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# Canada

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## LITIGATION

### Structure of the legal profession

**4.01** The Canadian legal profession combines, at least formally, the roles of barrister and solicitor. Every solicitor in Canada is technically a barrister with the right to appear in court and vice versa. Quebec retains the profession of notary. Notaries act in all areas of law except litigation, such as in contractual, real estate and non-litigious family matters.

As a practical matter, lawyers who practise in the area of commercial litigation tend to be specialists, restricting their practice to disputes of that kind. One result of the combined barrister and solicitor practice is that any lawyer may deal directly with his or her client. That is, even the litigation specialist may speak directly to his or her client without the intervention of a solicitor, although in complex commercial litigation it is usual for solicitors specialising in the area of commercial law in dispute to be part of the litigation team.

As the branches of the profession are combined in Canada, there are no barristers' chambers. Rather, lawyers work either in partnership or on their own. Partnerships will vary from small (two lawyers) to large (500 lawyers) firms. While the largest firms are generally situated in major centres such as Toronto, Montreal, Calgary or Vancouver, many have branch offices both inside and outside of Canada. The 1990s found the legal profession in a trend towards national law firms. Larger firms in the major commercial centres either merged with firms in other cities or have made other arrangements to work together.

### *The provinces and territories*

**4.02** Because Canada comprises ten provinces and three territories, each with its own law society, it was traditionally necessary for a lawyer to be qualified by a provincial law society if he or she wished to practise law in that province. Law

<sup>1</sup> Without the assistance of Alex Colangelo, colleague of Douglas Harrison, this chapter could not have been completed.

societies across the country, however, have recently pursued agreements to allow freer mobility of lawyers across jurisdictions. To this end, within some restriction, lawyers that are called to the bar in one jurisdiction are now able to provide legal services in most other jurisdictions. In Quebec, meanwhile, special authorisation may be granted to allow a Canadian or foreign lawyer to practice in connection with a specific case. Further, a lawyer qualified in any Canadian jurisdiction has the right to appear, without restriction, in any of the federal tribunals, the Federal Court, the Tax Court and the Supreme Court of Canada.

#### *Leading and junior counsel*

**4.03** While the “Queen’s Counsel” designation for counsel is still employed in Canada, its significance has waned considerably. While in some provinces the award of a QC is still a recognition of outstanding ability, in others the designation has been rendered almost meaningless as an indication of skill in litigation as a result of indiscriminate awarding of the title. Canada’s two largest provinces, Quebec and Ontario, have ceased awarding it.

Seniority of counsel and experience in the courts is obviously of considerable importance to a client. Most commercial litigation of any size or difficulty requires the services of at least a senior and a junior litigation lawyer, with greater numbers being required in larger and more complex cases. This is not a duplication of effort, as the two or more lawyers act as a team dividing up duties and responsibilities among themselves so that each aspect of the case receives the attention it deserves, at a cost commensurate with its relative importance. Cases may be divided up by different counsel taking different witnesses, by the issues in the case or by some other means.

#### *Fees*

**4.04** Fees vary with seniority, expertise and location. Normally, lawyers will charge on the basis of the time spent on a matter. Hourly rates vary from city to city and from firm to firm, although usually not significantly for individuals with the same levels of skill in firms of comparable size.

Further, provinces generally permit lawyers to charge fees on a contingency basis with the lawyer obtaining a percentage of the proceeds of litigation. However, the legislation and rules of each province prescribe specific requirements.<sup>2</sup> While not appropriate for all cases, in certain circumstances the possibility of a contingency fee arrangement may remove some of the economic barriers to litigation.

Most major international litigation is likely to involve one or more of the larger national firms. While, as noted above, fees are normally based on hourly rates, also of relevance in setting the fee is the seniority of the lawyers involved, the complexity of the case, the amount and issues at stake, success and other matters. Lawyers will generally provide estimates of the cost of litigation on request.

<sup>2</sup> In Ontario, see Solicitors Act, R.S.O. 1990, c. S.15, s 28. Nova Scotia, meanwhile, contains rules on contingency fees in its Civil Procedure Rules, made under the authority of the Judicature Act, R.S.N.S. 1989, c. 240 [N.S. Rules] at Rule 63.17.

## **Court system**

**4.05** The civil court structure in Canada generally consists of four levels: the provincial-level statutory courts, which are generally defined by subject matter; provincial and territorial courts of general jurisdiction, which have inherent jurisdiction and are usually the courts of first instance; the provincial, territorial and federal courts of appeal; and the Supreme Court of Canada.

There is in addition a Federal Court system, comprised of the Federal Court (the trial division) and the Federal Court of Appeal, from which appeals may also be taken to the Supreme Court of Canada. In general terms, it deals with claims against the Crown in right of Canada, federal taxation matters and intellectual property and admiralty matters. There is also a Tax Court, which deals with income tax matters and from which an appeal lies to the Federal Court system.

### *Provincial and Territorial Courts*

**4.06** The Provincial and Territorial Courts are generally the lowest level courts, and are created by statute to preside over specific subject matter. Their judges are appointed by provincial governments, and generally, these courts have jurisdiction over provincial offences, family matters, and some criminal and civil matters. The applicable provincial or territorial law, however, will provide further detail with respect to specific jurisdictions, as there is no harmonisation with respect to the jurisdictions given to these courts. For example, while small claims fall within the jurisdiction of Alberta's Provincial Court, Ontario's Small Claims Court is found within the Superior Court system, referred to below.

### *The Superior Court*

**4.07** In Canada, this level of court is variously known as the Supreme Court, the Court of Queen's Bench or the Superior Court, depending on the province or territory. These courts are generally the highest trial courts for the province or territory, and enjoy inherent jurisdiction. Superior courts may be divided into divisions, such as in Ontario, or divisions may exist on a *de facto* basis, in order to ensure that judges with appropriate expertise hear cases that require specialised knowledge, such as family law or bankruptcy matters. Superior Court judges are appointed by the federal government. In Ontario, the Small Claims Court, which has jurisdiction for civil matters up to \$10,000, is a branch of its Superior Court, as is the Divisional Court, which has jurisdiction to hear certain appeals. The territory of Nunavut's Court of Justice, meanwhile, is unique in that it is a uniform court encompassing a traditional territorial court and a superior court of general jurisdiction.

### *The Court of Appeal*

**4.08** The Court of Appeal is the highest court in each province and territory and each one has both civil and criminal jurisdiction. In civil matters, appeals are usually heard by a panel of three justices. Argument in these courts is presented both in writing and orally. Typically a written argument, variously called a *factum* or

memorandum of argument, is filed by each party and oral argument is subsequently presented. The rules found in the respective provinces and territories describe the procedures of each court.

### *The Supreme Court of Canada*

**4.09** The Supreme Court of Canada hears appeals from the court of last resort in each of the provinces and territories, or the Federal Court of Appeal. Save for specific instances where leave is not required, such as in certain criminal cases, or in rare instances where a lower court grants leave, an appeal will only be heard if leave is granted by the Supreme Court.

The Supreme Court of Canada is not a court to correct error. Only those cases which are of public importance or involve issues of law that need to be decided by the highest court in the country are granted leave. An important consideration in determining whether to grant leave is the state of the law in the provinces and territories. If there are conflicting decisions of Courts of Appeal from different provinces and territories on a significant point of law, the Supreme Court of Canada will be much more inclined to hear the appeal. Similarly, if a case involves a point of constitutional law or concerns an issue under the Canadian Charter of Rights and Freedoms, there is a better chance leave will be granted.

Applications for leave to appeal are made in writing and are considered without oral argument, unless the court requests it. If oral argument is ordered, it can take place in Ottawa, where the court is situated, or by closed circuit television from a major centre. Leave applications are decided by three judges. However, as the court typically hears only seventy to one hundred appeals a year, for almost all civil cases the court of final appeal is the Court of Appeal in the province or territory from which the case originates.

The Supreme Court of Canada consists of nine judges including the Chief Justice of Canada. The judges are appointed by the federal government from the bench and bar from all parts of Canada. At least three Supreme Court justices, however, must be appointed from the Quebec Bench or be advocates of Quebec.<sup>3</sup>

### *The Federal Court and the Federal Court of Appeal*

**4.10** The Federal Court and the Federal Court of Appeal are statutory courts with limited jurisdiction.<sup>4</sup> The judges are appointed by the federal government from the bars of the provinces and the two courts have their headquarters in Ottawa. Both courts, however, sit on a regular basis in the major urban centres across Canada.

The Federal Court has original jurisdiction in all cases where relief is claimed against the Crown in right of Canada.<sup>5</sup> In particular, it has the exclusive right to hear cases

<sup>3</sup> Supreme Court Act, R.S.C. 1985, c. S-26, s 6.

<sup>4</sup> Until 2003, the Federal Court of Canada consisted of two divisions, a Trial Division and Appeal division. Pursuant to legislative amendments, however, the two divisions became separate courts, the Federal Court and the Federal Court of Appeal.

<sup>5</sup> Federal Courts Act, R.S. 1985, c. F-7 s 17.

involving prerogative remedies against any federal board or commission, and also has exclusive original jurisdiction to hear cases between private parties involving conflicting applications for patents, copyright, trade-mark or industrial design and in all cases in which it is sought to impeach any patent of invention or to have the register of copyrights, trade-marks or industrial designs changed.<sup>6</sup> Other federal-related matters such as citizenship appeals, civil cases involving navigation and shipping and maritime matters also fall within the jurisdiction of the Federal Court.

An appeal as of right lies from the Federal Court to the Federal Court of Appeal. The Federal Court of Appeal may also hear appeals from certain judgments of the Tax Court of Canada, and has jurisdiction to hear applications for judicial review from certain federal boards, commission and tribunals. The Federal Court of Appeal normally sits as a panel of three judges.

#### *Tax Court of Canada*

**4.11** The Tax Court of Canada has exclusive original jurisdiction to hear and determine references and appeals on matters arising out of certain tax and excise statutes such as the Income Tax Act, the Excise Tax Act and the Employment Insurance Act.<sup>7</sup> The Tax Court of Canada also sits at various locations across the country. Appeals of decisions made by the Tax Court of Canada are generally heard by the Federal Court of Appeal.

#### **Limitation**

**4.12** Limitation periods for civil actions are generally found in specific legislation of the various provinces and territories.<sup>8</sup> Typically, legislation will prescribe a basic limitation period to apply to all actions and may also include different limitation periods for specific types of actions.<sup>9</sup> Thus, across the country, limitation periods will vary by jurisdiction and by type of matter. Further, while historically, limitation periods began at the occurrence of the cause of action, some provinces delay the start of the limitation period until the date the claim was discovered.<sup>10</sup> The basic limitation period in Ontario is two years, which generally begins at the date of discovery of the claim.

#### **Service of process**

**4.13** While each jurisdiction has its own rules of procedure with respect to the circumstances under which a party may be served, both within and outside of the

<sup>6</sup> *Ibid.* at s 20.

<sup>7</sup> Tax Court of Canada Act, R.S.C. 1985, c. T-2, s 12(1).

<sup>8</sup> For example, Limitations Act (Alberta), R.S.A. 2000, c. L-12 and Limitations Act (British Columbia) R.S.B.C. 1996, c. 266. Specific statutes may also set out limitations periods, both at the provincial and federal level. See for example the federal Bank Act, S.C. 1991, c. 46.

<sup>9</sup> Limitations Act, 2002 (Ontario), S.O. 2002, c. 24, Sched. B, s 4. There may also be actions where limitation periods are found in other statutes, relating to specific actions.

<sup>10</sup> See *Ibid.* at ss 4-5.

jurisdiction, courts have found that these rules are procedural in nature and do not necessarily confer jurisdiction.<sup>11</sup> Thus, the jurisdiction of a court over a party “is no longer seen to be tied to the question of service”.<sup>12</sup>

#### *Service within the jurisdiction*

**4.14** The method of service varies in detail from jurisdiction to jurisdiction within Canada and is contained within the various rules of civil procedure in each jurisdiction.

#### GENERAL RULES FOR MANNER OF SERVICE

**4.15** The general rule is that the originating process is to be served personally or by an alternative to personal service in the manner provided for by the relevant rules of civil procedure. In the case of an individual, it is effected by leaving a copy of the document with the individual sought to be served. A corporation is served personally by leaving a copy of the document with an officer, director or agent of the corporation or with a person at any place of business of the corporation who appears to be in control or management of the place of business. It is not necessary to serve at the head office; any place where the corporation carries on business is sufficient. In the case of a person who is outside Ontario but is carrying on business within Ontario, personal service is effected by leaving a copy of the document with anyone carrying on the business in Ontario for that person. A partnership is served by leaving a copy of the document with any one or more of the partners or with a person at the principal place of business of the partnership who appears to be in control or management of the place of business. The rule is similar for a sole proprietorship.<sup>13</sup> Generally, other than the originating process, no other document need be served personally or by an alternative to personal service unless required by the rules or by order.

#### ALTERNATIVES TO PERSONAL SERVICE

**4.16** In Ontario, and in most of the other jurisdictions in Canada, acceptance of service by a solicitor is valid personal service on his or her client if the solicitor endorses the document, or a copy, with an acceptance of service and the date of that acceptance. Service by mail to the last known address may be made by sending a copy of the document, together with an acknowledgment of receipt card in a form prescribed by the rules to the last known address of the person to be served. Service in this fashion is only effective if the acknowledgment of receipt card, signed by the recipient, is returned. The effective date of service is then the date the sender receives the receipt. Service may also be made at a place of residence of the defendant if, for some reason, personal service cannot be effected, by leaving a copy of the originating process in a sealed envelope with anyone who appears to be an adult member of the same household and on the same day or the following day mailing another copy of that document to the person at that place of residence. Service in this manner is effective on the fifth day after the document is mailed.

