Canada

by

Brett Harrison, Sidney Elbaz, Guneev Bhinder &
Simon Paransky

McMillan LLP

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Canada

Authors

Brett Harrison is a partner in the commercial litigation department of McMillan LLP in Toronto, Ontario, Canada.

Sidney Elbaz is a partner in the commercial litigation department of McMillan LLP in Montreal, Quebec, Canada.

Guneev Bhinder is an associate in the commercial litigation department of McMillan LLP in Toronto, Ontario, Canada.

Simon Paransky is an associate in the commercial litigation department of McMillan LLP in Montreal, Quebec, Canada.

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Canada

PART A—GENERAL SECTION

(1) THE CANADIAN FEDERAL SYSTEM

A1.1 Canada is a federal country, comprised of ten provinces and three territories. In addition to a federal government, each province and territory has its own government.

A1.2 At the federal level, the seat of government is in Ottawa, where Members of Parliament from across Canada convene to govern. Additionally, the people of each province elect members to a Provincial Legislative Assembly or a Provincial Parliament. Canada's Constitution, the *Constitution Act, 1867*, stipulates the areas in which each level of government can enact legislation. For example, the federal government has been allotted authority over the regulation of trade and commerce, banking, patents, copyright and taxation; whereas, the provinces have authority over property and civil rights and the administration of justice in the province. As would be expected, there are areas of overlap, and the division of powers between the federal and provincial governments has been a long-standing source of contention among those who govern Canada.

(2) THE CANADIAN COURT SYSTEM

A2.1 There are four levels of courts in Canada. Choosing the jurisdiction in which to commence or respond to an action is a critical step in the litigation process, regardless of whether you initiated the action.

A2.2 The most commonly encountered court in Canada for commercial litigants is the Superior Court of each province. These are courts of general and inherent jurisdiction that hear both civil and criminal matters. The Superior Courts are split into a trial and appeal level, except in the Province of Quebec where the Superior Court and the Court of Appeal of Quebec are distinct judicial courts.

A2.3 The second type of court in Canada is the provincial court, which obtains its jurisdiction from provincial legislation. Typically, the provincial court will have jurisdiction over some civil, criminal and family law matters. The provincial court's jurisdiction over civil disputes is significantly restricted compared to the Superior Courts. For instance, in Alberta, the Provincial Civil Court has no jurisdiction over land, and it can only hear disputes where the value of the claim is less than or equal to CAD 50,000.

A2.4 The third type of court, the Federal Court, has jurisdiction over federal legislation, such as the *Income Tax Act* and the *Trade-marks Act*, certain issues under the purview of the federal government pursuant to the division of powers and, importantly, over all federally administered administrative boards, commissions and tribunals. There is a trial and appeal level at the Federal Court of Canada.

A2.5 The final Court of Appeal for all courts in Canada is the Supreme Court of Canada, Canada's highest court. In certain circumstances, predominantly in criminal law, appeals to the Supreme Court of Canada are as of right. In most circumstances, however, litigants in civil cases can only appeal if they obtain permission (or leave) from the Supreme Court of Canada.

A2.6 Understanding the hierarchy of the courts in Canada is important to understanding the role of precedent, or prior decisions, in Canadian law. With the exception of Quebec, all Canadian provincial jurisdictions are 'common law'. In a common law system, the principle of *stare decisis* applies, which means that precedents, or prior decisions, from higher levels of courts, will be binding on all lower level Canadian courts within the same jurisdiction. A decision of the Superior Court of one province will be persuasive in the Superior Court of another. Similarly, a decision of a Court of Appeal of one province is only binding in its own province, although it may be persuasive in the other provinces. There are many instances where two provincial Courts of Appeal have made different determinations on similar points of law. A decision of the Supreme Court of Canada, however, is binding on all other levels and types of courts in Canada.

A2.7 In Quebec, there is a 'civil law' system that is derivative of the *French Civil Code* of 1804. The *Civil Code of Quebec* or CCQ (enacted in 1994 and replacing the *Civil Code of Lower Canada* which was enacted in 1866), simply speaking, sets down the law in Quebec pertaining to the regulation of disputes between individuals in society – the private law. The principle of *stare decisis* does not hold as much influence since the Code itself is intended to be plain language and easy to apply. While integration into the federal system poses some difficulty for its application when decisions applying it are appealed, the Supreme Court of Canada maintains full jurisdiction over the CCQ. The procedure in the courts of Quebec is discussed separately in Part C.

A2.8 Apart from the court system, litigants can resort to mediation or arbitration to resolve disputes. In many cases, parties can agree by contract that they will resolve all of their disputes by way of arbitration. In most cases, Canadian courts will enforce a pre-dispute arbitration clause in a contract by prohibiting the parties from litigating the dispute in court and requiring them to proceed by arbitration. In most cases, parties wishing to arbitrate or mediate disputes are required to do so by agreement, although it is sufficient if that agreement is a provision in a pre-dispute contract. In some Canadian jurisdictions, the court offers judicial mediation or dispute resolution procedures, which allow parties to take a dispute off the litigation track after a formal action has been commenced. Ontario, for example, has a mandatory mediation requirement for many civil actions.

A2.9 Canada also has numerous regulatory and administrative tribunals that have jurisdiction over a wide range of commercial activities. These tribunals often have the power to impose penalties and make mandatory orders. The role of some of the tribunals that have the most impact on Canadian businesses is described in section A11.

(3) THE JUDICIARY

A3.1 Judges of the Supreme Court of Canada, the Federal Court, and all of the Provincial and Territorial Superior Courts are appointed by the federal government. Judges of the

various Provincial and Territorial (lower) Courts are appointed by the government of the respective province or territory.

A3.2 In order to be appointed as a judge by the federal government a candidate must have been a lawyer for at least ten years, but there is no requirement for the candidate to have received any other formal training. There are similar requirements for the appointment of provincial and territorial judges. After a lawyer has been appointed as judge, various courses and educational programmes are in place for new judges.

A3.3 In most cases, judicial appointments are chosen from applications submitted by interested lawyers and made based upon the recommendation (or at least the screening) of committees established within the various jurisdictions. The final decision, however, is made by the applicable government.

A3.4 Although judges are appointed by the government, various safeguards have been implemented in order to ensure judicial independence from political interference. These safeguards include security of tenure, security of financial remuneration, and institutional administrative independence.

A3.5 Security of tenure means that, once appointed, a judge is eligible to continue as judge until the age of retirement (required at age 75 for federally appointed judges, and age 70 in some provincial/territorial jurisdictions). Judges can only be removed from their positions if an independent investigation shows that there is a good reason. Each jurisdiction in Canada has a judicial council responsible for developing policies and codes of conduct to provide guidance for judges. The judicial council for a jurisdiction may recommend that a judge be removed if it becomes necessary, but there have been very few such instances in the past.

A3.6 The Canadian Judicial Council, which is responsible for federally appointed judges, consists of the chief justices of all of the federal courts and Provincial/Territorial Superior Courts. The Canadian Judicial Council is responsible for investigating complaints and allegations of misconduct on the part of federally appointed judges. The Council may recommend to the Minister of Justice that a judge be removed for serious misconduct. The Minister must get the approval of both the House of Commons and the Canadian Senate before a judge can be removed from office. There are similar rules for the removal of provincial and territorial judges, but their removal must be approved by the cabinet of the applicable province or territory.

A3.7 Security of financial remuneration means that judges should be paid sufficiently and in a manner that does not leave them in a position of dependence or subject to pressure. A government cannot change a judge's salary without consulting an independent commission.

A3.8 Institutional administrative independence means that the government is not to interfere with how the courts manage their own processes and exercise their judicial functions. For example, it is the chief justice of each court who chooses how cases are assigned to the judges of the court.

A3.9 There is a presumption that judges will act impartially and without bias, and judges are expected to remove themselves from any case in which they have a personal interest that gives rise to an appearance of bias. If a judge fails to follow this requirement, an appeal court may overturn a judge's decision and remit the matter for a new hearing by a different judge.

(4) THE LEGAL PROFESSION

A4.1 To become a practising lawyer in Canada a person must have a law degree (e.g., a Bachelor of Laws or Juris Doctor) from a recognized Canadian law school. Some Canadian law schools require only two years of university study prior to law school, while others prefer applicants that already have an undergraduate degree. In most law schools the minimum length of the programme is three academic years. Graduates from law school must also complete a period of articling which entails working under the supervision of a practising lawyer for a period of about one year. Graduates must also successfully complete the bar admission course and bar examination of the applicable jurisdiction, and then be licensed in the applicable province or territory. People who received legal training outside of Canada may be allowed to complete the bar admission process if they are accredited by the National Committee on Accreditation.

A4.2 Under the Constitution of Canada, each province and territory is responsible for the administration of justice and the regulation of the legal profession within that province or territory. Each province has established a self-governing organization, known as a Law Society, to supervise and regulate the legal profession. The bar admission courses, bar examinations and licensing process is regulated by each provinces' Law Society. Canada still uses the nomenclature of 'barristers and solicitors', but all licensed lawyers are admitted as both a barrister and a solicitor, regardless of their field of practice. The Law Societies are also responsible for disciplining lawyers, and in appropriate cases prohibiting lawyers from practising by 'disbarring' them.

A4.3 In recent years, a number of national law firms have developed. National law firms typically have offices in several major Canadian cities in various provinces offering a full range of legal services. All the national law firms have lawyers who specialize in commercial litigation. In addition, there are many sole practitioners and smaller firms that offer commercial litigation services.

(5) LEGAL FEES

A5.1 Fee arrangements between lawyers and their clients depend on the agreement between them. Fees can be charged based on an agreed fixed amount, traditional hourly rate, or a contingency basis related to the amount recovered in a lawsuit. All provinces of Canada now allow contingency fees, although some provinces have specific regulations such as a cap on the maximum percentage of recovery that may be paid as a contingent fee and a requirement that contingency arrangements be in writing. The courts have jurisdiction to review fee arrangements, including contingency arrangements, and to set aside any fee arrangement that is not fair and reasonable.

A5.2 Lawyers are required to deliver bills to their clients that contain a reasonable statement or description of the services rendered and the charge for those services, along with a detailed statement of disbursements. A lawyer's bill may be reviewed in a court-supervised procedure, often known as an 'assessment' or 'a taxation'. This procedure may be initiated by either a client who objects to the amount of the bill or the lawyer who is trying to recover payment of the bill. Some provinces have strict time deadlines for the assessment of bills. The assessment officer may examine the reasonableness of the amount of time charged to the client for particular services, and will also review the reasonableness of the bill in light of other factors such as the complexity of the matter, the monetary

amount in issue, the importance of the matter, the degree or responsibility assumed by the lawyer and the skill and competence demonstrated by the lawyer.

(6) ISSUES SPECIFIC TO NON-CANADIAN PARTIES

(a) Jurisdictional Issues in Canadian Courts

A6.1 A Canadian court will entertain an action brought by any legal person, provided they have an address for service in the province in which the action is brought. A foreign plaintiff, however, may be required to put up security for the defendant's costs to defend the proceeding, the amount of which will vary from province to province, and upon the circumstances.

A6.2 A Canadian court will take jurisdiction over a foreign defendant if the defendant is resident or is served within the court's jurisdiction or if the defendant voluntarily submits to the court's jurisdiction. A court will also have jurisdiction over a foreign defendant if the defendant is served outside the jurisdiction and there is a real and substantial connection between the subject matter of the litigation, the parties and the court's jurisdiction.

A6.3 Generally, a court does not have jurisdiction over proceedings involving any other jurisdiction's public law, penal law, or revenue law.

A6.4 In Canada, a court may decline to exercise jurisdiction if there is another forum that is more convenient and appropriate for the pursuit of the action and for securing the ends of justice. Foreign defendants will often seek to have the Canadian court decline jurisdiction in favour of their home territory. The application of this doctrine is discretionary, and Canadian courts look to a number of factors to determine which jurisdiction has the real and substantial connection to the case. A court can control the parties' choice of forum by issuing either a stay of proceedings or an anti-suit injunction.

(b) Choice of Law and Requirement to Prove Foreign Law

A6.5 The choice of law for any given legal action will depend upon the type of action. An action in tort (a civil wrong not arising from a breach of contract) is governed by the law of the place where the tort occurred. However, as described above, a Canadian court may choose not to exercise its jurisdiction in cases where a defendant has demonstrated that another jurisdiction is clearly more appropriate. In cases where at least one party to the contract is based in a European Member State, the Rome II Regulation applies, and sets out the rules for determining the governing law in tort claims. Depending on the circumstances, the Regulation may prescribe that the governing law should be of the country in which the damage occurred, or the country in which parties have habitual residence:

– An action in contract is determined by the proper law of the contract. Within limits, the parties to the contract may choose the proper law of the contract by specifying that law expressly in their contract. If the parties have not expressly set out what law will govern the contract, the courts will determine the proper law of the contract based on the jurisdiction with which the transaction has its closest connection. To this end, the court will look at factors such as where the contract was made, where it was to be performed, the residence of the parties, the legal form of the contract, the language of the contract, and arbitration or exclusive jurisdiction clauses. In cases where at least one party to the contract is based in a

European Member State, the Rome I Regulation applies to determine the governing law. This Regulation contains different rules to determine which law should govern a contract depending on the type of contract. Often, under the Regulation, the governing law is deemed to be the country where a party has habitual residence.

– Regarding property, the law to be applied for conflicts of law purposes will depend upon whether the property is movable or immovable. Generally, immovable property is land and buildings and movable property is personal property. Immovable property is subject to the law of the jurisdiction where it is located. The law applicable to movable property will depend upon the circumstances of the action.

A6.6 Canadian courts treat foreign law as a matter of fact, not as a matter of law. Therefore, the party relying on it must plead and prove the foreign law. Foreign law is proven through the testimony of experts. If the foreign law is not proven to the satisfaction of the court, the court will apply the law of its own jurisdiction. As well, a court will not apply the law of a foreign jurisdiction if it offends the province's morality or public policy.

(c) Enforcement of Foreign Currency Obligations

A6.7 There are two aspects to foreign currency obligations that must be determined: the money of account and the money of payment.

A6.8 The money of account is the amount of money due under the contract. It can be expressly set out in a certain currency. For example, in a contract with a United States (US) and Canadian element, the contract may say the debt is in US dollars. If the money of account is not expressly set out, then it is determined by the laws of the proper law of the contract. For example, if the proper law of the contract is British Columbia (BC), then BC law would be used to determine if the debt is in US or Canadian dollars.

A6.9 The money of payment is the system of discharging the foreign currency obligations. Debt may be discharged in the currency of the place of payment. If payment is in Canada, and the debt is in US dollars, the question becomes how many Canadian dollars does the debtor need to pay to fulfil the US dollar debt? The issue is which date in the history of the claim should be the date used to determine the rate of exchange. The common law on this issue is not entirely settled. Canadian courts have sometimes adopted the date on which the defendant breached (i.e., the date on which the plaintiff should have been paid).

A6.10 In the case of the enforcement of a foreign judgment, however, the courts have sometimes used the date of judgment as the appropriate date of exchange. This results in the plaintiff's award being altered to reflect the exchange rate on the date of the judgment. As well, certain provinces have legislation stating that where an order is made for a claim measured in a foreign currency, the conversion to Canadian dollars is determined by the exchange rate at the time of payment to the plaintiff.

(d) International Commercial Arbitration

A6.11 Canada is a party to the United Nation (UN) Convention on the Recognition and Enforcement of Foreign Arbitral Awards (known as the '1958 New York Convention'), and, as a result, an international arbitration award made in Canada may be enforced in any other signatory jurisdiction and an award from any other signatory jurisdiction may be enforced in Canada.

A6.12 The United Nation's Commission on International Trade Law (UNCITRAL) drafted a Model Arbitration Law in June 1985. The Canadian government and all provincial and territorial governments have passed international commercial arbitration legislation based on that model law.

A6.13 The various Canadian international commercial arbitration statutes bring into force, with minor variations, the 1985 UNCITRAL Model Law in the relevant federal, provincial or territorial jurisdiction. The legislation only applies within the relevant political boundaries. So, for instance, the Alberta *International Commercial Arbitration Act* only applies when Alberta is the place where the arbitration is conducted, where the parties have agreed that Alberta law will govern the arbitration, or the place where the award is to be enforced.

A6.14 Canadian courts give strong deference to arbitration agreements, particularly international commercial arbitration agreements, by staying court proceedings and enforcing international arbitration awards.

A6.15 All Canadian provinces and territories have statutes that apply to arbitration generally and different statutes that apply to international commercial arbitration specifically. Therefore, it is important to know when the international commercial arbitration statutes apply. Generally, domestic arbitration legislation will apply unless the relevant international arbitration specifically applies. *The International Commercial Arbitration Act* does not apply to domestic commercial arbitrations or to international 'non-commercial' arbitrations. The key to the application of the international commercial arbitration statutes is to determine what is meant by 'international' and what is meant by 'commercial'.

A6.16 Recently, the Supreme Court of Canada invalidated a standard form 'med-arb' agreement on the basis that the agreement was unconscionable. The agreement provided that any dispute be submitted to mediation and then arbitration under the rules of the International Chamber of Commerce (ICC). The Supreme Court of Canada created a narrow exception to the 'competence-competence' rule, a rule which creates a presumption that challenges to an arbitrator's jurisdiction are for the arbitrator to decide in the first instance. The new narrow exception allows a court to decide genuine jurisdictional objections where there is a 'real prospect' that such objections may never be resolved by an arbitrator. The Court held that the ICC's filing fee, among other factors, resulted in a 'real prospect' that the jurisdictional arguments would never be heard. As a result, the Court was the one that determined the question of validity.

(e) Obtaining Evidence for Foreign Proceedings

A6.17 This section summarizes the rules regarding the involuntary taking of evidence in Canada for use in foreign proceedings and taking of evidence outside of Canada for use in Canadian proceedings, including the role of commission evidence in such proceedings. Bilateral and multilateral treaties that facilitate the taking of evidence in transnational civil and criminal proceedings are also summarized.

(i) Taking Evidence in Canada for Foreign Proceedings

A6.18 A party to litigation outside of Canada may require the assistance of a Canadian court to obtain evidence from witnesses in Canada for use in the foreign proceeding. The medium by which this is normally achieved is through the use of a letter of request (also known as a letter rogatory). A letter of request is a formal request by a foreign court to a judge of a Canadian Superior Court requesting the taking of evidence from an individual resident in Canada.

A6.19 The foreign litigant first obtains the letter of request from the foreign court where the action is pending. The procedure of the foreign court will govern at that stage. The letter of request should name the witness to be examined, describe the nature of the evidence sought and indicate why the evidence of the witness is relevant and necessary.

A6.20 After the foreign litigant has obtained the letter of request, the foreign litigant must then make an application to the court in the Canadian province where the witness resides for an order of that court enforcing the letter of request.

A6.21 The country in which the requesting court is situated is not required to have negotiated a treaty with Canada, such as a Mutual Legal Assistance Treaty (MLAT), before the request. Rather, cooperation with the foreign court is governed by the principle of comity of nations. A Canadian court, however, will not grant an order where to do so would offend Canadian sovereignty or is contrary to Canadian public policy.

A6.22 The *Evidence Act* of the province in which the witness resides will generally govern the procedure by which the letter of request is enforced. The Canadian court has the discretion to order the examination of a witness or the production of a document, or both, for use in a foreign trial or for pre-trial discovery purposes, and regardless of whether the witness is a party to the foreign action or merely a person with relevant information.

