective interests, weighing the alleged "harm" to the applicant if its interests are not protected against the effect on other parties if their legal rights are restricted in the manner sought.

Injunctions are an equitable remedy. As such, they are discretionary in nature. In deciding whether to grant an injunction, a court must consider the overall context in which the application is made and determine whether granting or refusing to grant an injunction would be fair in the circumstances. The court may decide that injunctive relief is not appropriate if, for example, it appears that:

- The applicant has caused delay or otherwise does not claim relief in good conscience.
- The applicant has a lesser right to protection than third parties who may be affected by the injunction.
- The injunction would result in unjustifiable hardship to the respondent.
- The injunction would not be in the public's best interest.
- The injunction would, in effect, be a final determination of the matter.
- The injunction would, in effect, require the court to engage in continuing supervision of the parties' business interests.

1.4.2.2 Undertaking as to Damages

Injunctive relief is an extraordinary remedy with significant consequences if used inappropriately. As such, typically the applicant must give a meaningful undertaking to pay damages in the event that the injunction is granted but the litigation is ultimately decided against the applicant. Failure to honour such an undertaking may result in serious consequences associated with breach or contempt of a court order.

1.4.2.3 Mareva Injunctions

A Mareva injunction is a pre-trial order utilized in appropriate cases to prevent a defendant from "judgment-proofing" itself by dissipating or removing assets to a foreign jurisdiction. To succeed, the applicant must show a real risk of removal or dissipation of assets, as distinct from a mere apprehension or suspicion.

A court will only grant a Mareva injunction in the clearest of cases, and the applicant is generally required to provide an undertaking as to damages. Typically, a Mareva injunction application is brought without notice to the other parties and the applicant must establish:

- A strong likelihood of success.
- Full and frank disclosure of any material facts of which the court should be aware in considering the application.
- Full particulars of the claim, fairly stating any points made by the defendant that speak against the applicant's claim.
- A real risk that the defendant will move assets from the jurisdiction or dissipate them in order to avoid the possibility of judgment.
- Grounds for believing that the defendant has assets within the jurisdiction.

1.4.2.4 Anton Piller Orders

Anton Piller orders allow a plaintiff to apply to the court for what is, in essence, a civil search warrant. The purpose of the order is to preserve evidence from possible destruction and recover property belonging to the plaintiff that may be necessary to prove the plaintiff's case. If granted, the order must contain procedural protections for the defendant and go no further than is necessary to remedy the problem.

Upon obtaining an Anton Piller order, the plaintiff and its lawyers, who supervise the seizure process in their capacity as officers of the court, are permitted to enter the premises and search for and seize materials in the defendant's possession. The court assumes custody of any seized materials.

In light of the extraordinary and interventionist nature of the Anton Piller order, the threshold for obtaining relief is even higher than for other types of injunctions. The element of surprise is usually necessary to accomplish the objective of preserving evidence, so the application is made to the court in a closed hearing and without notice to any other party. During the hearing, the court expects the applicant to fully disclose all relevant matters within its knowledge, including information that does not support the request. If the applicant fails to disclose any material facts, the court has broad discretion to decline the application.

To succeed in obtaining an Anton Piller order, the applicant must establish:

- A strong likelihood of success.
- The damage, potential or actual, will be very serious if an order is not granted. "Damage" concerns whether the plaintiff will be unable to make its case at trial if the impugned materials are not available.

- The party against whom the order is made is actually in possession of incriminating documents or evidence.
- There is a "real possibility" that the party against whom the application is made may destroy, hide or abscond with the materials before the ultimate hearing. Since it is sometimes impossible for an applicant to produce direct proof in this regard, Canadian courts may be willing to infer a risk of destruction where the applicant can satisfy the court that the defendant has been acting dishonestly or in a suspicious manner. The court will not draw the inference lightly; evidence of dishonest or suspicious behaviour must be compelling.

As with other requests for an injunctive order, generally, the applicant must provide an undertaking as to damages.

1.5 Summary Disposition of Matters by the Court Without Trial

1.5.1 Default Judgment

Throughout Canada, the Rules of Court in each common law jurisdiction and the CCP in Quebec allow a plaintiff to apply for a default judgment when a defendant, properly served, has not filed the necessary pleadings in response to the action, following the expiration of the filing period. Default judgment applications generally do not require a court appearance. A default judgment can be obtained by filing the appropriate documents with the court, including proof of service and evidence demonstrating the defendant's failure to file the appropriate response documents.

If the plaintiff's claim is for a liquidated amount, the plaintiff can enter a default judgment against a defendant for a specific sum (not exceeding the amount of the liquidated amount), interest, if entitled, and costs. If the claim is for an unliquidated sum, such as general damages for pain and suffering, the court will issue a default judgment against the defendant for damages and costs in an amount to be assessed by the court at a later date.

While a default judgment is a final order of the court, a defendant is entitled to apply to set it aside in certain circumstances. Such applications are frequently granted when the defendant's failure to file was not wilful or deliberate, the defendant's application was made as soon as reasonably possible after learning of the default judgment and there is a defence worth investigating. Nevertheless, it is incumbent upon a party served with an action to respond appropriately and with dispatch.

1.5.2 Dismissal for Delay/Failure to Prosecute Action

Upon an application by a defendant, a court may dismiss an action if it determines there has been unreasonable delay. Typically, such a delay exceeds one or two years; however, the threshold can be longer depending on the province. An order dismissing a proceeding for want of prosecution can have severe consequences for a plaintiff; as such, it will not be made lightly. In particular, the order will not be made without giving the offending party an opportunity to remedy the default, unless the default was intentional or gives rise to a substantial risk that a fair trial will not be possible.

For a party to be successful on an application to dismiss for delay, the law generally requires that the delay be inordinate and inexcusable and that the cause or likely cause is of some prejudice to the applicant. Given the nature of the application, Canadian courts in most jurisdictions have made this order difficult to obtain. It is not uncommon for applications to fail, even in the face of delays measured in years.

In Quebec, a plaintiff's action is deemed discontinued if the plaintiff fails to file an inscription for proof and hearing of the action on the merits within six months from the date the case protocol is accepted. This delay is customarily extended by the court upon application showing valid reasons for the extension sought.

1.5.3 Summary Judgment and Summary Trials

1.5.3.1 Summary Judgment

Summary judgment rules enable a party to obtain judgment without a trial in certain situations. The party seeking summary judgment must prove there is no genuine issue requiring a trial.

Traditionally, summary judgment was only granted in very clear cases. However, the Supreme Court of Canada has recently stated that summary judgment is a tool that should be used to streamline dispute resolution and enhance access to justice and, as such, should be considered more broadly.

Therefore, while historically on a summary judgment motion a court would not try issues, find disputed facts, assess credibility or decide questions of law in a summary judgment proceeding, the role of the judge on a summary judgment motion is expanding. This has now been codified in the Ontario *Rules of Civil Procedure*, which permit a judge on a motion for summary judgment to weigh evidence, assess credibility, draw any reasonable inference from the evidence or conduct a mini-trial to allow for oral evidence, unless it is in the interest of justice to reserve such powers for trial. While similar changes have not been implemented in other provinces, courts have generally agreed with the principle that summary judgment should be granted wherever possible.

There is no provision for summary judgment in Quebec's CCP.

The role of the judge on a summary judgment motion is expanding.

1.5.3.2 Summary Trial

A summary trial application is based on affidavit evidence, without the requirement for witness testimony. A party may apply to the court for judgment in an action or on any issue. The applicant, and each of the other parties of record, may adduce evidence to support or oppose the application by way of affidavit, answers to written interrogatories, answers to evidence taken on examinations for discovery, admissions and expert evidence. The evidence may also include the transcripts of any cross-examination taken of the various affiants. In Ontario, summary trials may include cross-examination and re-examination of witnesses, provided notice of such an intention is provided 10 days before trial.

On hearing an application under the summary trial rules, the court may grant judgment in favour of any party, either on an issue or generally, unless the court is unable to find the facts necessary to decide the issues, despite the whole of the evidence presented, or the court is of the opinion that it would be unjust to decide the issues in the summary trial.

In provinces where courts will not find facts, make determinations of law and make credibility assessments on summary judgment motions, they are permitted to do so in the context of a summary trial.

There are limitations to the summary trial process. Courts will not hear such applications in circumstances in which it would be unjust to resolve the issues finally without a full trial. In making that determination, the court will consider the amount involved, the complexity of the matter in issue, the urgency of the matter, the likelihood of prejudice from further delays, whether credibility is a key issue, the cost of proceeding to a conventional trial in relation to the amount involved and any other matters that may impact the fairness of the process.

There is no provision for summary trial in Quebec's CCP.

1.5.4 Other Applications

1.5.4.1 Special Case

Parties to a proceeding may agree that a particular question of law or fact could substantially resolve their dispute. In such instances, most jurisdictions permit parties to state a question of law or fact in the form of a special case for the opinion of the court.

The special case is brought before a court and the parties set out the facts and documents necessary to decide the particular issue. With the consent of the parties, if any question in the special case is answered, the court may draw a reasonable inference, grant specific relief or order judgment to be entered.

1.5.4.2 Proceedings on a Point of Law

A point of law arising from the pleadings may, by consent of the parties or by order of the court, be set for hearing and disposed of at any time before the trial. Conducting a hearing on a point of law gives the court an opportunity to determine a question of law that goes to the root of the action, without having to decide issues of fact raised in the pleadings. However, such a hearing is only appropriate if a question arises as to whether a valid claim or defence can be raised by a party's allegations, assuming they are true. The facts relating to the point of law must not be in dispute, and it must be possible to resolve the point of law without hearing evidence. In determining whether to conduct proceedings on a point of law, the court must consider whether resolving the question would serve the ultimate purpose of eliminating a claim insupportable in law, thereby saving time and effort.

1.6 Simplified Procedure

Some provinces provide a simplified court procedure for civil disputes involving less complex matters or smaller claims below a threshold amount. The purpose is to attempt to lower the cost of litigation by reducing procedural complexity.

In Ontario, for example, if the claim is for money, real property or personal property, and if it is for C$200,000 or less, the "simplified procedure" is mandatory. Where the claim exceeds C$200,000, the action can proceed under the simplified procedure if the parties agree or if the plaintiff abandons the portion of its claim that exceeds the threshold.

Although the rules vary from province to province, the simplified procedure rules typically reduce the degree to which examination for discovery is available and provide for earlier trial dates.

1.7 Case Management and Pre-Trial Conferences

Most provinces, such as Ontario and British Columbia, have introduced special rules to manage the litigation process, including case management. Case management procedures are jurisdiction-specific and include an array of new and often shorter deadlines for the various steps in a proceeding. Case-managed proceedings are typically subject to a timetable established either by consent of the parties

or by the order of a judicial officer. Many jurisdictions require that mediation be attempted before going to trial. For these and other reasons, most civil and commercial cases in Canada are settled long before they reach trial.

Whether or not an action is subject to case management, if the action does not settle during its early stages and the trial date is approaching, the case will likely be brought before a judicial officer or a judge other than the trial judge for a pre-trial conference. The court may order a conference or a party to the proceeding may request one. The purpose of the conference is to consider the possibility of settlement, to simplify the issues for trial, to determine the timing and length of trial and to generally assist in disposing of the proceeding.

1.8 Costs

1.8.1 What Are Costs?

In Canada, it is common for the successful party in litigation to recover from the unsuccessful party a portion of the expenses incurred in pursuing or defending the case. These expenses may include such items as lawyers' fees and necessary expenses, such as expert reports and travel costs associated with various steps in the litigation.

In Canada, it is common for the successful party in litigation to recover from the unsuccessful party a portion of the expenses incurred in pursuing or defending the case.

Courts tend to exercise their discretion in accordance with the following principles: (1) costs usually flow from the unsuccessful litigant to the successful litigant, (2) except in rare circumstances, a party should not be fully indemnified for costs incurred in the litigation, (3) costs are used to encourage compromise and settlement between the parties, and (4) costs are used to penalize parties for inefficient or wasteful use of the courts' and parties' resources.

1.8.2 Assessment of Costs

The courts of each province have guidelines for setting the amount of costs to be paid. For example, Alberta has a predetermined schedule that sets out a sliding scale for "party-party" costs, resulting in less than full indemnity in most cases. Ontario uses a tariff system that has a scale of hourly rates based on the years of experience of the lawyer.

In some circumstances, the court can award higher costs to sanction unfounded serious allegations, such as fraud or conspiracy, or to sanction a party who engaged in unreasonable behaviour. Most provinces encourage the parties to settle by establishing cost consequences for failure to accept reasonable offers to settle and imposing a higher costs award if a party unreasonably rejected a settlement offer.

Where disputes arise with respect to quantification of the costs to be awarded, including the reasonableness of disbursements being claimed, most provinces have a special dispute resolution mechanism in place, whereby the parties may appear before an officer appointed by the court to assess the costs.

In Quebec, costs orders are nominal and do not generally include counsel fees.

1.8.3 When Costs Are Payable

Generally, costs become payable following the outcome of a trial or court application. The court, however, has discretion to make costs related to interlocutory motions payable "forthwith" and without regard to ultimate success in the litigation.

Once costs have been awarded, the successful party has a right to be paid. However, as with any award of money granted by the court, the successful party may need to enforce this right through the available civil enforcement mechanisms.

1.8.4 Security for Costs

A defendant may apply to the court to require the plaintiff to provide security for costs before the trial. Although there are slight differences in provincial rules, security for costs is generally available when (1) the plaintiff resides or conducts business outside the province and has no assets within the province, (2) the plaintiff is a corporation or nominal plaintiff and there is good reason to believe that the plaintiff has insufficient assets in the province to pay the defendant's costs, and (3) the plaintiff's action is frivolous and vexatious and there is good reason to believe that the plaintiff has insufficient assets in the province to pay the defendant's costs.

An order awarding security for costs will generally require that a plaintiff pay a certain amount of money into court or provide a letter of credit to ensure that funds are available to satisfy an award of costs to a successful defendant. Failure to comply with such an order within the time required may result in dismissal of a plaintiff's action. In rare circumstances, security for costs orders can also be granted in favour of a plaintiff against a defendant.

1.8.5 Costs in Class Proceedings

See section II, 2.5 "Awards, Costs, Funding and Counsel Fees" for a discussion of costs in class proceedings.

1.9 Trials

As in most other common law jurisdictions, less than five to 10 per cent of all lawsuits result in a trial. Most cases settle or are otherwise resolved at an earlier stage of the proceedings.

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Case management processes in many provinces are designed to ensure that cases move forward through the litigation process and reach trial on a timely basis, usually within two to three years of the case being filed. Complex cases often take more than three years to reach trial, whereas urgent cases can be dealt with more quickly.

In most commercial cases, pre-trial procedures — including discovery — continue right up to the commencement of trial. Expert reports and responding reports must be delivered within established time periods before trial — typically, 60 to 90 days — for expert witnesses to be permitted to testify at trial. Other pre-trial notices are necessary for certain documentary evidence to be placed in evidence at trial without full formal proof. It is also common practice to deliver Notices to Admit, which require the opposing party to admit certain facts, within the weeks leading up to trial. The purposes of Notices to Admit are to narrow the issues and increase the cost risk to the opposing party if non-contentious facts are not admitted. Often supplementary examinations for discovery and exchanges of documents to update previous pre-trial disclosure also take place within a few weeks or days before the trial is scheduled to commence.

In most cases outside of Quebec, any party may ask for a jury trial by delivering a jury notice. However, juries are not available in certain cases, such as in family law matters, in claims against a municipality and on applications for certain forms of equitable relief. Parties in Canada rarely elect to have civil matters determined by a jury. Juries are occasionally used in personal injury and defamation cases. The court retains the discretion to strike out a jury notice based on complexity of the case or strong local prejudice and to require a trial by judge instead.

1.9.1 Opening Statements

In most provinces, the plaintiff's counsel presents an opening statement at the beginning of the trial. Typically, judges prefer that defendant's counsel also present an opening statement before any evidence is called, so that the issues are clearly delineated from all perspectives at the outset of the trial. In complex cases, opening statements may last for hours or days, during which the judge may be introduced to many of the documents in issue in the case, as well as documents prepared by counsel to assist the court, such as a chronology of key events, a cast of characters, a glossary of technical terms or a summary of agreed facts.

1.9.2 Examination of Witnesses

Counsel conducting the direct examination of their own witness may not ask leading questions (questions that suggest the answers), except on non-contentious matters. Unless the witness is an expert witness, discussed below, the witness may only testify to matters within that witness's direct knowledge.

"Hearsay" evidence is generally not admissible unless the evidence falls within a recognized exception to the rule against hearsay or where it is found to be "necessary and reliable."

A lawyer may subpoena a witness and cross-examine an employee, director or officer of an opposing party. However, a lawyer will often be prohibited from interviewing such a witness ahead of time.