<sup>11</sup> See *Muscutt v Courcelles* (2002), 213 D.L.R. (4<sup>th</sup>) 577 (Ont. C.A.).

<sup>12</sup> J. Walker, *The Civil Litigation Process*, 6<sup>th</sup> ed. (Toronto: Emond Montgomery, 2005).

<sup>13</sup> Rules of Civil Procedure, R.R.O. 1990, Reg. 194 [Ontario Rules] at Rules 16.01, 16.02.

In the case of a corporation, where the head office or principal place of business of the corporation, or in the case of an extra-provincial corporation, the attorney for service in Ontario, cannot be found at the last address recorded with the government officials charged with the regulation of corporations, service may be made on the corporation by mailing a copy of the originating process to the corporation, or to the attorney for service in Ontario, at that address. In certain situations, meanwhile, the rules of procedure may also allow the service of documents by electronic means, such as fax or email.<sup>14</sup>

#### SUBSTITUTED SERVICE OR DISPENSING WITH SERVICE

**4.17** Under the rules in Ontario and the other Canadian jurisdictions, courts have the power to make an order for substituted service or, where necessary in the interests of justice, to dispense with service entirely. This may be ordered where for any reason it is demonstrated that it is impracticable to effect prompt service of an originating process. The court making such an order for substituted service is obliged to specify when service in accordance with that order is effective.<sup>15</sup>

#### *Cross-border service of process*

**4.18** It is generally possible to serve originating documents outside a Canadian jurisdiction without leave of the court with respect to certain types of claims.<sup>16</sup> The rules of civil procedure of the various jurisdictions describe the manner of service, and generally, originating documents are to be served in the manner provided by the local rules or as provided by the laws of the jurisdiction where service is made, provided that service could reasonably be expected to come to the notice of the person being served.<sup>17</sup> This would also pertain to service in countries that are not contracting states for the purposes of the 1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the “Convention”) or the bilateral conventions to which Canada is a party.<sup>18</sup>

As Canada has acceded to the Convention, parties wishing to serve documents in other contracting states, or foreign parties wishing to serve documents in Canada may follow the procedures set out in the Convention. The Convention allows the service of documents through a Central Authority designated by each contracting state.<sup>19</sup> Provided that the request complies with the provisions of the Convention,

<sup>14</sup> See for example, Ontario Rules, *Ibid.* at Rule 16.05 regarding serving a solicitor by fax or email, the British Columbia Supreme Court Rules, B.C. Reg 221/90, Rule 11 [B.C. Rules], and the Alberta Rules of Court, Alta. Reg 390/1968, Rule 16.1 [Alberta Rules]. Typically, service in one of these manners will require certain procedures be followed and the rules will prescribe the time at which service will be effective pursuant to the transmission of the documents.

<sup>15</sup> Ontario Rules, *Ibid.* at Rule 16.04.

<sup>16</sup> See for example, Ontario Rules, *Ibid.* at Rule 17.02, B.C. Rules, *supra* note 13 at Rule 13(1) and Manitoba Court of Queen’s Bench Rules, Man. Reg. 553/88, Rule 17.02 [Manitoba Rules].

<sup>17</sup> See Ontario Rules, *Ibid.* at Rule 17.05(2) and Manitoba Rules, *Ibid.* at Rule 17.05(1).

<sup>18</sup> The nineteen such bilateral treaties generally involve the use of diplomatic channels and “appear to be rarely used in practice”. See Holmsted and Watson, *Ontario Civil Procedure*, (Toronto: Carswell) [Holmsted and Watson].

<sup>19</sup> Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, 15 November 1965, The Hague, Can T.S. 189/2, Article 2, 3.

the Central Authority will then serve the document itself or arrange to have it served either in the manner of the law of the recipient state, or as requested by the applicant, unless the manner requested is incompatible with the law of the recipient state.<sup>20</sup> In Canada, a Central Authority exists for each jurisdiction, and is usually the Attorney General or Ministry of Justice of the respective jurisdiction.

Further, the Convention clarifies that unless the recipient state objects, the Convention does not interfere with the freedom to send documents directly by mail or to have them served through “judicial officers, officials or other competent persons of the State of destination.”<sup>21</sup> Thus, in a non-objecting state such as the United States, documents may still be served by private methods of service, and the Central Authority of the United States need not be involved. Service in an objecting state, however, must follow the procedures required for service through a Central Authority. Canada does not object to the private methods of service described by the Convention.

In addition to the Convention, the specific rules of civil procedure of the originating jurisdiction must also be considered. For example, while Ontario’s Rules of Civil Procedure recognise that a document may be served in a manner permitted by Article 10 of the Convention, the Rules state that service must be performed in a manner that would also be permitted by Ontario’s rules if the documents were being served in Ontario. Therefore, while the Convention may permit service by mail, it would not create a new manner of service in Ontario where it is not so permitted.<sup>22</sup> With respect to a foreign proceeding, litigants should also consider the requirements of the foreign court.

### **Personal jurisdiction over foreign defendants**

**4.19** There are three ways in which jurisdiction may be asserted over a defendant from outside the applicable jurisdiction, namely presence-based jurisdiction, consent-based jurisdiction and assumed jurisdiction.<sup>23</sup> In a question of whether to assume jurisdiction over a foreign defendant, service of an originating process will not determine jurisdiction. To this end, a “real and substantial connection” is required in order for a province to exercise jurisdiction, regardless of provincial rules prescribing the procedure with respect to service.<sup>24</sup> The Ontario Court of Appeal has identified a number of factors to be considered in determining whether there is a real and substantial connection and, therefore, jurisdiction over the plaintiff. These factors are:

- (a) the connection between the forum and the plaintiff’s claim;
- (b) the connection between the forum and the defendant;
- (c) unfairness to the defendant in assuming jurisdiction;
- (d) unfairness to the plaintiff in not assuming jurisdiction;
- (e) the involvement of other parties to the suit;

<sup>20</sup> *Ibid.* at Articles 4-5.

<sup>21</sup> *Ibid.* at Article 10.

<sup>22</sup> See for example, *supra* note 12 at Rule 17.05(3). Also see Holmsted and Watson, *supra* note 17.

<sup>23</sup> *Supra* note 10.

<sup>24</sup> See *supra* note 10.

- (f) the court's willingness to recognise and enforce an extra-provincial judgment rendered on the same jurisdictional basis;
- (g) whether the case is interprovincial or international in nature; and
- (h) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

The test will be applied in a flexible manner, and no factor is determinative.<sup>25</sup>

The real and substantial connection test, however, "requires only *a* real and substantial connection, not *the* most real and substantial connection."<sup>26</sup> To this end, courts retain the residual discretion to decline jurisdiction even where the real and substantial connection test has been met in cases where a court is satisfied that there is a more convenient forum in which to hear the action. Courts will apply the *forum non conveniens* doctrine by considering various factors, including the location of the majority of the parties, the location of key witnesses and evidence, the contractual provisions that specify applicable law or accord jurisdiction, the avoidance of a multiplicity of proceedings, the applicable law and its weight in comparison to the factual questions to be decided, geographical factors suggesting the natural forum, and whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic court.<sup>27</sup>

Most jurisdictions in Canada make no provision for the entry of a "conditional appearance" by which the issue of jurisdiction is deferred until the trial. A party seeking to challenge jurisdiction should do so before delivering a defence or a notice of intent to defend. It is felt that the issue of jurisdiction should be determined at the earliest possible time.

Further, the Ontario Rules of Civil Procedure provide that a defendant may apply to set aside service outside the jurisdiction on the grounds that service outside the jurisdiction was not authorised by the rules of procedure or that the jurisdiction is not the convenient forum for the hearing of the proceedings. The court can grant leave for the parties to adduce oral evidence, if necessary, at the hearing. If the application is successful, the court may set aside the service of the originating process or stay the local proceedings. Bringing a motion for such an order is not in itself a submission to the jurisdiction of the court by the party bringing the motion.<sup>28</sup>

#### *Restraint regarding foreign proceedings*

**4.20** An "anti-suit" injunction is an aggressive remedy brought by a party to restrain another party from launching or continuing a proceeding in the courts of another jurisdiction.<sup>29</sup> Canadian courts historically exercised the power to restrain foreign proceedings with great caution, as such an injunction affects the ability of a foreign court to exercise jurisdiction.<sup>30</sup> Anti-suit injunctions would not be necessary if comity

<sup>25</sup> *Supra* note 10.

<sup>26</sup> *Supra* note 10 at para. 44.

<sup>27</sup> *Supra* note 10 at para. 41.

<sup>28</sup> *Supra* note 12 at Rule 17.06(4).

<sup>29</sup> *Amchem Products Incorporated v British Columbia (Workers' Compensation Board)* [1993] 1 S.C.R. 897.

<sup>30</sup> See *Ibid.*

was universally accepted. However, courts of other jurisdictions “do occasionally accept jurisdiction over cases that do not satisfy the basic requirements of the *forum non conveniens* test.”<sup>31</sup>

In deciding whether to grant an injunction against a foreign proceeding, a Canadian court will consider whether the foreign court has “assumed jurisdiction on a basis that is inconsistent with principles relating to *forum non conveniens* and ... the foreign court’s conclusion could not reasonably have been reached had it applied those principles.”<sup>32</sup> If the Canadian court makes such a finding, it will then consider whether granting an injunction would “deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him.”<sup>33</sup>

Generally, however, a Canadian court will not consider an anti-suit injunction if there is no foreign proceeding pending. It is also preferable that a foreign decision not be pre-empted until the applicant has sought a stay in the foreign proceeding and failed.<sup>34</sup>

#### *State immunity*

**4.21** In 1980, in order to settle the issue as to whether a foreign state carrying on a commercial activity was immune from the jurisdiction of Canadian courts, the Parliament of Canada passed the *State Immunity Act*.<sup>35</sup> Except as provided for by this Act, a foreign state is immune from the jurisdiction of any court in Canada.

A foreign state is defined to include “any sovereign or other head of the foreign state or of any political subdivision of the foreign state while acting as such in a public capacity.” It also includes “any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state.”<sup>36</sup>

In any proceeding before a Canadian court, the court itself is obliged to give effect to the immunity conferred on a foreign state by the *State Immunity Act*, notwithstanding that the state has failed to take any step in the proceedings. A foreign state is, however, not immune from the jurisdiction of a Canadian court if the state waives the immunity conferred by the Act by submitting to the jurisdiction of the court in accordance with the Act’s provisions.

A foreign state is not immune from the jurisdiction of a Canadian court in proceedings that relate to any commercial activity of the foreign state. Commercial activity is defined to mean “any particular transaction, act or conduct or any regular course of conduct that by reason of its nature is of a commercial character.” Further, a foreign state is not immune from the jurisdiction of the court in any proceedings that relate to death, personal injury or any damage to or loss of property that occurs in Canada.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Ibid.*

<sup>33</sup> *Ibid.*, citing *SNI Aérospatiale v Lee Kui Jak* [1987] 3 All E.R. 510 at 522.

<sup>34</sup> *Ibid.*

<sup>35</sup> R.S.C. 1985, c S-18.

<sup>36</sup> *Ibid.* at s 2. A political sub-division means a province, state or other like political sub-division of a foreign state that is a federal state.

Property of a foreign state that is located in Canada is immune from attachment, execution, arrest, detention, seizure or forfeiture unless the state has waived its immunity, the property in question was used or was intended for use in a commercial activity, or the execution relates to a judgment establishing rights in property that were acquired by succession or gift or in immovable property located in Canada. For the purposes of satisfying a judgment with respect to an action for which no immunity is enjoyed, however, the property of a foreign state is not immune from the above forms of execution.<sup>37</sup> Further, military property of a foreign state and property of a foreign central bank or monetary authority not used or intended for use in a commercial activity also are immune from attachment and execution.

Service of an originating document in a judicial proceeding in Canada on a foreign state may be made in three ways. The state can agree on the manner of service, the document may be served in accordance with any international convention to which the state is a party or the document may be delivered to the Deputy Minister of Foreign Affairs, who will transmit it to the foreign state. An agency of a foreign state can be served in the first two of the preceding ways or in accordance with the applicable rules of civil procedure.

#### *Foreign diplomats*

**4.22** Under the *Foreign Missions and International Organizations Act*,<sup>38</sup> the bulk of the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations has been adopted and given the force of law in Canada in respect of all countries, whether or not they are parties to the Conventions. In general terms, diplomatic staff are immune from criminal and civil jurisdictions and administrative and technical staff of embassies are treated in a similar fashion, except that they are not immune from civil jurisdiction in respect of acts performed outside their official duties. Consular staff are immune in respect of acts performed in their official functions, with certain exceptions. The Minister of Foreign Affairs, however, retains the right to extend, withdraw or restore privileges or immunities for the purpose of according diplomatic missions and consular posts of a foreign state treatment that is comparable to the treatment of the Canadian diplomatic mission in that foreign state.

#### *International organisations*

**4.23** Under the *Foreign Missions and International Organizations Act*, the Canadian government also has the power to provide that international organisations have the privileges and immunities in Canada provided for under the United Nations Convention on Privileges and Immunities.<sup>39</sup> Various international organisations, such as the United Nations, the European Communities and the European Space Agency have been granted such privileges and immunities.