A6.23 The local court may limit the scope of questions or limit the scope of documents ordered to be produced and, in doing so, the court will be guided by local rules of evidence or procedure.

(ii) Taking Foreign Evidence for Canadian Proceedings

A6.24 In both civil and criminal proceedings, a Canadian court may order the appointment of a commissioner to take the evidence from a witness who is outside Canada. The transcript of the examination may then be used at the trial without the need for the witness coming to Canada.

A6.25 In addition, in civil cases, Canadian courts may issue letters of request (*see* discussion above) asking a foreign court or other authority having jurisdiction where the witness is located to assist in compelling a witness to attend before a commissioner in the foreign jurisdiction to answer questions for pre-trial discovery.

A6.26 Whether the foreign court will enforce the letter of request from the Canadian court is at the discretion of the foreign court and would be governed by the procedural rules of that jurisdiction.

A6.27 In Quebec, a witness may refuse to produce a document under the *Business Concerns Records Act*, which provides that, subject to certain exceptions, no person shall pursuant to or under any requirement issued by any legislative, judicial or administrative authority outside Quebec, remove or cause to be removed from any place in Quebec to a place outside Quebec, any document or digest of any document relating to any business concern. An objection raised in respect of the production of the document based on the *Business Concerns Records Act* will be determined by the Superior Court of Quebec.

(iii) Mutual Legal Assistance in Criminal Matters Treaties

A6.28 MLATs are bilateral agreements between two nations that seek to improve the efficiency of their respective laws of criminal procedure to better facilitate the prosecution of transnational crimes. The MLAT is a key mechanism for facilitating the gathering of involuntary evidence in criminal cases and seeks to streamline the process for the

summoning of witnesses, the production of documents, and service of process. MLATs are a response to the growing transnational nature of criminal activity.

A6.29 Canada's federal government has passed domestic legislation to facilitate MLATs. The *Mutual Legal Assistance in Criminal Matters Act* dictates the procedure by which foreign requests for assistance in gathering evidence are governed. Generally, for the foreign request for assistance to succeed, the country in which the court is situated must have a treaty with Canada and the request for assistance has to be approved by the federal Minister of Justice. However, limited types of assistance may be provided to a non-treaty country where certain conditions are met.

A6.30 Where the Minister of Justice has approved the request, a competent Canadian authority (e.g., the Attorney General of the province) makes the necessary application to the Superior Court of the province where the evidence is situated for an order compelling its taking.

A6.31 Canada has negotiated an MLAT with the US (Canada-US MLAT). Under the Articles of the Canada-US MLAT, a 'central authority' of one state must make requests for assistance to the central authority of the other. The central authorities for the purposes of the Canada-US MLAT are the International Affairs Group of the Department of Justice in Ottawa, and the Office of International Affairs of the Department of Justice in Washington, D.C., respectively.

A6.32 MLAT remedies are generally available only to the prosecution. The defence must proceed using the methods of obtaining evidence under the laws of the host country, most often through the mechanism of letters of request.

(iv) Civil Procedure Conventions

A6.33 Canada is not a party to the Hague Conventions on Civil Procedure, except the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters.

A6.34 This is an important consideration, given the fact that many of Canada's most important allies and trading partners, including the US, are party to the *1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters*, which governs the procedure by which the compulsion of evidence may be facilitated for use in transnational civil and commercial proceedings.

A6.35 Thus, except where the evidence being gathered is voluntary, obtaining evidence in Canada for use in a foreign civil proceeding is facilitated by way of letters of request (discussed above), and vice versa. However, the *Canada-United Kingdom Civil and Commercial Judgements Convention Act* provides for reciprocal recognition and enforcement of judgments in civil and commercial matters between Canada, the United Kingdom and Northern Ireland.

(7) GENERAL COURT PROCEDURES

A7.1 How is a civil claim (i.e., a non-criminal proceeding) dealt with in Canada's courts? This section summarizes the stages from the commencement of the lawsuit through to its ultimate resolution. The procedures in Quebec are summarized separately in Part C. This section also outlines the growing use of class actions in Canada. Virtually all Canadian provinces now have rules permitting representative actions.

(a) Time for Commencing the Proceedings

A7.2 The time deadlines and limitation periods for commencing lawsuits and actions are the subject of provincial law (with limited exceptions for matters within federal jurisdiction). If a party does not commence legal proceedings within the applicable limitation period, that party may be prohibited from making the claim thereafter.

A7.3 Limitation periods vary from province to province, and often vary within a particular province depending on the type of case. Alberta and Ontario both have a general two-year limitation period for most civil cases, such as breach of contract and negligence, but in certain limited circumstances, the limitation periods can be much shorter. For example, in BC, the limitation period to give notice of a claim to a municipal body is only two months.

A7.4 Generally, limitation periods begin to run when the claimant discovers the claim. In Ontario, the claimant is presumed to have discovered the claim on the day the act or omission on which the claim is based took place, unless the contrary is proven. In a contract claim, the limitation period begins to run at the time of a breach. In a negligence claim, the cause of action accrues only when the claimant suffers any damages, which is when the limitations clock starts running.

A7.5 In addition to the limitation periods set out in the statutes of the various provinces, there are certain common law doctrines (such as laches and acquiescence) which give the courts discretion to dismiss a claim if the plaintiff did not pursue its rights within a reasonable time.

A7.6 It is recommended that persons with potential actions seek legal advice as soon as they become aware of the claims. The hardest mistake to fix in litigation is missing the limitation period.

(b) Pleadings

A7.7 In civil actions in Canada, the nature and scope of the dispute to be resolved by the court is defined by the pleadings filed by the parties to the lawsuit. Pleadings are a concise statement of the facts that each party must prove to the court to establish that party's position. The plaintiff is required to state (or plead) all of the facts necessary to establish a valid cause of action against each defendant, and the defendant is required to plead all of the facts necessary to refute that cause of action. The pleadings are intended to define what facts and issues will be relevant at trial.

A7.8 Before commencing a civil action, the claimant should familiarize itself with the Rules of Court in the applicable province. In light of the COVID-19 global pandemic, various Canadian provinces have modernized the applicable rules. For instance, in Ontario, parties are no longer required to obtain consent of the other party or have a court order prior to serving documents by email. There is also a shift towards hearing matters by telephone or video conferences, allowing parties to commission affidavits virtually and expanding electronic filing of court documents.

A7.9 Commencing a civil action requires an originating document filed with the court and served on the opposing party/parties stating the nature of the claim and the relief sought. The Rules of Court in each province stipulate the specific form required. The vast majority of provinces require an action to be commenced by way of a Statement of Claim setting out the particulars of the claim and the relief sought. A more skeletal originating document (a

Notice of Action) is permitted in New Brunswick and Ontario and gives a general notice of the claim. A Statement of Claim is either appended to the originating document or filed and served at a later date according to the Rules of Court in the relevant province.

A7.10 After being served with the Statement of Claim, each defendant generally has a number of days to deliver a Statement of Defence in response to that Claim. If the Statement of Defence is not served on the plaintiff and filed with the court within the applicable deadline, the plaintiff may be able to apply to the court for default judgment against the defendant without any further notice to the defendant.

A7.11 If the defendant has a claim for relief against the plaintiff, the defendant can include a Counterclaim against the plaintiff in its Statement of Defence. The defendant can also make claims against other defendants (in a cross-claim) or join other parties in the action (by way of a Third-Party Claim).

A7.12 The Rules of Court in each province generally permit parties to amend pleadings during the course of proceedings. There are, however, significant differences pertaining to the timing and method of such amendments. Permission (by way of leave) of the court may be required in certain circumstances.

A7.13 Generally, a party may amend its pleading before the close of pleadings (and the scheduling or commencement of the trial). In certain provinces, the opposing party may apply to the court to set aside such amendments. In other provinces, unless the amendment necessitates the addition, deletion, or substitution of a party, the amendment is generally allowed without leave.

A7.14 In BC and Newfoundland and Labrador, the respective Rules of Court allow a party to plead any matter arising at any time whether before or after the issue of the originating document. In addition, in Manitoba a party may seek leave to amend its pleadings to allege a fact that occurred after commencement of the proceedings even though the fact gives rise to a new claim or defence.

A7.15 In Alberta, Saskatchewan, Newfoundland and Labrador, the Northwest Territories, and Nunavut, the costs of the amendment are borne by the party making the amendment unless otherwise ordered by the court.

(c) Joinder of Parties

A7.16 By court order, the court may add or substitute a person as a party under the Rules in all provinces where it is: (a) just and convenient to do so; and (b) that person ought to have been joined as a party or his/her participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectively adjudicated. In BC, a person made a party by court order may apply to the court to vary or discharge the order.

A7.17 The Rules of Court in all of the provinces give the court discretion to make an order joining 'necessary parties'. That is, every person whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding may be joined as a party to the proceeding. Additional plaintiffs (or defendants as the case may be) may be joined to the proceedings where there is a common question of law or fact arising in the proceeding, the claim to relief arises from the same transaction or occurrence, and it appears that joinder may promote the convenient administration of justice.

A7.18 The Rules of Court in many provinces provide that the court may relieve parties against the requirement of joinder. Such relief may be granted where it appears that the

joinder of multiple claims or parties may unduly complicate or delay the hearing or cause undue prejudice to a party. Relief may take the form of separate hearings or an order that a party be compensated for having to attend or be relieved from attending any part of a hearing in which the party has no interest.

A7.19 The Rules of Court in Alberta and the Northwest Territories provide for the court to authorize a representative action in circumstances where numerous persons have a common interest in the subject of an intended action. Then, one or more interested persons may sue or be sued (or defend as the case may be) on behalf of, or for the benefit of, all. Class proceedings are available in all Canadian jurisdictions based on the guidance from the Supreme Court of Canada. Provinces of Alberta, BC, Saskatchewan, Manitoba, Ontario, New Brunswick, Newfoundland and Labrador and Nova Scotia have implemented provincial class proceedings statutes and Quebec has class action provisions in the *Code of Civil Procedure* (CCP) as discussed more fully in section A8 below. The federal court's class action procedure is prescribed in its Rules of Court.

(d) The Discovery Process

(i) Particulars

A7.20 The Rules of Court in each province set out the requirements for pleadings in a proceeding. Where a pleading, such as a claim or a defence, fails to provide all of the information necessary for the case to be met, or a pleading is vague or overly general, a party may demand 'particulars' of that pleading. If the opposite party fails to provide particulars within a given time, a motion may be brought asking the court to order that particulars be delivered.

(ii) Discovery of Documents

A7.21 After pleadings have been exchanged, parties to an action are required to exchange all documents in their possession that are relevant to the issues raised in the pleadings, with the exception of documents that are privileged. These materials are accompanied by an affidavit of documents sworn by a representative of each party. The affidavit encloses a list of all relevant documents and states that, after a diligent search of that party's files and records, those are the only relevant documents to be produced. The definition of 'documents' has been expanded in Canada to include such things as paper documents, emails, computer files, tape recordings, videos and electronic media. The definition of 'relevance' is also broad. However, in Ontario the Rules were amended as of 1 January 2010 to narrow the scope to documents that are 'relevant to any matter in issue' instead of merely 'relating to' (or 'touching on') any matter in issue. Other changes to the Rules in Ontario as of 1 January 2010, include a requirement that parties agree on a 'discovery plan' in advance of documentary or oral discovery and a requirement that the principle of proportionality be observed throughout discovery. In cases where parties are unable to agree to a plan in a timely fashion, Ontario courts have imposed discovery plans on the parties. As of 1 January 2019, the discovery plan rule in Ontario was amended to expressly allow the courts to impose a discovery plan.

A7.22 The opposing party is entitled to receive a copy of every document listed in the affidavit of documents that is not privileged. Privileged documents are generally those created for the purpose of giving or receiving legal advice. Where legal advice of any kind is sought from a professional legal adviser in his or her capacity as such, the confidential communications relating to the giving or receiving of that advice are at the client's instance

permanently protected from disclosure by himself or by the legal adviser, except if the client waives the protection. The privilege extends to communications in whatever form but does not extend to facts that may be referred to in those communications if they are otherwise discoverable and relevant. Privileged documents are to be listed in the affidavit of documents separately, but do not need to be provided to the opposing party.

A7.23 If relevant documents are held by third parties, any party to an action may bring a motion seeking an order requiring that third party to produce those relevant documents for inspection. Again, the rules provide an exemption for privileged materials.

A7.24 Under both documentary discovery and discovery by oral questioning, with certain limited exceptions, the parties to an action are not permitted to use that evidence or information for any purposes other than those of the court proceeding in which the evidence was obtained.

(iii) Examinations for Discovery

A7.25 After the exchange of relevant documents, the parties are entitled to conduct an examination for discovery of the opposing party. In some provinces, such as Ontario, there is no automatic right to conduct a discovery of more than one representative of a corporate litigant, and no automatic right to discover persons who are not parties to the litigation.

A7.26 In Ontario, if a party wishes to examine more than one representative of a corporate litigant or to examine a person that is not a party to the litigation, it must obtain leave of the court to do so. The discovery witness that is produced on behalf of a corporate litigant must inform himself or herself of the corporation's knowledge. If the witness does not know the answer to a specific question, the witness may be required to give an 'undertaking' to make inquiries and provide the answer at a later date. For example, a corporate representative may be required to find out what another corporate employee said or did with respect to a particular issue. In complex cases, it is common to have numerous undertakings to provide information.

A7.27 With certain limited exceptions, such as information that is privileged, the person being examined must answer every question at the examination for discovery. All answers are taken under oath or affirmation in the presence of a court reporter, but no judge is present, and the examination typically takes place in an office setting. The transcript from the examination may be used later at trial.

A7.28 The party who first serves a notice of examination may examine first and is entitled to complete that examination before being examined by the other party. However, before a party can serve a notice of examination, the party must have delivered its affidavit of documents to the other side. Examinations for discovery can be a lengthy and expensive step in the litigation and many cases often settle around this stage in the proceeding. Pursuant to the Rule amendments that came into force in Ontario on 1 January 2010, there shall be a limit of seven hours for each party to conduct examinations for discovery (absent agreement or court order to the contrary). In complex cases, parties generally agree to extend this limit.

(iv) Examinations Before Motion or Trial

A7.29 In addition to examinations for discovery, there are provisions in most provinces for oral examinations of witnesses out of court before the hearing of a motion or the opening of trial, generally with leave of the court or consent of the parties. The attendance of persons to be examined can be required by summons, and that summons may also require the person to bring all relevant documents in his or her possession to the examination. As with

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

(e) Summary Disposition of Matters by the Court Without Trial

(i) Default Judgment

A7.30 The Rules of Court throughout Canada provide for a process whereby a plaintiff may proceed against a defendant and obtain a default judgment in circumstances where a defendant, properly served, has not filed the necessary pleadings in response to the action.

A7.31 While default judgment applications are court applications, generally speaking, a court appearance is not necessary. A default judgment can be obtained by filing the appropriate documents with the court, including proof of service and evidence demonstrating the defendant's failure to file the appropriate responding documents.

A7.32 If the plaintiff's claim is one of debt or liquidated demand, the plaintiff can enter a default judgment against a defendant for a specific sum not exceeding the amount of the debt or liquidated claim, interest if entitled, and costs. If the claim is for an unliquidated sum, such as general damages for pain and suffering, the court will issue a default judgment (or another similar document) against the defendant for damages and costs in an amount to be assessed by the court at a later date.

A7.33 While default judgment is a final order of the court, a defendant is entitled to apply to set aside such an order in certain circumstances. Such applications are frequently granted if the defendant's failure to file a response was not wilful or deliberate, if the defendant's application was made as soon as reasonably possible after learning of the default judgment (or an explanation for the delay is given) and if there is a defence worthy of investigation.

(ii) Dismissal for Delay/Failure to Prosecute Action

A7.34 If upon application by a party it appears to the court that there is want of prosecution in a proceeding, the court may order that the proceeding be dismissed. However, given that an order dismissing a proceeding for want of prosecution can have severe consequences on a plaintiff, it will not be lightly made. Furthermore, the order will not be made without giving the offending party an opportunity to remedy the default unless the default has been intentional or has given rise to a substantial risk that a fair trial will not be possible.

A7.35 For a party to be successful on an application for dismissal for delay, the law generally requires the delay to be inordinate, inexcusable, and have caused or is likely to cause some prejudice to the applicant. Given the nature of this application, Canadian courts have made this order difficult to obtain. It is not uncommon for such applications to fail even in the face of delays measured in years.

(iii) Summary Judgment

A7.36 The summary judgment rules enable a plaintiff to a proceeding to obtain summary judgment without a trial if the plaintiff's claim can clearly be proven and if the defendant is unable to raise a bona fide defence or raise an issue against the claim that ought to be tried. Summary judgment applications are not just the purview of the plaintiff, and such applications can also be brought by a defendant on the basis that there is no merit in the

whole or part of the claim and that there are no facts which would substantiate the whole or part of the claim.

A7.37 In essence, the summary judgment rules are intended to prevent vexatious defences or frivolous claims.

A7.38 Applications for summary judgment can only be made in plain cases and are not to be made where a party knows that the facts as to liability are in dispute, are of a complicated or difficult character.

A7.39 A proceeding for summary judgment is not a trial by affidavit and, in most provinces, the court does not try issues, find disputed facts, assess credibility or decide questions of law but simply determines whether there are issues to be tried. However, rules of certain provinces, including Ontario Rules of Civil Procedure, permit the judge hearing a motion for summary judgment to weigh evidence, assess credibility, draw any reasonable inference from the evidence or conduct a mini-trial to allow for oral evidence unless it is in the interests of justice for such powers only to be exercised at trial.

A7.40 A defendant in the case of a summary judgment application must show there is a 'triable issue', 'arguable case', or 'real chance of success' to successfully defeat a summary judgment application by a plaintiff.

A7.41 Affidavits and any other evidence submitted to the court in summary judgment applications are not used for the resolution of disputed issues of fact but for determining whether any issues are actually in dispute.

(iv) Summary Trial

A7.42 In BC and Alberta, the Rules of Court provide for a summary trial process in addition to the summary judgment application described above. In Ontario, all trials under 'Simplified Procedure', which is available for claims for up to CAD 200,000, proceed by a summary trial process. Similarly, the federal rules require, unless the Court orders otherwise, a 'Simplified Action' for proceedings under CAD 100,000.

A7.43 A summary trial application is a trial based upon affidavit evidence without, generally speaking, the requirement for witness testimony. Pursuant to the summary trial rules, a party may apply to the court for judgment in an action or on any particular issue. The applicant, and each of the other parties of record, may adduce evidence to support or oppose the application by way of affidavit, answers to written interrogatories, answers to evidence taken on examinations for discovery, admissions, and even expert evidence. Summary Trials in Ontario under the Simplified Procedure may also include up to ten minutes of direct examination of a witness instead of just cross-examination on an affidavit.

A7.44 On hearing an application under the summary trial rules, the court can grant Judgment in favour of any party, either on an issue or generally, unless the court is unable on the whole of the evidence before it to find the facts necessary to decide the issues of fact or law, or, the court is of the opinion that it would be unjust to decide the issues on the application.

A7.45 In most provinces, the summary trial process differs from the summary judgment process described above as the court is expressly permitted on a summary trial to find facts, make determinations of law and, in some cases, make credibility assessments. Summary judgment is not a trial. It is a distinct process. Certain provinces, including Ontario, permit a judge hearing a motion for summary judgment to weigh the evidence, evaluate credibility and draw inferences from the evidence where there appears to be a genuine issue requiring a trial; however, a full trial can be avoided by using these powers.