During cross-examination, a witness may not speak to their own lawyer or anyone else about any matter relating to the case. Witnesses may be declared "adverse" if their answers are inconsistent with their prior out-of-court statements. In deciding whether to make a declaration of adversity, the trial judge will consider the significance of the inconsistencies, a motive to support the opposite side or evidence of collusion with the opposite side, and the witness's conduct at trial. A witness who is declared adverse may be cross-examined by the lawyer who asked them to testify.

During cross-examination, a witness may not speak to their own lawyer or anyone else about any matter relating to the case.

1.9.3 Expert Witnesses

Expert evidence may be called at trial when it is necessary and relevant and when specialized opinion evidence or other technical assistance will help the court in its administration of justice between the parties.

The expert may be required to produce their entire file, including prior drafts of the expert report. Depending on the jurisdiction, the production of the expert's file must occur in advance of or during trial.

1.94 Documentary Evidence

Unless the authenticity of specific documents is in issue, most civil cases proceed on a cooperative basis with respect to the admission of documents into evidence. The parties usually produce one or more joint briefs of documents for the court's use. Typically, the relevant documents have been qualified for admission into evidence through the pre-trial discovery procedures and, if necessary, through the pre-trial document notices exchanged before trial. When the authenticity of a document is questioned, it is dealt with in the same manner as other contentious facts at trial.

1.9.5 Use of Examination for Discovery at Trial

Transcripts of examinations for discovery are not treated as evidence at trial unless they are read into the record by the party who conducted the examination or used to challenge an opposing witness with a contradictory answer from their examination for discovery. A party may qualify or contradict evidence read into the record from the opposing party's examination for discovery by referring to other evidence before the court.

In fairness to a witness, any prior inconsistent statement allegedly made by that witness before testifying at trial must be "put to" the witness when testifying so that they have an opportunity to explain the apparent contradiction. This applies whether the prior statement was made during examination for discovery or in some other context.

1.9.6 Length of Trials

Most civil cases are tried over the course of one or two weeks. However, in complex cases involving large amounts of money, trials have been known to take a year or longer. In many provinces, counsel are required to agree in advance to a trial schedule that includes lists and time estimates for witnesses. However, Canadian courts remain reluctant to impose or enforce time limits at trial.

1.9.7 The Decision

It is common for judges to take some time following the completion of trial to consider their decisions and deliver a written decision, including reasons for their conclusions. The period during which judgment is reserved is usually in keeping with the complexity of the issues. Most decisions are rendered within a few weeks. Often the court will invite the parties to make further submissions regarding costs to be awarded.

1.10 Judgments

1.10.1 Judgments and Orders

A judgment is the final determination of an issue or issues between parties to litigation. Typically, a judgment becomes effective on the date the judge pronounces it, rather than on the date a formal order or judgment is entered in the court registry. However, the judge may specify an effective date before or after the date of pronouncement.

Judgments may be given in either written or oral form. Once judgment is rendered, an order must be drawn up in the required form and entered. Usually, the successful party in the action will draw up the order and then obtain approval of its form from all parties who appeared at the trial or hearing. The order is then entered into the court by the registrar as an order of the court. If one or more parties refuse to approve the order, any party may make an appointment to settle the order before the court.

In Quebec, judgments are deposited at the court office and entered in the registers, without the need for an order approved by the parties.

1.10.2 Interest

Where the amount of interest payable on judgment debts is set out in the contract, pre-judgment interest will typically be based on the contract. It is illegal in Canada to charge interest at an effective annual rate over 60 per cent. Further, a rate stipulated on a monthly or daily basis may not be enforceable unless the contract expressly states the equivalent yearly rate of interest.

If there is no explicit or implied agreement between the parties, the rate of pre-judgment interest will be established by the province in which the case will be heard. Generally, pre-judgment interest will be based on the rate set for 30-day commercial paper.

1.11 Appeals

1.11.1 Availability of Appeals

There is often an automatic right to appeal a trial decision to a higher court, such as a provincial Court of Appeal.

The deadline for filing a notice of appeal or a motion for leave to appeal differs from province-to-province and depends on the type of case. Generally, the deadlines vary from 15 to 60 days. For example, in British Columbia, it is usually 30 days from the day following the effective date of judgment. In Ontario, leave to appeal to the Court of Appeal must generally be sought within 30 days, whereas leave to appeal to the Divisional Court is generally within 15 days.

Decisions issued by administrative tribunals, such as the Competition Tribunal or a provincial securities commission, are often subject to judicial review or appeal to a court. The availability of judicial review or appeal will depend on the legislation establishing the particular administrative tribunal. In some cases, arbitration decisions are also subject to review or appeal to a court.

A decision of a provincial Court of Appeal or the Federal Court of Appeal may be appealed to the Supreme Court of Canada, the highest court in Canada and the last judicial resort of Canadian litigants. The Supreme Court of Canada has jurisdiction over the civil law of Quebec and the common law of the other provinces and territories, and it can hear cases in all areas of the law.

In most circumstances, in order to appeal to the Supreme Court of Canada, an appellant must apply to the court for leave to appeal. The Supreme Court may grant an application for leave if it finds that the case raises an issue of public importance that goes beyond the immediate interests of the parties and, therefore, ought to be decided by the Supreme Court. The Supreme Court receives between 500 to 600 applications for leave to appeal each year, of which approximately 35 to 50 are successful.

The Supreme Court may grant an application for leave if it finds that the case raises an issue of public importance that goes beyond the immediate interests of the parties.

1.11.2 Standard of Review

The level of judicial deference given to a lower court or tribunal by an appellate court depends on the issue in question and corresponds with the standard of review to be applied.

An appellate court will rarely overturn findings of fact made at trial by a jury or trial judge. A finding of fact may only be overturned on appeal if there was a "palpable and overriding error." Accordingly, most appeals from lower court decisions are concerned with whether the court or tribunal below made an error in interpreting or applying the law. If an appellate court finds that the lower court incorrectly interpreted or applied the law, the appellate court may reverse the lower court's decision.

The presumed standard of review for expert administrative tribunals is reasonableness. Under the reasonableness standard, the tribunal's decision will be given deference. Such decisions are only overturned if they are found to be internally incoherent or untenable, given the factual and legal constraints. However, an expert tribunal will not be given deference when the legislature has indicated a different standard should apply or it is required by the rule of law. For example, if the issue is a constitutional question, the tribunal will not be granted deference. Additionally, expert tribunals will not be given deference on issues of procedural fairness.

The presumed standard of review for expert administrative tribunals is reasonableness.

1.12 Enforcing Judgments

Once a final judgment has been obtained, there are a variety of steps a judgment creditor can take to enforce the judgment, including investigation, seizure and sale of the debtor's real and personal property, and garnishment of wages and other debts. The judgment creditor bears the responsibility for enforcing the judgment.

Judgment creditors do not, by virtue of their judgments, achieve any priority status over other creditors. If the judgment debtor has few or no assets, the judgment creditor may find it impossible to collect the money owed under the judgment. In most cases, if a judgment debtor declares bankruptcy, the judgment debt will be discharged in bankruptcy.

If the judgment debtor has few or no assets, the judgment creditor may find it impossible to collect the money owed under the judgment.

Although the enforcement process can be cumbersome, particularly if real property is involved, a creditor who is intent on recovering the fruits of its judgment can effectively use the procedures available for enforcing judgments and other court orders to do so.

1.12.1 Investigation: Examination in Aid of Execution

In most provinces, judgment creditors are entitled to compel a judgment debtor to attend an examination in aid of execution to answer questions under oath. At the examination, a judgment creditor may question a judgment debtor on any matter pertinent to the enforcement of the judgment, the reason for non-payment or non-performance of an order, the debtor's income and property, the debts owed to and by the debtor, the disposal the debtor has made of any property, either before or after the judgment, and the means the debtor has or may have to satisfy the order. In some provinces, the court also has the discretion to order the attendance of any other person who may have knowledge of the debtor's circumstances, including the debtor's spouse.

1.12.2 Seizure and Sale of Real and Personal Property

1.12.2.1 Real Property

A judgment creditor may execute its judgment against any real property owned by the judgment debtor. The creditor must first register the judgment against the title interest of the debtor. Unless it is renewed, a registration will generally expire after a set period.

Once a judgment is registered against title to real property, a judgment creditor can seek to have the judgment debtor's interest in the property sold. There are different procedures in place in each province for the sale of the debtor's land. Some provinces require that there be a hearing before the land can be sold, and others have waiting periods after the registration. Ultimately, once the procedures are complied with, an appointed official, such as a sheriff or bailiff, will carry out the sale of the land.

A judgment creditor is not a secured creditor; if there are other charges registered against the title to a debtor's property at the time a judgment is registered, they will rank in priority over the judgment. Further, a judgment creditor will rank equal to other judgment creditors whose judgments are registered against title to the debtor's property, even if those registrations are made later in time, but prior to sale. Where there are no mortgages, liens or similar encumbrances registered against the judgment debtor's interest in the land, the proceeds of sale will typically be distributed rateably among the recognized creditors. Where a judgment debtor has only a joint or partial interest in the property, only that interest is subject to being sold.

1.12.2.2 Personal Property

All goods, chattels and personal property of a judgment debtor are liable to seizure and sale by a judgment creditor, except for certain exempted items and amounts. Items exempted from seizure may include household items, work tools, essential clothing and essential medical aids. Appointed officials, such as sheriffs and bailiffs, carry out the seizure and sale of the debtor's property. If assets are seized and sold, the creditor is entitled to the costs of enforcing the judgment. Just like in the case of real property, normally the proceeds from the sale of personal property are distributed rateably among the recognized creditors. However, any amounts owing for family support or maintenance orders will generally take priority over any other unsecured judgment debts.

1.12.3 Garnishment of Debts

One of the most effective enforcement tools is garnishment. A garnishing order requires the individual, corporation or financial institution served with the order to pay into court any money currently owed to the judgment debtor, instead of paying the judgment debtor. A creditor may obtain a garnishing order by applying to the court registry after judgment. Information as to likely sources of monies owing to the judgment debtor can be obtained through the examination in aid of execution process.

Typically, a garnishing order will be served on the bank branch where the debtor maintains an account, as well as on the debtor's employers and/or customers. In some provinces, a portion of the judgment debtor's wages will be exempt from garnishment. After the money has been paid into the court, it is distributed proportionately to all registered judgment creditors.

2. Class Actions

Class actions are proceedings brought by a representative plaintiff on behalf of, or for the benefit of, a class of persons having claims with common issues. The purpose of a class action is to efficiently address cases of alleged mass wrong and to improve access to justice for those whose claims may not otherwise be pursued. While formal class action legislation is currently in force in most provinces and the Federal Court, the Supreme Court of Canada has held that class actions can also be commenced in the absence of formal legislation.

2.1 Certification and Decertification

Class proceedings legislation anticipates that a class action will be commenced in the same manner as an ordinary lawsuit.

In most provinces, the plaintiff is required to bring a motion to allow the action to proceed as a class proceeding, shortly after the action is commenced. Until the court certifies the action, the representative plaintiff cannot proceed on behalf of the class. In Quebec, the plaintiff is required to bring an application for authorization to institute a class proceeding and to act as class representative before the action is commenced by way of an application to institute proceedings.

The certification motion occurs before a judge. In the common law provinces, the requirements for certification of a class proceeding are similar and generally include the following:

- The pleading must disclose a cause of action.
- There must be an identifiable class of two or more persons.
- The claims of the class members must raise issues against the defendants that are common to all class members.
- The class proceeding must be the preferable procedure for the fair and efficient resolution of the common issues.
- There must be a representative plaintiff who can fairly and adequately represent the interests of the class, who has produced a plan to advance the proceeding on behalf of the class and who does not have a conflicting interest with other class members.

The claims of the class members must raise issues against the defendants that are common to all class members.

Ontario has recently passed amendments to its class proceedings legislation that, once proclaimed, will require that common questions of fact and law "predominate" over any individual issues. As a result, courts will be required to specifically consider whether a class proceeding is superior to a variety of alternative procedures such as regulatory or other remedial schemes that may already be in place.

Quebec has somewhat similar criteria for authorization (certification). Historically, Quebec was thought to have the lowest threshold for class authorization because, unlike legislation in the common law provinces, the CCP does not include "preferability" as a requirement.

Notice of the certification order must be given to all potential class members, and a time period is established to allow people to opt in or out of the proceeding. The method of providing notice to the class members is largely dependent on the size and nature of the class and can range from notice by mail to known class members to mass media publication.

A court may order the decertification of a class proceeding if new information arises or events occur, such that the conditions for certification are no longer satisfied. If a class proceeding is decertified, the action may continue as one or more proceedings between the named parties.

2.2 Class Membership Requirements

The Canadian provinces differ in their requirements for participation in a class proceeding. British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec and Nova Scotia have "opt out" regimes, regardless of residency, whereby all class members who do not wish to be members of the certified proceeding must take active steps to opt out, or they will remain members of the class and be bound by a judgment or settlement of common issues.

In New Brunswick and Newfoundland and Labrador, there are separate regimes for resident and non-resident class members. In those provinces, resident class members are given an opportunity to opt out. However, class members residing outside the province must opt in to the class proceeding by taking an affirmative step, as set out in the certification order, if they wish to participate in, and be bound by, the class action.

The Supreme Court of Canada has not yet rendered a specific ruling on whether a provincial court can certify, constitutionally or otherwise, a "national class" with members in more than one province or territory, nor has it ruled on whether an order in a national class proceeding will be enforceable against non-residents. However, courts in a number of common law provinces have certified national classes, raising the possibility of multiple competing provincial class actions.

While most provinces have no formal procedure for coordination of contested class actions commenced in different provinces regarding the same subject matter, some provinces have issued practice directions adopting a protocol for the coordination of settlement hearings in class actions. In British Columbia, when there are multiple actions proposed or commenced in different provinces regarding the same subject matter, legislation requires the court to determine which province the action should proceed in at the certification stage. In response, the court may allow certification in British Columbia, deny certification in British Columbia in favour of certification in another province or refuse certification for a portion of the proposed class who may be certified as class members in a proceeding in another province. Ontario has recently passed amendments to their class proceedings legislation that, once proclaimed, will impose a similar procedure as British Columbia described above.

Quebec courts have, for the most part, resisted the urge to certify national classes. Where national classes are certified, Quebec courts have generally required class members to be residents of Quebec or have a claim that has some connection to the province under the rules of private international law.

2.3 Conduct of Class Action Proceedings

Once the action is certified, it will proceed through the normal discovery process on the common issues. The defendant has a right to examine for discovery the representative plaintiff(s) in the action. With leave of the court, the defendant may also discover other class members.

Generally, the judge who makes the certification order will hear all of the motions in the class proceeding up to the trial of the common issues. Depending on the province, that same judge may also hear the common issues trial.

The resolution of the issues in a class proceeding may require more than one trial. The first trial will resolve the issues certified as common to the class and may include a ruling on the entitlement to, and quantum of, aggregate damages. Judgment on the common issues is binding on all class members who have not opted out of the proceeding. Further, all court-approved consent resolutions, such as settlement or dismissal, are binding on all class members.

Once there has been a determination of the common issues, there may be a need for further assessment of individual claims. If there is an aggregate award in favour of the class, a method must be established, through consultation between court and counsel, to distribute the award to the class members. If individual issues remain to be determined after the court has adjudicated the common issues, then a procedure must be established to assess those claims. The court has broad discretion to establish a method to assess individual claims. Methods for assessing claims range from relying on filed proofs of claim to ordering complete trials on individual issues. Any assessment method chosen by the court will include consideration of the facts of each case, the amount of damages and the nature and extent of the outstanding issues.

2.4 Appeals

In the common law provinces, there is a right of appeal from any order refusing to certify or decertify a proceeding. In some provinces, an order certifying a class proceeding may only be appealed with leave of the court. In Quebec, there is a right of appeal from an order refusing to authorize a class proceeding, but leave to appeal is required for an order authorizing a class proceeding, and it is reserved for exceptional cases.

There is a right of appeal in all provinces from a judgment on the common issues. In addition, appeals as of right are normally available from orders that determine individual issues.

If a representative plaintiff fails to bring an appeal from a certification hearing order or judgment on common issues within the requisite time limits, or if a plaintiff abandons an appeal, any other class member may pursue the appeal with leave of the court.

2.5 Awards, Costs, Funding and Counsel Fees

Canadian jurisdictions differ on the matter of costs. In Ontario and Alberta, for example, costs may be awarded against the losing party in a class proceeding in the same manner as in any other action. In British Columbia and Newfoundland and Labrador, however, costs are rarely awarded in a class proceeding, although courts do have discretion to award costs where the conduct of one of the parties is found to be vexatious, frivolous or abusive, or where improper or unnecessary steps have been taken.