<sup>37</sup> See *Ibid.* at s 12.

<sup>38</sup> S.C. 1991, c. 41.

<sup>39</sup> *Ibid* at s 5(1).

### **Enforceability of forum selection clauses and choice of law clauses**

**4.24** Parties to a contract may agree to an exclusive jurisdiction clause in favour of a foreign court, and in such cases a defendant may apply for a stay of the Canadian proceedings, which will be granted unless there is a “strong cause” against doing so.<sup>40</sup> In the presence of such a clause, the plaintiff maintains the burden of showing why a stay should not be granted. In maintaining this test, the Supreme Court of Canada has recognised the desire to hold contracting parties to their agreements. The “strong cause” test, however, “provides sufficient leeway for judges to take improper motives into consideration in relevant cases and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage.”<sup>41</sup> With respect to a contract containing a non-exclusive jurisdiction or attornment clause, courts will not require a “strong cause” to refuse a stay, and may be more likely to recognise jurisdiction over the proceedings.<sup>42</sup>

With respect to such clauses designating a forum within Canada, it is not usual to confer jurisdiction on the courts of Canada generally. Instead, a choice of a specific province or territory is made.

Further, it is also common to include a ‘choice of law’ clause in an agreement; otherwise the court selected is confronted with the problem of choice of law. Canadian courts will generally apply the laws of other jurisdictions, but these laws will have to be proven as a question of fact. In the absence of any such proof, the Canadian court may assume that the foreign law is the same as its own. Subject to certain exceptions, however, Canadian courts will generally apply their own procedural rules rather than those of the foreign court.

### **Availability of preliminary/interim relief**

**4.25** The general purpose of an interlocutory injunction is to preserve the rights of a party until the issues between the parties can be determined at trial. An injunction is an extraordinary form of relief and is, therefore, only reluctantly granted by the court. In the normal situation, an injunction is granted to restrain the defendant from undertaking or continuing a course of conduct. The court may also grant a mandatory injunction, requiring the defendant to perform a positive act. Injunctions may also be granted to ensure that the defendant maintains sufficient assets in the jurisdiction so as to be able to satisfy an eventual judgment, the so-called *Mareva* injunction. Whatever the purpose of the injunction, the same general principles are applied by the court in determining whether to grant such relief.

<sup>40</sup> *Z.I. Pompey Industrie v ECU-Line N.V.* [2003] 1 S.C.R. 450.

<sup>41</sup> *Ibid.* at para. 20.

<sup>42</sup> See *B.C. Rail Partnership v Standard Car Truck Co.* [2003] B.C.J. No 194 (B.C.S.C.) at para 27, reversed on issue of whether the clause was “exclusive”, [2003] B.C.J. No 2557 (B.C.C.A.) and *Hayes v Peer 1 Network Inc.* [2007] O.J. No 57 (Ont. S.C.J.) at 50, reversed on issue of shifting onus for *forum non conveniens*, [2007] O.J. No 2476 (Ont. Div. Ct.).

### General interlocutory injunction

**4.26** This is the normal form of injunction wherein a defendant is ordered to refrain from acting in a certain manner that is alleged to be in violation of the plaintiff's rights. The injunction is given pending the trial of the action on the plaintiff's undertaking to pay any damage suffered by the defendant in the interim, if it should be subsequently determined by the court that the injunction ought not to have been granted.

In order to obtain an interlocutory injunction to restrain actions by the defendant, a court will consider a three-part test, considering:

- (a) whether there is a serious question to be tried;
- (b) whether the applicant would suffer irreparable harm if the application were refused; and
- (c) the balance of convenience, i.e. which party will suffer the greater harm from granting or refusing the remedy pending a decision on the merits.<sup>43</sup>

Irreparable harm "refers to the nature of the harm suffered rather than its magnitude", and represents harm that cannot be cured or quantified in monetary terms.<sup>44</sup> For example, this may occur where failing to prohibit an act would cause irrevocable damage to professional standing<sup>45</sup> or losing the ability to exploit a market opportunity.<sup>46</sup>

A plaintiff must always apply for an injunction without delay as delay will be regarded as a strong indication that the plaintiff could wait until trial for its relief. A plaintiff will normally be required to have commenced an action and prepared a notice of motion supported by sufficient affidavit evidence to satisfy the court of the requirements referred to above. However, in cases of extreme urgency, it will not be necessary to have commenced the action, if counsel for the plaintiff undertakes to the court that he or she will later do so.

A motion for an injunction, like other applications for interim relief, is normally made on notice to the defendant. The time periods for notice vary from province to province and may be waived by the court, but at least four days notice is required in Ontario. However, applications for injunctive relief may be made *ex parte*, without notice, in cases where the delay necessary to give notice would entail the "irreparable loss of rights".<sup>47</sup>

An injunction granted by way of a motion made without notice is normally only granted for a short period of time, and the plaintiff must subsequently apply for the continuation of the injunction on proper notice to the defendant.<sup>48</sup> It is extremely important on any motion made without notice that the moving party make a balanced presentation of facts and law, including anything that may favour the other side. The

<sup>43</sup> *RJR MacDonald Inc. v Canada (Attorney General)* [1994] 1 S.C.R. 311.

<sup>44</sup> *Ibid.*

<sup>45</sup> See *Benjamin v Toronto Dominion Bank* (2006) 80 O.R. (3d) 424 (Ont. S.C.J.).

<sup>46</sup> *Omega Digital Data Inc. v Airos Technology Inc.* (1996) 32 O.R. (3d) 21 (Ont. S.C.J.).

<sup>47</sup> *B.C.G.E.U. v British Columbia (Attorney General)* [1988] 2 S.C.R. 214 at para 44.

<sup>48</sup> See *supra* note 12 at Rule 40.02.

failure of a plaintiff to make full and frank disclosure will result in the opposing party being entitled to have the order that was obtained set aside.<sup>49</sup>

It is a condition for the issuance of any interlocutory injunction that the plaintiff provide an undertaking to the court as to damages. By this undertaking, the plaintiff agrees to pay the defendant any damages that the defendant may suffer as a result of the granting of the injunction should the defendant ultimately succeed at trial.<sup>50</sup> It may not be a sufficient reason to deny an injunction, however, where the plaintiff has insufficient assets within the jurisdiction to satisfy the undertaking. Further, foreign plaintiffs may be required to post security for the undertaking within the jurisdiction.

With the exception of an injunction granted on a motion made without notice, an interlocutory injunction is granted until the trial of the action or until further order of the court. The defendant may move for a variation or lifting of the injunction should circumstances change.

#### *Interlocutory mandatory injunction*

**4.27** A mandatory injunction requires a defendant to undertake some positive act to rectify a violation of the plaintiff's rights. The purpose of such an injunction is restorative, and thus, is generally more difficult to obtain at the interlocutory stage. Ontario courts have held that the plaintiff will be required to show a good *prima facie* case, which is a more stringent standard than that of the prohibitory injunction.<sup>51</sup> This higher threshold, however, is not universally accepted across the country.<sup>52</sup>

#### *Mareva injunction*

**4.28** A *Mareva* injunction prevents the defendant from transferring his or her assets out of the jurisdiction so as to render any judgment after trial of no value. Except in the rarest of cases, a motion for a *Mareva* injunction is made without notice to the defendant. The requirement for full and frank disclosure referred to above must be carefully observed.

It has been held that in order to obtain such an injunction, not only must a party have a strong *prima facie* case,<sup>53</sup> but it must also be shown that there is a genuine risk of disappearance of assets, generally in an attempt to frustrate a potential judgment.<sup>54</sup> Within Canada, it is generally insufficient merely to establish that the defendant is

<sup>49</sup> *United States of America v Friedland* [1996] O.J. No 4399 (Ont. C.J. (Gen. Div.)). See also, generally, C. Wirth, *Interlocutory Proceedings*, Looseleaf ed. (Aurora: Canada Law Book).

<sup>50</sup> See R.J. Sharpe, *Injunctions and Specific Performance*, Looseleaf ed. (Aurora: Canada Law Book) at 2-39.

<sup>51</sup> See *Alltricolor Financial Management Inc. (Re)* (2003) 7 R.P.R. (4<sup>th</sup>) 33 (Ont. S.C.J.), leave to appeal to Div. Ct. dismissed 27 R.P.R. (4<sup>th</sup>) 58.

<sup>52</sup> See *Hedstrom v Manufacturers Life Ins. Co.* (2002) 8 B.C.L.R. (4<sup>th</sup>) 192 (S.C.B.C.).

<sup>53</sup> See discussion in *Chitel v Rothbart* (1982) 141 D.L.R. (3d) 268 (Ont. C.A.).

<sup>54</sup> *Aetna Financial Services Ltd. v Feigelman* [1985] 1 S.C.R. 1. The courts of the various provinces are not necessarily in agreement on whether an intention to frustrate is necessary.

going to transfer the assets out of a particular province. However, domestic *Mareva* orders have been made in certain circumstances.<sup>55</sup>

Once obtained, the order must be served on the defendant. The plaintiff will also wish to communicate the existence of the injunction to all third parties who may have custody or control of assets of the defendant. A copy of the formal court order should be provided to all such parties in due course. It is sufficient to bind third parties in the first instance by informing them simply of the fact that the injunction has been granted, as well as its terms. The order will normally provide for a limit on the amount affected so that the defendant may deal with his or her assets insofar as they exceed that amount.

Again, because the injunction is normally made without notice, the order will usually be effective for a limited period of time. The plaintiff will have to bring a further motion for a continuation of the injunction on proper notice to the defendant. If continued, the defendant will be at liberty to apply to the court for the right to use assets or funds bound by the injunction if they are needed to pay debts incurred in the normal course of business. The onus will be on the defendant to establish that the right to use the funds is being sought for this purpose.

While the *Mareva* injunction can be effective in providing the plaintiff a significant tactical advantage, in practice it can be difficult to obtain. It is often very difficult for a plaintiff to put forward the type of evidence necessary to satisfy a court that there is a real risk that a defendant intends to dissipate or transfer its assets to avoid a future judgment. The simple belief of the plaintiff, no matter how strongly felt, will normally be insufficient to obtain such an order. It should also be remembered that a *Mareva* injunction only freezes assets, and it does not provide the plaintiff with any priority. Therefore, if another legitimate creditor of the defendant comes forward before the plaintiff obtains its judgment, the injunction can be lifted to enable that creditor to satisfy the debt.

#### *Interim preservation / inspection / delivery of property*

**4.29** Although not technically an injunction, an order can be obtained requiring a party to hold on to and preserve property pending the trial of an action.<sup>56</sup> In cases where the property consists of perishable goods, the order may require that the goods be sold in such manner and on such terms as are just.<sup>57</sup> The court may also grant a party the right to inspect property in the possession of another, including the right to undertake tests on it, pending the trial of an action.<sup>58</sup> In appropriate circumstances, an order may also be granted that permits a party, on posting such security as the court may order, to recover its property in the possession of someone else pending the trial of an action.<sup>59</sup>

<sup>55</sup> See *Gateway Village Investments Ltd. v Sybra Food Services Ltd.* (1987) 12, B.C.L.R. (2d) 234 (B.C.S.C.).

<sup>56</sup> See Courts of Justice Act, R.S.O. 1990, c. C.43 at s 104 and *supra* note 12 at Rule 45.

<sup>57</sup> See Rules of the Supreme Court (Newfoundland & Labrador) 1986, S.N.L. 1986, c. 42, Sch. D, s 22.04 [Newfoundland & Labrador Rules].

<sup>58</sup> See for example, *Ibid.* at Rule 22.

<sup>59</sup> See Courts of Justice Act, *supra* note 55 at s 104 and *supra* note 12 at Rule 44.

#### Anton Piller order

**4.30** This is an extreme type of interlocutory order, sometimes referred to as a “civil search warrant”. Such an order authorises the plaintiff to search the defendant’s premises for the plaintiff’s property and if found, to remove it or to inspect, copy and photograph it.

The *Anton Piller* order had its birth in the intellectual property field, where it was used to seize goods manufactured in violation of a copyright or patent. The order allows the plaintiff to obtain such goods as evidence of the violation of the plaintiff’s rights by the defendant. These orders can also be effective in other cases, such as where an employee has moved to a competitor and is alleged to have taken confidential information, such as customer lists.

The motion for an *Anton Piller* order is virtually always made without any notice to the defendant. Therefore, again, the importance of making full and frank disclosure is paramount. The plaintiff must establish to the satisfaction of the court that there is a strong *prima facie* case, that the damage to the plaintiff of the defendant’s potential or actual misconduct is very serious, that there is convincing evidence the defendant possesses incriminating documents or things and that there is a real possibility that the defendant may destroy such material before the discovery process can do its work.<sup>60</sup> The severity of such an award ensures that courts will consider these factors carefully.

Further, a number of guidelines have been established to provide protection to the rights of the parties. These include that an order should appoint a supervising solicitor, independent of the plaintiff, to be present at the search to ensure its integrity; that the plaintiff should be required to provide an undertaking to pay damages in the event the order turns out to be unwarranted or wrongfully executed; that the scope of the order should be no wider than necessary; and that the order should contain a clause limiting the use of the seized items to the purposes of the pending litigation. Further requirements govern the conduct of the search, and the responsibility of the supervising solicitor following the search.<sup>61</sup>

#### Receiver or receiver and manager

**4.31** In cases where the court is satisfied that it is just and convenient to do so, a plaintiff may obtain the appointment of a receiver or receiver and manager over the defendant’s property or business pending the trial of the action.<sup>62</sup>

As with the *Mareva* injunction, the courts will not appoint a receiver unless satisfied that there is strong evidence that the plaintiff’s right to recovery is in serious

<sup>60</sup> *Celanese Canada Inc. v Murray Demolition Corp.* [2006] 2 S.C.R. 189 at para. 35.