A7.46 There are obvious limitations on the summary trial process and the courts will not hear such applications in circumstances where it would be unjust to finally resolve the issues without a full trial. In making that determination, the court may consider such factors as the amount involved, the complexity of the matter in issue, the urgency of the matter, the likelihood of prejudice from further delays, whether credibility is a key issue, the cost of proceeding to a conventional trial in relation to the amount involved, and any other matters which may impact on the fairness of the process.

(v) Other Applications

A7.47 The Rules of Court vary from province to province. However, there are certain procedures in each of the provinces designed to assist in the resolution of actions.

(vi) Special Case

A7.48 Parties to a proceeding may agree that a particular question of law or fact may substantially resolve the dispute between the parties. As such, rules exist in most jurisdictions to allow parties to state a question of law or fact in the form of a special case for the opinion of the court. In certain circumstances, the court itself may order a question or issue arising in a proceeding, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be stated in the form of a special case.

A7.49 The special case is brought before a court and the parties set out the facts and documents necessary to decide the issue that is heard by the court. With the consent of the parties, on any question in the special case being answered, the court may draw any reasonable inference, grant specific relief or order Judgment to be entered.

(vii) Proceedings on a Point of Law

A7.50 A point of law arising from the pleadings may, by consent of the parties or by order of the court, be set for hearing and disposed of at any time before the trial. In deciding whether such an application should be made, the court will determine whether resolving the question posed by the parties would serve the purpose of eliminating a claim insupportable in law with a resultant saving of time and effort. The purpose of the rule is to provide a means of determining a question of law that goes to the root of the action without deciding issues of fact raised by the pleadings. Such applications are appropriate only in cases where, assuming allegations in a pleading of an opposite party are true, a question arises as to whether such allegations raise and support a claim or defence in law. The facts relating to the point of law are assumed (for the purpose of the application) not to be in dispute and the point of law must be capable of being resolved without hearing evidence. This rule was designed to provide for the elimination of claims insupportable in law, with a resultant saving of time and effort.

(f) Simplified Procedure

A7.51 Some Canadian provinces provide a simplified form of court procedures for civil disputes involving less complex matters or smaller claims below a threshold amount. The purpose of these simplified rules is to attempt to lower the cost of litigation by reducing the procedural complexity. For example:

- in Ontario, if the claim is for CAD 200,000 or less, the use of the 'simplified procedure' is mandatory, and where the claim exceeds CAD 200,000 the action can proceed under the simplified procedure if the parties agree or if the plaintiff abandons the portion of the claim that exceeds the threshold; and

– in BC, a 'fast track procedure' is available in circumstances where the trial of the proceeding can be completed within two days, but there is no limitation on the amount of the claim. This 'fast track procedure' is mandatory where the claim is CAD 100,000 or less or where the trial can be completed within three days.

A7.52 Although the rules vary from province to province, in general the simplified rules reduce the amount of examination for discovery that is available and provide for earlier trial dates.

(g) Interlocutory Motions and Applications

(i) General Procedural Motions

A7.53 Business disputes in Canada, as in other jurisdictions, commonly involve time-sensitive legal issues. Canadian courts devote significant time and resources to the process of providing a fair, balanced and timely pre-trial procedure for hearing litigants on practice or procedural issues. In appropriate cases, litigation issues may be determined on a summary basis without the need for a lengthy trial.

A7.54 Court applications of this nature generally seek directions or decisions 'between steps' in the litigation and, as such, are known as interlocutory motions. The Rules allow motions to be scheduled on relatively short notice to parties adverse in interest – often as little as two business days or even less in cases where it is appropriate for the court to hear the matter on an urgent basis or without requiring notice to other parties. However, despite the rules, there are significant scheduling delays in some cities, notably Toronto, and it may take several weeks to obtain a motion date for non-urgent matters.

A7.55 Counsel argue their respective positions in these motions based largely on evidence put forward in affidavits and scrutinized by cross-examination. Most Canadian jurisdictions use private court reporting services so that cross-examination of affiants occurs at a law office rather than the courthouse.

A7.56 The following is a list of some common types of interlocutory motions:

– determine whether the court should assume jurisdiction over the matter in issue;
– compel a plaintiff to post collateral as security for a defendant's litigation costs, where it appears likely that the plaintiff will be unable to pay the defendant's allowable costs if unsuccessful;
– strike out another party's pleadings or ask the court for other available relief, where that party has failed to meet procedural requirements in the action;
– consolidate multiple actions where there are common facts and issues which ought to be dealt with together, or split one lawsuit into multiple actions where the opposite is true;
– oversee court-supervised processes, such as appointment of a receiver, receiver-manager or liquidator;
– enforce the 'rules' and procedural protections of litigation by, for example, compelling a party to attend for cross-examination or examination for discovery, answer questions or provide requested records which are determined likely to be of assistance in the litigation;
– obtain judgment without trial, where there is no genuine defence to the claim or in cases where the court is satisfied that litigants' rights are clearly set out by contract or statute so as to obviate the need for trial; and
– dispute a judgment or other litigation step taken without providing appropriate notification to parties adverse in interest.

A7.57 While vigorous representation may be the most recognizable hallmark of litigation, interlocutory practice in Canada also reflects a tradition of counsel as officers of the court, with professional obligations to opposing counsel and parties adverse in interest as well as their own clients. In most cases, Canadian counsel tend to be courteous and respectful in the courtroom while at the same time advocating the interests of their client in as compelling a manner as possible.

(ii) General Test for an Injunction

A7.58 An injunction is an order of the court which restrains a pending or existing breach of contract, the commission or continuance of a wrongful act, or which seeks to preserve rights or assets pending the outcome of litigation.

A7.59 The most common type of injunction is known as a negative injunction, since it prohibits a party from undertaking or continuing certain conduct. Injunctions may also be positive or mandatory in nature so as to impose an obligation requiring a party to undertake or continue to act in a certain manner.

A7.60 The situations in which injunctive relief may be appropriate are too numerous to provide an exhaustive list; however, some common scenarios will include protecting against the use or disclosure of proprietary or confidential information (often in the context of customer lists or intellectual property examples), or preventing the occurrence or continuance of an alleged defamation, breach of a contractual non-competition covenant or prejudice to the shareholders of a corporation.

A7.61 Since the court is asked to restrict the legal rights of another party, applying for and obtaining injunctive relief is a complex process and will be awarded only in the clearest of cases. The basic test employed by the courts is a modification of the traditional English approach, and requires the applicant to show:

- There is a serious issue to be tried. To make this determination, the court will generally assess the merits of the case on a preliminary basis, without deciding the matter. Among other things, the applicant must satisfy the court that its lawsuit is not frivolous or vexatious.
- Refusing to grant the requested relief will cause irreparable harm to the applicant's interests. 'Irreparable' in this context is assessed according to whether resulting harm is probable and of such nature that it cannot be remedied in monetary terms. Even when there is a breach of a negative covenant, the moving party must still provide evidence of irreparable harm.
- The 'balance of convenience' favours granting the injunction. The court's assessment of this factor involves a comparison of respective interests, weighing the 'harm' alleged by the applicant if its interests are not protected, against the effect on other parties if their legal rights are restricted in the manner sought.

A7.62 Injunctions arise from a set of discretionary principles based on overall fairness, known as equitable considerations, allowing the court to consider the overall context in which the application is made. The court may decide that injunctive relief is not appropriate if, for example, it appears that:

- The applicant has caused delay or otherwise does not claim relief in good conscience.
- The applicant has a lesser right to protection than third parties who may be affected by the injunction (e.g., where the vendor of an asset applies for an injunction to prevent its sale, but in the meantime the purchaser has already

sold that asset to an innocent third party who had no notice of the vendor's claim).
- The injunction would result in unjustifiable hardship to the respondent.
- The injunction would not be in the public's best interest.
- The injunction would, in effect, be a final determination of the matter.
- The injunction would, in effect, require the court to engage in continuing supervision of particular business interests.

(iii) The Undertaking as to damages

A7.63 Injunctive relief is an extraordinary remedy with significant consequences if used inappropriately and, for this reason, the applicant must generally give a meaningful undertaking (promise to the court) to pay damages in the event the injunction is granted but the litigation is ultimately decided against the applicant. Failure to honour such an undertaking may result in serious consequences associated with breach or contempt of a court order.

(iv) Mareva Injunctions

A7.64 In addition to the legal risk of success or failure, the practical challenges of litigation often include whether the defendant will ultimately have any assets from which a judgment may be collected.

A7.65 One mechanism used by Canadian courts to address such concerns is the Mareva injunction, adopted from English law. This type of pre-trial order may be utilized in appropriate cases to prevent a defendant from 'judgment-proofing' itself by dissipating or removing assets to a foreign jurisdiction. To succeed, the applicant must show a real risk of removal or dissipation, as distinct from a mere apprehension or suspicion of this eventuality.

A7.66 Adopting the English principles posed unique challenges for Canadian courts, since Canada is a federal state composed of ten provinces and three territories. The dual federal/provincial nature of this relationship challenged the courts to decide whether another province or territory within Canada constitutes a truly 'foreign' jurisdiction. The common law has restricted the availability of Mareva Injunctions where the defendant is merely moving assets from one Canadian province to another since judgments from the first province are readily enforceable in the other province. Alberta has enacted provincial legislation that allows Mareva-type relief to be awarded in these circumstances.

A7.67 As with other requests for an injunctive order, the applicant must generally provide an undertaking as to damages and the courts will award such relief only in the clearest of cases – restricting a party's ability to move or dispose of its assets is a significant departure from conduct typically associated with the ordinary course of business. Typically the applicant must establish:

- a strong likelihood of success;
- full and frank disclosure of the material facts which the court should know in considering the application;
- full particulars of the claim, including the grounds and the amount of the claim, fairly stating the points made against it by the defendant that speak against their claim;
- a real risk that the defendant will move assets from the jurisdiction or dissipate those to avoid the possibility of judgment;
- grounds for believing that the defendant has assets within the jurisdiction.

(v) Mandatory Orders: Anton Piller Orders

A7.68 *Anton Piller* orders allow the plaintiff to apply to the court for what is, in essence, a civil search warrant.

A7.69 Such an order typically allows the plaintiff and its lawyers (who supervise the seizure process in their capacity as officers of the court) to enter a premises, search for and seize materials in possession of the defendant. The court assumes custody of these materials because the intention of this process is to preserve evidence from possible destruction (especially where it can be quickly and conveniently destroyed, as in the case of computer data) or to recover property of the plaintiff which may be necessary to prove its case.

A7.70 In light of the extraordinary and interventionist nature of such an order, the threshold for obtaining this relief is even higher than for other types of injunctions. The element of surprise is usually necessary to accomplish the objective of preserving evidence, so the application is made to the court in a closed hearing and without notice to any other party (known as *in camera* and ex parte). In this context, the court will expect the applicant to fully disclose all relevant matters within its knowledge, even if they do not support its request. If the applicant fails to disclose material facts, the court has broad discretion to decline the application.

A7.71 The order must contain procedural protections for the defendant and go no further than is absolutely necessary to remedy the problem that has given rise to the application for the order.

A7.72 To succeed in obtaining an *Anton Piller* order, the applicant must establish:

- A strong likelihood of success.
- The damage, potential or actual, will be very serious. Consideration of 'damage' under this heading is directed at whether the plaintiff would be unable to make its case at trial if the impugned materials are not available.
- The party against whom the order is made is actually in possession of incriminating documents or evidence.
- There is a 'real possibility' that the party against whom the application is made may destroy, hide or abscond with these materials before the ultimate hearing. Since it is sometimes impossible for an applicant to produce direct proof in this regard, Canadian courts are sometimes willing to infer a risk of destruction where the applicant can satisfy the court that the defendant has been acting dishonestly or in suspicious circumstances. However, the court will not draw this inference lightly – the inference of dishonesty, and that there is a 'real possibility' that evidence will be destroyed must be compelling before the court will presume prospectively that the defendant will do so.

A7.73 As with other requests for an injunctive order, the applicant must generally provide an undertaking as to damages.

(h) Case Management and Pre-trial Conferences

A7.74 Some provinces, such as BC, Alberta, Ontario, and Quebec, have introduced special rules to manage the litigation process. These case management procedures are very jurisdiction-specific, and include a wide array of new and often shorter deadlines for the various steps in a proceeding. Case-managed cases are typically subject to a timetable established either by the parties on consent or by the order of a judicial officer (such as a case management

associate judge). In Toronto, Ontario, a specialized form of case management may be available in the form of the Commercial List Court (a branch of the Ontario Superior Court reserved for certain commercial matters). In addition, many jurisdictions require that mediation be attempted before going to trial. For these and other reasons, the large majority of civil and commercial cases in Canada are settled long before they come to trial.

A7.75 Whether or not a proceeding is subject to case management, if it does not settle during discovery or at another early stage and is approaching trial, that case may be brought before a judge or other judicial officer (other than the trial judge) for a pre-trial conference. A conference may be ordered by the court or may be requested by a party to the proceeding. The purpose of the conference is to consider the possibility of settlement, to simplify the issues for trial, to determine the timing and length of trial, and to assist generally in disposing of the proceeding. Communications made at the pre-trial conference must be kept confidential from the judge who ultimately presides at the trial or hearing.

(i) Costs

(i) What Are Costs?

A7.76 It is common in litigation in Canada for the successful party to recover from the unsuccessful party a portion of the expenses incurred by the successful party for such items as lawyer's fees, expenses to obtain expert reports and travel expenses associated with various steps in litigation, including trial, preparation and interlocutory proceedings. The discretion to award costs is an extremely flexible tool in the hands of judges.

A7.77 Nonetheless, the practice has been for courts to exercise that discretion in accordance with certain principles: (i) costs usually flow from the unsuccessful litigant to the successful litigant; (ii) except in rare circumstances, a party is not to be over-indemnified or even fully indemnified for costs incurred in the litigation; (iii) costs are used to encourage compromise and settlement between the parties; and (iv) costs are used to penalize parties for inefficient or wasteful use of the court's and parties' resources.

(ii) Costs Schedules

A7.78 Notwithstanding the court's ability to fashion a flexible award, the courts of each province have different guidelines for setting the amount of costs to be paid. For example, Alberta has a predetermined schedule which establishes a sliding scale for 'party-party' costs which results in less than full indemnity in most cases; and Ontario uses a tariff system that has a scale of hourly rates based on the years of experience of the lawyer. Ontario, like most other provinces has two scales of costs – a partial indemnity scale (similar to Alberta's 'party-party' costs) which is used in most cases, and a substantial indemnity scale (similar to Alberta's 'solicitor-client' costs) which is used when the circumstances warrant a higher award of costs.

A7.79 The court commonly uses a higher award of costs to sanction unfounded serious allegations, such as fraud or conspiracy, or to sanction unreasonable behaviour by a party. The higher award of costs may also be used if a party rejected a settlement offer and ultimately recovers less than the rejected settlement at trial. Most provinces encourage the parties to settle by establishing cost consequences for failure to accept reasonable offers to settle.

A7.80 Where disputes arise with respect to quantification of the costs to be awarded, including the reasonableness of disbursements being claimed, most provinces have a special

dispute resolution mechanism in place whereby the parties may appear before an officer appointed by the court to tax or assess the costs.

A7.81 Where parties enter into a dispute resolution process not governed by the rules of court, such as mediation or arbitration, costs may be awarded in accordance with the agreement reached between the parties.

(iii) When Costs Are Payable

A7.82 Generally, costs become payable following the outcome of trial. The court, however, has discretion to make costs related to interlocutory motions payable 'forthwith' and without regard to ultimate success in the litigation.

A7.83 Once costs have been awarded, the successful party has a right to be paid, but, as with any award of money by the court, may need to enforce this right through the available civil enforcement mechanisms.

(iv) Security for Costs

A7.84 A defendant can apply to the court to require the plaintiff to provide security for costs before the trial of the action. There are slight differences between different provinces. In Ontario, the rules set categories for when the court may order security, including when: (i) the plaintiff resides outside of the province; (ii) the plaintiff is a corporation or nominal plaintiff and there is good reason to believe that the plaintiff has insufficient assets in the province to pay the defendant's costs; and (iii) there is good reason to believe that the plaintiff's action is frivolous and vexatious and the plaintiff has insufficient assets in the province to pay the defendant's costs.

A7.85 In Alberta, a court may award security where it considers it just and reasonable to do so having regard to five factors. These factors are: (i) whether it is likely the applicant will be able to enforce an order or judgment against assets in the province; (ii) the ability of the respondent to the application to pay the costs awarded; (iii) the merits of the action; (iv) whether an order to give security would unduly prejudice the respondent's ability to continue the action; and (v) any other matter the court considers appropriate.

A7.86 In BC, the rules do not include instructions on when a court may order security for costs. The ability to order security is part of the court's inherent jurisdiction and it has complete discretion regarding whether or not it will award security for costs, but adopts similar factors based on common law jurisprudence.

A7.87 An order awarding security for costs will generally require that a plaintiff pay a certain amount of money into court or provide a letter of credit; failure to do so once ordered will normally result in dismissal of a plaintiff's action.

A7.88 Security for costs orders are rarely granted in favour of a plaintiff as against a defendant, as such an award would be seen as an unreasonable impediment to a defence.

A7.89 Although the proper time to make such an application is early in the litigation, an order for security for costs does not immediately compensate the defendant. Instead, it provides some assurance that, if the defendant is successful following trial, and if a costs award is made in its favour, then it will be able to collect on that award.

(v) Costs in Class Proceedings

A7.90 *See* section A.8(f) for a discussion of costs in class action proceedings.

(j) Trials

A7.91 As in most other common law jurisdictions, less than 10% of all lawsuits result in trials. The vast majority of cases settle or are concluded at an earlier stage of the proceedings.

A7.92 Case management processes in many provinces are designed to ensure that cases move forward through the litigation process and reach trial on a timely basis, usually within two to three years of the case being filed. Urgent cases can be dealt with much more quickly, but complex cases often take more than three years to reach trial.

A7.93 In most commercial cases, pre-trial procedures (including discovery) continue right up to the commencement of trial. Expert reports and responding reports must be delivered within established time periods prior to trial (typically sixty to ninety days) in order for expert witnesses to be permitted to testify at trial. Other time-limited pre-trial notices include notices under the *Evidence Act* and *Business Records Act* which are necessary for certain documentary evidence to be placed in evidence at trial without full formal proof. In addition, it is a common practice to deliver Notices to Admit (notices requiring the opposing party to admit certain facts) within a few weeks before trial. The purpose of such notices is to narrow the issues and increase the cost risk to the opposing party if non-contentious facts are not admitted. In addition, supplementary examinations for discovery and exchanges of documents to update previous pre-trial disclosure (e.g., on the subject of damages) will often take place within a few weeks or days before trial is scheduled to commence.

A7.94 In most cases, any party may ask for a jury trial by delivering a jury notice. Juries are not available in certain cases (e.g., family law matters, various forms of equitable relief and claims against a municipality). However, parties in Canada rarely choose to have civil matters determined by a jury. Juries are used in personal injury and defamation claims but, even in these cases, jury trials are not universal. The court retains the discretion to strike out a jury notice and require a trial by a judge without a jury. A jury notice can be struck out based on complexity of the case or strong local prejudice but in most cases, a jury notice will be allowed to stand if one of the parties wishes to have a trial by jury.

A7.95 The trial itself is conducted in a manner that will be familiar to common law advocates around the world. The following points may be of interest.