The representative plaintiff is required to retain a lawyer to act on behalf of the entire class for the determination of the common issues. Contingency fees are permitted in all provinces. The agreement respecting counsel fees and disbursements must (1) be in writing, (2) state the terms under which the fees and disbursements are to be paid, (3) give an estimate of the expected fee, (4) state whether that fee is contingent on success, and (5) set out the method by which payment is to be made. In most provinces, the agreement respecting fees and disbursements between a lawyer and the representative plaintiff is not enforceable, unless it is approved by the court on the application of the lawyer. Amounts owing under an enforceable agreement are a first charge on any settlement funds or monetary award.

In some jurisdictions, the representative plaintiff may obtain funding for legal costs from publicly endowed funds.

In some jurisdictions, the representative plaintiff may obtain funding from a third-party for legal costs.

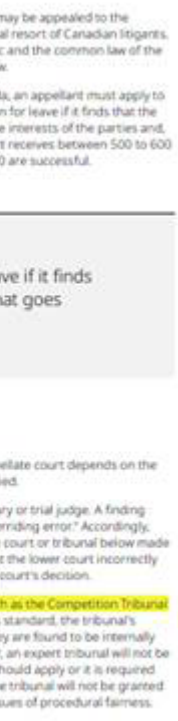
III. Quebec Law and Procedure

III. Quebec Law and Procedure

1. Overview

Quebec is among the few Canadian provinces where law is practised regularly in both English and French. Although most lawyers practising in Quebec are bilingual and, therefore, can give advice in both languages, there is still a perceived language barrier that makes Quebec seem less accessible than other jurisdictions. In Montréal, a claim can be prosecuted in both French and English, and written proceedings can be in one language for a plaintiff and in another for a defendant. However, most of the litigation in cities other than Montréal will be in French.

Another important difference in Quebec is that the province operates under a civil law system (*Civil Code of Québec*), as opposed to the other nine provinces and all the territories, which operate under a common law system. The fact that Quebec is governed by a civil code does not mean that common law is not at issue in proceedings in Quebec. In fact, common law may govern public or administrative law litigation and litigation that is conducted before the Federal Court of Canada (which sits in the cities of Montréal and Québec) or in matters ll within federal power under the Canadian Constitution, such as criminal law, bankruptcy and insolvency itime law.



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procedural point of view, proceedings in Quebec are conducted under the CCP, which is similar, to a extent, to the various rules of practice found in the common law provinces. An important reform of P came into force on January 1, 2016. The new CCP is intended to, among other things, streamline and nize many rules of civil procedure and affirm the existence of private, voluntary dispute prevention and tion processes, as well as encourage parties to explore such processes prior to pursuing l proceedings.

2. Quebec Courts and Jurisdiction

Quebec has two main levels of courts: (1) a superior court, designated as the Superior Court of Quebec, which has primary, inherent jurisdiction over most civil claims, and (2) a lower provincial court, designated as the Court of Quebec, which has a limited jurisdiction determined by statute. The Superior Court of Quebec is the court of original general jurisdiction and hears in first instance every action not assigned exclusively to another court by a specific provision of law. As such, the Superior Court of Quebec exercises an inherent competence that is akin to the jurisdiction of the Superior Courts in the other provinces.

As in the other provinces, jurisdiction in bankruptcy is specifically assigned to the Superior Court of Quebec under and by virtue of section 183(1.1) of the *Bankruptcy and Insolvency Act.*

The Court of Quebec has jurisdiction to the exclusion of the Superior Court for civil claims in which the sum claimed or the value of the thing demanded is less than C$85,000, except in actions reserved for the Federal Court of Canada.

The Court of Quebec has a Small Claims Division with its own special procedure for monetary claims of C$15,000 or less. Additionally, there are municipal courts in Quebec in which jurisdiction and the powers of the justices of the peace are set out in special laws.

The Court of Appeal of Quebec is the general appeal tribunal for Quebec. It hears appeals from any judgment from which an appeal lies, failing an express provision to the contrary in the CCP. More specifically, an appeal lies from any final judgment of the Superior Court of Quebec or Court of Quebec. However, leave to the Court of Appeal is required when the value of the subject matter of the dispute under appeal is less than C$60,000.

An interlocutory judgment of the Superior Court or the Court of Quebec is appealable as of right if it rejects an objection to evidence based on certain duties of confidentiality. Other interlocutory judgments can only be appealed if leave is granted. A judge of the Court of Appeal may grant leave if the decision appears unreasonable in light of the guiding principles or procedures.

Court of Appeal decisions are generally rendered by panels of three or five judges. The final arbitrator of disputes in Quebec is the Supreme Court of Canada, as in the common law provinces.

3. Contractual Liability in Quebec

3.1 Breach of Contract

Two provisions in the CCQ set out the details of a claim for breach of contract. Article 1458 sets out the liability of the party in breach:

> *Every person has a duty to honour his contractual undertakings.*
>
> *Where he fails in this duty, he is liable for any bodily, moral or material injury he causes to the other contracting party and is bound to make reparation for the injury; neither he nor the other party may in such a case avoid the rules governing contractual liability by opting for rules that would be more favourable to them.*

Article 1590 sets out what constitutes the performance of an obligation:

> *An obligation confers on the creditor the right to demand that the obligation be performed in full, properly and without delay.*
>
> *Where the debtor fails to perform his obligation without justification on his part and he is in default, the creditor may, without prejudice to his right to the performance of the obligation in whole, or in part by equivalence,*
>
> *(1) force specific performance of the obligation;*
>
> *(2) obtain, in the case of a contractual obligation, the resolution or resiliation of the contract or the reduction of his own correlative obligation;*
>
> *(3) take any other measure provided by law to enforce his right to the performance of the obligation.*

Note that in the civil law, the failure to fulfil a contract does not always give rise to a cause of action. For example, *force majeure* exempts the contracting party from liability, even if the contract does not contain a *force majeure* clause.

3.2 Remedies for Breach of Contract

Several remedies are available for a breach of contract, including specific performance, termination of the contract and resolution of the contract, reduction of obligations, non-performance and right of retention.

Unlike under the common law, where specific performance is an exceptional remedy, specific performance is a common remedy in Quebec. The court will refuse to grant specific performance where the obligation to be performed is *intuitu personae*, meaning that it requires unique and personal involvement by a physical person. Specific performance will also be denied where the obligation is illegal, dangerous, impossible or prejudices the rights of a third party, and where the actions performed are sufficiently complex to render compliance with the order difficult or impossible for the court to verify.

The court may also grant the resolution or the termination of a contract. The resolution of a contract is the retrospective and prospective annulment of a contract, whereas termination is the prospective annulment of a contract. Where the breach by the defendant is not sufficiently serious to warrant termination or resolution, the plaintiff may petition the court to reduce their correlative obligations under a contract. Pending the execution of the contract by their co-contracting party, the plaintiff may also withhold execution of their obligations under the contract or retain property in their possession that belongs to the defendant.

3.3 Damages

In addition to the remedies noted above, the plaintiff may apply for damages to compensate a sustained loss or a profit of which they have been deprived. Contractual damages are less extensive than extra-contractual damages. The defendant is only liable for damages foreseeable at the time the obligation was contracted, except in cases of intentional or gross fault. Even in the latter circumstance, the defendant can only be held liable for the immediate and direct consequences of the non-performance.

4. Extra-Contractual Liability in Quebec

In Quebec, the general regime for extra-contractual liability — comparable to common law tort liability — is set out in Article 1457 of the CCQ. Note how it mirrors the article for contractual liability:

> *Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.*
>
> *Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.*
>
> *He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.*

Subsequent articles in the CCQ deal with cases that have to do with liability for the act of a minor and liability for the act of a thing. To bring a successful action for extra-contractual liability in Quebec, a plaintiff must prove fault on the part of the defendant, injury suffered by the plaintiff and a causal link between the fault and the injury.

4.1 Duty of Care

Unlike the common law, the civil law creates a generalized duty of care between all individuals living together in a society. While at first this may seem to broaden the scope of extra-contractual liability in Quebec, the civil law has adopted a more restrictive approach to both fault and causation.

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A typical situation in which the common law and civil law approach differ is the case of the bystander. In a common law jurisdiction, a bystander who comes across a person in distress and does nothing to help said person cannot be held responsible, as the bystander owes no duty of care to the person in distress. In Quebec, a bystander is required to take all reasonable steps to help an individual in distress, although the bystander is not required to put themselves at risk.

4.2 Standard of Care/Fault

The civil law approach to fault and the standard of care is substantially similar to that of the common law. Both systems adopted an objective standard to measure the defendant's conduct. Whereas the common law archetype is the fictional "reasonable person," the traditional civilist archetype, doubtless reflecting the prejudices of the age, used to be the *bon père de famille* (the good head of the household). More recently, two new archetypes have become discernible in the literature, namely the *honnête citoyen* (the honest citizen) and the *personne prudente et diligente* (the prudent and diligent person).

To blunt the impact of the generalized duty of care, courts sometimes have recourse to the language of fault. The *personne prudente et diligente*, while prudent and diligent, is not expected to foresee all possible consequences of their actions. Thus, the court might find that the injury inflicted on the plaintiff is so unexpected or beyond reason that no fault exists on the part of the defendant.

4.3 Injury

The laws of injury in Quebec and the rest of Canada do not differ greatly. If anything, treating injury and causation separately in Quebec has led to a greater emphasis on each one. One particularity of the CCQ is the recognition of moral damages as a recoverable head of damages. Moral damages have been used, for example, to compensate *solatium doloris*, the harm felt by a spouse or relative following the death of the plaintiff, as well as nervous shock complained of by a plaintiff.

4.4 Causation

Causation and, in particular, remoteness are used by civil courts as a factor in limiting the effect of a generalized duty of care. A defendant will not be held responsible for losses that the court considers too remote.

5. Commencement of an Action and Service

In Quebec, an action is instituted by way of an originating application. The defendant responds to the application by filing an answer within 15 days of being served. The parties are then called upon to agree to a timetable for the prosecution of the case, known as a case protocol. The case protocol includes all procedural matters dealing with the presentation of preliminary motions, the scheduling of examinations out of court, the filing of expert reports and the filing of all pleadings to bring the case to trial. Should the parties fail to agree on a timetable, the judge will impose one on the parties, dictating the time periods within which the various procedural steps must be completed.

The parties must file a request with the court to set the case down for trial within six months after the date on which the case protocol is approved. The request is made by a joint declaration that the case is ready for trial and setting out details such as lists of exhibits and witnesses. If the declaration cannot be made jointly, the plaintiff or another party can file a proposed declaration, and the other parties are given 15 days to file their own proposed declaration, stating what should be added or deleted; failing which, the initially filed proposed declaration is accepted.

At any stage before the trial date, the judge may conduct a pre-trial conference to determine whether a settlement is possible, whether admissions can be made and how much time is required for trial. In a standard court action in Quebec, the parties will be heard approximately 12 to 36 months from the time the originating application was filed, and, in most civil matters, a Quebec judge has a maximum of six months from the time the trial ended to render a judgment. An unsuccessful party who wishes to appeal the judgment has 30 days to appeal the trial judge's decision or, if applicable, apply for leave to appeal. There is no procedure for summary judgment in Quebec.

All originating documents — for example, the originating application — are to be served by a bailiff or via an enumerated alternative to personal service. Personal service is normally carried out by a process server and can take between one and several days to perform. All other court documents must be served personally, either by bailiff, by mail or, in cases where a party has permitted its lawyer to accept service, by email, facsimile or courier. Proof of service is made by an Affidavit of Service sworn by the person serving the documents and is accepted in court proceedings as proof of service.

Clear rules exist as to how documents are to be served on any entity that is not a natural person. For example, personal service on a corporation is made at its head office (if in Quebec) or one of its establishments in Quebec and involves leaving the document in the care of a person who appears in a position to give it to an officer, director or agent of the corporation, or by delivering the document personally to an officer, director or agent of the corporation at any place.

6. Procedures in Courts of First Instance

In Quebec, the limitation period is three years for most contractual and extra-contractual civil claims. When the cause of action arises from moral, bodily or material damages appearing progressively or tardily, the time limitation period starts to run from the date the damage appears for the first time. Time limitation in Quebec is a matter of public order and cannot be reduced contractually or otherwise.

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Within a standard court action in Quebec, the CCP sets out various remedies available to the parties within the context of civil proceedings. Apart from filing the originating application to seek a damage award, interim remedies are also available in Quebec, including interlocutory injunctions. Seizures before judgment may be permitted with leave of a judge, which allows the plaintiff to seize the property of a defendant when there is reason to fear that the recovery of the debt may otherwise be in jeopardy. Similarly, Article 517 of the CCP provides that a plaintiff may also seize, without obtaining leave of the court, certain property before judgment, including movable property that the plaintiff has a right to recover and movable property permitted to be seized by a provision of law, to assure the exercise of the plaintiff's rights upon it.

Final judgments in Quebec may also be enforced by a writ of seizure and sale of property, garnishment by the judgment creditor of the debts owing to the judgment debtor, and an order for forced surrender. A final judgment in Quebec may only be enforced when it becomes executory and once a right of appeal has lapsed.

Finally, the losing party, under and by virtue of Article 340 of the CCP, must pay all legal costs, including the cost of the stenographer, unless the court, by a decision-giving reasons, orders otherwise. Additionally, the court may, by a decision supported by reasons, reduce the costs relating to experts' appraisals requested by the parties, particularly if, in the opinion of the court, there was no need for the appraisals, the costs were unreasonable or a single expert appraisal would have sufficed. Lawyers' fees are recoverable in the event of abuse of proceedings by the other party, in which case, they are usually awarded in the context of a claim for damages in the originating application or in an incidental proceeding rather than as costs. However, these awards remain exceptional. The general rule is that each party pays its own lawyers' fees, which are not recoverable from the losing party.

7. Discoveries and Examination of Witnesses

7.1 Generally

Discoveries in Quebec are provided for in Articles 221 to 230 of the CCP. Written and oral discoveries must be set out in the case protocol. Oral discovery is not allowed in claims of less than C$30,000. In any event, the right to oral discovery is limited to three hours in claims of less than C$100,000 and five hours in other claims. It can be extended from five to seven hours or from three to four hours upon the agreement of all parties. Oral discovery is conducted under oath before a court stenographer and each party may ask relevant questions to every opposing party.

In Quebec, objections raised during oral discovery, including objections based on relevance, generally do not prevent the examination from continuing, and the witness is required to answer under reserve of any objections to be adjudicated at trial. That said, the witness may refuse to answer questions objected to on the basis of (1) not being able to compel the witness, (2) fundamental rights, or (3) protecting a fundamental and legitimate interest. In such case, objections must be adjudicated before the court within five days.

Finally, an examined party may give information and/or documents by an undertaking to be provided at a later date if such information and/or documents are not available at the time of the examination. Note that the affidavit of documents does not exist in Quebec. A party has no obligation to disclose in advance all documents relevant to a matter in issue that are or have been in the party's possession, control or power. Examinations out of court, thus, become particularly important in order for the party conducting the examination to obtain communication of the relevant documents through undertakings of the opposing party.

7.2 Abroad

Article 499 of the CCP provides for the examination of witnesses abroad by a rogatory commission. More specifically, the court may, on motion, appoint a commissioner to receive the testimony of any person who resides outside Canada, if the witness cannot be examined by technological means.

Any party may, after notice is given to the other parties, have examinations and cross-examinations admitted by the court and attached to the rogatory commission. In any event, whether or not there are examinations beforehand, the commissioner may ask, and must allow the parties to ask, any questions relevant to the case. Additionally, the commissioner shall reserve any objections made by the parties to the evidence. The depositions are recorded in writing and signed by the witness and the commissioner unless they are taken by a duly sworn stenographer.

Finally, the commissioner is authorized to make a copy of any document exhibited by a witness who refuses to part with it.

8. Recognition of Foreign Judgments

The rules governing the enforcement of orders from courts outside Quebec are set out in Book 10 of the CCQ. The same rules apply to the enforcement of orders from courts in other countries and courts in other provinces of Canada. The application for enforcement is made by an originating application.

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Article 3155 of the CCQ states that a Quebec authority recognizes and, where applicable, declares enforceable any decision rendered outside Quebec except where:

- The authority of the country in which the decision was rendered had no jurisdiction under the provisions of the title in the CCQ pertaining to recognition and enforcement of foreign decisions.
- The decision is subject to ordinary remedy or is not final or enforceable in the jurisdiction in which it was rendered.

- The decision was rendered in contravention of the fundamental principles of procedure.
- A dispute between the same parties, based on the same facts and having the same object, has given rise to a decision rendered in Quebec, is pending before a Quebec authority or has been decided in a third country.
- The outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations.
- The decision enforces obligations arising from the taxation laws of a foreign country.