<sup>61</sup> *Ibid.*

<sup>62</sup> See Courts of Justice Act, *supra* note 55 at s 101 and *supra* note 12 at Rule 41.

<sup>63</sup> See *Ryder Truck Rental Can. Ltd. v 568907 Ont. Ltd. (Trustee of)* (1987) 16 C.P.C. (2d) 130 (Ont. H.C.).

jeopardy.<sup>63</sup> The existence of security held by the plaintiff over the property will be taken into account in support of the motion for a receiver.<sup>64</sup>

An order appointing a receiver will name the person or firm appointed as the receiver, specify any security that the plaintiff or the receiver is to furnish for the proper performance of the receiver's duties and state whether the receiver is also appointed as manager and if so, the scope of his powers as manager. The order will also contain such other directions and terms as may be necessary.<sup>65</sup>

A receiver is normally entitled of his own motion to apply to the court for further directions and authorisations as may be necessary.<sup>66</sup> Once appointed by the court, the receiver can only be discharged by an order of the court.<sup>67</sup>

### Case management

**4.32** Due to the increasing loads on Canada's civil court system, and the toll that delay can take on the parties to litigation,<sup>68</sup> various jurisdictions have implemented case management systems. A case management system involves transferring principal responsibility for management of the pace of litigation from the parties and their counsel to the judiciary.<sup>69</sup> A timetable for the various steps in an action is typically established, and there is increased judicial intervention during the early steps of an action in an attempt to ensure closer adherence to timelines and promote an earlier resolution of cases.<sup>70</sup>

While the application of case management systems varies by jurisdiction, typically, timetables will be adopted for completing the various steps in litigating an action. A case management judge or master may be assigned to hear motions and generally manage the proceeding, and settlement conferences may be automatically scheduled by the registrar, by which time examinations for discovery and production of documents and related motions are to be completed.<sup>71</sup> Further, some jurisdictions have implemented mandatory mediation.<sup>72</sup> Case management rules, however, are not universally applied and will usually contain classes of cases to be excluded,<sup>73</sup> or limit the availability of case management to specific geographic locations.<sup>74</sup> In Toronto, the case management system does not apply to actions placed on the Commercial List, although those commercial cases will enjoy their own procedural enhancements.<sup>75</sup>

<sup>64</sup> See *Bank of Montreal v Apcon Ltd.* (1981) 33 O.R. (2d) 97 (S.C.).

<sup>65</sup> *Supra* note 12 at Rule 41.03.

<sup>66</sup> *Supra* note 12 at Rule 41.05.

<sup>67</sup> *Supra* note 12 at Rule 41.06.

<sup>68</sup> *Supra* note 11 at 525.

<sup>69</sup> See Ontario, Ministry of the Attorney General, Ontario Civil Justice Review First Report (March 1995), online: Ministry of the Attorney General <<http://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjr/firstreport/management.asp>> at Chapter 13.

<sup>70</sup> See *Ibid.*

<sup>71</sup> See *supra* note 12 at Rules 77, 78 and 24.1.

<sup>72</sup> See *supra* note 12 at Rule 24.1.

<sup>73</sup> For example actions placed on the Commercial List in Toronto and family law proceedings in British Columbia.

<sup>74</sup> See, for example *supra* note 12 at Rule 77 and N.S Rules, *supra* note 1 at Rule 68.

<sup>75</sup> *Supra* note 12 at Rules 77-8.

**Procedure**

**4.33** The procedure with respect to litigation in Canada, as in England, the United States and elsewhere in the common law world, is adversarial. However, adversarial does not include surprise. The principle underlying the procedural rules in Canada is that each side should reach trial with as much knowledge and appreciation of the other side's case as possible. The rules of civil procedure are designed to provide parties with the power to require such disclosure. It is the responsibility of the individual parties, however, to make the necessary demands for information, with relief for improper refusals available from the courts.

Each party to a proceeding will be represented by its own lawyer unless a party chooses to present its own case, which would rarely happen in a significant commercial case. While lawyers are permitted to practice across the spectrum of substantive law, in the larger urban centres it is usual to see a degree of specialisation amongst members of the bar. As in England, the barrister presenting the case is both the servant of the client and an officer of the court. As an officer of the court, he or she is under the obligation not to mislead the court and to assist it to understand the issues at hand.

The rules of civil procedure of the provinces and territories set out the specific procedures by which actions and applications are commenced, and the procedure for pursuing the action through completion. The rules specify the procedure for filing pleadings, serving documents, pursuing discovery, arguing motions, conducting the trial and instigating appeals.

*Class actions*

**4.34** While Canada was not historically amenable to the types of class action cases found in the United States, most provinces have now enacted class proceedings legislation to regulate such proceedings. The Supreme Court of Canada, meanwhile, has recognised the inherent jurisdiction of the courts to manage the mechanics of class actions, regardless of the existence of specific legislation. This has led to a rapid rise in the scope and extent of Canadian class actions.

Generally, for a court to certify a class proceeding, the following must be established by the representative plaintiff:

- (a) the statement of claim discloses a cause of action;
- (b) there is an identifiable class of two or more persons;
- (c) the claims of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the determination of those common issues; and
- (e) the proposed class representative:
  - (i) can fairly and adequately represent the interests of a class in accordance with a workable plan; and
  - (ii) does not have a conflict of interest with other class members on the common issues to be raised.<sup>76</sup>

<sup>76</sup> See for example, Ontario's Class Proceedings Act, 1992, S.O. 1992, c. 6. Also see the Supreme Court of Canada's decision in *Western Canadian Shopping Centres Inc. v Dutton* [2001] 2 S.C.R. 534 [*Western Canadian Shopping*], which considered the tests for class actions amongst various provinces and

A certification order will typically specify the manner in which individual members of the class may opt out of the proceedings, or opt in as the case may be, depending on the situation.<sup>77</sup> Those that opt out, or fail to opt in, may then pursue separate actions should they desire. Members of the class who do not opt out by the deadline imposed by the certification order are bound by the determination of the action. Even in cases where the conditions for a class proceeding are met, courts are still able to exercise discretion in disallowing the action in a liberal and flexible manner.

As class proceedings are a relatively new phenomenon in Canada, there still exists uncertainty with respect to the likelihood of success at the certification level, especially on a province-to-province basis. The success rates on certification motions can vary drastically amongst the provinces, and the standards of appeal from certification motions are not standardised across jurisdictions. Further, unlike the United States, Canada lacks a multi-district litigation mechanism for dealing with actions that cross provincial borders, such that there can be competing national class actions in different provinces or non-recognition of national classes in other provinces.<sup>78</sup>

### Discovery/disclosure

**4.35** The discovery process in most of Canada is, like so many other things, at the mid-point between the extremes exemplified by the rules in the United States on the one hand and in England on the other. In one aspect, the Canadian procedure is closer to that of the United States, in that the obligation to produce relevant information extends not only to documents but to information possessed. As previously mentioned, the objective of the Canadian procedure is to prevent surprise at trial by requiring the disclosure of the entirety of the parties' cases. While this may not be fully successful in all cases, the process is intended to provide for a more accurate and fair judicial process. On the other hand, the Canadian right of discovery is not nearly as extensive as the deposition procedure in the United States. As a general rule, all relevant documents must be produced and an affidavit to that effect must, as a prerequisite to proceeding with the case, be served.<sup>79</sup> While an order may be obtained to require a further and better affidavit on production or, in some jurisdictions, cross-examination may be permitted on the affidavit, in most cases such an affidavit is final. In some jurisdictions, such as Ontario, a certificate of a solicitor is required to the effect that the client has been advised of his or her obligation to produce all relevant documents.<sup>80</sup>

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distilled the common requirements to the following four conditions: (1) the class must be capable of clear definition; (2) there must be issues of fact or law common to all class members; (3) with regard to the common issues, success for one class member must mean success for all; and (4) the class representative must adequately represent the class; at para 37 to 42.

<sup>77</sup> For example, see the Alberta Class Proceedings Act, S.A. 2003, c. C-16.5, which deems residents as class members where they meet the criteria, but which requires non-residents to opt in to be included.

<sup>78</sup> See *Western Canadian Shopping*, *supra* note 75, where the Supreme Court of Canada found that in the absence of legislation, the courts must fill the void and determine the availability and the mechanics of class actions, at para. 34.

<sup>79</sup> See, for example, Ontario Rules, *supra* note 12 at Rule 30 and B.C. Rules, *supra* note 13 at Rule 26.

<sup>80</sup> *Supra* note 12 at Rule 30.03(4). See also Manitoba Rules, *supra* note 15 at Rule 30.03(3).

In most provinces, the rules permit oral discovery of one representative of each of the parties, while some provinces permit more than one.<sup>81</sup> Oral discovery generally occurs after discovery of documents in order to allow counsel the benefit of the documents of the adverse party in preparing his or her questions.<sup>82</sup> The object of the oral examination is to ascertain the nature of the other party's case, narrow the issues and obtain admissions.<sup>83</sup> The examinations take place in private, and normally only a court reporter, witnesses and counsel are present. Examinations are held either in the offices of the reporter or of one of the lawyers. The witness testifies under oath, and his or her counsel may object to questions asked by the examining counsel. The witness may also provide undertakings to answer questions or provide requested documentation to the examiner at a later date, should the witness need to confirm information or retrieve documents. Transcripts are usually produced and any disagreements on the propriety of a question or demand for undertakings can be taken up in court, which may make an appropriate order.

The importance of the examination for discovery is further enhanced by the fact that evidence from an examination may be used at trial. For example, a party may read into its evidence any part of the testimony of an adverse party.<sup>84</sup> The examination evidence of a witness may also be used for the purpose of impeaching the testimony of a witness at trial.<sup>85</sup> This could occur when the evidence at discovery was inconsistent with the testimony at trial. In circumstances where a person examined for discovery is unable or unavailable for trial, courts may also allow the evidence from examination to be entered at trial.<sup>86</sup>

#### *Discovery of documents*

**4.36** As mentioned above, parties to an action are obliged to disclose all relevant documents on any matter in issue in an action that are, or have been in the possession, control or power of the party, whether or not privilege is claimed.<sup>87</sup> The extent of the obligation to produce documents varies from jurisdiction to jurisdiction, but the modern trend in Canada is to impose more extensive production. An example of this is contained in the Ontario Rules of Civil Procedure, which form the basis of the following discussion.

#### THE OBLIGATION

**4.37** In Ontario, each party is obliged to disclose every document relating to any matter in issue in an action that is, or has been in, the possession, control or power

<sup>81</sup> See the Nova Scotia Rules, *supra* note 1 at Rule 18.01, which allows more. Also see the Alberta Rules, *supra* note 13 at s 200, which allows the examination of more than one representative of a corporation that is a party to the action.

<sup>82</sup> See for example, the Alberta Rules, *supra* note 13 at Rule 189, which specifically states that an affidavit of records must precede discoveries.

<sup>83</sup> See generally, *supra* note 11 at chapter 9.

<sup>84</sup> See *supra* note 12 at Rule 31.11(1) and B.C. Rules, *supra* note 13 at Rule 40(27).

<sup>85</sup> See *supra* note 12 at Rule 31.1(2).

<sup>86</sup> See for example, *supra* note 12 at Rule 31.11(6) and Alberta Rules, *supra* note 13 at Rule 214(3).

<sup>87</sup> See for example, *supra* note 12 at Rule 30.02(1). See also B.C. Rules, *supra* note 13 at Rule 26.

of a party to the action, whether or not privilege is claimed in respect of the document.<sup>88</sup> This includes an insurance policy under which an insurer may be liable. It must be produced for inspection if requested, although the insurance policy is not admissible in evidence unless it is relevant to an issue in the action.<sup>89</sup>

(a) “*A party*”: Parties to the proceedings are obliged to provide discovery. If a non-party holds relevant documents, one party may apply to the court for it to order production for inspection of documents that are in the non-party’s possession, control or power that are not privileged. The court must be satisfied that the documents are relevant to a material issue in the action and that it would be unfair to require the party who applied to proceed to trial without having discovery of the non-party’s documents.<sup>90</sup>

(b) “*Disclose*”: The disclosure of the existence of all documents relating to any matter in issue in the action, which are or have been in the possession, control or power of a party, must be made whether or not they are privileged. Disclosure is made by the preparation and service on the opposite party of an affidavit of documents. The other parties may then inspect and take copies of the listed documents that are not privileged.<sup>91</sup> Where a claim of privilege is made, the grounds for the claim must be stated.<sup>92</sup>

Further, the obligation for disclosure is continuing, and relevant documents later discovered, or that later come into possession of a party must be disclosed by way of a supplementary affidavit.<sup>93</sup>

In cases where an affidavit is incomplete or where privilege was improperly claimed, a party has a number of options. The party may ask the court to order a cross-examination on the affidavit of documents; order service of a further and better affidavit; order the disclosure or production for inspection of the document; and inspect the document in order to determine its relevance or validity of a claim of privilege.<sup>94</sup> A party that fails to serve an affidavit of documents, produce a document for inspection or comply with an order of the court under the discovery rules may suffer a sanction as severe as the dismissal of its action.<sup>95</sup>

(c) “*Documents*”: In Ontario, documents are defined to include sound recordings, videotapes, films, photographs, charts, graphs, maps, plans, surveys, books of account and data and information in electronic form, which includes email. Such a broad definition is common across jurisdictions.<sup>96</sup>

(d) “*Possession, control or power*”: A document is deemed to be within a party’s power if that party is entitled to obtain it and the party seeking it is not so entitled.<sup>97</sup> The court has the power to order a party to disclose all relevant documents in the possession, control or power of the party’s subsidiary or affiliated

<sup>88</sup> *Supra* note 12 at Rule 30.02.