(i) Opening Statements

A7.96 Plaintiff's counsel invariably makes an opening statement at the beginning of the trial. Typically, judges prefer that defendant's counsel also present an opening statement before any evidence is called so that the issues are clearly delineated from all perspectives at the outset of the trial. In complex cases, opening statements may last for hours or even more than a day. In the course of extended openings, the judge may be introduced to many of the documents in issue in the case. The judge is likely to be given various documents which have been prepared by counsel to assist the court, for example, a chronology of key events, a cast of characters, a glossary of technical terms or a summary of agreed facts.

(ii) Examination of Witnesses

A7.97 Counsel conducting the direct examination of his or her own witness may not ask leading questions (questions that suggest the answers) except on non-contentious matters.

A7.98 A witness may be declared hostile if the answers given to the lawyer who asked him or her to testify are inconsistent with prior out-of-court statements. However, this declaration is rarely made unless the trial judge feels it is necessary to do justice in the case.

A7.99 There is no longer a hard and fast rule against 'hearsay' evidence and the test as to whether the evidence is 'necessary and reliable' will be applied.

A7.100 A lawyer may subpoena as a witness and cross-examine an employee, director or officer of an opposing party. However, a lawyer will often be prohibited from interviewing such a witness ahead of time.

A7.101 A witness may not speak to his or her own lawyer or any other lawyer on the same side of the case about evidence the witness has already given or, during cross-examination, about any matter relating to the case.

(iii) Expert Witnesses

A7.102 Expert evidence may be called at trial when it is necessary and relevant and when it will assist the court to have opinion evidence or other technical assistance to do justice between the parties.

A7.103 Canadian courts are becoming increasingly sceptical of expert evidence which is used to simply buttress the advocacy of counsel. On the other hand, it is a rare commercial case that does not have at least one expert witness (and usually two or three) on each side.

A7.104 Crucial questions can arise regarding the litigation privilege which attaches to communications between an expert witness and the lawyer who retained him or her. The litigation privilege only attaches to protect communications with an expert from disclosure where the dominant purpose of such communication is the litigation itself and only where the expert is not called as a witness at trial. Once it is determined that the expert will be called at trial, the findings and opinions of the expert will be subject to disclosure in the discovery process. At trial, the expert may also be required to produce his or her entire file, including prior drafts of the expert report. However, Canadian jurisprudence is not unanimous as to the requirement that draft reports be produced at trial.

(iv) Documentary Evidence

A7.105 Unless the authenticity of specific documents is in issue, most civil cases proceed on a cooperative basis with respect to the admission of documents into evidence. The parties usually produce joint briefs of documents for the use of the court. Typically, the relevant documents have been qualified for admission into evidence through the pre-trial discovery procedures and, if necessary, through the pre-trial document notices exchanged before trial. Any documents that are contentious as to authenticity are dealt with in the same manner as other contentious facts at trial.

(v) Use of Examination for Discovery at Trial

A7.106 Transcripts of examinations for discovery are not treated as evidence at trial except to the extent they are read into the record by the party who conducted the examination. This may be done by simply reading several questions and answers from the opposing party's examination for discovery into the record during the presentation of one's own case or by confronting an opposing witness with a contradictory answer from his or her examination for discovery.

A7.107 A party is free to qualify or contradict evidence which that party has read into the record from the opposing party's examination for discovery, by referring to other evidence placed before the court at the trial.

A7.108 In fairness to a witness, any prior inconsistent statement allegedly made by the witness before testifying at trial must be 'put to' the witness when testifying so that he or she has an opportunity to explain the apparent contradiction. This applies whether the prior statement was made during examination for discovery or in some other context.

(vi) Length of Trials

A7.109 Most civil cases are tried in one or two weeks. However, in complex cases involving large amounts of money, trials have been known to take a year or more to be completed. Counsel are required, in many provinces, to agree in advance to a trial schedule (including lists and time estimates for witnesses) in advance. However, our courts remain reluctant to impose or enforce time limits at the trial stage.

(vii) The Decision

A7.110 It is usual for judges to take some time following the completion of trial to consider their decisions and deliver a written decision, which will include reasons for the conclusions which have been reached. The period during which judgment is reserved is usually in keeping with the complexity of the issues to be determined.

A7.111 Generally, the court will invite the parties to make further submissions as to the costs to be awarded.

A7.112 It is the responsibility of counsel for the parties to draft and agree upon the formal judgment to be issued based on the written reasons signed by the trial judge. If there is any disagreement as to the formal judgment, the issue will be settled by the trial judge.

(k) Judgments

(i) Judgments and Orders

A7.113 A judgment is the final determination of an issue or issues between parties to litigation. A judgment normally becomes effective from the date on which the judge pronounces it rather than on the date that a formal order or judgment is entered in the Court Registry. However, the judge may specify an effective date before or later than the date of pronouncement. Where an appeal is permitted from a judgment, the deadline for filing the appeal differs from province to province. In BC and Ontario, it is usually thirty days from the day following the effective date of the judgment and one month in Alberta.

A7.114 Judgments may be given in either written or oral form. Once judgment is given, an order must be drawn up in the required form and entered. Usually, the successful party in the action will draw up the order and then obtain the approval of its form from all parties who appeared at the trial or hearing. The order is then signed and entered into the court by the registrar as an order of the court.

A7.115 If one or more parties refuse to approve the order, any party may make an appointment to settle the order before the registrar. The registrar's decision is reviewable by the judge who gave the original judgment.

A7.116 The purposes of drawing and entering an order are as follows:

(i) The successful party can prove that it has the authority to proceed under the terms of the order. The unsuccessful party will have proper material upon which to base an appeal. Neither party will be able to re-litigate the same matter, since it has clearly been resolved. Failure to enter an order may be treated as evidence of its abandonment by the successful party.

A7.117 Though not mandatory, it is advisable to serve the order on the person who is expected to obey it. Service will prove that the party knew of the order, which is a prerequisite for establishing contempt of court if that party fails to obey the order. If an order is obtained without notice to the other party or parties, the person obtaining the order must serve it on each person affected by it.

(ii) Foreign Currency Judgments

A7.118 Common Law. Under the common law, a money judgment had to be expressed in Canadian dollars, and the date of conversion into Canadian dollars of sums agreed to be paid in a foreign currency was a matter of some controversy. The operative principle developed that the successful litigant should be provided sufficient Canadian funds to purchase the amount awarded in foreign currency at the time of the judgment.

A7.119 Statutory Provisions. Legislation and procedural rules have clarified the law regarding foreign currency judgments in different provinces. The BC *Foreign Money Claims Act* states that the court may order the unsuccessful party to pay that amount of Canadian currency required to purchase the equivalent amount of foreign currency owing to the other party. The foreign currency must be converted at a chartered bank located in BC, and the date of conversion is the last day that the bank quotes a Canadian dollar equivalent to the foreign currency prior to the day when the debtor makes a payment under the order. Under the Ontario *Courts of Justice Act*, similar provisions apply, but the bank must be listed under Schedule I of the Canadian *Bank Act*, and the judge has the discretion to fix a different date for conversion of the funds. In Alberta, foreign currency judgments are still regulated by the common law. However, under the Alberta Rules of Court (for judgments from the United Kingdom) and the Alberta *Reciprocal Enforcement of Judgments Act* (for judgments from other reciprocating jurisdictions), when a foreign judgment (i.e., a non-Alberta judgment) is subsequently registered in Alberta, it will be converted into Canadian currency at the exchange rate on either the date that the court clerk registers the judgment for judgments from the United Kingdom or the date of the original judgment for judgments from other reciprocating jurisdictions.

(iii) Interest

A7.120 Pre-Judgment Interest. The amount of interest payable on judgment debts may have been agreed upon by the parties in a contract. In such cases, pre-judgment interest will normally be based on the contract. Note, however, that it is illegal in Canada to charge interest at an effective annual rate of over 60% and a rate stipulated on a monthly or daily basis may not be enforceable unless the contract expressly states the equivalent yearly rate of interest.

A7.121 In BC, if there is no explicit or implied agreement between the parties, the rate will be based on the *Court Order Interest Act*, which gives the judge discretion to fix an appropriate rate. Generally, such pre-judgment interest will be based on the rate set for thirty-day commercial paper. In Ontario, the rate is based on the Bank of Canada's short-term rate for advances to Schedule I Canadian banks and is calculated quarterly. In Alberta, the Regulation to the *Judgment Interest Act* fixes an annual rate for both pre- and

post-judgment interest. Tables are regularly published by each provincial government showing the applicable rates of interest during each period.

A7.122 Post-Judgment Interest. After judgment is pronounced, money awards in BC will bear interest at a rate equal to the prime lending rate of the Bank of Canada. This rate is fixed each half-year, on 1 January and 1 July. However, the court does have the authority to fix a different interest rate. In Ontario, post-judgment interest is fixed every quarter and is calculated as 1% above the rate for pre-judgment interest, dated on the end of the first day of the last month of the quarter preceding the quarter when the judgment was given. In Alberta, the pre- and post-judgment interest rates are the same. Published tables are available showing the applicable rates of post-judgment interest for each province at a specified date. If a partial payment is made by the judgment debtor, it will first be applied to pay off the outstanding interest.

A7.123 Note that for foreign money judgments in BC, the post-judgment interest rate will be calculated based on the foreign prime rate, in other words, the interest rate in the foreign country that is most closely analogous to the prime lending rate of the Bank of Canada.

(l) Appeals

(i) Availability of Appeals

A7.124 In most cases, there will be an automatic right to appeal a trial decision to a higher court, such as a provincial Court of Appeal. In some cases, often in respect of interlocutory orders that do not finally determine the case or in matters where the amount in issue is relatively small, a party may have to get leave (i.e., permission) to appeal to a higher court.

A7.125 The deadline for filing a notice of appeal or a motion for leave to appeal differs from province to province and depending on the type of case. Generally, the deadlines vary from fifteen to sixty days.

A7.126 Decisions from administrative tribunals, such as the Competition Tribunal or a Securities Commission, are often subject to judicial review by a court, or appeal to a court. The availability of judicial review or an appeal will depend upon the provisions of legislation empowering the particular administrative tribunal. In some cases, arbitration decisions are also subject to review or appeal to a court.

A7.127 Every province has a Court of Appeal which is the highest court in that province. A decision of a provincial Court of Appeal may be appealed to the Supreme Court of Canada which is the highest court in Canada. The Supreme Court is the last judicial resort of all litigants. It has jurisdiction over the civil law of Quebec and the common law of the other nine provinces and three territories, and it can hear cases in all areas of the law.

A7.128 In most cases a party will not be allowed to appeal to the Supreme Court of Canada without obtaining permission from the Supreme Court. An application for leave may be granted when the Supreme Court finds that the case raises an issue of public importance that ought to be decided by the Supreme Court. This means that the case must raise an issue that goes beyond the immediate interest of the parties to the case. The Supreme Court receives as many 600 applications for leave each year, and leave to appeal is only granted to approximately seventy cases per year. Applications for leave are usually decided by a panel of three judges of the court.

(ii) Standard of Review

A7.129 On appeals, different standards of review are applied to different kinds of cases. Appeal courts grant different levels of judicial deference to the lower court or tribunal depending on the issue in question. However, some useful generalizations can be made.

A7.130 An appeal court will rarely overturn findings of fact made at a trial by a jury or a trial judge. A finding of fact at trial is only to be overturned on appeal if it was plainly wrong, and there was a 'palpable and overriding error'. Accordingly, most appeals from lower court decisions are concerned with whether the court or tribunal below made an error in interpreting or applying the law, and the standard of review is one of correctness, that is, the appeal court must be satisfied that the lower court correctly applied the law, and may reverse the lower court decision if there was an error.

A7.131 The situation is more complicated with respect to appeals from expert administrative tribunals (such as the Competition Tribunal or a Securities Commission). In those cases, the standard of review will depend on the legislative intent in conferring jurisdiction on the administrative tribunal. The analysis must consider a number of questions, such as the tribunal's role or function, whether the tribunal's decisions are protected by a privative clause, that is, a legislative provision stating that the tribunal's decisions are not subject to appeal, and whether the question in issue goes to the tribunal's jurisdiction.

A7.132 In 2008, the Supreme Court of Canada issued a decision which reformulated the standard of review for the decisions of administrative tribunals. The Supreme Court implemented two standards of review – correctness and reasonableness. Recently, the Supreme Court of Canada revisited these principles and established that reasonableness is the presumptive standard of review, meaning judicial deference to the tribunal's decision will be exercised. The presumption can be rebutted in certain circumstances, in which case a standard of correctness would apply where the courts substitute their own view and show no deference to the tribunal's decision.

(m) Enforcing Judgments

A7.133 Once a final judgment has been obtained, there are a variety of steps that a judgment creditor (i.e., a person who is owed money as a result of a court order) may take to enforce the judgment. Those steps include investigation, seizure and sale of the debtor's real and personal property, and garnishment of wages and other debts. The responsibility for enforcing the judgment rests on the judgment creditor.

A7.134 Judgment creditors do not, by virtue of their judgments, achieve any priority status, as against, for example, secured creditors. If the judgment debtor (i.e., the person who owes money as a result of a court order) has little or no assets, the judgment creditor may find it impossible to collect the money owing under the judgment. In most cases, if a judgment debtor declares bankruptcy, the judgment debt will be discharged with the bankruptcy.

A7.135 Although the enforcement process can be cumbersome, particularly where real property is involved, the procedures available for enforcing judgments and other court orders can be used effectively if a creditor is intent on recovering the fruits of its judgment.

A7.136 A judgment given in one Canadian province is entitled to recognition and enforcement in another Canadian province, as long as there is a real and substantial connection between the original province and the subject matter in question or the defendant. In order to do so, however, the judgment creditor will have to obtain an order from the court of the other province.

A7.137 Several of the provinces have reciprocal enforcement of judgments legislation. This legislation allows a judgment creditor in a province to apply to the court of that province for an order registering a judgment from a reciprocating province. The result of registering a foreign judgment in this manner is that it will be of the same force and effect as if it had been a judgment given in the registering court on the date of the registration. As well, the registering court will have the same control and jurisdiction over the foreign judgment as it has over judgments it itself gives. The reciprocal enforcement legislation often does not allow a judgment to be registered if the defendant did not submit to the jurisdiction of the original court by defending the action, in such cases, the judgment creditor may have to resort to the common law.

A7.138 If the defendant did not submit to the jurisdiction of court of the original province (e.g., if the plaintiff obtained a default judgment), then the judgment creditor will have to commence another legal action in the other province for an order enforcing the original judgment. Under Canadian law, a judgment creditor is entitled to succeed in the subsequent action to enforce without having to re-litigate the merits of the original claim, as long as the judgment creditor can prove that the defendant or the subject matter of the original claim had a real and substantial connection to the original province.

(i) Investigation: Examination in Aid of Execution

A7.139 In addition to whatever private investigatory means may be available to a judgment creditor, there are legal procedures that can be used to compel a judgment debtor to provide information that may facilitate enforcement.

A7.140 In most provinces, judgment creditors are entitled to compel a judgment debtor to attend an examination (often called an examination in aid of execution) to answer questions under oath. At such an examination a creditor may question a judgment debtor as to any matter pertinent to the enforcement of the judgment, the reason for non-payment or non-performance of an order, the income and property of the debtor, the debts owed to and by the debtor, the disposal the debtor has made of any property, either before or after the judgment, and the means the debtor has or may have to satisfy the order.

A7.141 In some provinces, the court has the discretion to order the attendance of any other person who may have knowledge of the debtor's circumstances, including the debtor's spouse.

A7.142 In BC, a judgment creditor has the additional right to serve a subpoena on the debtor requiring the debtor to attend a hearing on a specified date. The subpoena to debtor differs from an examination in aid of execution in that it is held before an examiner (usually a Court Registrar). The range of questions that may be put to a debtor under a subpoena process is narrower than on examination. For example, in BC it has been held that the scope of permissible questions under the subpoena to debtor process is limited to an examination of the judgment debtor's present ability to pay the judgment. The advantage of a subpoena to debtor is that an immediate order for repayment may be made by the examiner, with imprisonment as a potential penalty for failure to comply.

(ii) Seizure and Sale of Real and Personal Property Real Property

A7.143 A judgment creditor may execute its judgment against any real property (i.e., land) owned by a debtor. The creditor must first register the judgment against the title interest of the debtor. Unless it is renewed, a registration will generally expire after a set period of time (e.g., two years in BC, six years in Ontario).

A7.144 Once a judgment is registered against title to real property, a judgment creditor can seek to have the debtor's interest in the property sold. There are different procedures in place in each province for the sale of the debtor's land. Some provinces require that there be a hearing before the land can be sold, and others have waiting periods after the registration. Ultimately, once the procedures are complied with, the sale of the land will generally be carried out by an appointed official such as a sheriff or bailiff.

A7.145 A judgment creditor is not a secured creditor, and if there are other charges (such as a mortgage) registered against the title to a debtor's property at the time a judgment is registered, they will rank in priority to the judgment. Further, a judgment creditor will only rank equally with other judgment creditors whose judgments are registered against title to the debtor's property, even if those registrations are made later in time, but prior to sale. Where there are no mortgages, liens or similar encumbrances registered against the judgment debtor's interest in the land, the proceeds of sale will typically be distributed rateably among the recognized creditors. Where a judgment debtor has only a joint or partial interest in the property, only that interest is subject to being sold.

(iii) Personal Property

A7.146 All goods, chattels and personal property of a judgment debtor are liable to seizure and sale by a judgment creditor, except for certain exempted items and amounts. Items exempted from seizure may include household items, work tools, essential clothing and essential medical aids.

A7.147 To seize personal property, a creditor must first obtain a writ on application to the court registry. A writ remains in force for a limited period of time, but it may be renewed. The seizure and sale of the debtor's property is carried out by appointed officials (such as sheriffs and bailiffs). If assets are seized and sold, the creditor is entitled to the costs of the enforcement. Normally the proceeds from the sale of property are distributed rateably among the recognized creditors. However, any amounts owing for family support or maintenance orders will generally take priority over any other unsecured judgment debts

(iv) Garnishment of Debts

A7.148 One of the most effective enforcement tools is garnishment. A garnishing order when served, requires the party served to pay into court, instead of paying the judgment debtor, any money currently owed to the debtor. A creditor may obtain a garnishing order by applying to the court registry after judgment. Information as to likely sources of monies owing to the judgment debtor can be obtained through the examination in aid of execution process.

A7.149 Typically, a garnishing order will be served on the bank branch where the debtor maintains an account and on the debtor's employers or customers. In some provinces, a portion of the judgment debtor's wages will be exempt from garnishment. A party subject to the garnishing order (e.g., the bank or employer) must pay into court the amount that is owing to the creditor. The money is then usually paid out proportionately to all registered judgment creditors.

(8) CLASS ACTION PROCEEDINGS

A8.1 Class actions are proceedings brought by a representative plaintiff on behalf of or for the benefit of a class of persons having claims with common issues. The fundamental

purpose of a class action is to efficiently address cases of alleged mass wrong and to improve access to justice for those whose claims might not otherwise be pursued.

A8.2 Canadian class actions have been commenced in such varied areas as product liability, environmental contamination, consumer protection, pension plans, securities, antitrust, financial services, insurance, and employment disputes.

A8.3 Class action legislation was not intended to create any new cause of action. Instead, it provides a purely procedural tool to address mass claims by allowing one or more persons to bring an action on behalf of many.

A8.4 Formal class action legislation is currently in force in most provinces. The Supreme Court of Canada has held that class actions can be commenced even in those provinces without formal legislation.