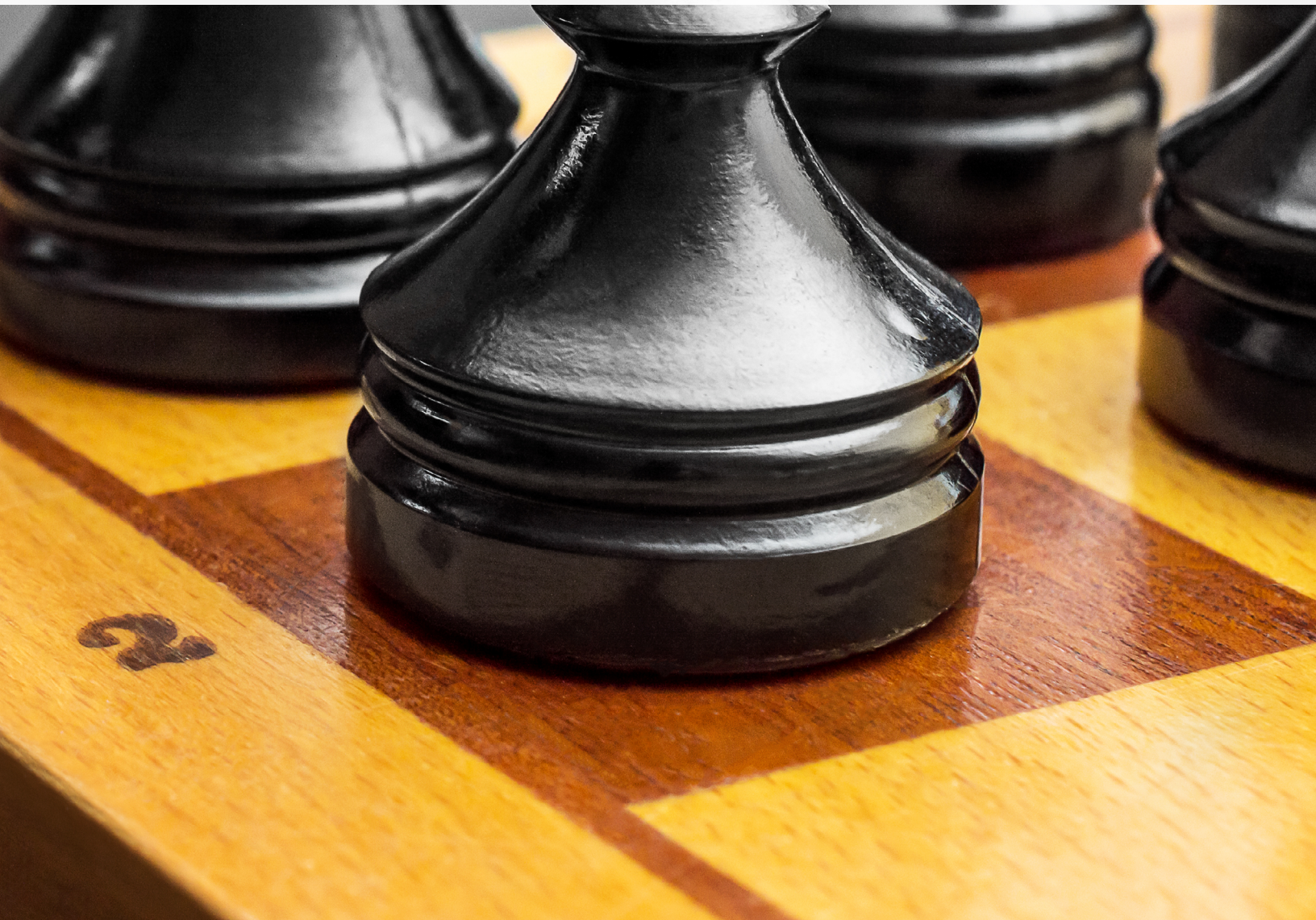
Article 3158 of the CCQ also provides that the Quebec courts are confined to verifying whether the foreign decision, with respect to which recognition or enforcement is sought, meets the requirements prescribed in the CCQ on recognition and enforcement of foreign decisions, without entering into any examination of the merits of the decision.

Article 3168 of the CCQ provides that the jurisdiction of a foreign authority is recognized by the Quebec courts only where:

- The defendant was domiciled in the country in which the decision was rendered.
- The defendant possessed an establishment in the country in which the decision was rendered, and the dispute relates to its activities in that country.
- An injury was suffered in the country in which the decision was rendered.
- The obligations arising from a contract were to be performed in that country.
- The parties submitted to the foreign authority disputes that arose or could have arisen between them with respect to a specific legal relationship.
- The defendant accepted the jurisdiction of the foreign authority.

As such, once the Quebec court has made the determination that the foreign authority was competent and that none of the exceptions stated at Article 3155 of the CCQ are applicable, the decision will be recognized and declared enforceable.

IV. Typical Civil Claims



IV. Typical Civil Claims

Although there are many different types of civil (non-criminal) proceedings heard in Canada's courts, this section highlights aspects of Canadian law and legal procedure affecting only some of the most common claims involving businesses.

1. Breach of Contract

1.1 General

A contract is a promise or a set of promises that when performed create a legally recognized obligation and when breached generally necessitate a remedy. Contract law in Canada is, for the most part, governed by the common law of the provinces and territories or, in the case of Quebec, by the civil law as set out in the CCQ. However, certain types of contracts are impacted by statute, and the enforcement of all contracts is subject to statutory limitation periods.

1.2 Formalities

Except for certain contracts that must be in writing or signed under seal, Canadian law recognizes the enforceability of promises, whether oral or written, provided there is "consideration," or a mutuality of promises, flowing from the promisee to the promisor. Courts look to the parties' bargain to determine the parties' objective or manifest intent to be bound. Courts will also determine whether there has been an "offer" and "acceptance" based on the type and transmission of communication between the parties.

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1.3 Overview of Remedies

In addition to self-help remedies, such as rights of set-off or termination for anticipatory repudiation, contracting parties have access to the courts for enforcement or redress with respect to agreements that are not being honoured. However, other than certain types of equitable remedies, the most common and usual remedy for breach of contract is an award of damages.

1.4 Damages

The general rule for recoverable loss in breach of contract cases is that the courts award damages to place the aggrieved parties in the same position they would have been in had the contract been

performed. Damages for mental distress or hurt feelings are not typically awarded, although Canadian courts have shown a willingness in recent years to award punitive damages for certain types of breached contracts (for example, employment and insurance). However, due to a reluctance of the courts to award punitive damages for the breach of private agreements, and the fact that most breach of contract cases are heard by a judge and not a jury, the vast majority of broken contracts result in damages governed by the general rule mentioned above.

1.5 Equitable Remedies

As a general principle, Canadian courts will not compel the performance of a contract. However, where it can be established that damages will be an inadequate remedy, Canadian courts have the power to order specific performance of a contract or issue injunctions preventing the temporary or permanent breach of an agreement. In addition to, or in lieu of, equitable relief, courts may award equitable damages, but the calculation of these damages does not follow the same principles that govern common law damages. For example, damages might be awarded in lieu of an injunction where the injury that will result from a future unlawful action (such as a threatened trespass on land) can be adequately compensated in damages. Further, the breach of certain types of contracts, such as a distribution of licensed goods, may entitle the aggrieved party to elect an accounting of the breaching party's profits.

1.6 Liquidated Damages

In some contracts, the parties may choose to specify a liquidated sum of damages in the event of breach. The caveat here is that the specification of liquidated damages cannot be a penalty. If the liquidated damage clause is enforceable, then it will preclude the aggrieved party from having to prove its actual damages. In the absence of a liquidated damages clause, the aggrieved party will be entitled to damages directly resulting from the breach, as well as consequential damages that were, or ought to have been, in the minds of the parties at the time of contract.

1.7 Excuses for Non-Performance

Excuses for non-performance can include a mistake (with or without rectification), misrepresentation, unconscionability, fraud, illegality or rendering the contract void for reasons of public policy. As mentioned above, certain contracts, such as consumer agreements, can be set aside for statutorily prescribed reasons. In some cases, performance of the contract may not be possible because events that neither party anticipated have rendered the agreement radically different from those that existed when the contract was undertaken.

1.8 Other Restrictions

Statutory limitation periods may impact the enforceability of a contract depending on when the breach occurred. The ability to enforce may also be affected by waiver or estoppel, although most commercially written contracts will contain express provisions dealing with such matters. The assertion of collateral contracts affecting the primary contract may also affect enforcement.

2. Negligence

This section addresses the common law tort of negligence as it exists in all Canadian provinces and territories except Quebec. Under the CCQ, actions arising out of negligence can be brought as actions for extra-contractual liability, as discussed in section III, 4 "Extra-Contractual Liability in Quebec."

2.1 Elements

To establish a common law cause of action for negligence, a plaintiff must prove that the defendant owed him or her a duty of care, the defendant breached that duty and the plaintiff suffered damage resulting from the breach.

2.2 Duty of Care

Whether or not a potential defendant owes a plaintiff a duty to take care is based on the "neighbour principle." The law requires people and entities to take reasonable care to avoid acts or omissions that can be reasonably foreseen as likely to injure their neighbours.

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To determine who, in law, is a neighbour, the following two questions must be considered:

1. Is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of the defendant, carelessness on the defendant's part might cause damage to that person?
2. If so, are there any considerations that ought to negate or limit:
    - The scope of the duty.
    - The class of persons to whom it is owed.
    - The damages to which a breach of it may give rise.

In considering the second part of the two-part test, the Supreme Court of Canada has indicated that policy issues should be considered in determining whether any factors exist to justify denying liability. Policy issues to be considered include, among other things, the effect of recognizing the duty of care on legal obligations generally, the impact on the legal system and any general societal effect of imposing liability.

The courts repeatedly emphasize that the categories of negligence are not closed and that a novel theory of duty must be assessed against the two-part test set out above.

2.3 Standard of Care

The standard of care is the measure against which the defendant's conduct is assessed. It is an objective measure. In considering whether the standard of care was breached, the courts use the fictional reasonable person. The question is whether the conduct complained of fell below the standard of conduct of a reasonable person similarly situated.

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The reasonable person standard has been diluted for certain types of less capable actors, such as children, youth and persons with a disability. The standard has also been strengthened for certain individuals of superior capacity. Professional people, for example, cannot escape liability by merely performing up to the capacity of the ordinarily prudent layperson. A lawyer is obliged to act like a reasonably prudent lawyer, and a medical doctor is obliged to act like a reasonably prudent doctor. Rather than asking whether the performance was to the best of the defendant's ability, the courts assess whether their conduct was up to the standard of a competent professional in exercising his or her particular profession.

In considering whether a party's conduct is negligent, the court may consider any relevant prevailing custom or behaviour. Those who act in accordance with the general practice of their trade, industry or profession often avoid civil liability. However, it is possible for a court to find that the prevailing custom or practice itself falls below the required standard of care, so that acting in accordance with the prevailing custom or practice will not preclude a finding of breach.

Likewise, a statute setting out the conduct required in certain circumstances or of a particular profession may provide a useful standard of reasonable conduct and some evidence of breach, but it does not provide *prima facie* evidence of negligence. A violation of a statute alone does not equate to liability.

2.4 Burden of Proof

The plaintiff must plead and prove negligence on the balance of probabilities to succeed in an action for negligence. Canada has rejected the doctrine of *res ipsa loquitur* that provides that the elements of duty of care and breach of duty can sometimes be inferred from the very nature of an accident or other event even without direct evidence of how the defendant behaved.

2.5 Damage and Causation

There can be no liability for negligence unless the plaintiff has suffered damage as a result of the defendant's act or omission. The specific breach of the standard of care must be the conduct that gives rise to the damage. The courts have declared that causation need not be proven with "scientific precision," although the question of causation must be proved to the satisfaction of the court on the balance of probabilities. The most employed technique for determining causation is the "but for" test — if the accident would not have occurred but for the defendant's negligence, the defendant's conduct is a cause of the injury.

The courts have declared that causation need not be proven with "scientific precision," although the question of causation must be proved to the satisfaction of the court on the balance of probabilities.

In circumstances in which there may be more than one cause of an accident, defendants who have caused loss will not be excused merely because other causes or factors have helped to produce the harm. It is sufficient if the defendant's negligence was one of the causes of the harm. If the acts of two persons are both substantial factors in bringing about the result, then liability is imposed on both persons on the theory that both acts "materially contributed to the occurrence." The "material contribution" test is limited to circumstances in which multiple defendants may each be the cause of damage or where the plaintiff, through no fault of their own, cannot show which defendant caused the harm.

2.6 Remoteness

Courts will generally restrict a plaintiff's recovery if a consequence of the defendant's act or omission is thought to be too "remote." The doctrine of remoteness attempts to draw an appropriate line between the consequences for which the negligent defendant will be held liable and those for which the defendant will escape liability. Whether a consequence is too remote or is "proximate" enough to result in a finding of liability often turns on the facts of the case.

There is no specific formula to be applied in determining whether any damage is too remote to be recovered. While specific rules have developed for situations that commonly arise, the general approach to the question of remoteness is a pragmatic one: in the chain of cause and effect, when can the consequences of an act no longer be fairly accepted as attributable to the defendant's act?

The most common recurring situations in assessing remoteness include:

- **Thin-skulled plaintiffs:** Negligent defendants must take their victims as they find them.
- **The rescuer:** A negligent wrongdoer is liable to reimburse a rescuer for losses incurred during a rescue attempt.
- **Intervening forces:** Wrongdoers are not immune from responsibility even if there are intervening forces. The question becomes whether it is fair to hold a negligent actor liable when the conduct of others is also involved in bringing about the accident.

2.7 Contributory Negligence

If the plaintiff's own negligence contributes to a loss, the right to recover damages for negligence is affected. The court will attempt to quantify the relative degrees of responsibility for the damage as between the wrongdoer and the contributorily negligent plaintiff, and the defendant will be liable for only that portion of the damages attributable to their degree of responsibility.

3. Trademark, Copyright and Patent

The Federal Court and the provincial superior courts generally have concurrent jurisdiction over the litigation of intellectual property disputes in Canada. The Federal Court's jurisdiction is purely statutory and exclusive with respect to making *in rem* declarations (declarations against property) as to the invalidity of a registered intellectual property right. Provincial superior courts may only rule on the validity of rights as between the parties to the litigation. As well, appeals of decisions of the Commissioner of Patents and Registrar of Trademarks are exclusively within the jurisdiction of the Federal Court. Fresh evidence can be filed on appeal to the Federal Court from decisions of the Registrar of Trademarks.

Since the Federal Court's jurisdiction is purely statutory, where the subject matter of a lawsuit involves elements both covered and not covered by an applicable federal statute, it may be necessary to sue in provincial court. For example, franchise disputes often involve claims relating to registered trademarks, which the Federal Court has jurisdiction over, but they may also have a contractual element, which the Federal Court does not have jurisdiction over.

Alternative dispute resolution is generally available for intellectual property disputes in Canada, except for matters that the Federal Court has exclusive jurisdiction over.

Disputes over internet domain names can be adjudicated by arbitrators pursuant to the dispute resolution procedures promulgated by the Canadian Internet Registration Authority (CIRA), the provincial superior courts or the Federal Court if a trademark owner is alleging that the use of a domain name violates its registered or common law trademark rights.

In certain cases, exclusive licensees have standing to sue. However, it may be necessary to name the owner of the applicable intellectual property right as a party to any such action.

Interlocutory injunctions, Mareva injunctions, Anton Piller orders and comparable extraordinary remedies are generally available if the appropriate thresholds are met.

Both the *Trademarks Act* and the *Copyright Act* provide for the ability to request that Canadian customs officers detain, on an interim basis, goods imported into Canada or exported from Canada that appear to infringe on intellectual property rights. These provisions increase the ability of brand owners to prevent counterfeit products from entering Canada, but requests cannot be made for goods transiting through Canada. The request is valid for two years. Once goods are detained, Canadian customs will hold the goods for up to 10 business days. If a lawsuit is commenced during that time, Canadian customs will hold the goods until the court proceedings are determined or settled or until the court directs that they should no longer be held.

Bifurcation orders involve ordering separate trials on liability and, if liability is found, a separate trial on damages. They are generally available on consent but are unlikely to be granted in the absence of consent.

Special rules govern pharmaceutical litigation relating to the issuance of notices of compliance (NOCs) for generic versions of drugs that are the subject of patent rights. In some limited cases, applications can be made in the Federal Court to prohibit the Minister of Health from issuing an NOC. However, in most other cases, an NOC prohibition application is unavailable. Instead, a patent infringement action must be brought against the generic version of a patented drug.

In Canada, unlike in some other jurisdictions, there are generally no jury trials in intellectual property proceedings. As well, with respect to patent proceedings, there are no preliminary proceedings (referred to as Markman hearings in the United States) to determine the construction of a patent prior to trial.