<sup>89</sup> *Supra* note 12 at Rule 30.02(3).

<sup>90</sup> *Supra* note 12 at Rule 30.10.

<sup>91</sup> *Supra* note 12 at Rule 30.04 and Alberta Rules, *supra* note 13 at Rule 193(1).

<sup>92</sup> See for example, B.C. Rules, *supra* note 13 at Rule 26(2) and Alberta Rules, *supra* note 13 at Rule 187.1(2)(b).

<sup>93</sup> *Supra* note 12 at Rule 30.07.

<sup>94</sup> *Supra* note 12 at Rule 30.06. See also Alberta Rules, *supra* note 13 at Rule 196(1).

<sup>95</sup> *Supra* note 12 at Rule 30.08.

<sup>96</sup> *Supra* note 12 at Rule 30.01(1). See also the B.C. Rules, *supra* note 13 at Rule 1(8), which also defines “documents” quite broadly.

<sup>97</sup> *Supra* note 12 at Rule 30.01. See also Manitoba Rules, *supra* note 15 at Rule 30.01(1).

corporations, or of a corporation controlled directly or indirectly by that party.<sup>98</sup> Production of documents belonging to a party's bank and relating to its account with that bank may be compelled under the federal or provincial Evidence Acts.<sup>99</sup>

- (e) “*Relating to any matter in issue in an action*”: As in England, the matters in issue in an action are defined by the pleadings and all documents whether helpful or damaging must be produced.

It should be noted, however, that for certain sizes of claims, the rules of procedure of the various provinces dispense with traditional disclosure and discovery requirements. For example, in Ontario's Small Claims Court, which has jurisdiction over civil cases with a maximum claim of \$10,000, the rules only require parties to produce documents upon which they intend to rely in court and there is otherwise no discovery process. Further, Ontario has also enacted a “simplified procedure” for civil claims up to \$50,000, which dispenses with oral discovery.<sup>100</sup>

#### *Privilege and other exceptions to the obligation*

##### SOLICITOR—CLIENT PRIVILEGE

**4.38** Communications between a lawyer and client for the purposes of receiving or giving legal advice are privileged, whether or not litigation is involved. The privilege is a substantive legal right. A document will meet the criteria for solicitor-client privilege if it:

- (a) is a communication between solicitor and client;
- (b) entails the seeking or giving of legal advice; and
- (c) is intended to be confidential.<sup>101</sup>

While not absolute, the Supreme Court of Canada has found that solicitor-client privilege “must be as close to absolute as possible if it is to retain relevance.”<sup>102</sup> However, the Court has also ruled that solicitor-client privilege does not attach to advice provided by a lawyer if it is on purely business matters.<sup>103</sup>

##### LITIGATION PRIVILEGE

**4.39** Unlike solicitor-client privilege, litigation privilege is not directed at fostering communications between a lawyer and his or her client, but at ensuring the efficacy of the judicial process.<sup>104</sup> Litigation privilege applies to relationships beyond those of solicitor-client, to encompass third parties, and is based on “the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial

<sup>98</sup> *Supra* note 12 at Rule 30.02(4). See also Manitoba Rules, *supra* note 15 at Rule 30.02(4).

<sup>99</sup> See, for example, Evidence Act (Ontario), R.S.O. 1990, c. E.23, s 33.

<sup>100</sup> See *supra* note 12 at Rule 76.

<sup>101</sup> *R. v Solosky*, [1980] 1 S.C.R. 821 at 837.

<sup>102</sup> *Lavallee, Rackel & Heintz v Canada (Attorney General)* [2002] 3 S.C.R. 209.

<sup>103</sup> *R. v Campbell* [1999] S.C.R. 565 at para. 50.

<sup>104</sup> See *Blank v Canada (Minister of Justice)* [2006] 2 S.C.R. 319 at para. 27.

advocate.”<sup>105</sup> In Ontario, a party asserting litigation privilege must prove that the document was created for the dominant purpose of actual or contemplated litigation.<sup>106</sup> Examples of documents over which litigation privilege has been found to apply include: witness statements and adjusters’ reports prepared by the defendants after receipt of a notice letter from the plaintiff’s counsel,<sup>107</sup> witness statements obtained by a liability insurer in the months following an accident and prior to the commencement of litigation<sup>108</sup> and investigators’ reports prepared where there was a reasonable prospect of litigation.<sup>109</sup> Thus, litigation need not have been initiated at the time a document was created in order for litigation privilege to apply. The privilege, however, is not absolute and will generally come to an end upon the termination of the relevant litigation.<sup>110</sup>

#### WAIVER

**4.40** Privilege belongs to the client, and as such can only be waived by the client. Waiver of privilege requires that the possessor of the privilege:

- (a) has knowledge of the existence of the privilege; and
- (b) voluntarily expresses an intention to waive the privilege, although fairness and consistency may require waiver in the absence of an intention to waive.<sup>111</sup>

Disclosing the existence of a document does not constitute a waiver but fairness and consistency may require that disclosure of part of the contents constitutes waiver of privilege for the whole.<sup>112</sup> Further, waiver of privilege in respect of one document concerning a particular transaction or event may, if the circumstances warrant, be held to constitute a waiver of background documents used in the preparation of the relevant document.<sup>113</sup>

#### SELF INCRIMINATION

**4.41** There is no privilege in Canada to refuse the disclosure of information or documents on the ground that they might lead to criminal liability. Instead, the *Canada*

<sup>105</sup> *Ibid.* at para. 28, quoting R.J. Sharpe (now Sharpe J.A. of the Ontario Court of Appeal) in “Claiming Privilege in the Discovery Process” (Special Lectures of the Law Society of Upper Canada, 1984) 163 at p. 164-5.

<sup>106</sup> See *General Accident Assurance Company et al. v Chrusz* (1999), 45 O.R. (3d) 321 (Ont. C.A.). Also see *Kennedy v McKenzie* (2005) 17 C.P.C. (6<sup>th</sup>) 229 (Ont. S.C.J.), which found that the document must have been created for (i) for the dominant purpose of litigation; (ii) in answer to inquiries made by an agent for the party’s solicitor; (iii) at the request or suggestion of the party’s solicitor; (iv) for the purpose of being reviewed by counsel to give legal advice; or (v) to enable counsel to prosecute or defend an action or prepare a brief. The Supreme Court of Canada has recognised that the dominant purpose test, rather than a substantial purpose test is appropriate. See *supra* note 103 at para. 60.

<sup>107</sup> *Gabany v Sobey’s Capital Inc.* (2002) 27 C.P.C. (5<sup>th</sup>) 297 (Ont. S.C.J.).

<sup>108</sup> *Green Estate v Ontario Rugby Football Union* (2001) 6 C.P.C. (5<sup>th</sup>) 160 (Ont. S.C.J.).

<sup>109</sup> *Scopis Restaurant Ltd. v Prudential Assurance Co. of England Property & Casualty (Canada)* (1999) 29 C.P.C. (4<sup>th</sup>) 99 (Ont. S.C.J.).

<sup>110</sup> *Supra* note 103 at para. 36.

<sup>111</sup> *S & K Processors Ltd. v Campbell Ave. Herring Producers Ltd.* [1983] 4 W.W.R. 762 (B.C.S.C.) at para. 6.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

*Evidence Act* and the *Evidence Acts* in the common law provinces provide a witness protection against the use of such incriminating evidence. Where a witness is compelled to answer questions that may tend to incriminate, the answer given may not be used in any other criminal or civil proceeding.<sup>114</sup>

#### IMPLIED/DEEMED UNDERTAKINGS

**4.42** While some provinces have adopted statutory “deemed undertaking” rules,<sup>115</sup> other jurisdictions maintain the common law principle of “implied undertakings”. Under the Ontario Rules of Civil Procedure, parties and their counsel are deemed to undertake not to use evidence obtained in discovery procedures for purposes other than those of the proceeding in which the evidence was obtained.<sup>116</sup> This relatively recent rule was enacted to codify and refine the common law principle recognising such an implied undertaking.<sup>117</sup> While limiting the actions of the party receiving the evidence, the rule does not “label the evidence as sealed or privileged.”<sup>118</sup>

#### PUBLIC INTEREST PRIVILEGE AND NATIONAL INTEREST PRIVILEGE

**4.43** Public interest privilege is recognised in Canada at common law and by statute<sup>119</sup> and is intended to protect information that lies “either in national security or in the effective conduct of government.”<sup>120</sup> National interest privilege, meanwhile, protects information that could be injurious to international relations or national defence or national security.<sup>121</sup> Cabinet confidences are also given special protection in order to promote government operation.<sup>122</sup>

#### SETTLEMENT PRIVILEGE

**4.44** Communications between the parties that have as their purpose the settlement of a dispute are generally privileged. Canadian courts give a liberal interpretation to this privilege because of the public interest in the resolution of disputes prior to trial. Such written communications are usually headed “Without Prejudice”. However, the mere inclusion of this statement will not serve to protect an otherwise unprivileged communication. It is the content, not the form, which governs, and it is not necessary to characterise a settlement offer as being without prejudice to make it privileged, although it is safer to do so. Once settlement is reached, the privilege no longer applies, and thus, a party can apply to enforce a settlement agreement should the

<sup>114</sup> See Canada Evidence Act, R.S.C. 1985, c. C-5, Evidence Act (British Columbia), R.S.B.C. 1996, c. 124, s 4.

<sup>115</sup> See Manitoba Rules, *supra* note 15 at Rule 30.1 and Prince Edward Island Supreme Court Rules of Civil Procedure, made under authority of the Supreme Court Act, R.S.P.E.I. 1988, c. S-10, at Rule 30.1.

<sup>116</sup> *Supra* note 12 at Rule 30.1.

<sup>117</sup> See *supra* note 11 at 879. Also, see *Goodman v Rossi* (1995) 24 O.R. (3d) 359 (Ont. C.A.). For a review of the rationale and nature of implied undertakings, see the Supreme Court of Canada’s ruling in *Juman v Doucette* (2008) 290 D.L.R. (4th) 193.

<sup>118</sup> See *Tanner v Clark* (2003), 63 O.R. (3d) 508 (Ont. C.A.) at para. 6.

<sup>119</sup> Canada Evidence Act, *supra* note 113 at section 37.

<sup>120</sup> *Bisaillon v Keable* [1983] 2 S.C.R. 60 at 97.

<sup>121</sup> Canada Evidence Act, *supra* note 113 at s 38.

<sup>122</sup> Canada Evidence Act, *supra* note 113 at s 39.

other party default. An unsuccessful settlement attempt can also be used after trial in some situations to argue for recovery of a higher costs award.<sup>123</sup>

#### *Discovery of witness evidence*

**4.45** Historically, the Canadian practice for discovery did not include the disclosure in advance of trial of the evidence of factual witnesses. However, changes to rules, such as in Ontario, allow parties on an examination for discovery to obtain disclosure of the name and addresses of persons who might reasonably be expected to have knowledge of the issues in the action, as well as a summary of the substance of the evidence of such persons.<sup>124</sup>

The historical restraint against discovery of persons other than parties has also been relaxed in Canada. Some jurisdictions now permit examinations of “any person”<sup>125</sup> without leave, while rules in others allow courts to grant leave subject to certain conditions.<sup>126</sup> Thus, parties now have the ability to gather more information about witness evidence than in the past.

#### **Witness evidence at trial**

**4.46** Generally, witnesses at trial are examined orally, and the rules of civil procedure will prescribe the process of taking evidence.<sup>127</sup> The rules of evidence, meanwhile, will determine the permissibility of certain types of evidence, such as hearsay and the compellability of certain witnesses.<sup>128</sup> Where an impediment exists to a witness attending at trial, procedures exist for taking evidence beforehand for use at trial.<sup>129</sup> A party may examine a witness before trial for use at trial on consent of the parties or with leave of the court. In general, the court will exercise discretion to order such an examination where there is a possibility that the person will be unavailable to testify by reason of age or infirmity. In Ontario at least, the discretion of the court has been broadened to include situations where such an examination is required due to convenience of the witness or to save costs.<sup>130</sup> The procedure for examining a witness is governed by the Rules of Civil Procedure and videotaping the examination is permitted. For the purpose of a witness outside of the jurisdiction, a party may request that the court issue a commission authorising the taking of evidence

<sup>123</sup> *Supra* note 12 at Rule 49.

<sup>124</sup> *Supra* note 12 at Rule 31.06. Also, see *Blackmore v Slot All Ltd. [1985] O.J. No 1687* (Ont. H.C.J.), leave to appeal refused (1985), 21 C.P.C. (2d) xlvi (Ont. H.C.J.) and *Dionisopoulos v Provias [1990] O.J. No 30* (Ont. H.C.J.).

<sup>125</sup> See for example the N.S. Rules, *supra* note 1 at Rule 18.01, which allows any person to be examined without an order, subject to the court’s authority to limit the number of persons examined where appropriate.

<sup>126</sup> See for example, *supra* note 12 at Rule 31.10.

<sup>127</sup> See for example, *supra* note 12 at Rule 53.01.