(a) Class Actions Versus Representative Actions

A8.5 Virtually all Canadian provinces, including those with class action legislation, have rules permitting representative actions in certain circumstances. In representative actions, one or more persons may be appointed to represent a person or class of persons who cannot be readily ascertained, found or served. In a representative action, any order (including a settlement order) is binding on a person or class of persons represented and success for one of the plaintiffs must mean success for all.

A8.6 Until more recently, Canadian courts interpreted the rules for representative actions very narrowly. However, in 2001, the Supreme Court of Canada ruled that a representative action rule provided a provincial court with a sufficient basis for a class action even in the absence of specific class action legislation.

A8.7 Unlike the historical use of representative actions, class actions permit class litigation to proceed, notwithstanding differences between class members. The legislation permits the global resolution of issues common to the class, with individual issues to be separately determined.

(b) Certification and Decertification

A8.8 Class proceeding legislation anticipates that a class action will be commenced in the same manner as an ordinary lawsuit. That action will include in it a claim that is brought on behalf of a defined class of two or more members against the defendants. In most provinces, the plaintiff is required to make an application to certify the action as a class proceeding shortly after the action is commenced. Until the action is certified by the court, the representative plaintiff cannot proceed on behalf of the class. In Quebec, the application or motion to certify the class proceeding is made before the claim is issued.

A8.9 The certification application occurs before a judge. In the common law provinces, the requirements for certification of a proceeding as a class proceeding are similar and, in general, include the following:

- The pleading must disclose a cause of action.
- There must be an identifiable class of two or more persons.
- The claims of the class members must raise issues against the defendants that are common to all class members.
- The class proceeding must be the preferable procedure for the fair and efficient resolution of the common issues.

– There must be a representative plaintiff who would fairly and adequately represent the interests of the class and who does not have a conflicting interest with other class members.

A8.10 Quebec's CCP lists the following four criteria for class action certification (the CCP uses the term 'authorization'):

(1) the claims of the members of the class raise identical, similar or related issues of law or fact;
(2) the facts alleged appear to justify the conclusions sought;
(3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and
(4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

These criteria are somewhat similar to those of other provinces, although they are largely considered to be more lenient. Historically, Quebec has been thought to have the lowest authorization threshold because, among other reasons, its legislation made no express mention of 'preferability' as a requirement. The Supreme Court has reiterated in recent decisions that the Quebec class action authorization threshold is low. In a major recent decision, the Supreme Court reemphasized the liberal approach to class action authorization and noted that an authorizing judge could not step outside the authorization criteria and evaluate the appropriateness (let alone the preferability) of a class action.

A8.11 Notice of certification of a class proceeding must be given to members of the class. The method of providing a notice to the class members is largely dependent upon the size and nature of the class and can range from notice by mail to known class members to mass media publication. Notice of the certification order is given to all potential class members and a time period is established to allow the class members to opt out of, or for non-residents in some provinces, opt into the proceeding.

A8.12 A court may also order the decertification of a class proceeding where new information arises or events occur in which the conditions for certification are no longer satisfied. If a class proceeding is decertified, the action may continue as one or more proceedings between different parties.

(c) Class Membership Requirements

A8.13 The Canadian provinces differ in their requirements for participation in a class proceeding.

A8.14 Ontario, Manitoba, Saskatchewan, Quebec and Nova Scotia have 'opt out' regimes regardless of residency, whereby all class members who do not wish to be members of the certified proceeding must take active steps to opt out of the proceeding or they will remain members of the class and be bound by a judgment or settlement of common issues.

A8.15 In Alberta, BC, New Brunswick and Newfoundland there are separate regimes for resident and non-resident class members. In those provinces, resident class members are given an opportunity to opt out. However, class members who reside outside of the province must opt into the class proceeding by taking an affirmative step (as set out in the certification order) if they wish to participate in and be bound by the class action. Prince Edward Island is the only province in Canada without class proceedings legislation.

However, under common law, the PEI courts may certify class actions under existing rules of practice related to representative proceedings, applying principles and ad hoc procedures similar to those legislated in other provinces.

A8.16 All Canadian jurisdictions allow for certification of national classes (classes with members in more than one or all provinces). The Ontario act is silent on the issue of including non-residents as class members. Ontario courts have taken the approach of certifying national class action on an opt-out basis, subject to a real and substantial connection between the subject matter of the action and Ontario. Class action legislation in BC, Alberta, Saskatchewan and Newfoundland expressly deal with national classes and allow for non-residents to opt in to a class proceeding commenced in another province. Only Manitoba class action legislation has adopted the opting out process for non-resident class members. This raises the possibility of multiple competing provincial class actions. The Canadian Bar Association adopted the Canadian Judicial Protocol for the Management of Multijurisdictional Class Actions and the Provision of Class Action Notice as best practices. The protocol has been implemented by Alberta, BC and Ontario. Generally, the class action plaintiff's counsel take a cooperative approach in dealing with multi-class actions. Quebec courts have resisted the urge to certify national classes without a real and substantial connection to Quebec. This case law should be approached with a degree of caution in light of the 2016 legislative changes. In 2016, Quebec enacted Article 575 which prevents a Quebec court from denying an application for authorizing for the sole reason that members of the class are engaged in a class action pending outside of Quebec. The article further requires that the Quebec court takes into consideration the protection of the rights and interests of Quebec residents if and when it is asked to decline jurisdiction or suspend a motion for authorization to institute a class proceeding in Quebec.

(d) Conduct of Class Action Proceedings

A8.17 Once the action is certified, it will proceed through the normal discovery process on the common issues. The defendant has a right to examine for discovery the representative plaintiff(s) in the action. With leave of the court, the defendant may also discover other class members.

A8.18 Generally, the judge who makes the certification order will hear all of the motions in the class proceeding up to the trial of the common issues. Depending on the province, that same judge may also hear the common issues trial.

A8.19 The resolution of the issues in a class proceeding may require more than one trial. The first trial, on the common issues, will resolve the issues certified as common to the class. In some cases, the common issues trial may include a ruling on the entitlement to, and quantum of, aggregate damages. Statistical evidence may be used at the trial of the common issues in certain circumstances. Judgment on the common issues is binding on all members of the class who have not opted out of the proceeding and all consent resolutions of a certified class proceeding, such as settlement or dismissal, are also binding on the class members, provided they are approved by the court.

A8.20 Once there has been a determination of the common issues, there will, in many cases, be a need for further assessment of individual claims. If there is an aggregate award in favour of the class, a method must be established, through consultation between court and counsel, to distribute the award to the class members. If individual issues remain to be determined after the court has adjudicated the common issues, then a procedure must be established for the assessment of those claims. The court has a broad discretion to establish methods of assessing

individual claims ranging from the filing of proofs of claim to complete trials on individual issues. The method of assessment chosen by the court will take into consideration the facts of each particular case, the amount of damages and the extent of the issues outstanding.

(e) Appeals

A8.21 In the common law provinces, there is a right of appeal from any order refusing to certify a proceeding or decertifying a proceeding. In some provinces, an order certifying a class proceeding may only be appealed with leave of the court. In Quebec, there is a right of appeal from an order refusing to authorize a class proceeding. However, defendants must seek leave to appeal an order certifying a class action and the criteria for obtaining such leave is restrictive.

A8.22 There is a right of appeal in all provinces from a judgment on the common issues. In addition, appeals as of right are normally available from orders that determine individual issues.

A8.23 If a representative plaintiff does not bring an appeal from an order made on the certification hearing or a judgment on common issues within the time limits for such an appeal, or abandons an appeal, any class member may pursue the appeal with leave of the court.

(f) Awards, Costs, Funding and Counsel Fees

A8.24 The Canadian jurisdictions differ on the matter of costs. In Ontario, Nova Scotia and Alberta, costs may be awarded against the losing party in a class proceeding (i.e., the representative plaintiffs or the defendants) in the same manner as in any other action. In BC, Manitoba and Newfoundland, on the other hand, costs are not normally awarded in a class proceeding. In these jurisdictions, the courts do have some discretion to award costs where the court considers the conduct of one of the parties to be vexatious, frivolous, or abusive. Saskatchewan amended its class actions legislation to move from a 'no costs' structure into one where the courts have the right to make any order of costs it considers appropriate.

A8.25 The representative plaintiff is required to retain a lawyer to act on behalf of the entire class for the determination of the common issues. Contingency fees are permitted in all provinces. The agreement respecting counsel fees and disbursements must be in writing and state the terms under which the fees and disbursements are to be paid, give an estimate of the expected fee, state whether that fee is contingent on success and set out the method by which payment is to be made. In most provinces, the agreement respecting fees and disbursements between a lawyer and the representative plaintiff is not enforceable unless it is approved by the court on the application of the lawyer. Amounts owing under an enforceable agreement are a first charge upon any settlement funds or monetary award.

A8.26 In some jurisdictions the representative plaintiff may obtain funding for some legal costs from publicly endowed funds.

(9) MEDIATION

A9.1 Mediation is a method of dispute resolution in which two or more parties meet with the assistance of an impartial mediator to attempt to agree to a settlement of the dispute between them. The mediator has no authority to issue any orders or to compel the parties to enter into a settlement. The mediator's role is simply to assist the parties to reach an agreement among themselves.

A9.2 Prior to the mediation being held, the parties will normally exchange a brief summary of their positions and copies of the most relevant documents. At the start of the mediation each party can make an opening statement, either in person and/or through its lawyer. This is usually followed by an open discussion between the parties. After the parties have explained their positions to each other, the mediator will often separate them into different rooms, and the mediator will then speak to each party in private and attempt to help them come to a resolution. The mediator may present settlement offers from one party to the other and explain the rationale for the offers.

A9.3 Mediation may be used as a form of dispute resolution on its own before the commencement of adversarial proceedings like a court action or an arbitration, or mediation may be used during the course of adversarial proceedings.

(a) Advantages and Disadvantages of Mediation

A9.4 There are many benefits and advantages to mediation. A mediation can be conducted in a short time frame. Usually a mediation is completed in less than a day. It is less costly and less formal than a trial or an arbitration hearing. Mediation is a confidential process. All of the information revealed at a mediation is legally privileged and the parties are not entitled to rely on the information in any subsequent litigation or arbitration. The parties have some control in selecting the mediator and establishing the procedure for the mediation. They can choose a mediator who is not a lawyer or judge, and thus they can choose an expert in the area in dispute. Because the parties are involved in structuring the settlement, they can be creative and implement business solutions that would not be available to a court deciding a lawsuit. In some cases, a mediated settlement will allow the parties to continue their business relationship.

A9.5 The main disadvantage of mediation is that, if it fails, the parties will have spent time and money on the process without achieving a settlement. However, even if a complete settlement is not achieved, benefits may be gained. For example, issues or claims may be narrowed or resolved and partial settlements may be achieved with some parties in multiparty disputes. Information disclosed during the mediation may assist in assessing the strength of your position or that of your opponent.

A9.6 Nonetheless, there are circumstances in which mediation may not be the best course of action. If there is a disparity with respect to the power of the parties or a party is unable to afford to proceed with litigation, the other party will have more power in the mediation and that imbalance may preclude a satisfactory or fair outcome at mediation. Further, there may be cases in which extensive pre-hearing discovery of documents or witnesses is important, given the nature of the allegations or the defence. In such cases it may be best to delay mediation until after the discovery process is completed.

A9.7 In the event that the matter will set a precedent for other similar situations or if a party wants a binding determination of law or an interpretation of legislation, the matter is not likely appropriate for mediation. Further, if one of the parties does not have a legitimate intention to attempt to resolve the matter, the mediation will likely be futile.

(b) Court-Annexed Mediation

A9.8 There is a trend in favour of mandatory consideration and/or participation in alternative dispute resolution in courts across Canada.

A9.9 The Rules of Civil Procedure in Ontario establish mandatory mediation for nearly all civil cases and cases related to the administration of an estate or trust that are commenced in the cities of Toronto, Ottawa, and Windsor. Such cases in those cities must be mediated before proceeding to a trial.

A9.10 In Quebec, though not mandatory for all proceedings, the CCP offers a settlement conference where, at any stage of the proceedings, the Chief Justice may, at his own initiative and with the consent of the parties or at the request of the parties, designate a judge to preside at a settlement conference to facilitate dialogue between the parties and explore mutually satisfactory solutions to the litigation.

A9.11 In Alberta, the Rules of Court, in effect as of 1 November 2010, require that parties participate in a dispute resolution process, or have that requirement waived by the court, in order to secure a trial date. Dispute resolution processes include the use of an impartial third-party mediator, court-annexed dispute resolution, judicial dispute resolution, or any other programme or process as designed by the court. On application, the court may waive the requirement of a party to attend dispute resolution. Grounds for such an application include situations where there would be no benefit in continuing the process or where it is desirable to continue to trial.

A9.12 In BC, a Notice to Mediate process has been established by regulation whereby a party in a Supreme Court process may require all of the other parties to attend a mediation by delivering a Notice to Mediate. The Notice to Mediate regulations apply to a broad range of civil, non-family actions. Certain small claims matters in certain registries are also subject to mediation.

(c) Enforcement

A9.13 At the conclusion of a successful mediation, the parties will normally memorialize the terms of the settlement in a written document that is signed by the parties and their lawyers. Depending on the circumstances, it may be possible to enforce an oral settlement agreement, but it is more difficult to do so.

A9.14 Public policy in Canada encourages parties to settle litigation, and, as a result, it also favours the enforcement of all valid settlement agreements. There are some limited circumstances in which a court will not enforce a settlement, for example, if one of the parties is under a mental disability the settlement must be approved by the court before it is enforceable.

A9.15 A settlement agreement is a contract, and it may be enforced just like any other contract. If one party fails to comply with the terms of a settlement, the non-breaching party may have the option to accept the failure to comply as a repudiation of the contract of settlement and proceed to litigate the original dispute as if there was no settlement. The non-breaching party will likely also have the option to start a court action to enforce the terms of the settlement. If the terms of the settlement are adequately documented in a written agreement, it will often be faster and easier to enforce the settlement agreement than it would be to litigate the original action. Ontario has passed legislation, the Commercial Mediation Act, 2010, which makes it possible to enforce a settlement agreement resulting from the mediation of a commercial dispute without having to start a court action as the settlement agreement, in certain cases, can be registered with the court and enforced as if it were a judgment of the court.

(10) DOMESTIC ARBITRATION

A10.1 There is an increasing trend in Canada towards resolving commercial disputes by arbitration, rather than through litigation in the courts. In most cases, Canadian courts will enforce an agreement to submit a dispute to arbitration and the resulting arbitral award.

A10.2 Arbitration is a quasi-judicial form of dispute resolution by one or more decision makers called arbitrators, usually appointed by the parties. Most arbitrations involve a hearing similar to a trial in a court action, resulting in a binding decision. However, the arbitration process is often less formal. For instance, the rules of evidence applicable to trials in court typically do not apply or are relaxed.

A10.3 All of the jurisdictions within Canada have now enacted legislation governing arbitrations. While there are differences between these statutes, they contain many similar provisions. In general, these statutes oust the jurisdiction of the courts over disputes that the parties have agreed to submit to arbitration, require a stay of related court actions, and allow the court to intervene in an arbitration only in limited circumstances. The general, domestic arbitration acts do not govern certain types of arbitrations, most notably arbitrations in the labour field which are governed by separate, more specific statutes, and international commercial arbitrations which are governed by the UNCITRAL Model Law (*see* section A6(d) above).

A10.4 The general arbitration statutes in many of the provinces provide that the law with respect to limitation periods applies to an arbitration as though the arbitration proceedings were an action before the courts.

(a) Advantages and Disadvantages of Arbitration

A10.5 Arbitration does have a number of advantages in many circumstances and it can lead overall to a more satisfactory dispute resolution process. However, there are also certain inherent and circumstance-dependent disadvantages that should be considered before agreeing to arbitration.

A10.6 Perhaps the most significant advantage of arbitration is that the parties can agree upon a mutually acceptable decision maker. This can be particularly useful if the nature of the dispute calls for specialized or technical knowledge not likely held by a judge of the court. In addition, this allows the parties to review the background and other characteristics of the arbitrator before the decision-making power is ceded, which is an opportunity not normally afforded in court actions.

A10.7 There are many other advantages that might be available, especially if the parties can reach agreement on procedural and other matters. The process is relatively unfettered in its flexibility and adaptability. Also, quite different from the open and public nature of court proceedings which is difficult to displace, the parties can agree that the nature of the dispute, the arbitration proceedings, and the award shall be kept private and confidential, which is often valuable in cases involving commercially sensitive information. In addition, to achieve earlier finality and to reduce cost, the parties can agree to eliminate appeal rights to a significant extent, which parties are more inclined to do for arbitration proceedings determined by a mutually agreeable decision maker. Arbitrations are also well-suited for virtual hearings as the Canadian arbitration bar has a history of working electronically.

A10.8 Depending on one's perspective and strategy for a particular dispute, there are other aspects of arbitrations that may be advantageous or disadvantageous.

A10.9 A significant benefit to potential corporate defendants is the possibility of excluding class action proceedings through a properly drafted arbitration submission clause. However, in the province of Quebec, consumer protection legislation renders arbitration clauses unenforceable in consumer contracts, thus negating this benefit of arbitration clauses.

A10.10 For disputes involving an intransigent party not willing to participate in any process at all, there are certain aspects of arbitrations that can tend toward a more expeditious and less costly resolution. Typically, the arbitral tribunal is cloaked with the jurisdiction to set and control the process with these goals in mind. Depending on the approach of a particular arbitrator, intervention of this nature may begin at the earlier stages of the dispute. Also, while certainly available in some cases, it is relatively uncommon for there to be examinations of witnesses before the hearing, in the form of examinations for discovery or depositions. In addition, a carefully crafted pre-dispute arbitration clause in a commercial agreement can substantially reduce the opportunities for delay tactics by an unwilling party in the face of a subsequent unwanted dispute. On the other hand, a recalcitrant party can sometimes find refuge in the absence of established rules of procedure for arbitrations, which can lead to cost and time similar to, or greater than, that experienced in court actions.

A10.11 Arbitration does not work well when it is desired that a precedent be set by the resolution of the dispute because arbitrations are often conducted in private and on a confidential basis and also because there is no public registry for arbitration decisions. In certain instances, difficulties can be encountered in relation to the bounds of the jurisdiction of the arbitral tribunal, compared to the wide-sweeping inherent jurisdiction of the courts. Jurisdictional issues can arise as to whether the arbitral tribunal has the power to decide all substantive claims related to the dispute before it, whether the arbitral tribunal can grant certain types of relief such as punitive damages and security for costs, and whether it is practical to seek remedies such as emergency interim injunctive relief from an arbitral tribunal. Unintended difficulties also can arise in instances where there are multiple parties to a dispute and only some of the parties are bound by an arbitration clause.

(b) Arbitration Agreement and Procedures

A10.12 An arbitration agreement can be written or oral, and it can be detailed or general. In some instances, parties will agree to include an arbitration clause in a commercial agreement, before any dispute exists, so that any dispute that may later arise in respect of the agreement will be resolved through arbitration. In such cases, in general, neither of the parties has recourse to the courts for resolution of the dispute. In other instances, in the absence of a pre-dispute arbitration submission clause, the parties may agree to submit a dispute to arbitration after it arises, even after court proceedings have been commenced.