In Canada, unlike in some other jurisdictions, there are generally no jury trials in intellectual property proceedings.

If a plaintiff in Canada is successful in an action for infringement of its patent, trademark or copyright rights, it is generally entitled to the following remedies:

- An injunction to restrain the continued infringement.
- Compensation for the infringement committed up to the date of the order, typically in the form of an election between the plaintiff's damages and an accounting of the infringer's profits; in the case of patents, additional compensation for infringing activities that occur between the date of publication of the application in Canada and the date the patent was granted. The *Copyright Act* also provides for statutory damages.
- Destruction or delivery up of the infringing goods.
- Punitive damages (in rare cases where the defendant's conduct has been egregious).
- Pre- and post-judgment interest and legal costs.

4. Defamation

Defamation is a notoriously complex tort. This section provides only an outline of the common law tort of defamation as it exists in the common law provinces of Canada. Quebec's defamation law is similar, but it has a few significant variations that are not addressed in this guide.

Defamation is a notoriously complex tort.

4.1 Elements

To establish a cause of action for defamation, a plaintiff must prove that the defendant has made a defamatory statement to a third party about the plaintiff. A defamatory statement is any statement that would damage the reputation of the plaintiff in their community in the estimation of "reasonable" persons.

Defamation is a strict liability tort. Once the plaintiff has established that defamatory words were published, the onus shifts to the defendant to prove that the words complained of are defensible. The usual defences to a defamation claim are that the words claimed to be defamatory were true (justification), fair comment, published on an occasion of absolute or qualified privilege, or constitute responsible communication on a matter of public interest.

4.2 Defence of Justification

Truth, or justification, is an absolute defence to a defamation claim. Plaintiffs have no right to have their character or reputation protected from imputations that are true.

Unlike in the United States, where the impact of the First Amendment places the onus on the plaintiff to prove that what has been written is false, in Canada, the onus is on the defendant to prove that the words complained of are substantially true. Similarly, Canadian common law does not afford any special recognition to "public figures" other than in the context of meeting a "public interest" test for the defences discussed below. In other words, Canada does not have a *New York Times Co. v. Sullivan* defence.

Unlike in the United States, where the impact of the First Amendment places the onus on the plaintiff to prove that what has been written is false, in Canada, the onus is on the defendant to prove that the words complained of are substantially true.

4.3 Fair Comment

The fair comment defence protects expressions of opinion on matters of public interest that are based on facts. Although some Canadian courts have suggested that the comment must be fair, the better view is that the opinion can be obstinate or prejudiced as long as it is an opinion that can honestly be held by any person on the proven facts. It is not necessary for the speaker to honestly hold the expressed opinion.

4.4 Privilege

Provincial statutes provide a defence of privilege regarding various forms of reports, such as the statutory privilege for fair and accurate reports on court proceedings. In addition to court proceedings, legislation also protects fair and accurate reports on public meetings and communications, and decisions made by bodies that represent governmental authority. In some cases, the privilege is absolute, but in others, it applies as long as the defendant does not act with malice.

In addition to statutory privilege, the common law recognizes a qualified privilege that protects defamatory statements where the defendant had a legal, moral or social duty in making the statement, and the recipient of the information had a corresponding interest in receiving the information. Qualified privilege has been recognized in numerous situations, including employment, family, union, business-to-business, litigation and medical communications. The question in each case is whether there is an interest in publishing and receiving the information.

4.5 Responsible Communication on a Matter of Public Interest

A relatively recent development in Canadian libel law is the protection of news reports on matters of public interest where those news reports were prepared and published responsibly and relate to a matter of public interest. The Supreme Court of Canada recognized the defence in the landmark decision of *Grant v. Torstar*. The court has termed this defence "responsible communication on a matter of public interest" and is available where (1) the publication is on a matter of public interest, and (2) the publication was responsible, in that the defendant was diligent in trying to verify the allegations, having regard to all of the relevant circumstances. Where these two elements are present, a defence will be available, even if what was published is false.

4.6 Malice

Where the defences of fair comment, qualified privilege or responsible communication are established, they can only be defeated if the plaintiff proves that the defendant acted maliciously, in the sense that the dominant motive for the publication was not to comment on a matter of public interest, but rather to injure the subject of the comment.

4.7 Jurisdiction

Given the First Amendment and the impact of *New York Times Co. v. Sullivan* in the United States, Canada is a more "plaintiff-friendly" jurisdiction than the U.S. Consequently, U.S.-based defendants have sometimes attempted to bring claims in Canada. This tactic has increased with the advent of the internet. The Supreme Court of Canada recently considered the issue of jurisdiction in *Haaretz.com v. Goldhar* in the context of an internet-defamation case. The court noted that given the ease with which jurisdiction may be established in a defamation case, judges must conduct a robust and carefully scrutinized review of the issue of *forum non conveniens* (inconvenient forum). In that case, the court found that the appropriate forum was Israel, not Ontario.

Even in cases where it is established that the appropriate jurisdiction is Canada or a Canadian province, when online material is viewed in Canada, the plaintiff's damages may be limited to the loss of the plaintiff's reputation in Canada. American courts have been reluctant to enforce Canadian libel judgments, having regard to the fact that Canada does not have protections for free speech akin to those provided by the First Amendment. Accordingly, even if a libel judgment is obtained in Canada against a U.S.-based defendant, it may be very difficult to enforce in the United States.

4.8 Damages

Damages are presumed in defamation cases. Canadian awards are much smaller than awards in the United States. The largest award in a Canadian case was for C$2.5-million. Most Canadian damage awards for libel are less than C$100,000.

5. Tax Litigation

The Tax Court of Canada is a superior court of record that has jurisdiction over the litigation of most federal income tax and commodity tax disputes in Canada. The Tax Court's jurisdiction is purely statutory and generally covers all matters relating to assessments and reassessments of tax, interest or penalties. Appeals of Tax Court of Canada decisions are exclusively within the jurisdiction of the Federal Court of Appeal.

Federal tax dispute litigation is commenced by a taxpayer filing a notice of appeal in the Tax Court of Canada. Cases may proceed either by way of informal or general procedure. Informal procedure

is limited to cases in which the amount of federal tax and penalties in dispute for each taxation year, excluding interest, is C$25,000 or less. For goods and services tax (GST) appeals, the amount in dispute cannot exceed C$50,000. General procedure is available in any other instance where you do not qualify for and do not choose to follow the informal procedure, regardless of the disputed amount. In general procedure cases, discovery is held by exchange of documents followed by the examination, without a judge, of one witness on behalf of each party. One or both parties may then apply for a hearing date, where witnesses will be examined and cross-examined before a judge and documents will be formally entered into evidence. Trials in the Tax Court of Canada typically take one day or less, particularly where the parties have agreed on all or substantially all of the facts. However, in more complex and contentious cases, the trial may not be completed for several weeks or months.

In the Tax Court of Canada, the onus is on the taxpayer to show that the assumptions that the Canada Revenue Agency used in its taxation assessment are erroneous. Once the taxpayer establishes a *prima facie* (at first sight) case, the burden shifts to the Canada Revenue Agency to prove the accuracy of its assumptions on a balance of probabilities. There is an exception with respect to civil penalties or assessments beyond the normal limitation period, in which case the Canada Revenue Agency carries the burden of proof. Generally, the Minister of National Revenue is represented by specialized tax litigation counsel from the Department of Justice.

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The decision of whether, and on what basis, to accept a settlement offer in any case is made on a collaborative basis between the Canada Revenue Agency and the Department of Justice. Settlements are generally based on a principled approach to the matter rather than as a percentage of the dollar amount at stake. This differs from the rules of general civil litigation, but it does offer the opportunity to develop creative settlement strategies, particularly if multiple taxation years or issues are involved.

In granting judgment in favour of a taxpayer, the Tax Court of Canada may order the Minister of National Revenue to reassess, as directed by the judge. Where the assessment or reassessment is wholly incorrect, the assessment or reassessment may be vacated entirely.

Historically, costs have been recoverable only in accordance with rather modest tariff amounts, but certain recent decisions have reflected a greater effort to indemnify successful litigants. Reasonable disbursements incurred by the successful party (including expert witness costs) are generally fully recoverable.

V. Regulatory Agencies and Tribunals

V. Regulatory Agencies and Tribunals

1. General Nature and Purpose of Regulatory Agencies

Canadian provinces and territories have numerous administrative agencies, tribunals, boards and commissions that regulate a wide range of activities and business interests. The operations of nearly every business may be affected in some way by the activities of one or more of these agencies.

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Administrative agencies and tribunals are established by legislation, from which they acquire their jurisdiction and authority. The procedures of each tribunal vary as much as their areas of responsibility and expertise, but, in general, all agencies are required to comply with the principles of natural justice and procedural fairness. As such, parties affected by the decision of an agency or tribunal must be given an opportunity to be heard, either orally or in writing.

The standard of review of an administrative decision will presumptively be reasonableness. There are two exceptions where the standard will not be reasonableness:

1. Where the legislature has expressed an intention for correctness review to apply, by either explicitly stating this or providing a statutory right of appeal, or
2. Where the rule of law requires a correctness standard of review. This includes constitutional questions, general questions of law of central importance to the legal system as a whole and questions on the jurisdictional boundaries between tribunals.

Where there is a statutory appeal from an administrative decision, questions of law are automatically reviewed on a correctness standard. When applying the correctness standard, appellate courts do not owe any deference to the administrative decision-maker of decisions they consider to be incorrect. Questions of fact or mixed fact and law are reviewed for palpable and overriding error.

2. Regulatory Agencies Impacting Businesses

2.1 Competition Tribunal

Certain non-criminal conduct regulated by Canada's *Competition Act* is reviewable by the Competition Tribunal (Tribunal). Members of the Tribunal include judges and persons with expertise in economics, business and law. They are appointed by the Government of Canada to hear and decide applications under Parts VII.1 and VIII of the *Competition Act.*

Reviewable practices are not considered criminal and not prohibited unless they are made subject to an order of the Tribunal that is specific to the conduct and party. Matters reviewable by the Tribunal include refusal to deal, exclusive dealing, tied selling, market restriction, abuse of dominant position, price maintenance and certain other "anti-competitive" acts. The Tribunal can order a person to do or cease doing a particular act in the future if it finds, on the balance of probabilities, that such a person has engaged in the reviewable activity. The Tribunal cannot impose a penalty for most reviewable practices, but it can impose administrative monetary penalties under the abuse of dominance and certain deceptive-marketing-practices provisions.

Breaches of certain provisions of the *Competition Act* and breaches of orders of the Competition Tribunal may constitute criminal offences. Criminal charges are prosecuted in criminal courts, not before the Tribunal.

Breaches of certain provisions of the *Competition Act* and breaches of orders of the Competition Tribunal may constitute criminal offences.

In most cases, complaints are brought to the Tribunal by the Commissioner of Competition, who is appointed by the federal government to administer the *Competition Act.* However, private individuals and corporations have the right to seek permission from the Tribunal to bring complaints directly to the Tribunal with regard to five limited areas: exclusive dealing, tied selling, refusal to deal, price maintenance and market restriction.

With respect to mergers, if the Commissioner concludes that a merger transaction or proposed merger transaction is likely to prevent or lessen competition substantially, the Commissioner may challenge the transaction before the Tribunal. The Tribunal has broad authority to dissolve a completed merger, order a purchaser to dispose of all or some assets or shares, or preclude the parties from proceeding with all or part of a proposed merger if it finds, on the balance of probabilities, that (1) the merger is likely to prevent or lessen competition substantially in a relevant market, and (2) the efficiencies likely to result from the proposed transaction do not outweigh its likely anti-competitive effects. In determining whether to issue such an order, the Tribunal is directed to consider a number of factors. These include the extent of foreign competition, whether the business being purchased has failed or is likely to fail, the extent to which acceptable substitutes are available, barriers to entry, whether effective competition would remain, whether a vigorous and effective competitor would be removed, the nature of change and innovation in a relevant market, and any other factor relevant to competition.

2.2 Securities Commissions in Canada

The provinces are largely responsible for the regulation of capital markets. Accordingly, each province has established laws, regulations, rules and policies concerning the governance of the capital markets. Uniformly throughout Canada, each province has established a securities commission to regulate and enforce securities laws. Fortunately, the various securities commissions have, in large measure, adopted harmonious approaches regarding how capital markets are governed.

In accordance with its empowering legislation, each provincial securities commission is responsible for the administration of its province's *Securities Act* and obliged to perform all of the duties assigned to the securities commission pursuant to that *Securities Act*. These duties entail administrative functions, rule-making and policy-making functions and, significantly, investigation and enforcement functions that are substantially similar across the provinces.

The securities commission of each province is given substantial authority to enforce that province's securities laws. That authority includes the ability to investigate any matter the securities commission may consider expedient for the due administration of securities laws or the regulation of each province's capital markets, or to assist in the due administration of the securities laws or the regulation of the capital markets in other jurisdictions.

The investigation authority allows persons appointed by the securities commission to investigate or inquire into the affairs of any person or company. This includes the right to examine persons, documents or things for which the investigation is ordered. The person undertaking the investigation has extensive power, including the authority to summon and enforce the attendance of any person and compel that person to testify under oath or otherwise. Under British Columbia's recently amended *Securities Act*, property of third parties may be seized by the provincial securities commission and third-party landlords and recordkeepers may be compelled to cooperate with an investigation. Based on the results of an investigation, securities commissions are given the concomitant authority to conduct administrative or regulatory hearings before a quasi-judicial tribunal composed of appointed commissioners.

In addition to its administrative hearing capacity, the securities commission is empowered to bring quasi-criminal prosecutions under provincial offence legislation. There are three types of quasi-criminal offences:

1. General offences, such as making an untrue statement to the securities commission.

2. Offences by directors and/or officers, such as acquiescing in the securities commission of a general offence.

3. Insider trading and/or tipping offences. Anyone found to have committed an offence of this type can be held liable for a maximum fine of C$5-million and/or a maximum prison term of five years.

In British Columbia, charges may be laid by the provincial government under the *Offence Act* and heard in a provincial court.

Securities commission investigations or hearings tend to focus on the securities commission's principal purpose, which is enforcing requirements for timely, accurate and sufficient disclosure of information to the capital markets by capital markets participants. Other purposes include investigations and enforcement proceedings to restrict or discourage fraudulent and unfair market practices and procedures and maintain high standards of fitness and business conduct to ensure honest and responsible conduct by market participants. Accordingly, a securities commission may conduct hearings into issues such as market manipulation, continuous and accurate disclosure obligations, and insider-trading violations.

Securities commission decisions are subject to appeal. Such appeals may be taken to the courts, which act in a supervisory capacity over the securities commissions' decisions. Historically, judicial intervention regarding securities commission decisions has been restrained.

Securities commissions have appellate authority over "self-regulatory organizations," such as the Investment Industry Regulatory Organization of Canada, the Mutual Fund Dealers Association of Canada and other industry watchdogs that have specific regulatory jurisdiction over capital markets participants. The appellate authority of the securities commissions is expressed broadly, but by convention, it is as restrained as the appellate authority exercised by the courts over the securities commissions themselves.

The federal government and certain of the provinces signed a memorandum of agreement in September 2014 to formalize the terms and conditions of a new proposed cooperative capital markets regulatory system (Cooperative System) in Canada. Under the Cooperative System, a single regulator, the Capital Markets Authority, would receive delegated powers from the federal government and the governments of Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island and the Yukon to administer the proposed federal *Capital Markets Stability Act*. The act would be adopted by all participating provinces and territories in the Cooperative System to replace their respective current *Securities Acts*. In 2017, the Quebec Court of Appeal ruled that the proposed Cooperative System was unconstitutional. However, this decision was appealed to the Supreme Court of Canada, and in the fall of 2018, it unanimously held that the Cooperative System was constitutional. Notwithstanding the Supreme Court of Canada decision, the Cooperative System has yet to be implemented. In April 2019, Nova Scotia agreed to join the Cooperative System and signed the memorandum of agreement.

2.3 Environmental Protection Agencies

Myriad environmental protection laws and regulations exist at both the federal and provincial levels in Canada. These regulations control the discharge of contaminants; the management and disposal of waste; the exploitation of natural resources; and the importation, manufacture, sale and use of toxic substances. Many activities that fall within the scope of these regulations require government licences, permits or approvals. Government agencies or departments charged with the administration of Canada's environmental protection laws and regulations are empowered to investigate and prosecute breaches of the law and issue a variety of orders and directives that require legal compliance or expensive environmental remedial action.

Myriad environmental protection laws and regulations exist at both the federal and provincial levels in Canada.