<sup>128</sup> A long history of jurisprudence has been essential in shaping the laws of evidence. The evidence statutes of Canadian jurisdictions also provide a codification of the rules. See for example, the Evidence Act (Ontario), *supra* note 98 at s 11, which states that a spouse is not compellable to disclose communications made during marriage.

<sup>129</sup> See *supra* note 12 at Rule 36.

<sup>130</sup> See *supra* note 12 at Rule 36.

before a commissioner and a letter of request, or letters rogatory, directed to the judicial authorities of the witness' jurisdiction, requesting the issuing of the necessary process to compel the person to attend an examination.<sup>131</sup>

Further, most provinces in Canada have enacted legislation providing for the reciprocal adoption of a summons to witnesses.<sup>132</sup> A summons from another province can be adopted by the reciprocating province, which will compel the witness in the same way as a domestic summons. In this way, the summons becomes an order of the court of the reciprocating province and can be enforced by contempt proceedings if not obeyed by the witness.

#### *Obtaining evidence for use outside of Canada*

**4.47** The federal Evidence Act, as well as legislation in many provincial and territorial jurisdictions, provide for taking evidence within a Canadian jurisdiction for the use in proceedings outside of Canada.<sup>133</sup> Generally, requests for judicial assistance will be met where:

- (a) the request is issued by a court or tribunal of a competent jurisdiction for a purpose for which a request could be issued by the domestic court;<sup>134</sup>
- (b) the evidence sought is relevant;
- (c) the evidence sought is otherwise unattainable;<sup>135</sup>
- (d) the order sought is not contrary to public policy;<sup>136</sup>
- (e) documents sought are identified with reasonable specificity;<sup>137</sup> and
- (f) the order sought is not unduly burdensome.<sup>138</sup>

Further, courts will attempt to balance the impact on Canadian sovereignty and whether justice requires the taking of commission evidence.<sup>139</sup> While traditionally, such requests were granted only where proceedings were ongoing in foreign courts, the Supreme Court of Canada has refused to recognise a rule to that effect.<sup>140</sup> The rule that evidence could only be used for trial, and not pre-trial discovery purposes, has also been relaxed.

<sup>131</sup> See *supra* note 12 at Rules 36.03 and 34.07(2). Canada is also a party to a number of bilateral conventions concerning how letters of request are to be dealt with. However, a bilateral treaty is not necessary to enact the procedures. See also Halsbury's Laws of Canada, 1<sup>st</sup> ed., Conflict of Laws (Markham: LexisNexis, 2006) at 325.

<sup>132</sup> See for example the Interprovincial Subpoenas Act, R.S.O. 1990, c.I.12.

<sup>133</sup> See for example, Evidence Act (Ontario), *supra* note 98 at s 60, Quebec's Special Procedure Act, R.S.Q. c. P-27, ss 9-20, and the Canada Evidence Act, *supra* note 113.

<sup>134</sup> Evidence Act (Ontario), *supra* note 98 at s 60(1).

<sup>135</sup> See *Pecarsky v Lipton et. al.* [1999] O.J. No 2004 (Ont. S.C.J.). See also *Re Westinghouse Electric Corp. and Duquesne Light Co. et. al.* (1977) 78 D.L.R. (3d) 3 (Ont. H.C.J.), cited with approval by the Supreme Court of Canada in *Gulf Oil Corporation v Gulf Canada Ltd.* [1980] S.C.J. No 41. The Ontario High Court of Justice discussed the "mutuality of purpose and of power" between the courts in different jurisdictions, which are under a mutual obligation consistent with their own jurisdiction.

<sup>136</sup> *Pecarsky, Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> See *Connecticut Retirement Plans and Trust Funds v Buchan* [2007] O.J. No 3112.

<sup>140</sup> See *Zingre v The Queen et. al.* [1981] 2 S.C.R. 392 at 403.

The Canadian court will, if it is satisfied that the request should be honoured, grant an order enforcing the request by ordering the witness to appear and be examined. The court will normally provide the time, date and place where the examination will be conducted and before whom the examination is to take place. Again, the order should identify any documents that the witness is to produce at the examination. The foreign court can also ask that a particular person be appointed to preside at the examination. Sanctions imposed by the provincial supreme or superior court are available should the witness refuse to attend the examination.<sup>141</sup>

Should the witness refuse to answer any question or to produce a document during the course of the examination, the parties may apply to the court within the jurisdiction of the examination for a determination of the validity of the objection.<sup>142</sup> Further, since witnesses at such an examination lack the protection of a trial judge during the proceedings, a witness examined pursuant to a letter of request is entitled to legal representation at the examination.<sup>143</sup>

#### *Expert witnesses*

**4.48** Expert witnesses are used extensively in Canadian commercial litigation and are retained by parties for the purpose of giving evidence on matters of technical or specialist issues. In order to be admissible, the evidence of the expert must be relevant, necessary in assisting the trier of fact, there must be an absence of an exclusionary rule otherwise prohibiting the receipt of the evidence, and the evidence must be given by a properly qualified expert.<sup>144</sup> An expert's evidence should be uninfluenced by the litigation, and the expert should provide an unbiased opinion to the court.

It is also possible for a court to appoint an independent expert to inquire into and report on any question of fact or opinion relevant to an issue in the action.<sup>145</sup> In such a case, the expert's report will be filed as evidence at trial, and the parties have the opportunity to cross-examine the expert.<sup>146</sup> A party that intends to call an expert witness at trial, meanwhile, must serve the expert's report on every other party prior to trial. The required time for filing varies by jurisdiction, but sanctions for failing to serve an expert report may result in the inadmissibility of the expert's evidence.<sup>147</sup>

### **Mode of trial**

#### *Juries*

**4.49** Jury trials are more common in Canada than in England but the frequency with which juries are empanelled varies from jurisdiction to jurisdiction. Some

<sup>141</sup> See Evidence Act (Ontario), *supra* note 98 at s 60(1).

<sup>142</sup> See *Lafarge Canada Inc. v Khan* (2008) 89 O.R. (3d) 619 (Ont. S.C.J.).

<sup>143</sup> *Ibid.*

<sup>144</sup> *R. v Mohan* (1994), 114 D.L.R. (4th) 419 (S.C.C.).

<sup>145</sup> See *supra* note 12 at Rule 52.03.

<sup>146</sup> See *supra* note 12 at Rule 52.03.

<sup>147</sup> See *supra* note 12 at Rule 53.03 and B.C. Rules, *supra* note 13 at Rule 40A.

jurisdictions do not allow for jury trials,<sup>148</sup> while in others, such as Alberta, the power to determine whether a case is to be tried by a jury rests with the court, and a jury trial is relatively rare.<sup>149</sup> In Ontario, it is the right of a party to require that issues of fact be tried, or damages assessed, by a jury by delivery of a jury notice.<sup>150</sup> The Rules of Civil Procedure allow a party to bring a motion to strike out a jury notice, and the trial judge also has the discretion to try an action without a jury.<sup>151</sup>

In most Canadian jurisdictions, there are no causes of actions for which jury trials are mandatory, as once was the case. In Ontario, while there is a *prima facie* right to have common law actions tried by a jury, matters over which the Courts of Chancery previously had exclusive jurisdiction, i.e. equitable relief, will not be tried with a jury, and any jury notice will be struck out.<sup>152</sup> Further, trial by jury is not available in an action against the Crown.<sup>153</sup> The majority of civil cases are heard by a judge sitting alone and large commercial cases are virtually never tried with a jury.

### *Judges*

**4.50** Judges in Canada appointed by the federal government have, at the time of appointment, been in practice for at least ten years<sup>154</sup> and have been members of the Bar of one of the provinces or territories. There are approximately 1000 judges who were appointed by the federal government presently serving across Canada. Judges appointed by the federal government can only be removed from office through resignation, illness or by an order of Parliament. Federal judges must retire at age 75, but can elect to take supernumerary (part-time) status after 10 or 15 years on the Bench, depending on age.

While the process for screening appointments to the Bench was historically informal, a more considered process has developed for their appointment. The appointment procedure now includes an investigation and consultation process by the government with groups within and outside of the legal community. The selection process for appointments to the Supreme Court of Canada has also undergone recent change, with the most recent appointment undergoing a public Parliamentary interview after nomination by the Prime Minister.

### **Speed of trial**

**4.51** A proceeding is commenced either by a writ of summons or a statement of claim, and time limits for the delivery of the subsequent pleadings vary from province

<sup>148</sup> See for example *supra* note 4 at s 48.

<sup>149</sup> Alberta Rules, *supra* note 13 at Rule 233. See also G.H. Peolman & E.J. Bodnar, *Civil Procedure and Practice: Recent Developments*, (1999) 37 Alta. L.R. 909-972.

<sup>150</sup> Courts of Justice Act, *supra* note 55 at s 108.

<sup>151</sup> See for example, *Gorman v Falardeau (2005) 15 C.P.C. (6<sup>th</sup>) 158 (Ont. C.A.)*, where the trial judge discharged the jury due to the complexity of the case.

<sup>152</sup> See Courts of Justice Act, *supra* note 55 at s 108(2).

<sup>153</sup> See Proceedings Against the Crown Act, R.S.O. 1990, c. P.27, s 11.

<sup>154</sup> See Judges Act, R.S.C. 1985, c. J-1, s 3. The practice requirement for Provincial Court judges may differ. See, for example, British Columbia's Provincial Court Act, R.S.B.C. 1996, c. 379, s 2, which requires five years of bar membership. Requirements for Justices of the Peace in the various jurisdictions also differ.

to province. The use of the writ of summons, meanwhile, has waned in Canada. This is largely due to the fact that it does not contain the statements of fact necessary to obtain default judgment, and thus, a statement of claim must be served in any event before any proceedings in default can be taken. If the originating process is served within the jurisdiction, it is normally required that the statement of defence should be served within a month. Thereafter, the plaintiff has a right of reply. If the originating process is served outside the jurisdiction, then somewhat longer periods are permitted for the service of the statement of defence. For example, in Ontario, a defendant served outside Canada or the United States of America is permitted 60 days after the service of the statement of claim to deliver the statement of defence.<sup>155</sup> Failure to deliver the statement of defence may result in default proceedings against the defendant without further notice to it. However, counsel for the parties can agree to the extension of any time limits without court order, and this often occurs.

After the pleadings have been exchanged, the discovery process begins. Once the productions of documents and oral examinations have been completed, the action may be set down for trial. In Ontario, the registrar will then place the action on the trial list sixty days later, or in some locations trial dates may be fixed by a judge in assignment court.<sup>156</sup> In some cases, a pre-trial conference may be held after an action is placed on the trial list, at which settlement may be encouraged, failing which trial dates may be set.<sup>157</sup>

As discussed above, due to increasing delays in the judicial process, various jurisdictions have attempted various methods to accelerate the sometimes slow process of progressing towards trial, such as case management, simplified procedures for civil actions up to a certain value and mandatory mediation. These projects have met varying levels of success and pilot projects are currently underway in different jurisdictions.

If an appeal is taken to a Court of Appeal, further delay is caused due to the time required to prepare a transcript of the evidence taken at trial. Once complete, the transcript is lodged with the appellate court, and written arguments are prepared and filed. The process is not a speedy one and an appeal can take up to a year before it is heard in the Court of Appeal for Ontario.<sup>158</sup> In the Supreme Court of Canada, an appeal is heard on average, nine months after a leave to appeal has been granted.<sup>159</sup> Further, courts often reserve judgment in the more difficult cases, and further time may elapse before a decision is released.

The foregoing should not lead to a conclusion that Canadian courts cannot move quickly if justice requires them to do so. For example, for an injunctive or other urgent application for interlocutory relief, an order can be obtained from a judge as

<sup>155</sup> *Supra* note 12 at Rule 18.01.

<sup>156</sup> See Ontario, Ministry of the Attorney General, *An Introduction to Civil Cases in the Superior Court of Justice* (Toronto: Ministry of the Attorney General), online: <<http://www.attorneygeneral.jus.gov.on.ca/english/courts/civil/intro2civilcasesinscj-EN.pdf>>.

<sup>157</sup> See *supra* note 12 at Rule 78, Toronto Civil Case Management Pilot Project.

<sup>158</sup> See the Rt. Hon. Beverley McLachlin (Address to the Empire Club of Canada, 8 March 2007) <online: [http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/Challenges\\_e.asp](http://www.scc-csc.gc.ca/aboutcourt/judges/speeches/Challenges_e.asp)>.

<sup>159</sup> See Statistics 1997 to 2007, online: Supreme Court of Canada <[http://www.scc-csc.gc.ca/information/statistics/HTML/intro\\_e.asp](http://www.scc-csc.gc.ca/information/statistics/HTML/intro_e.asp)>.

soon as one is available. Also, the court may order a trial be expedited. In complex cases, the delay in reaching a hearing is not completely the consequence of imperfections in the court system. Such cases, particularly with the extensive rights of production and discovery usually require a great deal of time to prepare. In such cases, the court may appoint a judge to hear all interlocutory motions prior to trial. Normally such a pre-trial judge will not preside at the trial.<sup>160</sup> Further, in Toronto, a “Commercial List” was established in 1991 for the hearing of certain commercial actions, and specific procedures have been introduced to manage and expedite these cases.

The great majority of cases in Canada, however, never reach trial. As the system requires full disclosure, the parties are able to appreciate the strengths and weaknesses of their positions at an early stage. When passions cool, settlement is often achieved through negotiation. Additionally, the rules of procedure generally prescribe a pre-trial process in which a judge not assigned to hear the case gives the parties his or her view of the merits of the case and encourages settlement.