A10.13 Usually, at a minimum, arbitration clauses stipulate the nature and extent of the disputes to be arbitrated and whether there will be one or more arbitrators. Arbitration clauses also commonly specify the rules of procedure that are to govern the proceedings, either by setting these out or by incorporating rules set out in a particular statute or developed by a recognized body. A more detailed arbitration submission clause, included in a commercial agreement at the outset of the relationship before any dispute, can result in a much more satisfactory dispute resolution process than might be agreed upon by both parties after a dispute has arisen.

A10.14 The enforceability of an arbitration clause may be subject to consumer protection legislation. In Quebec, a clause that obliges a consumer to refer a dispute to arbitration is

prohibited, although after a dispute arises, the consumer may agree to refer the dispute to arbitration.

A10.15 Subject to certain basic requirements, the parties can mutually agree on a process completely tailored to the particular circumstances of the dispute to achieve a just resolution in the most efficient and economic manner possible.

(c) The Arbitration Award, Interest, Costs, and Enforcement

A10.16 Generally, an arbitration award is to be made in writing, and shall state the reasons on which it is based. Unless the arbitration award is varied or overturned on any appeal or set aside, it is binding on the parties.

A10.17 Usually, in the absence of a contrary agreement between the parties, the arbitral tribunal has the same powers as a court with respect to awarding interest and costs. In relation to costs, normally, the default is a complete discretion over the costs of the arbitration proceedings, including the arbitrator's own costs. This discretion will likely be exercised with reference to the general 'loser pays' principle in Canada, on a reduced tariff basis. However, the parties can limit or eliminate the arbitrator's jurisdiction in this respect by agreeing on creative formulae or other provisions regarding liability for costs.

A10.18 The provincial and territorial arbitration acts provide for the enforcement of arbitral awards through a straightforward application to the court. This has the effect of converting the arbitral award into a judgment of the court, upon which normal enforcement or execution proceedings may be undertaken. Some of these statutes provide such a process for arbitral awards made anywhere within Canada.

(d) Appeals

A10.19 Parties to an arbitration are generally able to exclude rights of appeal in most instances. The parties also may agree to preserve rights of appeal. Under most arbitration statutes in Canada, in addition to any rights of appeal, an arbitral award may be set aside on various grounds, including an invalid arbitration agreement, an award outside of the jurisdiction of the arbitrator, an improperly composed arbitral tribunal, manifestly unfair or unequal treatment of a party, a reasonable apprehension of bias on the part of the arbitrator, or an award obtained by fraud.

A10.20 In the province of Quebec, the situation in respect of a right of appeal of an arbitration award is different. There is no right of appeal of the arbitration award and the parties cannot contractually preserve rights of appeal as such. In order to be enforceable as a judgment, an arbitration award must be homologated by the Court of Quebec. The CCP provides that, as a general rule, courts should only refuse homologation for very limited procedural grounds, and never based on the merits of the case. As such, the only possible recourse against an arbitration award is an application for its annulment, which is obtained by application to the Court or by opposition to a motion to homologate the arbitration award. The motion for annulment or opposition to homologation must be filed within three months after the arbitration award is issued. A right of appeal does lie with the Court of Appeal of Quebec against a homologation or cancellation judgment rendered by the Court of Quebec.

A10.21 Appeals and applications to set aside arbitral awards are usually governed by strict timelines which the court may not be able to extend.

(e) Commercial Arbitration Act

A10.22 The federal Commercial Arbitration Act (CAA) governs arbitrations where at least one of the parties to the arbitration is the federal Government of Canada, one of certain specified departments of the federal government, or a Crown corporation wholly owned by the federal government. The CAA applies to arbitral awards and arbitration agreements whether made before or after the CAA came into force.

A10.23 The CAA adopts the *Commercial Arbitration Code*, based on the model law adopted by UNCITRAL, with only those changes necessary to Canadianize the model law with specific reference to 'Canada' or its courts. Otherwise, the UNCITRAL model law applies unamended to all applicable arbitral awards and arbitration agreements.

(11) REGULATORY AGENCIES AND TRIBUNALS

(a) General Nature and Purpose of Regulatory Agencies

A11.1 Canadian provinces and territories have numerous administrative agencies, tribunals, boards, and commissions that regulate a wide range of activities and business interests. The operations of nearly every business may be affected in some way by the activities of one or more of these agencies.

A11.2 These agencies regulate activities as disparate as the marketing of milk and wheat; the conduct of professionals such as investment advisors, physicians and lawyers; minimum labour and employment standards and human rights issues; land use, expropriation and zoning; telecommunications and broadcasting; capital markets and the protection of investors; and anti-competitive and other illegal business practices.

A11.3 Administrative agencies and tribunals are set up by legislation, and they acquire their jurisdiction and authority from that legislation. The procedures of each tribunal vary as much as their areas of responsibilities and expertise but, in general, all agencies are required to comply with the principles of natural justice and procedural fairness which require that parties affected by their decision be given an opportunity to be heard, either orally or in writing.

A11.4 The decisions of some agencies and tribunals are expressly subject to appeal to the civil courts, while other agencies are protected by a 'privative clause' that provides that their decisions are final and not subject to appeal or in some other manner directs the court to show deference to the tribunal's decision.

A11.5 In cases involving a 'privative clause', the civil courts still have the authority to review the decision of the tribunal and the procedures that the tribunal employed to ensure that the tribunal did not exceed its authority and that the tribunal complied with the rules of natural justice and procedural fairness.

A11.6 The standard of review employed by a court on an appeal or on a judicial review of an administrative decision will depend on the legislative intent in conferring jurisdiction on the administrative tribunal. A different standard of review may be applicable to different types of decisions by the same tribunal.

A11.7 The Supreme Court of Canada has implemented two distinct review standards:

– The standard of reasonableness, where the court will uphold the tribunal's decision if the court believes it was a reasonable decision. A court conducting a

review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. Reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process, and with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

– The standard of correctness, where the court will only uphold the tribunal's decision if the court concludes for itself that the tribunal's decision was correct. Under this standard of review, judicial deference is at its lowest. The Supreme Court of Canada recently revisited the administrative law principles and the law of judicial review in Canada. The Court has established that reasonableness is the presumptive standard of review. This presumption can be rebutted in situations where the governing statute provides explicitly for a correctness standard or right of appeal, or where certain legal questions are at issue (e.g., constitutional or administrative jurisdiction), then the applicable standard will be correctness.

A11.8 Prior to the recent Supreme Court of Canada decision, contextual factors, such as private clauses, were used to determine the standard of review. Such factors no longer serve an independent function in identifying the standard of review. Now that there is a presumption of reasonableness as the starting point, expertise of a tribunal is also not relevant to a determination of standard of review. This factor, however, remains a relevant consideration in conducting the reasonableness review.

A11.9 The role of some of the tribunals that have the most impact on Canadian businesses is described below.

(b) Competition Tribunal

A11.10 Certain non-criminal conduct regulated by the *Competition Act* of Canada is reviewable by the Competition Tribunal. The members of the Tribunal include judges and persons with expertise in economics and business, and they are appointed by the Government of Canada to hear and decide applications under Parts VII.1 and VIII of the *Competition Act*.

A11.11 Reviewable practices are not criminal and are not prohibited until made subject to an order of the Tribunal specific to the particular conduct and party. Matters reviewable by the Tribunal include refusal to deal, exclusive dealing, tied selling, market restriction, abuse of dominant position, price maintenance, and certain other 'anti-competitive' acts. The Tribunal can order a person to do or cease doing a particular act in the future if it finds, on the civil standard of the balance of probabilities, that a person has engaged in the reviewable activity. The Tribunal cannot impose a penalty for most reviewable practices; the Tribunal can impose administrative monetary penalties under the abuse of dominance and certain deceptive marketing practices provisions.

A11.12 Breaches of certain provisions of the *Competition Act* and breaches of orders of the Competition Tribunal may constitute criminal offences. Criminal charges are prosecuted in the normal criminal courts and not before the Tribunal.

A11.13 In most cases, complaints are brought to the Tribunal by the Commissioner of Competition who is appointed by the federal government to administer the *Competition Act*. However, private individuals and corporations do have the right to seek permission from the Tribunal to bring complaints directly to the Tribunal in relation to five limited areas – exclusive dealing, tied selling, refusal to deal, price maintenance, and market restriction.

A11.14 With respect to mergers, if the Commissioner concludes that a merger transaction is likely to prevent or lessen competition substantially, the Commissioner may challenge the transaction before the Tribunal. The Tribunal has broad authority to dissolve a completed merger, to order a purchaser to dispose of all or some assets or shares, or to order the parties not to proceed with all or part of a proposed merger if the Tribunal finds, on the balance of probabilities, that a merger or proposed merger prevents or lessens, or is likely to prevent or lessen, competition substantially in a relevant market and the efficiencies likely to result from the proposed transaction do not outweigh its likely anti-competitive effects.

A11.15 In considering whether to make such an order, the Tribunal is directed to consider a number of factors, such as the extent of foreign competition, whether the business being purchased has failed or is likely to fail, the extent to which acceptable substitutes are available, barriers to entry, whether effective competition would remain, whether a vigorous and effective competitor would be removed, the nature of change and innovation in a relevant market, and any other factor relevant to competition.

(c) Securities Commissions in Canada

A11.16 Canada does not have a national securities regulator. The regulation of the capital markets is carried out largely within provincial jurisdiction. Accordingly, each province has established laws, regulations, rules and policies concerning the governance of the capital markets. Uniformly throughout Canada, each province has established a Securities Commission within the province to regulate and enforce securities laws. Happily, the various Securities Commissions have in large measure adopted similar or harmonious approaches to most aspects of the means by which the capital markets are governed. The Canadian Securities Administrators is the informal body through which the various provincial securities regulators cooperate to achieve consistent governance practices and explore policy initiatives. The Supreme Court of Canada unanimously held in a reference that the federal government's proposed Cooperative Capital Markets Regulatory System (CCMR) was constitutional. The CCMR aims to replace securities regulation in participating jurisdictions with a harmonized regulatory framework. However, not all provided have signed on to the CCMR.

A11.17 Under its empowering legislation, each provincial Securities Commission is responsible for the administration of the respective provincial *Securities Act* and is obliged to perform all the duties assigned to the Commission pursuant to the respective *Securities Act*. These duties entail administrative functions, rule-making and policy-making functions and, significantly, investigation and enforcement functions.

A11.18 The investigation and enforcement provisions are substantially similar across the provincial Securities Commissions.

A11.19 To enforce the securities laws of each province, the Securities Commissions are given substantial enforcement authority. That authority includes the ability to investigate any matter the Commission may consider expedient:

- For the due administration of securities laws or the regulation of the capital markets in each province.
- To assist in the due administration of the securities laws or the regulation of the capital markets in other jurisdictions.

A11.20 The investigation authority allows persons appointed by the Commission to investigate or inquire into the affairs of any person or company, including the right to

examine persons, documents or things in respect of which the investigation is ordered. The power of the person making the investigation is extensive and includes the power to summon and enforce the attendance of any person and the authority to compel that person to testify on oath or otherwise. Based upon the results of an investigation, the Securities Commissions are given the concomitant authority to conduct administrative or regulatory hearings before a quasi-judicial tribunal composed of appointed commissioners.

A11.21 In addition to the administrative hearing capacity, the Ontario Securities Commission is empowered to bring quasi-criminal prosecutions under provincial offence legislation. There are three types of quasi-criminal offences:

(i) General offences, such as making an untrue statement to the Commission.
(ii) Offences by directors and/or officers, such as acquiescing in the commission of a general offence.
(iii) Insider trading and/or tipping offences. Anyone who commits an offence of this type is liable to a maximum fine of CAD 5 million and/or a maximum prison term of five years.

A11.22 In BC, charges may be laid by the provincial government under the *Offence Act* and heard in a provincial court.

A11.23 While the subject matter of any Securities Commission investigation or hearing can be quite diverse, the subject matter of hearings or prosecutions tends to emphasize the Securities Commission's principal purposes of enforcing requirements for timely, accurate and sufficient disclosure of information to the capital markets by capital markets participants. It also includes investigation and enforcement proceedings for the purposes of restricting or discouraging fraudulent and unfair market practices and procedures and, also, for the purposes of maintaining high standards of fitness and business conduct to ensure honest and responsible conduct by market participants. Accordingly, a Securities Commission may conduct hearings into issues such as market manipulation, continuous and accurate disclosure obligations and insider trading violations.

A11.24 Decisions made by a Securities Commission are subject to appeal. Appeals may be taken to the courts, which will act in a supervisory capacity over the decisions of the commissions. Historically, judicial intervention over the decisions of the Securities Commissions has been restrained.

A11.25 The Securities Commissions themselves have appellate authority over 'self regulatory organizations' such as the Investment Industry Regulatory Organization of Canada, the Mutual Fund Dealers Association of Canada, and other industry watchdogs who themselves have specific regulatory jurisdiction over capital markets participants. The appellate authority of the Securities Commissions is expressed broadly, but by convention is as restrained as the appellate authority exercised by the courts over the commissions themselves.

(d) Environmental Protection Agencies

A11.26 A myriad of environmental protection laws and regulations exist at both the federal and provincial levels of government in Canada. These regulations control the discharge of air and water contaminants, the management and disposal of wastes, the exploitation of such natural resources as our forests and minerals, and the importation, manufacture and use of toxic substances such as pesticides. Many activities that fall within the scope of these regulations require government licenses, permits or approvals of one sort or another. Furthermore, government agencies or departments charged with the

administration of Canada's environmental protection laws and regulations are empowered to investigate and prosecute breaches of the law and to issue a variety of orders and other directives that require legal compliance or often expensive environmental remedial action.

A11.27 With respect to enforcement activities, the most common tool available to environmental agencies is the prosecution of an offence before the lower courts, which deal with regulatory non-criminal offences. While some provincial and federal agencies have recently been granted the authority to issue administrative penalties that do not involve judicial processes, this enforcement tool is used less often as the available penalties are relatively minor. Those individuals and corporations prosecuted before the courts are subject to maximum fines that in the case of corporations, can run in the millions of dollars. Individuals, including officers and directors, may be imprisoned, typically, for one to five years.

A11.28 It is not necessary for the prosecuting agency to establish that the accused intended to violate the environmental law in question, as is the case with true criminal offences. However, an accused person is entitled to be acquitted of a regulatory charge if the accused can demonstrate that the offending activity or event resulted, notwithstanding that the person was acting diligently to comply with the relevant law. This is the defence of 'due diligence' that is an important part of Canadian regulatory or 'quasi-criminal' law and has contributed to the need of those involved in activities that can adversely affect the environment to develop environmental management and compliance systems.

A11.29 As a consequence of the discretionary powers granted government agencies to regulate activities by way of orders, directives and permits, environmental protection laws typically include rights of appeal to an independent or quasi-independent tribunal. In addition, environmental protection or assessment laws also include public hearing requirements for significant activities such as large or hazardous waste disposal facilities and large-scale industrial or natural resource projects, to ensure that both the environmental merits of the project and the concerns of the public are addressed before the project is commenced.

A11.30 Environmental appeals or hearings can arise when agencies impose onerous terms and conditions in air, sewage or waste management and disposal permits, or when they simply refuse to issue such a permit. Appeals are also typically available when an environmental agency issues an administrative penalty or an order that requires a person to take investigatory or remedial action. In some cases, these statutory appeals lead to the courts or to the executive level of government, typically a Minister of the Environment or even the full government Cabinet.

A11.31 The procedures utilized by the various environmental protection tribunals vary, in keeping with the general principle of administrative law that a tribunal not be bound by precedent and that it develop its own particular expertise in dealing with the issues that come before it. Accordingly, strict judge-made rules of evidence rarely apply and great efforts are generally taken to accommodate the ordinary citizen in participating in the hearing process. This is particularly the case with respect to environmental protection tribunals, as public participation has always been seen as an important part of environmental protection.

A11.32 For example, environmental impact assessment, which is typically triggered when a major industrial project, such as a hydroelectric dam or a mine requires a government permit, often generates widespread local and regional public concerns as to the likely or potential impact of the project upon the natural and social environment. The intent of the process is not only to require the proponent to demonstrate that it has assessed all the potential environmental impacts and taken steps to mitigate them, but also to demonstrate that the public has been consulted and given an opportunity to voice their concerns and have them

addressed. If the initial public consultation process is unsuccessful in managing such public concerns, then a public hearing may be required to provide a more comprehensive public airing. Often the process is political in nature, as some tribunals merely have the power to report on their hearing to a senior government official and make recommendations.

A11.33 Historically, administrative hearings with respect to appeals from environmental licensing and permit decisions or environmental remediation orders have been less contentious. More recently, however, Canadian environmental agencies have become more aggressive in these areas. As a result, in many parts of the country, there has been a proliferation of appeals to environmental tribunals questioning the wisdom of environmental authorities in exercising their powers. Attempts to address historical soil and groundwater contamination have been particularly contentious, resulting in protracted appeals to environmental protection tribunals and, ultimately, the courts. In many cases, past owners or occupiers have been named in environmental orders, whether or not there is any evidence that they failed to follow the laws that existed at the time or had any involvement in causing the subject pollution or contamination.

(e) The Canadian International Trade Tribunal

A11.34 The Canadian International Trade Tribunal (CITT) is the federal administrative tribunal which is authorized to, among other things, hear customs and federal excise tax appeals, conduct inquiries as part of Canada's implementation of trade remedies such as in the case of dumping/subsidization, and conduct inquiries into complaints by potential suppliers concerning the procurement by the federal government covered by the World Trade Organization) Agreement on Government Procurement, Canada's domestic Agreement on Internal Trade (AIT), Comprehensive and Progressive Agreement for Trans-Pacific Partnership as well as Canada's domestic AIT. In addition to the foregoing, the CITT's mandate includes conducting safeguard inquiries, references on economic and trade issues, and a mandate involving tariffs on textiles.

A11.35 The CITT is a quasi-judicial body that carries out statutory responsibilities independently of government. The CITT has rules and procedures similar to those of a court of law, but they are not quite as strict or formal, and the proceedings are typically much shorter in length.

A11.36 The CITT's mission is to support a fair and open trade system. Each of the principal mandates of the CITT are discussed below.

(i) Bid Protest Tribunal for Procurement Matters

A11.37 The CITT acts as the 'bid protest' tribunal for federal government procurement matters, where a bidder considers the procurement or the treatment of its bid to have been unfair. Complaints made to the CITT must be made within ten business days from the date on which the complainant becomes aware of the flaw in the procurement process. The CITT almost invariably proceeds by way of written submissions from the complainant and the government. It issues its ruling very promptly, typically within three months.

A11.38 If the complaint is upheld, the CITT can make one of several orders, including: (a) an order that a new procurement take place; (b) an order that the contract be awarded to the complainant; and (c) an order awarding damages based on the complainant's lost profit.

A11.39 The CITT is an 'expert' tribunal, in that its members have considerable knowledge of, and experience with, federal government procurement policy and law.

Accordingly, the decisions of the CITT are given considerable weight by the Federal Court of Appeal (the court responsible for reviewing the CITT's decisions) and are not easily overturned by the court.

A11.40 The CITT does not necessarily oust the Federal Court's jurisdiction to hear a procurement dispute between the bidder and the federal government. However, if the dispute is simply or primarily that the procurement violated a trade agreement, the Federal Court could refuse to hear the dispute on the grounds that the dispute should have been pursued by way of a complaint to the CITT – the expert tribunal for the enforcement of the trade agreements.

A11.41 If no trade agreement applies to the procurement, the CITT does not have jurisdiction and the dispute would have to be put before the Federal Court.