With respect to enforcement activities, the most common tool available to environmental agencies is the prosecution of an offence before the lower courts that deal with regulatory non-criminal offences. While some provincial and federal agencies have recently been granted the authority to issue administrative penalties that do not involve judicial processes, this enforcement tool is rarely used because the available penalties are relatively minor. Individuals and corporations prosecuted before the courts are subject to maximum fines that, in the case of corporations, can run in the millions of dollars. Individuals, including corporate officers and directors, may be sentenced to prison from one to five years.

It is not necessary for the prosecuting agency to establish an intention to violate the environmental law in question, as with true criminal offences. However, an accused is entitled to be acquitted of a regulatory charge if the accused can demonstrate that the offending event occurred notwithstanding their diligent efforts to comply with the relevant law. This is the "due diligence" defence that is an important part of Canadian regulatory or "quasi-criminal" law. Due diligence has led to the development of environmental management and compliance systems by persons involved in activities that can adversely affect the environment.

Government agencies are granted discretionary powers to regulate activities by way of orders, directives and permits. Therefore, environmental protection laws typically include rights of appeal to an independent or quasi-independent tribunal. In addition, environmental protection or assessment laws also include public-hearing requirements for significant projects, such as hazardous-waste disposal facilities and large-scale industrial or natural-resource projects, to ensure that both the environmental merits of the project and public concerns are addressed before the project is undertaken.

Environmental appeals or hearings can arise when agencies impose onerous terms and conditions in air, sewage or waste management and disposal permits, or when they simply refuse to issue a permit. Appeals are also typically available when an environmental agency imposes an administrative penalty or issues an order that requires a person to take investigatory or remedial action. In some cases, these statutory appeals end up in court or are brought to the executive level of government.

In keeping with the general principles that a tribunal should not be bound by precedent and should be allowed to develop its own particular expertise to deal with the issues that come before it, the procedures utilized by the various environmental protection tribunals vary. Accordingly, strict judge-made rules of evidence rarely apply, and efforts are made to accommodate ordinary citizens participating in the hearing process, especially those before environmental tribunals, as public participation is seen as an important part of environmental protection.

An environmental impact assessment is typically triggered when a major industrial project requires a government permit. It often generates widespread local and regional public concerns regarding the potential impact of the project on the natural and social environment. The intent of the process is to not only require the proponent to demonstrate that it has assessed all of the potential environmental impacts and taken steps to mitigate them, but also demonstrate that the public has been consulted and given an opportunity to voice concerns. If the initial public consultation process is unsuccessful in managing such public concerns, then a public hearing may be required to provide a more comprehensive public airing. Often the process is political in nature, as some tribunals only have the power to report on the hearing to a senior government official and make recommendations.

Historically, administrative hearings with respect to appeals from environmental licensing and permit decisions or environmental remediation orders have been less contentious. Recently, however, Canadian environmental agencies have become more aggressive in these areas. As a result, in many parts of the country, there has been a proliferation of appeals to environmental tribunals questioning the wisdom of environmental authorities in exercising their powers. Attempts to address historical soil and groundwater contamination have been particularly contentious, resulting in protracted appeals to environmental protection tribunals and, ultimately, the courts. In many cases, past owners, occupiers and senior corporate officers and directors have been named in environmental orders, whether or not there is any evidence that they failed to follow the laws applicable at the time or had any direct involvement in causing the subject pollution or contamination.

2.4 Energy Boards and Commissions

There are several statutes at both the federal and provincial levels that govern Canada's energy sector. In many cases, these statutes provide for ongoing regulation by federal or provincial agencies and tribunals.

In 2019, the National Energy Board was replaced by the Canadian Energy Regulator to reflect Canadians' priorities in areas such as greater certainty, more transparency, enhanced public participation and an expanded role for Aboriginal Peoples.

The Canadian Energy Regulator is an independent federal regulatory agency that regulates the interprovincial and international aspects of the energy industry, including:

- The construction and operation of interprovincial and international pipelines that transport commodities including, but not limited to, oil and natural gas.

- Pipeline traffic, tolls and tariffs.
- The construction and operation of international and designated interprovincial power lines.
- The export and import of natural gas, oil and electricity.

Power lines and pipelines that are completely within the borders of one province are usually regulated by that province's regulatory agency. Both federal and provincial energy boards typically review the economic and technical feasibility and the environmental and socio-economic impact of proposed projects.

In addition, utility companies that supply electricity and natural-gas services within a province are usually regulated by that province's regulatory agency, such as the Alberta Utilities Commission, the British Columbia Utilities Commission, the Ontario Energy Board and Quebec's Régie de l'énergie. The mandates of the various agencies vary from province to province and depend on how electricity and natural-gas utility services are regulated. In general, the boards are responsible for making decisions regarding complaints and issuing approvals of the distribution and transmission rates charged by the various utility companies that they regulate. They may also regulate marketers of gas and electricity commodities, although they typically do not fix the prices of the commodities being sold.

Most of these agencies operate in a manner similar to a civil court. Their powers include swearing in and examining witnesses, as well as taking evidence. The agencies hold public hearings in which applicants and interested parties can participate. These hearings can be conducted either orally or in writing. Decisions can generally be appealed to a court, although the court will usually defer to the agency's factual findings and industry expertise and review primarily for errors of law or jurisdiction.

2.5 Canadian International Trade Tribunal

The Canadian International Trade Tribunal (CITT) is the federal administrative tribunal. It is a quasi-judicial body that carries out statutory responsibilities independently of the government. The CITT has rules and procedures like those of a court of law, but they are not as strict or formal, and the proceedings are typically much shorter in length. The CITT's mission is to support a fair and open trade system.

2.5.1 Bid Protest Tribunal for Procurement Matters

The CITT acts as the "bid protest" tribunal for federal government procurement matters when a bidder considers the procurement or the treatment of its bid to have been unfair. Complaints made to the CITT must be submitted within 10 business days of the date on which the complainant becomes aware of the flaw in the procurement process. The CITT almost invariably proceeds by way of written submissions from the complainant and the government. It issues its ruling promptly, typically within three months.

If the complaint is upheld, the CITT can make one of several orders, including an order that (1) a new procurement take place, (2) the bids be re-evaluated, (3) the contract be awarded to the complainant, (4) the designated contract be terminated, or (5) damages be awarded based on the complainant's lost profit.

The CITT members have considerable experience with federal government procurement policy and law. Accordingly, the CITT's decisions are given significant weight by the Federal Court of Appeal and are not easily overturned by the court.

The CITT may have concurrent jurisdiction with the Federal Court to hear a procurement dispute between the bidder and the federal government. However, if the dispute is simply or primarily about whether the procurement violated a trade agreement, the Federal Court can refuse to hear the dispute on the grounds that it should have been pursued by way of a complaint to the CITT. If no trade agreement applies to the procurement, the CITT does not have jurisdiction, and the dispute must be brought before the Federal Court.

2.5.2 Dumping and Subsidizing

International trade agreements and Canadian legislation allow the Canada Border Services Agency (CBSA) to impose duties on imported goods when Canadian producers are adversely affected by unfair international competition. These measures apply where the imported goods are sold at a price lower than in the home market or lower than the cost of production (dumping) and receive benefits from certain types of government grants or other assistance (subsidizing), and if the dumping or subsidization causes "material injury" to Canada's domestic industry for the like goods.

The CBSA is responsible for determining whether dumping and/or subsidizing occurred. It makes both a preliminary and then a final determination of dumping and/or subsidization. The CITT's role in the process is to determine whether the dumping and/or subsidizing has caused material injury or retardation to a domestic industry or is threatening to do so. The CITT holds a preliminary injury inquiry exclusively by written submissions to determine whether the complaint filed with the CBSA provides a reasonable indication of injury. If the CITT makes a negative determination, then the entire investigation is terminated. If the CITT makes a positive determination, then the CBSA proceeds to its own preliminary determination and, at that point, the CITT initiates a formal injury inquiry. If the CITT makes a finding of material injury, the CBSA continues to impose anti-dumping or countervailing duties on the dumped or subsidized imports.

Parties to a bid protest or dumping case have the right to appeal CITT decisions to the federal courts and, potentially, the Supreme Court of Canada. In certain cases involving U.S. or Mexican interests, CITT decisions involving dumping or subsidizing allegations may be reviewed by a binational panel under the provisions of CUSMA.

2.5.3 Appeals and Other Matters

The CITT's mandate includes hearing appeals of CBSA decisions made under the *Customs Act* and the *Special Import Measures Act* and Minister of National Revenue decisions under the *Excise Tax Act*. In the case of CBSA decisions made under the *Customs Act*, the CITT hears appeals of decisions on tariff classification, valuation and country of origin issues. The CITT's own rules of procedure govern such appeals. Typically, appeals to the CITT are heard by three-member panels, but in some cases, a single member may hear the appeal.

2.6 Labour Relations Boards

The labour relations statutes of every province and the federal *Canada Labour Code* each provide for the establishment of a labour relations board. Labour relations boards are expert administrative tribunals charged with the administration and enforcement of the applicable labour relations statute. They perform both administrative and adjudicative functions.

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Most labour relations boards are composed of impartial labour relations experts and representatives of both labour and management. When adjudicating, the board decides matters as either a three-person panel — generally, the chair/alternate chair/vice-chair and two members, one from each of the employer and employee constituencies — or simply the chair, alternate chair or a vice-chair sitting alone.

Labour relations boards are responsible for the following matters:

- Certifying and decertifying trade unions as employee bargaining agents.
- Processing and resolving, by settlement or adjudication, unfair labour practice complaints, as well as employees' duty of fair representation complaints against their unions.
- Issuing declarations and directions with respect to unlawful strikes and lockouts and, in some circumstances, unlawful picketing.
- Issuing successor and related employer declarations in the event of a sale of business or other corporate transaction.
- In some jurisdictions and certain circumstances, arbitrating grievances arising under collective agreements.
- Providing direction with respect to inter-union or jurisdictional disputes over the assignment of work.

Labour relations statutes may also charge labour relations boards with additional responsibilities, such as inquiring into complaints that an employee has been disciplined for exercising rights under occupational health and safety legislation, directing the settlement of a first collective agreement through arbitration, enforcing public-sector employment legislation, reviewing the findings of employment standards officers regarding alleged breaches of employment standards legislation, and hearing appeals of orders issued by inspectors regarding health and safety legislation violations.

Labour relations boards also provide field or administrative services that are designed to facilitate the settlement of disputes and enable employers, trade unions and employees to tailor solutions to their needs. Most labour relations boards have officers who are responsible for attempting to mediate and resolve disputes after an application to the board has been filed and conduct and assist with board-supervised votes, such as certification votes or final offer votes.

If a matter cannot be resolved informally through a board's field services department, the board will conduct a formal hearing into an application and issue a written decision. Labour relations boards hold full adjudicative hearings in which the parties are required to present evidence and make legal arguments. Labour relations board orders are made enforceable by either the exercise of powers of the judiciary or board prosecutions.

Decisions of labour relations boards are protected from court intervention by privative clauses in the labour relations statutes that typically provide that the decisions of a board are final and binding on the parties. However, a party to a labour relations board proceeding may still seek to overturn a board decision by applying to the court for judicial review. Board decisions will generally be reviewed on a reasonableness standard. A court will set aside a board's decision if the board has violated the principles of natural justice or procedural fairness.

3. Consultations with Aboriginal Peoples

Canada's *Constitution Act*, *1982* enshrines the rights of the Aboriginal Peoples of Canada. In particular, section 35 recognizes the *sui generis* (unique) rights that give rise to a duty on the Crown to deal honourably with Aboriginal Peoples. Doing so is part of the process of reconciling the Crown's assertion of sovereignty over Aboriginal Peoples and control of land and resources that were formerly cared for and controlled by Aboriginal Peoples. As part of its obligation, the Crown is required to consult, and where appropriate, accommodate Aboriginal Peoples when Crown conduct has the potential to adversely affect Aboriginal rights.

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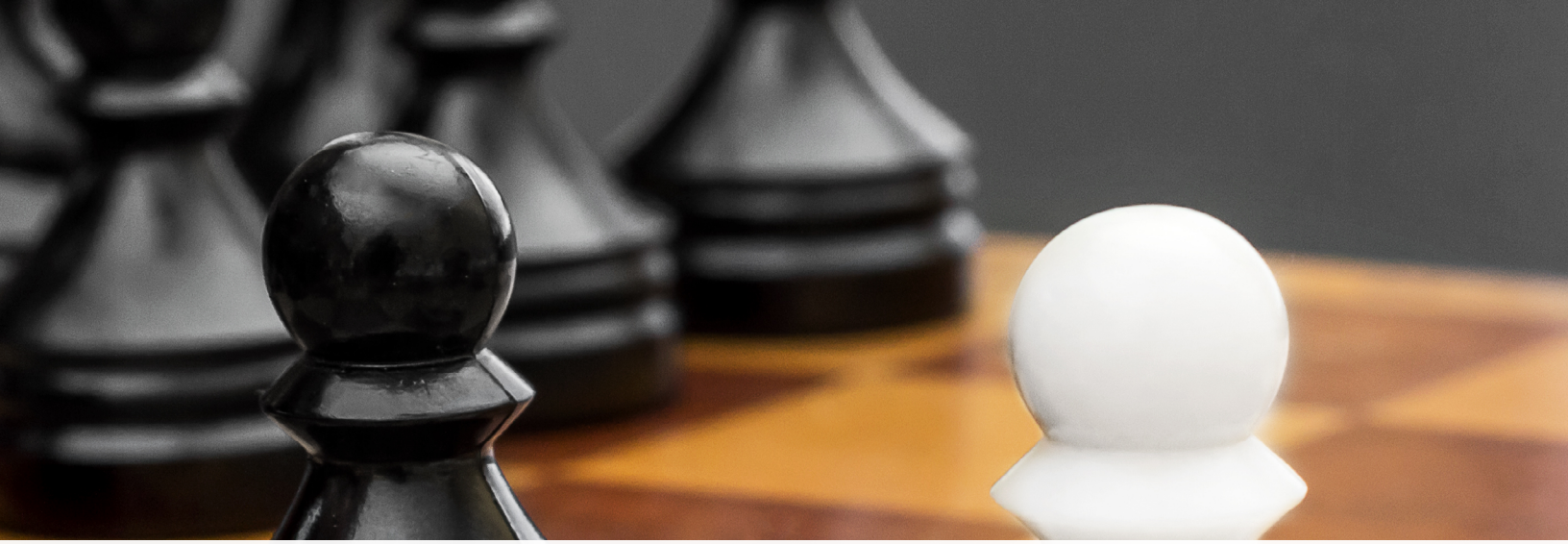
For the purposes of the duty to consult, Crown conduct includes a decision by a government agency, cabinet minister or administrative body with the authority to issue a licence, permit or other authorization to non-governmental project proponents. As a result, Aboriginal rights are often engaged in the context of regulatory approvals for resource extraction or infrastructure projects, such as those that require approval of the Canadian Energy Regulator. The law and practice informing the respective roles of the government, the regulatory agency or tribunal and the project proponents in consulting with Aboriginal Peoples in the regulatory approval process continues to evolve.

The Supreme Court of Canada has determined that the Crown may rely on the regulatory process to partially or completely fulfil its duty to consult, so long as the agency's statutory duties and powers enable it to do what the duty requires in the particular circumstance. As the Crown is still bound by its duty, this may require supplementary action on behalf of the Crown to provide for additional avenues of meaningful consultation and accommodation before a project is approved. The Canadian Energy Regulator approval process itself can trigger the duty to consult. Ultimately, Crown consultation has to be appropriate and adequate, and any decision affecting Aboriginal or treaty rights must be made in accordance with the duty to consult.

The extent of Aboriginal consultation required depends on the context, including the strength of the Aboriginal Peoples' claim to the right asserted and the potential adversity of the proposed project. For example, the government or regulatory agency may be required to accommodate Aboriginal interests by placing environmental protection conditions on the project approval or requiring the project proponents to demonstrate how the project can benefit Aboriginal Peoples. When the Crown fails to adequately fulfil its obligation to consult or, if necessary, accommodate, the affected Aboriginal Peoples can seek judicial review of the government or regulatory body's decision. Depending on the type of decision at issue, judicial review must be commenced in a provincial superior court or in Federal Court. Typically, an application for judicial review must be filed within 30 to 60 days following the date of the decision.



VI. Mediation

VI. Mediation

1. Nature of Mediation

Mediation is a method of dispute resolution in which two or more parties meet with an impartial mediator to attempt to agree to a settlement of their dispute. The mediator has no authority to issue any orders or to compel the parties to enter into a settlement agreement. The mediator's role is simply to assist the parties in reaching an agreement.

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Before the mediation is held, the parties will usually exchange a summary of their positions and copies of the most relevant documents. At the start of the mediation, each party can make an opening statement, either in person or through a lawyer. This is often followed by some discussion between the parties. After the parties have explained their positions to each other, the mediator will often separate the parties into different rooms, speak to each party in private and attempt to help the parties come to a resolution. The mediator may present settlement offers from one party to the other and explain the rationale for the offers.