## **Damages**

**4.52** Damages in most commercial actions are intended to be compensatory. Generally, punitive damages are awarded only in exceptional cases where the defendant’s conduct is so “malicious, oppressive and high-handed” that it “offends the court’s sense of decency”.<sup>161</sup> With respect to instances of a breach of contract, the defendant’s conduct must constitute “an actionable wrong”, such as in the case of an insurer’s breach of a duty to act in good faith under the policy.<sup>162</sup> Both prejudgment and postjudgment interest is available to a party entitled to an order for the payment of money, and in Ontario prejudgment interest will run from the date the cause of action arose.<sup>163</sup>

In commercial litigation, the quantification of damages often takes place as a second part of the trial following the hearing of the evidence on liability. It is also possible for a trial judge to refer the assessment of damages to a master or other judicial officer who will then hear the evidence and report his conclusions on damages to the court. In Ontario at least, this would generally only be done with consent of all parties.<sup>164</sup> Accounting firms are used extensively in Canadian courts as experts and the larger firms have developed a good deal of expertise in the quantification of damages in commercial disputes of all kinds.

## **Enforcement of judgments**

**4.53** The rules relating to the enforcement of judgments in the Canadian jurisdictions are derived from the English procedure. They have developed in different

<sup>160</sup> See *supra* note 12 at Rule 37.15.

<sup>161</sup> *Hill v Church of Scientology [1995] 2 S.C.R. 1130.*

<sup>162</sup> *Vorvis v Insurance Corporation of British Columbia [1989] 1 S.C.R. 1085* and *Pilot v Whiten [2002] 1 S.C.R. 595.*

<sup>163</sup> Courts of Justice Act, *supra* note 55 at ss 128-9.

<sup>164</sup> See *supra* note 12 at Rule 54.02(1).

ways in the different jurisdictions. The following discussion is based on the Ontario Rules of Civil Procedure. A judgment of the Ontario Superior Court, or a judgment of a foreign court, which is registered and therefore treated as a judgment of the Superior Court, may be enforced in the following ways.

#### *Writs of seizure and sale*

**4.54** A successful party (judgment creditor) may enforce a judgment by a writ of seizure and sale, which is issued by administrative act and without court order. The writ of seizure and sale permits the judgment creditor to require the sheriff to seize personal property and, on notice to the judgment debtor, sell such property in satisfaction of the judgment. It also permits the judgment creditor to require the sheriff, after the filing of such a writ against real property, to sell the real property four months after the writ was filed. Prior notice must also be given to the judgment debtor of the sale of such property.<sup>165</sup>

#### *Garnishment proceedings*

**4.55** In Ontario, a judgment creditor may also garnish the judgment debt from a debtor of the judgment debtor or an employer. The procedure begins with the administrative act of registering the notice of garnishment.<sup>166</sup> That filing must include an affidavit stating, among other things, the name and address of each person to whom a notice of garnishment is to be directed, the amount owing, and the belief of the deponent that those persons are or will become indebted to the debtor and the grounds for the belief.<sup>167</sup> The garnishment order so obtained remains in effect for six years, but may be renewed, and is continuing, in the sense that it catches not only debts immediately due and owing but also most future debts owing to the judgment debtor.

#### *Examination in aid of execution*

**4.56** A judgment creditor may, without court order, examine a judgment debtor once in every 12-month period.<sup>168</sup> The examination may be conducted in relation to 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 disposition the debtor has made of any property either before or after the making of the order, the debtor's present, past and future means to satisfy the order, whether the debtor intends to obey the order or has any reason for not doing so, and any other matter pertinent to the enforcement of the order.<sup>169</sup> An officer or director of a corporate debtor or, in the case of a debtor that is a partnership or sole proprietorship, a partner or sole

<sup>165</sup> *Supra* note 12 at Rule 60.07.

<sup>166</sup> *Supra* note 12 at Rule 60.08(4).

<sup>167</sup> *Supra* note 12 at Rule 60.08(4).

<sup>168</sup> *Supra* note 12 at Rule 60.18(4).

<sup>169</sup> *Supra* note 12 at Rule 60.18(2).

proprietor, may be examined.<sup>170</sup> Where it appears from the examination that a debtor has concealed or made away with property to defeat or defraud his creditors, a judge may make a contempt order against the debtor.<sup>171</sup> The court further has the authority to order an examination of any person that the court is satisfied may have knowledge of the matters about which the judgment debtor may be examined.<sup>172</sup>

#### *Receiver*

**4.57** A Canadian court may appoint a receiver to operate the business of a judgment debtor or, before judgment, to operate the business pending the resolution of the litigation.<sup>173</sup> To obtain the latter, the creditor must show that there is strong evidence that the creditor's right to recovery is in serious jeopardy.<sup>174</sup> Receivers also are appointed privately pursuant to a contractual right, particularly in the event of default under loan agreements with financial institutions. Commonly in such cases, an order is also obtained from the court to appoint the receiver, as the receiver then becomes an officer of the court and responsible to it.<sup>175</sup>

#### *Bankruptcy*

**4.58** In Canada, the law of bankruptcy and insolvency is the exclusive responsibility of the federal government. Consequently, the law of bankruptcy is uniform across Canada. An unpaid judgment debt, or any debt provable under the Bankruptcy and Insolvency Act, will enable the creditor to petition for the bankruptcy of an individual or a corporation. It should be noted, however, that a judgment by itself gives the judgment creditor no priority over the other creditors of the bankrupt.

#### *Specific performance, etc.*

**4.59** Canadian courts have the power to award remedies other than damages. Particularly, orders for specific performance may be granted, requiring that an act such as a contract be performed. The courts also have the power to make declaratory orders with respect to a party's rights. There is also the power to grant the full range of equitable remedies including an order granting a constructive trust over property held by the defendant. This has the effect of requiring the defendant to deliver up the property to the plaintiff, and is granted in cases such as those involving a breach of fiduciary duty, cases of unjust enrichment, or "where good conscience so requires".<sup>176</sup>

<sup>170</sup> *Supra* note 12 at Rule 60.18(3).

<sup>171</sup> *Supra* note 12 at Rule 60.18(5).

<sup>172</sup> *Supra* note 12 at Rule 60.18(6).

<sup>173</sup> See *supra* note 12 at Rule 41.02.

<sup>174</sup> See *supra* note 62.

<sup>175</sup> See *Re Confederation Treasury Services Ltd.* (1995) 37 C.B.R. (3d) 237 (Ont. Gen. Div.).

<sup>176</sup> *Soulos v Korkontzilas* [1997] 2 S.C.R. 217 at para 34.

## Appeals

**4.60** While the procedures for appealing a decision of a court or tribunal differ across Canadian jurisdictions, as a rule, courts will not overturn findings of fact made by the trier of fact unless there has been a palpable and overriding error.<sup>177</sup> Thus, appeals will concentrate on questions of law, rather than a dispute over facts. Typically, appeals from provincial courts are made to the superior court of the province, appeals from the superior court are made to the court of appeal, and ultimate appeals are heard by the Supreme Court of Canada. However, the procedure may be different amongst the provinces, such as Ontario, where the Divisional Court branch of the Superior Court of Justice also hears appeals of some cases.<sup>178</sup>

Leave may be required in order to appeal,<sup>179</sup> and the rules of procedure specify the time restrictions on seeking leave,<sup>180</sup> or serving a notice of appeal.<sup>181</sup> The ensuing steps include serving and filing exhibits, transcripts and the facts upon which the parties intend to rely. The rules of procedure of the relevant jurisdiction provide the time requirements for each step. Appeals of interlocutory orders, which may require leave, typically involve fewer steps due to the more focused aspect of such an application, and the lack of trial transcripts and witness evidence.

While appeals in commercial cases to the courts of appeal of the provinces and territories may be relatively common, the Supreme Court of Canada will only grant leave in rare cases where it is of the opinion that an issue or question is of public importance or of a certain degree of significance.<sup>182</sup>

## Recognition and enforcement of foreign judgments

### *Recognition and enforcement*

**4.61** A foreign judgment cannot itself be enforced in the same way as a domestic judgment. Unless reciprocal enforcement legislation applies, a fresh Canadian proceeding must be instituted claiming payment of the debt, which the foreign judgment is deemed to create. The resulting Canadian judgment can then be enforced in the usual way.

Traditionally, Canadian law took a relatively restrictive approach with respect to the enforcement of foreign judgments. In recent times, however, the Supreme Court of Canada has recognised that “the rules of private international law are grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner”.<sup>183</sup> Thus, a more liberal approach to the recognition of foreign judgment has emerged.<sup>184</sup>

<sup>177</sup> See *Housen v Nikolaisen* [2002] 2 S.C.R. 235 at para 1.

<sup>178</sup> See Courts of Justice Act, *supra* note 55 at ss 6(1)(b) and 19(1)(a).

<sup>179</sup> See Courts of Justice Act, *supra* note 55 at s 6(1).

<sup>180</sup> See *supra* note 12 at Rule 62.02.

<sup>181</sup> See *supra* note 12 at Rule 61.04(1).

<sup>182</sup> See Supreme Court Act, *supra* note 2 at s 40(1).

<sup>183</sup> *Morguard Investments Ltd. v De Savoye* [1990] 3 S.C.R. 1077.

<sup>184</sup> See *Ibid.*, which applied amongst the provinces. In *Beals v Saldanha* [2003] S.C.J. No 77 [Beals], however, the Supreme Court recognised that the application of the *Morguard* principles extended to foreign judgments as well.

In order to enforce a foreign judgment, a party must either apply under the reciprocal enforcement legislation of a province or territory in which enforcement is desired, or commence an action under the relevant rules of procedure, as mentioned above. Lawyers may prefer to bring an action, notwithstanding the existence of reciprocal enforcement legislation, as the conditions for enforcement are generally the same with either method, and a summary judgment may be obtained at relatively small expense.

In seeking to enforce a foreign judgment, the plaintiff need not re-litigate the merits of the claim. Under the traditional common law rule, a foreign judgment would be recognisable and enforceable if it was for a certain sum of money, the judgment was final and conclusive and the foreign court had jurisdiction over the defendant. The Supreme Court of Canada, however, has reconsidered the first requirement, and equitable judgments may now be recognised.<sup>185</sup> It has further suggested that the finality requirement with respect to equitable judgments may be the topic of further consideration.<sup>186</sup>

With respect to jurisdiction of the foreign court over the defendant, it is not necessary that the plaintiff prove that the foreign court had jurisdiction under the foreign court's rules of procedure. Rather, Canadian courts must recognise jurisdiction under the Canadian rules of international jurisdiction. Thus, Canadian courts will recognise international jurisdiction where the defendant was within the jurisdiction at the time of the action, where the defendant submitted to the jurisdiction of the foreign court or where a "real and substantial connection between the petitioner and the country or territory exercising jurisdiction" exists.<sup>187</sup>

A defendant may submit to the jurisdiction of the foreign court in a number of ways. These include invoking the foreign jurisdiction as a plaintiff in the same proceeding,<sup>188</sup> defending the proceeding on the merits, or in the case of a contractual dispute, previously submitting to the jurisdiction by way of a clause in the contract.<sup>189</sup>

Meanwhile, the "real and substantial" connection is not a rigid test, but is "simply intended to capture the idea that there must be some limits on the claims to jurisdiction."<sup>190</sup> The Supreme Court of Canada has found that "the 'real and substantial connection' test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial

<sup>185</sup> See *Pro Swing Inc. v Elta Golf Inc.* [2006] 2 S.C.R. 612.

<sup>186</sup> *Ibid.* at para 29.

<sup>187</sup> *Supra* note 182.

<sup>188</sup> See *K-Lath, a Division of Georgetown Wire Co. v Gemini Structural System Inc.* [1997] A.J. No 736 (Alta. C.A.).

<sup>189</sup> See Section 4.24, Enforceability of forum selection clauses and choice of law clauses, above.

<sup>190</sup> *Hunt v T&N plc* [1993] 4 S.C.R. 289.

one”.<sup>191</sup> The test has been applied to foreign judgments from various foreign states, and the courts have been flexible in its application.<sup>192</sup>

### Defences

**4.62** There are a number of defences that may be raised in an action to enforce a foreign judgment, namely where the judgment was obtained by fraud, situations where the proceedings of the foreign court breached the rules of natural justice, instances where the judgment would offend public policy, judgments involving the enforcement of foreign tax, penal or expropriations law and non-compliance with applicable limitations statutes. A defendant, however, is not permitted to defend the judgment on the merits of the claim.

### Statutes

**4.63** Various provinces and territories also have specific legislation providing for the registration of foreign judgments.<sup>193</sup> Despite the fact that the various enactments of Canadian jurisdictions may contain language dissimilar to that of the common law tests for the recognition of foreign judgments, the Supreme Court has found that the provincial acts “were never intended to alter the rules of private international law. They simply provided for the registration of judgments as a more convenient procedure than was formerly available”.<sup>194</sup> The foreign jurisdictions to which provincial enforcement statutes apply also vary by province. In some provinces, enforcement legislation applies only to other Canadian jurisdictions,<sup>195</sup> while in others legislation applies to American states and other foreign jurisdictions as well.<sup>196</sup> Despite the existence of reciprocal enforcement legislation in Canada, the judgments of courts of most foreign countries must still be enforced without reference to any treaty or legislation.