(ii) Dumping and Subsidizing

A11.42 International trade agreements and Canadian legislation allow the Canada Border Services Agency (CBSA) to impose duties on imported goods when Canadian producers are adversely affected by unfair international competition.

A11.43 These measures apply where the imported goods:

- are sold at a price lower than in the home market or lower than the cost of production (dumping);
- receive benefits from certain types of government grants or other assistance (subsidizing).

A11.44 The determination of dumping and subsidizing is the responsibility of the CBSA. The CBSA makes both a preliminary and then a final determination of dumping and/or subsidization. The CITT's role in the process is the determination of whether such dumping or subsidizing has caused material injury or retardation or is threatening to cause material injury to a domestic industry. The CITT holds a preliminary injury inquiry exclusively by written submissions to determine whether the complaint filed with the CBSA discloses a reasonable indication of injury. If the CITT makes a negative determination on this point, then the entire investigation is terminated. If the CITT makes a positive determination at the preliminary injury inquiry, then the CBSA proceeds to its own preliminary determination and, at that point, the CITT initiates a formal injury inquiry. If the CITT makes a finding of material injury, the CBSA continues to impose anti-dumping or countervailing duties on the dumped or subsidized imports.

A11.45 Parties to a bid protest or dumping case have the right to have CITT decisions appealed to the federal courts and, potentially, to the Supreme Court of Canada. In certain cases involving US and/or Mexican interests, CITT decisions involving dumping or subsidizing allegations may be reviewed by a bi-national panel under the provisions of Canada-United States-Mexico Agreement.

(iii) Appeals and Other Matters

A11.46 The CITT's mandate includes hearing appeals of decisions of the CBSA made under the *Customs Act* and the *Special Import Measures Act* and of the Minister of National Revenue (the Minister) under the *Excise Tax Act*. In the case of decisions of the CBSA made under the Customs Act, the Tribunal hears appeals of decisions on tariff classification, valuation, or country of origin issues. The CITT's own Rules of Procedure govern such appeals. The CITT hears such appeals in panels of three members or, in some cases, a single member may hear an appeal.

PART B—PARTICULAR CLAIMS

(1) BREACH OF CONTRACT

B1.1 The following is a general description of contract law in Canada and the remedies for breach (except for Quebec, which is discussed in Part C).

(a) General

B1.2 A contract is a promise or set of promises, the breach of which gives a remedy or the performance of which creates a legally recognized obligation. Contract law in Canada is, for the most part, governed by the common law of the provinces and territories or, in the case of Quebec, by the civil law as set out in the CCQ. Originating in and adopted from nineteenth century England, the common law affecting contracts has continued to develop over the years through decisions of the Canadian courts. Certain types of contracts will be impacted by statute, and the enforcement of all contracts will be subject to statutory limitation periods.

(i) Formalities

B1.3 Except for certain contracts that must be in writing or signed under seal, Canadian law recognizes the enforceability of promises, oral or written, provided there is 'consideration' flowing from the promisee to the promisor or a mutuality of promises. Courts look to the parties' bargain to determine an objective or manifest intent of the parties to be bound. Courts will also determine whether there has been an 'offer' and 'acceptance' based upon the type and transmission of communication between the parties.

(ii) Remedies

B1.4 The law provides a multitude of remedies against those who breach their contracts. In addition to self help remedies such as rights of set-off or termination for anticipatory repudiation, contracting parties have access to the courts for enforcement or obtaining redress in respect of agreements that are not being honoured. However, with the exception of certain types of equitable remedies (such as specific performance, injunctions or an accounting for profits), the most common and usual remedy for breach of contract will be an award of damages.

(iii) Damages

B1.5 The general rule for recoverable loss in breach of contract cases is that the courts will award damages to place the aggrieved parties in the same position they would have been in had the contract been performed. Damages for mental distress or hurt feelings are not typically awarded although Canadian courts have shown a willingness to award punitive damages in recent years for certain types of breached contracts (e.g., employment and insurance). Owing in part to a reluctance of courts to award punitive damages for the breach of private agreements and the fact that most breach of contract cases will be heard by a judge and not a jury, the vast majority of broken contracts will result in damages governed by the general rule mentioned above.

(iv) Equitable Remedies

B1.6 As a general principle, Canadian courts will not compel the performance of a contract. However, where it can be established that damages will be an inadequate remedy, Canadian courts have the power to order specific performance of a contract or to issue injunctions preventing the temporary or permanent breach of an agreement. In addition to or in lieu of this type of equitable relief, courts may also award damages but these are not awarded on the same principles as those governing common law damages. For example, damages might be awarded instead of an injunction where the injury that will result from a future unlawful action (such as a threatened trespass on land) can be adequately compensated for in damages. The breach of certain types of contracts (e.g., distribution of licensed goods) may also entitle the aggrieved party to elect an accounting of the breaching party's profits.

(v) Liquidated Damages

B1.7 In some contracts, the parties may choose to specify a liquidated sum of damages in the event of breach. The caveat here is that the specification of liquidated damages cannot be a penalty. If the liquidated damage clause is enforceable, it will avoid the need for the aggrieved party to prove their actual damages. In the absence of a liquidated damages clause, the aggrieved party will be entitled to damages directly resulting from the breach and consequential damages in the minds (or which ought to have been in the minds) of the parties at the time of contract.

(vi) Excuses for Non-performance

B1.8 Excuses for non-performance can include mistake (with or without rectification), misrepresentation, unconscionability, fraud, illegality, or rendering the contract void for reasons of public policy. As mentioned above, certain contracts such as consumer agreements can be set aside for statutorily prescribed reasons. In some cases, performance of the contract may not be possible because events which neither party had anticipated have rendered the agreement radically different from what was undertaken by the contract.

B1.9 Statutory limitation periods will impact upon enforceability depending upon when the breach occurred. The ability to enforce may also be affected by waiver or estoppel although most commercially written contracts will contain express provisions dealing with such matters. The assertion of collateral contracts affecting the primary contract may also affect enforcement.

(2) NEGLIGENCE

B2.1 This section addresses the common law tort of negligence as it exists in all provinces and territories of Canada except Quebec. Under the CCQ, actions arising from negligence can be brought as actions for extra-contractual liability, and this is discussed in Part C.

(a) Elements

B2.2 To establish a common law cause of action for negligence, a plaintiff must prove that:

(a) Defendant owed him or her a duty of care.
(b) Defendant breached that duty.

(c) Defendant's breach of duty was the cause of the plaintiff's damages.
(d) Plaintiff suffered damages resulting from the breach.

(b) Duty of Care

B2.3 Whether or not a potential defendant owes a plaintiff a duty to take care is based on the neighbour principle – the law requires persons to take reasonable care to avoid acts or omissions which can be reasonably foreseen as likely to injure their neighbours.

B2.4 To determine who, in law, is a neighbour, the following two questions must be considered:

(i) Is there a sufficiently close relationship between the parties so that, in the reasonable contemplation of the defendant, carelessness on its part might cause damage to that person? If so,
(ii) Are there any considerations which ought to negate or limit:
  (a) the scope of the duty;
  (b) the class of persons to whom it is owed; or
  (c) the damages to which a breach of it may give rise?

B2.5 In considering the second part of the two-part test, the Supreme Court of Canada has indicated that policy issues should be taken into consideration in determining whether any factors exist which justify denying liability. Policy issues to be considered include, among other things, the effect of recognizing the duty of care on legal obligations generally, the impact on the legal system and any general societal effect of imposing liability.

B2.6 The courts repeatedly emphasize that the categories of negligence are not closed and that a novel theory of duty must be assessed against the two-part test set out above.

(c) Standard of Care

B2.7 The standard of care is the measure against which the defendant's conduct is assessed. It is an objective measure. In considering whether the standard of care was breached, the courts use the fictional reasonable person. That is, the question is whether the conduct complained of fell below the standard of conduct of a reasonable person similarly situated.

B2.8 The reasonable person standard has been diluted for certain types of less capable actors such as children, youth and those under a disability. The reasonable person standard has also been strengthened for certain individuals of superior capacity. Professional people, for example, cannot escape liability by performing merely up to the capacity of the ordinarily prudent lay person. A lawyer is obliged to act like a reasonably prudent lawyer and a medical doctor is obliged to act like a reasonably prudent doctor. Rather than asking whether the performance was to the best of any particular defendant's ability, the courts assess whether the defendant's conduct was up to the standard of a person of average competence in exercising their particular profession.

B2.9 In considering whether any particular conduct is negligent, the court can consider any relevant prevailing custom or behaviour. Those who act in accordance with the general practice of their trade, industry, or profession often avoid civil liability. However, it is also possible for a court to find that the prevailing custom or practice itself falls below the required standard of care and following such a prevailing custom or practice will not avoid a finding of breach.

B2.10 A statute setting out the conduct required of a particular profession or in particular circumstances may provide a useful standard of reasonable conduct and some evidence of a breach, but does not provide prima facie evidence of negligence. A violation of a statute alone does not equate to liability.

(d) Burden of Proof

B2.11 The plaintiff must plead and prove negligence on the balance of probabilities to succeed in an action for negligence. The maxim *res ipsa loquitur* ('the thing speaks for itself') has been rejected in Canada.

(e) Damage and Causation

B2.12 There can be no liability for negligence unless some damage has been suffered by the plaintiff. The specific breach of the standard of care must be the conduct that gives rise to the damage. The courts have declared that causation need not be proven with 'scientific precision' although the question of causation must be proved to the satisfaction of the court on the balance of probabilities. The most commonly employed technique for determining causation is the 'but for test' – if the accident would not have occurred but for the defendant's negligence, the defendant's conduct is a cause of the injury.

In circumstances where there may be more than one cause of an accident, defendants who cause losses cannot be excused merely because other causes or factors have helped to produce the harm. It is sufficient if the defendant's negligence was a cause of the harm. If the acts of two people are both substantial factors in bringing about the result, then liability is imposed on both people on the theory that both 'materially contributed to the occurrence'.

(f) Remoteness

B2.13 There is no specific formula to be applied in determining whether any particular damage is too remote to be recovered. While there are specific rules for recurring situations which often arise, the more general approach to the question of remoteness is a pragmatic one – in the chain of cause and effect, when can the consequences of an act no longer be fairly accepted as attributable to the defendant's act?

B2.14 The most common recurring situations in assessing remoteness include: Thin-skulled plaintiffs (negligent defendants must take their victims as they find them). The rescuer (a negligent wrongdoer is liable to reimburse a rescuer for losses incurred during a rescue attempt). Intervening forces (wrongdoers are not immune from responsibility even if there are intervening forces. The question becomes whether it is fair to hold a negligent actor as liable when the conduct of others is also involved in bringing about the accident).

(g) Contributory Negligence

B2.15 If the plaintiff's own negligence contributes to a loss, the right to recover damages for negligence is affected. The court will attempt to quantify the relative degrees of responsibility for the damage as between the wrongdoer and the contributorily negligent plaintiff and the defendant will be liable for only that portion of the damages attributable to his or her degree of responsibility.

(3) TRADE-MARK, COPYRIGHT, PATENT

B3.1 The Federal Court and the provincial superior courts have jurisdiction over the litigation of intellectual property disputes in Canada. The Federal Court's jurisdiction is purely statutory and generally exclusive relating to in rem proceedings (actions against things or property as opposed to persons) such as with respect to declaring the invalidity of a registered intellectual property right. Provincial superior courts may only rule on the validity of rights between parties. As well, appeals of decisions of the Commissioner of Patents and Registrar of Trade-marks are exclusively within the jurisdiction of the Federal Court. In appeals to the Federal Court from decisions of the Registrar of Trade-marks, fresh evidence can be filed on appeal.

B3.2 Since the Federal Court's jurisdiction is purely statutory, where the subject matter of a lawsuit involves elements both covered and not covered by an applicable federal statute, it may be necessary to sue in provincial court. For example, franchise disputes often involve claims relating to registered trade-marks, in respect of which the Federal Court has jurisdiction, as well as a contractual element, for which it may not.

B3.3 Alternative dispute resolution (such as mediation and arbitration) is generally available for intellectual property disputes in Canada except in respect of those matters where the Federal Court has exclusive jurisdiction.

B3.4 Disputes over Internet domain names can be adjudicated both by arbitrators pursuant to the dispute resolution procedures promulgated by the Canadian Internet Registration Authority or in the provincial superior courts (or in the Federal Court if a registered or applied for trade-mark is involved).

B3.5 In certain cases, exclusive licensees have standing to sue. However, it may be necessary to name the owner of the applicable intellectual property right as a party to any such action.

B3.6 Interlocutory injunctions, Mareva injunctions, *Anton Piller* orders and comparable extraordinary remedies are generally available if the appropriate thresholds are met.

B3.7 Both the *Trade-marks Act* and the *Copyright Act* provide for the ability to obtain interim orders detaining goods imported into Canada that appear to infringe intellectual property rights. However, these provisions are rarely used generally because the extent of evidence required to obtain such order is high and parties who have such evidence can generally obtain an interlocutory injunction in the ordinary course in any event.

B3.8 Bifurcation orders, that is, ordering separate trials on liability and if and only if liability is found, a separate trial on damages, are generally available on consent. Bifurcation orders are rarely granted in the absence of consent.

B3.9 Special rules govern pharmaceutical litigation relating to the issuance of Notices of Compliance where the drug in question may be covered by a third party's patent. The *Patented Medicines (Notice of Compliance) Regulations* have undergone various amendments. In 2017, the Regulations were amended to fundamentally change the nature of proceedings and replaced summary procedures with full actions including rights of appeal.

B3.10 In Canada, unlike some other jurisdictions, there are no jury trials in intellectual property proceedings. As well, with respect to patent proceedings, there are no preliminary proceedings (sometimes known as *Markman* hearings) to determine the construction of a patent prior to trial.

B3.11 If a plaintiff is successful in an action for infringement of its patent, trade-mark or copyright in Canada, it is generally entitled to the following remedies:

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

(4) DEFAMATION

B4.1 Defamation is a notoriously complex tort. This section provides only an outline of the common law tort of defamation as it exists in the common law provinces of Canada. Quebec's law of defamation is similar but has a few significant variations, and is not addressed below.

B4.2 In common law, defamation may take the form of libel or slander. Libel consists of written publication or communication of a permanent nature while slander involves oral publications or communication that are transitory in nature. For slander, the claimant must plead and prove special damages unless the words are actionable per se. The provinces of Alberta, Manitoba, New Brunswick, Newfoundland and Prince Edward Island have statutorily abolished the distinction between libel and slander and treat all defamatory publications as common law libel where damages are presumed. Nova Scotia treats libel and slander the same for statutory purposes. Most jurisdictions require a plaintiff to provide written notice of an action for libel against a newspaper or broadcaster within a fixed period of time.

B4.3 Certain Canadian jurisdictions, including Ontario, Quebec and BC, have introduced anti-SLAPP (Strategic Lawsuit Against Public Participation) legislation. SLAPP actions are where persons or organizations enjoying an economic advantage against members of the public commence lawsuits to silence and deter public from criticism. The anti-SLAPP legislation provides a summary mechanism for defendants of SLAPP suits to seek dismissal in an expedient and less expensive manner.

(a) Elements

B4.4 To establish a cause of action for defamation, a plaintiff must prove that the defendant has made a defamatory statement to a third party regarding him or her. A defamatory statement is any statement that would lower the reputation of the plaintiff in his or her community in the estimation of 'reasonable' persons.

B4.5 Defamation is a strict liability tort. Once the plaintiff has established that defamatory words were published, the onus shifts to the defendant to prove that the words complained of are defensible. The usual defences to a defamation claim are that the words claimed to be defamatory were:

(a) True (justification).
(b) Fair comment.
(c) Published on an occasion of privilege.

(b) The Defence of Justification

B4.6 Truth, or justification is an absolute defence to a defamation claim. A plaintiff has no right to have his or her character or reputation free of an imputation that is true.

B4.7 Unlike the US, where the impact of the First Amendment places the onus on the plaintiff to prove that what has been written is false, in Canada the onus is on the defendant to prove that the words complained of are substantially true. Similarly, Canadian common law does not afford any special recognition to 'public figures', other than in the context of meeting a 'public interest' test for the defences discussed below, that is, Canada does not have a *New York Times v. Sullivan* defence.

(c) Fair Comment

B4.8 The defence of fair comment protects honestly held expressions of opinion on matters of public interest, based on facts. Although some Canadian courts have suggested that the comment must be fair, the better view is that the opinion can be obstinate or prejudiced, as long as it is an opinion that can be honestly held by any person on the proven facts. It is not necessary for the speaker to honestly hold the opinion expressed.

B4.9 Where the defence of fair comment is established, it can only be defeated if the plaintiff acted maliciously, in the sense that the dominant motive for the publication was not to comment on a matter of public interest, that is, the comment was made to injure the subject of comment.

(d) Privilege

B4.10 Provincial statutes provide a defence of privilege to various forms of reports for example, the statutory privilege for fair and accurate reports on court proceedings. In addition to court proceedings, legislation also protects fair and accurate reports on public meetings and communications, and decisions by bodies that represent governmental authority in Canada. In some cases, the privilege is absolute. In others, it applies as long as the defendant does not act with malice.

B4.11 In addition to statutory privileges, the common law recognizes a qualified privilege that protects defamatory statements where the defendant had a legal, moral or social duty in making the statement and the recipient of the information had a corresponding interest in receiving the information. Qualified privilege has been recognized in numerous situations, including communications regarding employment (e.g., reference letters), family communications, union communications, business to business communications, communications about litigation and medical communications. The question in each case is whether or not there is an interest in publishing and a corresponding interest in receiving the information.

B4.12 A relatively recent development in Canadian (and English) libel law is the recognition of qualified privilege to protect news reports on matters of public interest where those news reports were prepared and published responsibly and relate to a matter of public interest. The defence has been recognized by the Supreme Court of Canada in the landmark decision *Grant v. Torstar*. The defence, which the Supreme Court has labelled as 'responsible communication

on a matter of public interest' will be available where: (i) the publication is on a matter of public interest; and (ii) the publication was responsible, in that the defendant was diligent in trying to verify the allegations having regard to all the relevant circumstances. Where these two elements are present, a defence will be available, even if what is published is false.

(e) Jurisdiction

B4.13 Due to the absence of the First Amendment and the impact of *New York Times v. Sullivan* in the US, Canada is a more 'plaintiff-friendly' jurisdiction. Consequently, US-based defendants have sometimes attempted to bring claims in Canada. This tactic has increased with the advent of the Internet. -Lower courts had been receptive to allowing US-based defendants to be sued in Canada, even when they have little or no connection to this jurisdiction. The Supreme Court of Canada in a recent decision indicated that foreign plaintiffs will still have to show a 'real and substantial' connection to the jurisdiction and whether the jurisdiction is the appropriate forum. American courts have been reluctant to enforce Canadian libel judgments having regard to the fact that Canada does not have protections to free speech similar to those provided by the First Amendment. Accordingly, even if a libel judgment is obtained in Canada against a US-based defendant, it may be very difficult to enforce this judgment in the US.

(f) Damages

B4.14 In defamation cases damages are presumed. Canadian awards are much smaller than awards in the US. The largest award in a Canadian case was for CAD 2.5 million, CAD 500,000 of which was for 'punitive' damages, intended to punish the defendants for their highly malicious conduct.

B4.15 Most Canadian damage awards for libel are under CAD 100,000. The advent of the Internet may, however, push damage awards upwards, as at least one appellate-level court has found that damage awards for defamation over the Internet should be higher than those awarded for print publication. An Ontario appellate court recently upheld a CAD 700,000 damages award in an internet libel case.