Mediation can be used before or during adversarial proceedings, such as a court action or an arbitration.

2. Advantages and Disadvantages

There are many benefits to mediation, including:

- It can be conducted in a short time frame and is usually completed in less than a day.
- It is generally less costly and less formal than a trial or an arbitration hearing.
- It is a confidential process, as all of the information revealed at a mediation is legally privileged, and the parties are not entitled to rely on the information in any litigation or arbitration.
- The parties have some control over the selection of the mediator and in establishing the procedure for the mediation and can choose a mediator who is not a lawyer or judge, such as an expert in the area in dispute.
- Because the parties are involved in structuring the settlement, they can be creative and implement business solutions that would not be available to a court deciding a lawsuit.

- In some cases, a mediated settlement will enable the parties to continue their business relationship.
- Information disclosed during the mediation may assist the parties in assessing the strength of their position or that of their opponent.

The main disadvantage of mediation is that if it fails, the parties will have spent time and money on the process without achieving a settlement. However, even if a complete settlement is not achieved, benefits may be gained. For example, issues or claims may be narrowed or resolved, and partial settlements may be achieved with some of the parties in multi-party disputes.

There are circumstances in which mediation may not be the best course of action. If there is a disparity with respect to the power of the parties or a party is unable to afford to proceed with litigation, the other party may have more power in the mediation, and that imbalance may preclude a satisfactory or fair outcome. Further, there may be cases in which extensive pre-hearing discovery of documents or witnesses is important, given the nature of the allegations or the defence. In such cases, it may be best to delay mediation until after the discovery process is completed.

In the event the matter will set a precedent in similar situations, or where a party wants a binding determination of law or an interpretation of legislation, the matter is likely inappropriate for mediation. Further, if one of the parties does not have a legitimate intention to attempt to resolve the matter, mediation is likely futile.

3. Court-Annexed Mediation

There is a trend in courts across Canada to favour mandatory participation in alternative dispute resolution. The *Rules of Civil Procedure* in Ontario establish mandatory mediation prior to trial for nearly all civil cases and cases related to the administration of an estate or trust that are commenced in the cities of Toronto, Ottawa and Windsor.

In the province of Quebec, although not mandatory for all proceedings, the CCP offers a voluntary settlement conference where, at any stage of the proceedings, the chief justice may, at their own initiative and with the consent of the parties or at the request of the parties, designate a judge to preside at a settlement conference to facilitate dialogue between the parties and explore mutually satisfactory solutions to the litigation.

In Alberta, the *Rules of Court* with respect to mandatory alternative dispute resolution had been suspended. However, effective September 1, 2019, the suspension was lifted for a one-year pilot project and all civil cases are required to participate in a mediation or judicial dispute resolution, or have that requirement waived by the court, prior to securing a trial date.

In British Columbia, a notice-to-mediate process has been established by regulation, whereby a party in a Supreme Court of Canada proceeding may require all of the other parties to attend a mediation by delivering a notice to mediate. The first enacted notice-to-mediate regulations applied to motor vehicle actions and residential construction, as well as certain disputes under the *School Act*. The process has been expanded to include a broad range of civil, non-family actions. Certain small claims matters are also subject to mediation.

4. Enforcing a Mediated Settlement

At the conclusion of a successful mediation, the parties will typically memorialize the terms of the settlement in a written document that is signed by the parties and their lawyers. An oral settlement

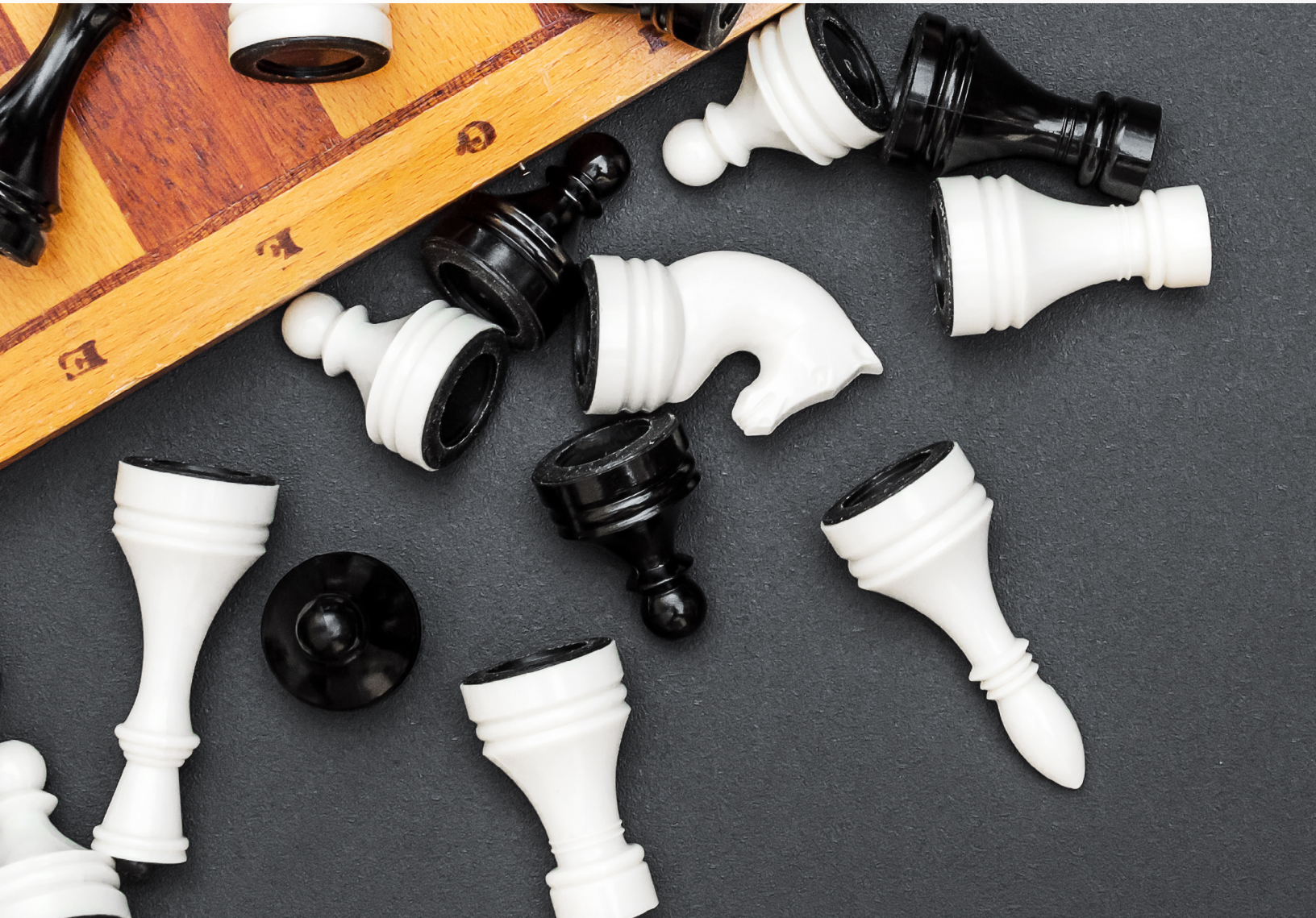
agreement, if proven, is enforceable, but there is a risk that there will be insufficient evidence to prove its existence or terms.

Public policy in Canada encourages parties to settle litigation. As a result, it also favours the enforcement of all valid settlement agreements. There are some limited circumstances in which a court will not enforce a settlement. For example, if one of the parties suffers from a mental disability, the court must approve the settlement before it can become enforceable.

A settlement agreement is a contract that may be enforced just like any other contract. Outside Quebec, if one party fails to comply with the terms of a settlement, the non-breaching party may have the option to accept the failure to comply as a repudiation of the contract of settlement and proceed to litigate the original dispute as if no settlement had been reached. The non-breaching party is also likely to have the option to start a court action to enforce the terms of the settlement. If the terms of the settlement are adequately documented in a written agreement, it will often be faster and easier to enforce the settlement agreement than it would be to litigate the original action. In Quebec, the authorities tend not to allow the repudiation of a settlement agreement, leaving the non-breaching party with the sole option of seeking homologation (approval) of the settlement agreement by the court.

In Ontario, the *Commercial Mediation Act, 2010* makes it possible to enforce a settlement agreement resulting from the mediation of a commercial dispute without having to start a court action. This is because the settlement agreement, in certain cases, can be registered with the court and enforced as if it were a judgment of the court.

VII. Domestic Arbitration



VII. Domestic Arbitration

There is a trend in Canada toward resolving commercial disputes by arbitration rather than through litigation in the courts. In most cases, Canadian courts will enforce both the agreement to submit a dispute to arbitration and the resulting arbitral award.

1. Nature of Arbitration

Arbitration is a quasi-judicial form of dispute resolution by one or more arbitrators who are usually appointed by the parties. Most arbitrations involve a hearing that results in a binding decision. However, the arbitration process is often less formal than a trial in court. For instance, the rules of evidence applicable to trials in court typically do not apply or are relaxed.

Most arbitrations involve a hearing that results in a binding decision.

All jurisdictions in Canada have legislation governing arbitrations. While these statutes differ, they contain many similar provisions and, in general, restrict the jurisdiction of the courts over disputes that the parties have agreed to submit to arbitration. Further, they require a stay of related court actions and allow the court to intervene only in limited circumstances. The general, domestic arbitration acts do not govern certain types of arbitrations, most notably, arbitrations in the labour field and international commercial arbitrations.

The general arbitration statutes in many of the provinces provide that the law with respect to limitation periods applies to arbitrations.

2. Advantages and Disadvantages of Arbitration

Some view arbitration as a panacea. It has many advantages in a variety of circumstances that can lead to a more satisfactory dispute resolution process overall. However, there are also certain inherent and circumstance-dependent disadvantages that should be considered before agreeing to arbitration.

Perhaps the most significant advantage of arbitration is that the parties can agree on a mutually acceptable decision-maker. This can be particularly useful if the nature of the dispute calls for specialized or technical knowledge that a judge is unlikely to have.

Perhaps the most significant advantage of arbitration is that the parties can agree on a mutually acceptable decision-maker.

The process is relatively flexible and adaptable, which is well-suited to parties who can reach agreement on procedural and other matters. Further, unlike the open and public nature of court proceedings, the parties can agree that the arbitration proceedings will be kept private and the award will be kept confidential, both of which can be important in cases involving commercially sensitive information. In addition, to achieve earlier finality and reduce the cost, the parties can agree to eliminate appeal rights to a significant extent.

For disputes involving an intransigent party who is unwilling to participate in any process, there are certain aspects of arbitration that can have a more expeditious and less costly resolution. Typically, the arbitral tribunal is cloaked with the jurisdiction to set and control the process with these goals in mind. Depending on the approach of the arbitrator, intervention of this nature may begin at the earlier stages of the dispute. While certainly available in some cases, it is relatively uncommon for witnesses to be examined in the form of examinations for discovery or depositions prior to the hearing. In addition, a carefully crafted pre-dispute arbitration clause in a commercial agreement can substantially reduce the opportunities for an unwilling party to employ delay tactics in the face of a subsequent dispute. However, a recalcitrant party can sometimes find refuge in the absence of established rules of procedure for arbitrations that can be as costly and time consuming as court hearings.

Arbitration is not ideal if the parties wish to set a precedent by the resolution of the dispute because, as previously noted, arbitrations are often conducted in private and on a confidential basis, and therefore, there is no public registry for arbitration decisions. In certain instances, difficulties are encountered regarding the bounds of arbitral tribunal jurisdiction as compared to the wide sweeping, inherent jurisdiction of the courts.

Jurisdictional issues can arise as to whether:

- The arbitral tribunal has the power to decide all substantive claims related to the dispute.
- It can grant certain types of relief, such as injunctive relief, punitive damages and security for costs.
- It is practical to seek remedies such as emergency interim injunctive relief from an arbitral tribunal.

Difficulties can also arise in instances when only some of the parties to a multi-party dispute are bound by an arbitration clause.

3. Arbitration Agreement and Procedures

An arbitration agreement can be written or oral (except in Quebec, which requires that the agreement be written), and it can be detailed or general. In some instances, parties will agree to include an arbitration clause in a commercial agreement so any dispute that may later arise regarding that agreement will be resolved through arbitration. In such cases, typically, neither of the parties has

recourse to the courts for resolution of the dispute. In other instances, in the absence of a pre-dispute arbitration clause, the parties may agree to submit a dispute to arbitration after it arises, even after court proceedings have been commenced.

At a minimum, arbitration clauses generally stipulate the nature and extent of the disputes to be arbitrated and whether there will be one or more arbitrators. Arbitration clauses also commonly specify the rules of procedure that are to govern the proceedings, by either setting them out or incorporating rules set out in a particular statute or developed by a recognized body. A detailed arbitration clause that is included in a commercial agreement at the outset can result in a more satisfactory dispute resolution process than might otherwise be agreed to after a dispute has arisen.

The enforceability of an arbitration clause may be subject to consumer protection legislation. For example, in both Quebec and Ontario, consumers have a right to have certain types of disputes resolved in a court. These rights cannot be taken away ahead of time by an arbitration clause, but after a dispute arises, the consumer may agree to refer the dispute to arbitration. Further, in Quebec, parties cannot agree to arbitrate disputes regarding the status and capacity of persons, family matters or other related matters of public order. Matters unrelated to public order are arbitrable.

Subject to certain basic requirements, the parties can agree on a process completely tailored to the circumstances of the dispute to achieve a just resolution in the most efficient and economic manner possible.

4. Arbitration Award Interest, Costs and Enforcement

Generally, an arbitration award is to be made in writing and shall state the reasons on which it is based. Unless the arbitration award is varied, overturned or set aside, it is binding on the parties.

Usually, in the absence of a contrary agreement between the parties, the arbitral tribunal has the same powers as a court with respect to awarding interest and costs. Typically, the arbitral tribunal will have complete discretion over the costs of the arbitration proceedings, including the arbitrator's own costs. This discretion is generally exercised with reference to the "loser pays" principle in Canada, on a reduced tariff basis. However, the parties can limit or eliminate the arbitrator's jurisdiction in this respect by including in the arbitration agreement creative formulas or specific provisions regarding liability for costs.

The provincial and territorial arbitration acts provide for the enforcement of arbitral awards through a straightforward application to the court. This has the effect of converting the arbitral award into a judgment of the court, upon which normal enforcement or execution proceedings may be undertaken. Some of the arbitration acts provide for the same process for arbitral awards made anywhere in Canada.

5. Ability to Appeal or Set Aside the Award

Parties to an arbitration are generally able to exclude rights of appeal in most, but not all, instances. In British Columbia, for instance, parties in a domestic arbitration can only agree to exclude rights of appeal after an arbitration has been commenced. Under most arbitration statutes in Canada, in addition to any rights of appeal, an arbitral award may be set aside on various grounds, including an invalid arbitration agreement, an award outside the jurisdiction of the arbitrator, an improperly composed arbitral tribunal, manifestly unfair or unequal treatment of a party, a reasonable apprehension of bias on the part of the arbitrator, or an award obtained by fraud.

In Quebec, there is no right to appeal an arbitration award, nor can parties contractually preserve rights of appeal. The only possible recourse against an arbitration award is an application for its annulment

that is obtained by application to the court or opposition to a motion to homologate (approve) the arbitration award. The grounds raised to annul an arbitration award are similar to the grounds mentioned above. A right of appeal does lie with the Court of Appeal of Quebec against a judgment rendered by the Superior Court of Quebec that declares an arbitration award null or fails to homologate the award for the same reasons identified above.

Appeals and applications to set aside arbitral awards are governed by strict timelines that the court may not be able to extend.

6. Commercial Arbitration Act

The federal *Commercial Arbitration Act* (CAA) governs commercial arbitrations where at least one of the parties to the arbitration is the federal government, a specified department of the federal government or a Crown corporation. The CAA applies to arbitral awards and arbitration agreements whether they were made before or after the CAA came into force.

The CAA adopts the *Commercial Arbitration Code* based on the United Nations Commission on International Trade Law (UNCITRAL) Model Law, which was drafted in June 1985. Only those changes necessary to "Canadianize" the Model Law with specific reference to "Canada" or its courts are made. Otherwise, the UNCITRAL Model Law applies unamended to all applicable arbitral awards and arbitration agreements.

7. International Alternative Dispute Resolution in Canada

7.1 International Arbitration in Canada

Since Canada is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, also known as the "1958 New York Convention," an international arbitration award granted in Canada may be enforced in any other signatory jurisdiction. Conversely, an award from any other signatory jurisdiction may be enforced in Canada. Giving strong deference to arbitration agreements, particularly international commercial arbitration agreements, Canadian courts will stay court proceedings and enforce international arbitration awards.