The reciprocal enforcement of judgments legislation does not preclude someone who has obtained a foreign judgment from either suing in Canada on his or her original cause of action (i.e. ignoring the effect of the existing foreign judgment) or suing in Canada on the foreign judgment as he or she would at common law and in the absence of such legislation.

<sup>191</sup> *Beals*, *supra* note 183 at para. 32.

<sup>192</sup> See *Fabrelle Wallcoverings & Textiles Ltd. v North American Decorative Products Inc.* (1992), 6 C.P.C. (3d) 170 (Ont. C.J. (Gen. Div.)).

<sup>193</sup> For example, see the Reciprocal Enforcement of Judgments Act, R.S.O. 1990, c. R.5 and the Court Order Enforcement Act, R.S.B.C. 1996, c. 78, ss 28-39.

<sup>194</sup> *Supra* note 182.

<sup>195</sup> See for example Reciprocating States Declarations (Judgments) Regulations, N.S. Reg. 142/73.

<sup>196</sup> See for example B.C. Court Order Enforcement Act, *supra* note 192 and the applicable Orders in Council under s 37.

**Foreign Extraterritorial Measures Act (Canada)**

**4.64** Pursuant to this Act, where a foreign tribunal has given a judgment in proceedings instituted under an antitrust law or under the Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996,<sup>197</sup> and the recognition or enforcement of the judgment in Canada has adversely affected, or is likely to adversely affect, significant Canadian interests or Canadian sovereignty, the Attorney General may:

- (a) declare that the judgment shall not be recognised or enforceable in Canada in any manner; or
- (b) in the case of a judgment for a specified amount of money, declare that, for the purposes of recognition and enforcement in Canada, the amount of the judgment shall be deemed to be reduced to a specified amount.<sup>198</sup>

Where the Attorney General has made such an order in respect of a foreign judgment against a Canadian citizen or resident or a corporation incorporated in Canada or a person carrying on business in Canada, that person may sue and recover in Canada from the recipient any amount paid under the foreign judgment in excess of the amount recoverable in Canada.<sup>199</sup> A Canadian court rendering judgment for such recovery may order the seizure and sale of shares of any corporation incorporated in Canada in which the person against whom the judgment is rendered has an interest, whether the share certificates are located inside or outside Canada.<sup>200</sup>

This statute was originally introduced to guard against the possible enforcement in Canada of multiple damages awards made under American antitrust laws. It was amended, however, in response to the Helms-Burton Act.<sup>201</sup>

**Competition Act (Canada)**

**4.65** Under the *Competition Act*, where the competition tribunal finds that a judgment or order made by a foreign court can be implemented in whole or in part in Canada or by corporations incorporated in Canada and such implementation would:

- (a) adversely affect competition in Canada;
- (b) adversely affect the efficiency of trade or industry in Canada without bringing about or increasing in Canada competition that would restore or improve that efficiency;
- (c) adversely affect the foreign trade of Canada without compensating advantages; or
- (d) otherwise restrain or injure trade or commerce in Canada without compensating advantages,

the tribunal may order that no measures be taken in Canada to implement such judgment or order or that only such implementing measures as the tribunal prescribes, for the purpose of avoiding one of the effects referred to above.<sup>202</sup>

<sup>197</sup> Also known as the Helms-Burton Act, Pub. L104-114, 110 Stat. 785, 22 U.S.C. ss 6021-6091.

<sup>198</sup> R.S., 1985, c. F-29, s 8.

<sup>199</sup> *Ibid.* at s 9.

<sup>200</sup> *Ibid.*

<sup>201</sup> See An Act to amend the Foreign Extraterritorial Measures Act, S.C. 1996, c. 28 (Bill C-54).

<sup>202</sup> Competition Act, R.S.C. 1985, c. C-34, s 82.

## Costs

### *Entitlement*

**4.66** Subject to the Rules of Civil Procedure, in Ontario courts have the discretion to determine by whom and to what extent costs shall be paid.<sup>203</sup> Courts will consider a number of factors in exercising its discretion to award costs, including the principle of indemnifying the successful party, the amount of costs that an unsuccessful party could reasonably expect to pay, the amount claimed and the amount recovered in the proceeding, the complexity of the proceeding and the conduct of the parties.<sup>204</sup> In awarding costs, courts will fix them in accordance with the stated factors as well as the tariffs, which set maximum costs for certain types of expenses. Unlike in the past, in Ontario at least, costs will be fixed by the court at the conclusion of a hearing, and only in exceptional cases will a costs assessment be assigned to an assessment officer.<sup>205</sup>

### *Payment into court / offers to settle*

**4.67** Some Canadian jurisdictions follow the English practice of permitting a defendant to protect itself on costs by making a payment into court.<sup>206</sup> If the plaintiff does not accept the payment and recovers less than the amount of the payment in at trial, the plaintiff is obliged to pay the defendant's costs after the date of the payment.<sup>207</sup> In Ontario, the payment into court procedure has been dispensed with and in its stead the rules provide that either party can make an offer to settle in writing. If the plaintiff makes an offer and obtains a judgment as favourable or more favourable than the terms of the offer, the plaintiff is entitled to partial indemnity costs to the date of the offer and substantial indemnity costs thereafter unless the court orders otherwise.<sup>208</sup> If the defendant makes the offer and the plaintiff obtains a judgment, but one that is only as favourable as or less favourable than the terms of the offer to settle, the plaintiff is entitled to partial indemnity costs to the date of the offer and the defendant is entitled to partial indemnity costs after it, again unless the court orders otherwise.<sup>209</sup> The fact of the offer, or for that matter a payment into court, is not disclosed to the court trying the case until all questions of liability and the relief to be granted in the proceeding, if any, have been determined and disposed of.<sup>210</sup> Thereafter, the court may be advised of the offer and the costs to be awarded will be settled with the court being aware of the existence of the offer.

<sup>203</sup> *Supra* note 55 at s 131(1).

<sup>204</sup> *Supra* note 12 at Rule 57.01(1).

<sup>205</sup> *Supra* note 12 at Rule 57.01(3.1).

<sup>206</sup> See Alberta Rules, *supra* note 13 at Rule 166.

<sup>207</sup> See Alberta Rules, *supra* note 13 at Rule 174(1).

<sup>208</sup> *Supra* note 12 at Rule 49.10(1).

<sup>209</sup> *Supra* note 12 at Rule 49.10(2). “[P]artial indemnity costs” are defined in Rule 1.03 as those costs awarded in accordance with the Tariff, while “substantial indemnity costs” is defined as an amount 1.5 times what would otherwise be awarded. Even at a substantial indemnity rate, costs awarded will not necessarily represent the actual legal costs incurred.

<sup>210</sup> *Supra* note 12 at Rule 49.06.

*Security for costs*

**4.68** In most Canadian jurisdictions, the rules of civil procedure provide that an order may be obtained requiring a plaintiff or applicant to provide security for costs of the proceedings under certain circumstances. These include if the plaintiff is ordinarily resident outside the province or territory in question, if the plaintiff has another proceeding for the same relief outside the jurisdiction, or if there is good reason to believe that the plaintiff has insufficient assets to pay the costs of the defendant.<sup>211</sup> These rules apply not only to foreign plaintiffs but to plaintiffs who reside in other Canadian jurisdictions. Security for costs may also be awarded in appropriate circumstances even if the plaintiff resides in the jurisdiction. The court has discretion as to whether to order the plaintiff to provide security and with respect to the quantum and means of payment.<sup>212</sup> In most cases the court now requires that the application for security for costs only be brought once, and only after the statement of defence has been delivered.<sup>213</sup> Where the rules of procedure of a jurisdiction do not provide for security for costs, courts have been found to have inherent jurisdiction to make such an order.<sup>214</sup>

## ALTERNATIVE DISPUTE RESOLUTION

**Mediation**

**4.69** Alternative dispute resolution (ADR) has become increasingly common in the Canadian litigation landscape. In Ontario, for example, mandatory mediation has been established for case-managed actions in the larger geographic areas in an attempt to provide parties an opportunity to avoid some of the expense and delay of litigation.<sup>215</sup>

Mediators are not employees of the courts, however, but are typically senior lawyers that have been appointed to a roster of local mediators. Mediators are chosen by agreement of the parties, or otherwise assigned by the court, and they provide neutral third-party guidance at mediation. Mediations are informal and confidential. Additional mediation sessions may be requested at any stage in an action with the consent of the parties.

A review of Ontario's mandatory mediation program in 2001 found that the pace of litigation improved under the program and a substantial majority of litigants and lawyers were satisfied with the overall experience. Further, about 40% of cases settled at or within seven days of mediation.<sup>216</sup> Other provinces are also beginning to

<sup>211</sup> *Supra* note 12 at Rule 56.01(1).

<sup>212</sup> *Hallum v Canadian Memorial Chiropractic College (1989) 70 O.R. (2d) 119 (Ont. H.C.J.)*.

<sup>213</sup> *Supra* note 12 at Rule 56.03(1).

<sup>214</sup> See *Global Banking Systems Inc. v Datawest Solutions Inc. [2006] B.C.J. No 3287 (B.C.C.A.)*.

<sup>215</sup> *Supra* note 12 at Rule 24.1.

<sup>216</sup> Ontario, Ministry of the Attorney General, Evaluation of the Ontario Mandatory Mediation Program (Rule 24.1): Executive Summary and Recommendations, (12 March 2001), online: Ministry of the Attorney General <[http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/exec\\_summary\\_recommend.pdf](http://www.attorneygeneral.jus.gov.on.ca/english/courts/manmed/exec_summary_recommend.pdf)>.

integrate mediation into the civil litigation process, although not necessarily making it a mandatory part of the process.<sup>217</sup>

## Arbitration

**4.70** Private arbitration is also an increasingly popular avenue for dispute resolution. Arbitration provides parties with a mechanism by which a third party resolves disputes, and contractual provisions for arbitration can be drafted in order to bypass the courts entirely. Parties may determine the procedure to be followed for dispute resolution and can choose a decision-maker with experience in the subject matter at issue. Further, parties need not retain counsel licensed to practice in the jurisdiction where the arbitration is held, and may choose counsel from their home jurisdiction.

Most provinces and territories have enacted legislation with respect to domestic arbitration between parties from the same jurisdiction.<sup>218</sup> The legislation will typically limit the ability of the courts to review an arbitral decision, and will deal with issues such as the composition, conduct and jurisdiction of arbitral tribunals. Canada has also adopted the UNICITRAL Model Law on International Commercial Arbitration, which has been incorporated into Canadian jurisdiction by separate legislation in the various jurisdictions.<sup>219</sup> Some provinces, however, have made modifications to the text of the UNICITRAL Model Law. The various provincial and territorial international arbitration statutes, like their counterpart domestic arbitration legislation, deal with the jurisdiction and conduct of arbitral tribunals and give effect to private arbitration agreements.

Canadian courts have shown a propensity towards holding parties to their arbitration agreements and staying court actions covered by such agreements.<sup>220</sup> The increasing trend towards the enforcement of arbitral agreements and the limiting of judicial review should motivate parties to carefully consider a number of issues when drafting and negotiating arbitration clauses to ensure that disputes over the procedure and scope of arbitration are avoided. Among other things, agreements with arbitration clauses should consider how disputes are escalated, the scope and location of the arbitration, the composition and appointment of the arbitral tribunal and the procedure for the arbitration and possible appeals.

Canada is also a signatory to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and most Canadian jurisdictions have given it effect in their international commercial arbitration statutes<sup>221</sup> or in separate legislation.<sup>222</sup> The awards in arbitration proceedings in foreign jurisdictions are

<sup>217</sup> See for example Alberta's Civil Mediation Program, Practice Note 11, online: <<http://www.albertacourts.ab.ca/CourtofQueensBench/CivilMediationProgram/HowtheProgramWorks/tabid/159/Default.aspx>>.

<sup>218</sup> See for example the Ontario Arbitration Act, 1991, S.O. 1991, c. 17.

<sup>219</sup> See for example the Ontario International Commercial Arbitration Act, R.S.O. 1990, c. I.9.

<sup>220</sup> See *Agrium Inc. v Babcock* [2005] 363 A.R. 103 (Alta. C.A.) and *Canadian National Railway Company v Lovat Tunnel Equipment Inc.* (1999) 174 D.L.R. (4<sup>th</sup>) 385 (Ont. C.A.).

<sup>221</sup> See Alberta's International Commercial Arbitrations Act, R.S.A. 2000, c. I-5, s 2.

<sup>222</sup> See the British Columbia Foreign Arbitral Awards Act, R.S.B.C. 1996, c. 154.

enforceable if the award has, in pursuance of the law in force in the jurisdiction where it was made, become enforceable, in the same manner as a judgment given by a court in that jurisdiction. Thus, arbitration has now established itself within the dispute-resolution framework of Canadian law.

#### KEY FEATURES OF LITIGATING IN CANADA

- While Canadian law and procedure is traditionally based on English law, in some aspects, such as with respect to the discovery process, Canadian procedure has moved closer to that of the United States.
- Due to the increasing loads on Canada's civil court system, various jurisdictions have implemented case management systems which transfer principal responsibility for management of the pace of litigation to the judiciary.
- In an attempt to further improve the litigation process, alternative dispute resolution has become increasingly common in Canada. As such, provinces have begun to incorporate ADR programs, such as mandatory mediation, into the litigation process. Private arbitration has also increased in popularity.
- While Canada was not historically amenable to the types of class action cases found in the United States, most provinces have now enacted class proceedings legislation and class actions are becoming increasingly common throughout the country.
- Most civil cases are heard by a judge sitting alone and large commercial cases are virtually never tried with a jury.