The Canadian government and all provincial and territorial governments have international commercial arbitration legislation based on the 1985 UNCITRAL Model Law, bringing it into force in each jurisdiction, with minor variations. The legislation only applies within the relevant political boundaries. For instance, the Alberta *International Commercial Arbitration Act* only applies when the arbitration is conducted in Alberta, the parties have agreed that Alberta law will govern the arbitration or the award is to be enforced in Alberta.

All Canadian provinces and territories have statutes that apply to arbitration generally and different statutes that apply to international commercial arbitration specifically. Typically, domestic arbitration legislation will apply unless the relevant international arbitration specifically applies. The *International Commercial Arbitration Act* does not apply to domestic commercial arbitrations or international "non-commercial" arbitrations. Whether the international commercial arbitration statutes will apply depends on the determination of what is meant by "international" and "commercial."

7.2 International Arbitration Process

7.2.1 Agreement to Arbitrate

For Canadian international commercial arbitration legislation to apply, the agreement to arbitrate must be in writing. Typically, when parties begin a commercial relationship, they will agree to submit to arbitration any dispute that may arise in connection with their contract. However, parties can agree at any time to submit a dispute to arbitration rather than go to court. An arbitration agreement may be set forth in a single clause of a more comprehensive agreement or it may be set forth separately.

7.2.2 Enforcing the Agreement

An agreement to refer future or current disputes to arbitration is binding on the parties. One party may compel another to submit to arbitration whenever a dispute falls within the scope of the arbitration agreement. The general rule is that a Canadian court must stay a court proceeding if the parties have entered into an arbitration agreement.

The general rule is that a Canadian court must stay a court proceeding if the parties have entered into an arbitration agreement.

7.2.3 Commencing an Arbitration

To commence an arbitration, notice must be given pursuant to the arbitration agreement.

7.2.4 Pre-hearing

A pre-hearing conference to establish the framework of the arbitration is not uncommon and, indeed, a requirement of the rules of some of the international arbitration institutions. Matters that may be dealt with at the pre-hearing conference include the service of documents, the extent and content of pleadings, stipulations of uncontested facts, confidentiality concerns, the identification and availability of witnesses, the need for interpreters, the selection of hearing rooms, and costs. Applications for interim relief or protection measures are also possible pre-hearing issues.

Typically, in a pre-hearing conference, a claim is filed, and particulars of that claim may be requested and provided; a defence and counterclaim may be filed; relevant documentary evidence is produced; and the parties may exchange expert reports.

7.2.5 Hearing

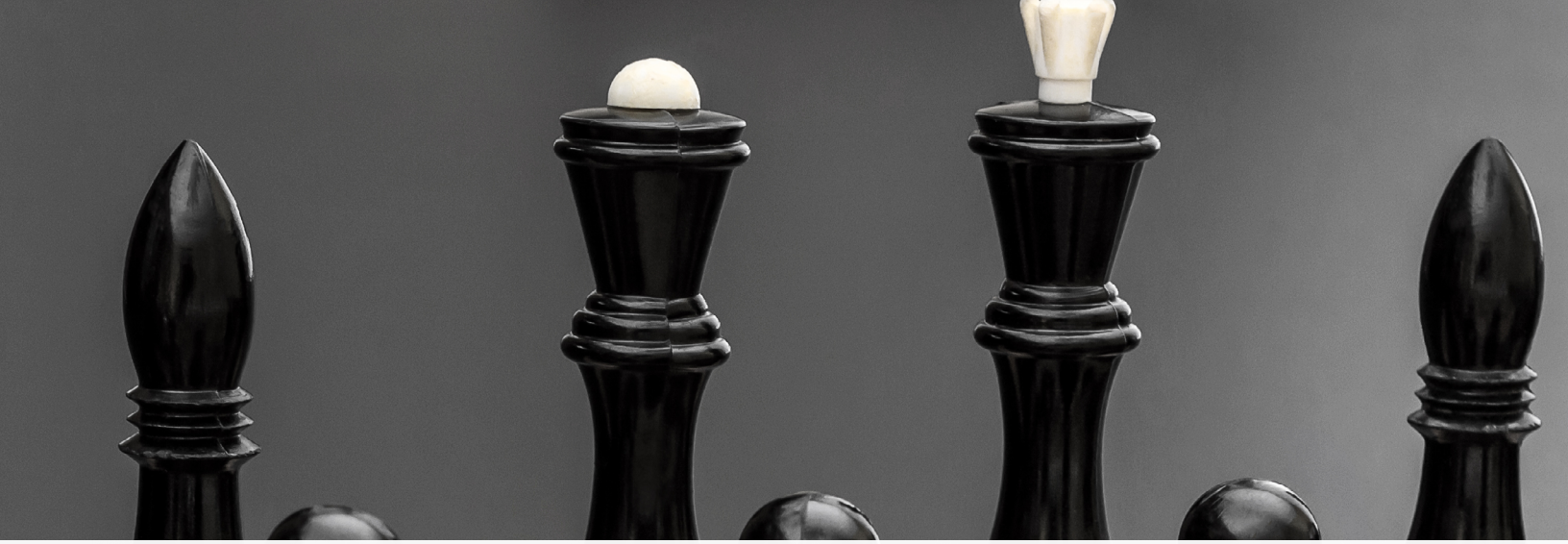
Arbitration proceedings must follow the principles of impartiality, practicability and expediency. Both parties must be given a fair opportunity to present their case. An oral hearing is not necessary as the parties may agree to present their case through documents only or through both documents and argument. An arbitration hearing generally resembles proceedings before a court, although often it is less formal. During the arbitration hearing, the parties will be able to produce evidence and present arguments to the arbitrator.

7.2.6 Award

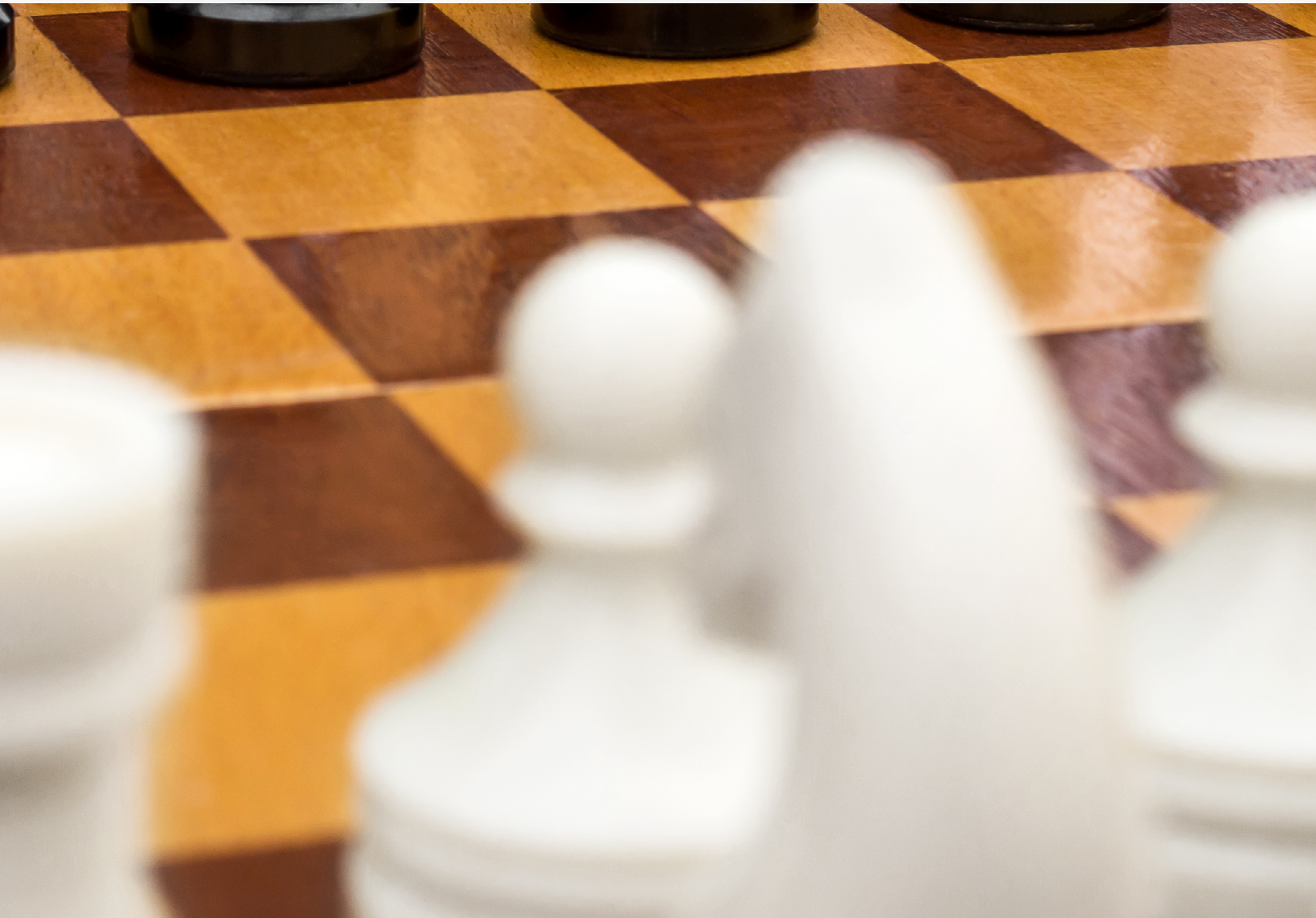
The arbitration award must be given in writing, typically specifying the reasons on which it is based. However, the parties are free to agree that no reasons are to be given. A settlement reached by the parties during the arbitration proceedings may also be recorded in the form of an award.

7.2.7 Review and Enforcement

Unless the parties otherwise expressly agree, there is no right to appeal an arbitrator's decision, and rights of review are very narrow.



VIII. Foreign Judgments



VIII. Foreign Judgments

1. Choice of Law and Requirement to Prove Foreign Law

The applicable law for any given legal action will depend on the type of claim. For example:

- An action in tort (a civil wrong not arising from a breach of contract) is governed by the law of the place where the tort occurred. However, a Canadian court may decline jurisdiction where the application of the choice of law for torts might give rise to an injustice. Accordingly, the choice of law for an action in tort depends on the particular facts of the situation and a consideration of competing doctrines. It is generally less costly and less formal than a trial or an arbitration hearing.
- The jurisdiction for an action in contract may be determined by express contractual language, or a court will determine which law should apply after deciding which jurisdiction is most closely connected to the transaction. To this end, the court will look at factors such as where the contract was made, where it was to be performed, the residence of the parties, the legal form of the contract, the contract's language and the terms of arbitration or exclusive jurisdiction clauses.
- Regarding property, the applicable law for conflicts of law purposes will depend on whether the property is movable or immovable. Generally, immovable property is real property, and movable property is personal property. Immovable property is subject to the law of the jurisdiction in which it is located. The law applicable to movable property will depend on the circumstances of the action.

Canadian courts treat foreign law as a matter of fact rather than as a matter of law. As such, the party relying on foreign law must plead and prove that law. Foreign law is proven through the testimony of experts. If the foreign law is not proven to the satisfaction of the court, the court will apply the law of its own jurisdiction. A court will not apply the law of a foreign jurisdiction if that law would offend the province's morality or public policy.

2. Enforcement of Foreign Judgments

To enforce a foreign judgment in Canada, a party must obtain an order from a Canadian court. Canadian courts have adopted a generous and liberal approach to the recognition and enforcement of foreign judgments. The only prerequisite is that the foreign court had jurisdiction. The foreign court's jurisdiction is determined by considering whether there was a real and substantial connection between the defendant and the foreign jurisdiction at the time the action was commenced. If the defendant was present in the foreign jurisdiction when the action was started, or if the defendant voluntarily submitted or agreed to submit to the jurisdiction of the foreign court, the foreign court will be recognized as having jurisdiction. The rules governing the enforcement of a foreign judgment under Quebec's civil law regime are slightly different.

Canadian courts have adopted a generous and liberal approach to the recognition and enforcement of foreign judgments.

Even if a foreign judgment meets the requirements for recognition and enforcement in Canada, there are certain defences to enforcement that a defendant can raise. A foreign judgment will not be enforced if the judgment was obtained by fraud on the part of the party seeking its enforcement, the proceedings under which the foreign judgment was obtained were contrary to the principles of natural justice, or the underlying cause of action on which the foreign judgment is based is contrary to the public policy of the province in question. In addition, Canadian courts will not enforce judgments based on criminal/quasi-criminal, taxation or public laws of a foreign jurisdiction.

In addition to the common law, several of the provinces have enacted legislation governing the reciprocal enforcement of judgments. The legislation allows a judgment creditor in certain circumstances to apply to the court of that province for an order registering the foreign judgment. This can only be done if the foreign judgment is from a reciprocal jurisdiction, as set out in the reciprocal enforcement of judgments legislation. A foreign judgment, if recognized in a Canadian province under the common law rule, may be exported from one reciprocating province in Canada to others under reciprocal enforcement of judgments legislation. Once a foreign judgment is registered, it has the same force and effect as a judgment given in the registering court. Additionally, the registering court will have the same control and jurisdiction over the foreign judgment as it has over its own judgments. The reciprocal enforcement of judgments legislation in the various provinces does not alter the rules of private international law. It simply provides for the registration of judgments as a more convenient procedure than the former procedure of bringing an action to enforce a judgment.

3. Obtaining Evidence for Foreign Proceedings

3.1 Taking Evidence in Canada for Foreign Proceedings

A party to litigation outside of Canada may require the assistance of a Canadian court in obtaining evidence from witnesses in Canada for use in the foreign trial. Typically, such assistance is sought by way of a letter of request or a letter rogatory that is a formal request by a foreign court to a judge of a Canadian superior court requesting the taking of evidence from an individual resident in Canada.

The foreign litigant first obtains the letter of request from the foreign court where the action is pending. The foreign court's procedure will govern at this stage. The letter of request should name the witness to be examined, describe the nature of the evidence sought and indicate why the evidence of the witness is relevant and necessary. After obtaining the letter of request, the foreign litigant must make an application to the court in the resident Canadian province of the witness for an order to enforce the letter of request.

The country in which the requesting court is situated need not be a party to a treaty with Canada. However, a Canadian court will not grant an order where doing so would offend Canadian sovereignty or be contrary to Canadian public policy.

Depending on the subject-matter of the dispute, the *Canada Evidence Act* or the evidence act of the province in which the witness resides will generally govern the procedure by which the letter of request is enforced. The Canadian court has the discretion to order for use in a foreign trial the examination of a witness or the production of a document, or both, regardless of whether the witness is a party to the foreign action or merely a person with relevant information. Canadian courts generally enforce letters of request to gather evidence to be used at trial. Depending on the relevant statutory authority and the rules of procedure of the requested court, they also have discretion to enforce letters of request for pre-trial proceedings in appropriate circumstances. The local superior court may limit the scope of questions or documents to be produced. In doing so, the court is guided by local rules of evidence and procedure.

3.2 Taking Foreign Evidence for Canadian Proceedings

A Canadian court may order the appointment of a commissioner to take the evidence from a witness who is outside Canada. The transcript of the examination may then be used at trial without requiring the witness to be present in Canada.

Canadian courts may issue letters of request asking a foreign court or authority to assist in compelling a witness to appear before a commissioner in the foreign jurisdiction to answer questions for pre-trial discovery. Enforcing the letter of request from the Canadian court is in the foreign court's discretion and governed by the procedural rules of that jurisdiction. As such, it may be prudent in the letter of request to ask that an oath be administered and that a cross-examination of the witness be conducted.

3.3 Civil Procedure Conventions

Unlike the United States, Canada is not a party to The Hague Convention on Civil Procedure but is a party to The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. Thus, except where the evidence is offered voluntarily, obtaining evidence in Canada for use in a foreign civil proceeding, and vice versa, is facilitated by way of letters of request. Canada has entered into approximately 25 bilateral conventions that indicate how letters of request should be transmitted to the proper Canadian authority.

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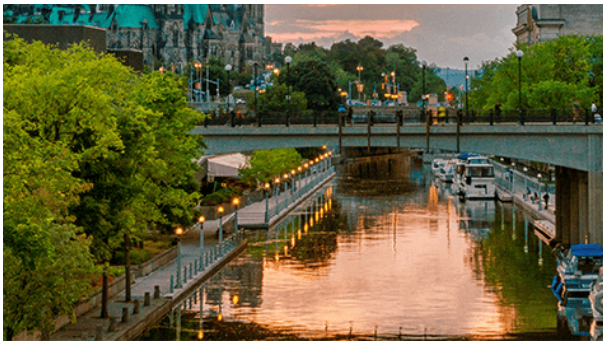

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