(5) ENFORCEMENT OF FOREIGN JUDGMENTS

(a) Common Law Provinces and Territories

B5.1 To enforce a foreign judgment in Canada, a party must obtain an order from a Canadian court. The common law rule is that the court will recognize and enforce a foreign judgment if the foreign court that made the judgment has jurisdiction in the 'international sense'.

B5.2 Jurisdiction in the international sense is determined by considering if there was a real and substantial connection between the defendant and the foreign jurisdiction at the time that the action was commenced. A foreign court will also be recognized as having jurisdiction in the international sense if the defendant was present in the foreign jurisdiction when the action was started, or if the defendant voluntarily submitted or agreed to submit to the jurisdiction of the foreign court. As well, for a court to recognize and enforce a foreign judgment, the foreign judgment must be final and conclusive.

B5.3 The rules for enforcing a foreign judgment under Quebec's civil law regime are slightly different, and they are discussed separately in Part C, section (4)(c).

B5.4 Even if a foreign judgment meets the requirements for recognition and enforcement in Canada, there are certain defences to enforcement the defendant can raise. A foreign judgment will not be enforced if the judgment was obtained by fraud on the part of the party seeking to enforce it, if the proceedings under which the foreign judgment was obtained were contrary to the principles of natural justice, or if the underlying cause of action on which the foreign judgment is based is contrary to the public policy of the province in question.

B5.5 In addition to the common law, several of the provinces have reciprocal enforcement of judgments legislation. This legislation allows a judgment creditor in a province to apply to the court of that province for an order registering the foreign judgment. This can only be done if the foreign judgment is from a reciprocal jurisdiction, as set out in the reciprocal enforcement of judgments legislation.

B5.6 The result of registering a foreign judgment in this manner is that it will be of the same force and effect as if it had been a judgment given in the registering court on the date of the registration.

B5.7 As well, the registering court will have the same control and jurisdiction over the foreign judgment as it has over judgments it itself gives. The reciprocal enforcement of judgments legislation in the various provinces does not alter the rules of private international law. These statutes simply provide for the registration of judgments as a more convenient procedure than the former procedure of bringing an action to enforce a judgment.

B5.8 Canada is also party to international conventions that may affect enforcement of foreign judgments. The convention between Canada, United Kingdom and Northern Ireland for reciprocal recognition and enforcement of judgments in civil and commercial matters has been incorporated into Canadian law though federal and provincial legislation (except in Quebec).

(b) Procedure in Quebec

B5.9 *See* Part C, section (4)(c) below for the procedure in Quebec for enforcing foreign judgments.

(6) ENFORCEMENT OF ARBITRATION AWARDS

B6.1 Canada is a party to the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the '1958 New York Convention'), and, as a result, an international arbitration award made in Canada may be enforced in any other signatory jurisdiction and an award from any other signatory jurisdiction may be enforced in Canada.

B6.2 The UNCITRAL drafted a Model Arbitration Law in June of 1985. The Canadian federal government and all provincial and territorial governments have passed international commercial arbitration legislation based on that model law.

B6.3 The various Canadian international commercial arbitration statutes bring into force, with minor variations, the 1985 UNCITRAL Model Law in the relevant federal, provincial or territorial jurisdiction. The legislation only applies within the relevant

political boundaries. For instance, the Alberta *International Commercial Arbitration Act* only applies when Alberta is the place where the arbitration is conducted, where the parties have agreed that Alberta law will govern the arbitration, or the place where the award is to be enforced.

B6.4 As a practical matter, a party seeking to enforce an international arbitration award in Canada should bring an application to the court of the province where the debtor has its most significant assets. If it is necessary to enforce the award in additional provinces, then subsequent applications can be brought in those provinces.

B6.5 In order to bring such an application, the party seeking to enforce the award will have to file an affidavit with the court setting out a brief history of the arbitration and providing the court with an authenticated original award or a certified copy, and the original arbitration agreement. If the award or agreement is not made in an official language of the relevant jurisdiction, the party must supply a certified translation.

B6.6 The party seeking to enforce an arbitration award must serve the debtor against whom enforcement is sought with notice of the application to enforce. The debtor is entitled to resist the application by filing affidavit evidence to demonstrate that the requirements of the Model Law for enforcement (listed below) have not been met. In that event, there would likely be cross-examinations on the affidavits prior to the hearing, and then oral argument before a judge.

B6.7 Pursuant to the Model Law, a court may only refuse to enforce an award if:

(a) the party making the application furnishes proof that:
  (i) a party to the arbitration agreement was under some incapacity; or the agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the relevant jurisdiction where the application for enforcement has been brought; or
  (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
  (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
  (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of the Model Law; or
(b) the court finds that:
  (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of the relevant jurisdiction; or
  (ii) the award is in conflict with the public policy of the relevant jurisdiction.

B6.8 Courts have expressed that a high degree of deference should be accorded to international arbitral awards under the Model Law. Once a court order has been obtained to enforce an arbitration award that order may then be enforced in the same manner as any other order of that court. *See* section A(m) above for a description of that procedure.

PART C—QUEBEC LAW AND PROCEDURE

(1) GENERAL

C1.1 Quebec is among the few, if not the only, Canadian province where law is practised regularly both in the English and French languages. This distinct feature of practising law in the French language makes Quebec sometimes less accessible to other jurisdictions because of the language barrier. It is important, however, to note that the majority of lawyers practising in Quebec are bilingual and can easily give advice in both languages. A claim can be prosecuted in Quebec in both the French and English languages, where written proceedings can be in one language for a plaintiff and in another language for a defendant. These types of situations are regularly seen when litigation is conducted in the City of Montreal but, more often than not, most of the litigation in cities other than Montreal will be in French.

C1.2 The Quebec legislature is currently considering new legislation, titled *Bill 96: An Act respecting French, the official and common language of Québec*. As currently worded, Bill 96 would require 'legal persons' (such as corporate entities) that are party to court cases in Quebec to accompany any English proceedings with certified French translations obtained at the filing party's expense. While this legislation is still being debated, in the event that it passes, certain parties to litigation in Quebec will need to ensure that they are respecting new language requirements including, when required, filing certified French translations together with English versions of court proceedings.

C1.3 Another important difference that resides in Quebec is that the province operates under a civil law code (CCQ), as opposed to the other nine provinces and all the territories, which operate under a common law system. The fact that Quebec is governed by a civil code does not mean that common law is not at issue in proceedings in Quebec, inasmuch as common law may govern public or administrative law litigation and litigation that is conducted before the Federal Court of Canada (which sits both in the City of Montreal and in the City of Quebec in the province of Quebec), or in matters that fall within federal power under the Canadian constitution, such as criminal law, bankruptcy and insolvency, or maritime law. Common law principles are sometimes 'imported' into Quebec's civil law by the Supreme Court, although this practice is not without controversy.

C1.4 From a procedural point of view, proceedings in Quebec are conducted under the CCP of Quebec which is similar, to a certain extent, to the various rules of practice found in the common law provinces.

(2) QUEBEC COURTS AND THEIR JURISDICTIONS

C2.1 Quebec has two main levels of courts: (i) a Superior Court, designated as the Superior Court of Quebec, that has primary, inherent jurisdiction over most civil claims, and (ii) a lower provincial court, designated as the Court of Quebec, that has a limited jurisdiction determined by statute. The Superior Court of Quebec is the court of original general jurisdiction and hears in first instance every action not assigned exclusively to another court by a specific provision of law. As such, the Superior Court of Quebec exercises an inherent competence which is akin to the jurisdiction of the superior courts in the other provinces within the Canadian federal system.

C2.2 Jurisdiction over bankruptcy matters, as in the other provinces, is specifically assigned to the Superior Court of Quebec under and by virtue of section 183(1.1) of the *Bankruptcy and Insolvency Act*.

C2.3 The Court of Quebec has jurisdiction to the exclusion of the Superior Court in any action (i) where the sum claimed or the value of the thing demanded is less than CAD 85,000, except in actions for alimony pension and those reserved for the Federal Court of Canada; (ii) for specific performance, annulment, dissolution or rescission of a contract or for reduction of the obligations resulting from a contract, when the value of the plaintiff's interest and the object of the dispute is less than CAD 85,000; and (iii) to annul a lease when the amount claimed for rent and damages is less than CAD 85,000. The Court of Quebec also has jurisdiction over claims relating to property taxes, and other amounts due by law to a municipality or school board.

C2.4 On 30 June 2021, the Supreme Court of Canada issued a response to a reference, or question, regarding the constitutional validity of the monetary limit for the Court of Quebec. In *Reference re Code of Civil Procedure (Que.)*, Article 35, 2021 SCC 27, the Supreme Court ruled that Article 35 of Quebec's CCP, which set the monetary jurisdiction of the Court of Quebec over claims for less than CAD 85,000, was invalid. According to the court, this monetary limit was too high, and thus infringed on the inherent constitutional jurisdiction of the Superior Court. The Supreme Court suspended its decision by twelve months, until 30 June 2022, in order to avoid the confusion caused by an immediate change of jurisdiction. Unlike judgments, the Supreme Court's answers to reference questions are, at least in principle, non-binding. As such, it remains to be seen whether the Quebec legislature will choose to respond to this ruling after 30 June 2022, by amending the CCP to decrease the jurisdiction of the Court of Quebec.

C2.5 The Court of Quebec also has a 'Small Claims Division' with its own special procedure for monetary claims of CAD 15,000 or less. Quebec also has municipal courts where jurisdiction and the powers of the justices of the peace are set out in specific laws.

C2.6 The Court of Appeal of Quebec is the general appeal tribunal for Quebec and hears appeals from any judgment from which an appeal lies, failing an express provision to the contrary in the CCP. More specifically, an appeal lies as of right from most final judgment of the Superior Court of Quebec or the Court of Quebec that 'terminate a proceeding', that is, that constitute the final judgment on the merits of a case or put an end to a proceeding. In certain cases, judgments can be appealed only with leave of the Court of Appeal. These categories include, among others, cases where the value of the object of the dispute in appeal is less than CAD 60,000, judgments denying leave to intervene, and judgments certifying a class action.

C2.7 An appeal also lies from an interlocutory judgment of the Superior Court or the Court of Quebec with leave from the Court of Appeal when the interlocutory judgment in part decides the underlying dispute, when the interlocutory judgment orders the doing of anything which cannot be remedied by final judgment or when it unnecessarily delays the trial or the action.

C2.8 Decisions rendered by the Court of Appeal are generally rendered by panels of three or five judges. The final arbitrator of disputes for Quebec is the Supreme Court of Canada as in the common law provinces.

(3) GENERAL COURT PROCEDURES

(a) Commencement of an Action and Service

C3.1 In Quebec, an action is instituted by way of an originating application. The application is served on the defendant along with a summons that states, amongst other things, that the defendant must cooperate with the plaintiff in preparing the case protocol that governs the proceedings. The defendant answers the application by filing an Appearance within fifteen days of service (thirty days for a foreign defendant). The parties must conclude a case protocol within forty-five days of the service of the application (three months for a foreign defendant). The case protocol acts as a timetable in respect of all aspects of the prosecution of the case, including all procedural matters dealing with the presentation of preliminary motions, the scheduling of examinations out of court, the filing of expert reports, as well as the filing of all pleadings to bring the case to trial. Should the parties fail to agree upon a case protocol, a judge will impose one on the parties, dictating the time periods within which the various procedural steps will have to be completed by the parties to bring the action for hearing on the merits. The parties must sign and file the case protocol with the practice division of the relevant court, following which a judge reviews the protocol and either accepts it or calls the parties to a case management conference to modify it. Case protocols are presumed by law to have been accepted if there is no response from the court twenty days after their filing.

C3.2 In civil instances, the action must be inscribed on the merits within six months of the service of the Motion, failing which, the plaintiff is deemed to have discontinued the action. To inscribe the action, discovery and all procedural steps must be completed and the plaintiff must file with the court a 'Request for Setting Down for Trial and Judgment' and a Declaration with a list of the witnesses that the plaintiff intends to present at trial, the expected length of the hearing, a list of exhibits and an indication as to whether the transcripts of out of court examinations will be filed for the purpose of trial. In certain districts, the plaintiff's Declaration is replaced by a Joint Declaration of File Completeness, which is completed and filed by all parties to the action.

C3.3 At the time of setting down the date(s) for trial, the judge will conduct a pre-trial conference to determine whether a settlement is possible and/or whether admissions can be made and to determine how much time is required for trial. While the practice may vary from district to district, for trials that are expected to last fewer than three days, the parties will be heard approximately twelve to fifteen months from the time that the originating application was filed. Longer hearings may take up to two to three years to schedule. A judge in Quebec has a maximum of six months in most civil matters to render the judgment from the time that a trial ends. An unsuccessful party who wishes to appeal the judgment has thirty days to appeal the trial judge's decision, either by filing a notice of appeal or a motion for leave to appeal, as the case may be. There is no procedure for summary judgment in Quebec.

C3.4 All originating Documents (e.g., the originating application) are to be served personally or by an alternative to personal service. Personal service is normally effected by a bailiff and can take from one to several days to perform if the party is located in Quebec. All other court documents need not be served personally and can be served by mail or, in cases where a party has permitted its lawyer to accept service, by e-mail, facsimile or courier. Proof of service is proven by an Affidavit of Service sworn by the person serving the documents and is accepted in court proceedings as proof of service. Where personal service is required but such service is impractical or impossible, parties can seek an exemption by filing a motion for special mode of service before a judge or special clerk.

C3.5 Clear rules exist as to how documents are to be served on any entity which is not a natural person. For example, personal service on a corporation involves 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 in management of the place of business.

(b) Procedures in Courts of First Instance

C3.6 As indicated above, civil proceedings in Quebec are commenced by originating Application, except in a few cases. In Quebec, the limitation period is three years for most civil claims in contract and *in delicto* – that is, in fault. When the cause of action arises from moral, bodily and material damages appearing progressively or tardily, the time limitation period starts to run from the date the damage appears for the first time. Time limitation in Quebec is a matter of public order and cannot be reduced contractually or otherwise.

C3.7 Within a standard court action in Quebec, the CCP sets out various remedies available to the parties within the context of civil proceedings. Apart from the originating application, interim remedies are also available in Quebec, including interlocutory injunctions, seizures before judgment where the plaintiff may, with leave of a judge, seize the property of a defendant when there is reason to fear that without this remedy the recovery of the debt may be in jeopardy. Similarly, Article 517 of the CCP provides that a plaintiff may also seize, without the need of obtaining leave from the court, certain property before judgment, including movable property which the plaintiff has a right to recover, movable property over the price of which the plaintiff has a preferential right and that is being used in a way as to jeopardize the exercise of that right, and movable property which a provision of law permits the plaintiff to seize to assure the exercise of rights upon it.

C3.8 Final judgments in Quebec may also be enforced by a writ of seizure and sale of property, garnishment by the judgment creditor of the debts owing to the judgment debtor, and an order for the depossession or possession of property. A final judgment in Quebec may only be enforced when it becomes executory and once any right of appeal has lapsed.

C3.9 Finally, with respect to costs, the losing party, under and by virtue of Articles 339–341 of the CCP, must pay all costs, including the cost of the stenographer, unless by a decision giving reasons, the court reduces or compensates it or orders otherwise. As well, the court may, by a decision giving reasons, reduce the costs relating to experts' appraisals requested by the parties, particularly if, in the opinion of the court, there was no need for the appraisal, the costs were unreasonable or a single expert appraisal would have sufficed. Costs of the litigation are taxed (i.e., assessed) pursuant to a tariff which provides for the various amounts that the successful party may claim for its disbursements and legal services rendered. Although there is a possibility, in cases of particularly aggressive conduct by a party, of an award of costs on a solicitor and client basis (i.e., a complete indemnity), in Quebec, such costs are usually awarded within a claim made as damages in the originating application rather than as costs. However, these awards remain exceptional and the general rule is that each party supports the cost of its own attorney's fees, which are not recoverable from the losing party.

(c) Discoveries and the Examination of Witnesses Abroad

C3.10 All discoveries in Quebec are contemplated in Book II, Title III (Articles 221–264) of the CCP. Oral discoveries are conducted under oath before a court stenographer and each party may ask relevant questions to every opposing party. Article 221 provides

for the possibility for either party to conduct pre-trial examinations. The parties, their representatives and employees are subject to pre-trial examination as of right. Usually a party only examines one representative of an opposing party, but an examination of another representative may be allowed if the first representative was not aware of all the relevant facts pertaining to the dispute. In other cases, examinations of multiple representatives or examinations of persons outside the list enumerated in the CCP can be done either with the witnesses' and the parties' consent or with leave of a judge.

C3.11 In Quebec, objections are made during the examination and are usually adjudicated by a judge in chambers after the examination has been completed. Parties may also submit anticipated objections to a judge for a ruling prior to the examination. If an objection has been dismissed, then the examination may be resumed or the answer to the question for which there was an objection can be given in writing.

C3.12 Finally, a party who is examined may give information and/or documents by an undertaking to be provided at a later date, when such information and/or documents are not available at the time of the examination. The Affidavit of Documents does not exist in Quebec, that is, a party has no obligation to disclose in advance all documents relevant to a matter in issue in the action and that are or have been in the party's possession, control or power. Examinations out of court thus become particularly important in order for the party conducting the examination to obtain communication of the relevant documents through undertakings of the opposing party. No oral pre-trial examinations are permitted in cases where the amount claimed is less than CAD 30,000. If the amount claimed is between CAD 30,000 and CAD 100,000, the pre-trial examination may not exceed three hours, but may be extended to five hours with the parties' consent. If the amount claimed is greater than CAD 100,000, the pre-trial examinations may not exceed five hours, but may be extended to seven hours with the parties' consent. A longer duration may also be authorized by the court. Oral examination transcripts are not automatically part of the court record. Only the party that has conducted the examination may decide to file all or excerpts of the transcript into evidence or not to produce it at all.

C3.13 Articles 499 and following of the CCP provide for the examination of witnesses abroad by Rogatory Commission. More specifically, the court may, on motion, appoint a commissioner to receive the testimony of any person who resides outside Quebec or in a place too far distanced from the place where the case is pending. The motion must contain the names of the proposed commissioner and of the persons to be examined.

C3.14 The judgment which appoints the commissioner identifies the witnesses to be examined and the manner in which they will be sworn, gives the instructions necessary to guide the commissioner in the carrying out of his duties and fixes the time within which the commissioner is to be returned.

C3.15 Any party, if it sees fit to do so, may, after notice to the other parties, have interrogatories and cross-interrogatories admitted by the court and attached to the commission. In any event, whether or not there are interrogatories beforehand, the commissioner may put, and must allow the parties to put, any questions relevant to the case and he shall reserve any objections made by the parties to the evidence. The examinations are recorded in writing and signed by the witness and the commissioner, unless they are taken by a duly sworn stenographer.

C3.16 Finally, the commissioner is authorized to make a copy of any document exhibited by a witness who refuses to part with it.

(4) PARTICULAR CLAIMS

(a) Contractual Liability in Quebec

C4.1 The CCQ sets out the details of a claim for breach of contract. Article 1458, sets out the liability of the party in breach:

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

C4.2 Article 1590 sets out what constitutes the performance of an obligation:

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

C4.3 Note that in the civil law, non-execution of the contract does not always give rise to a cause of action. For example, force majeure (superior force) may exempt the contracting party from liability. Also note that Article 1458 of the CCQ does not allow parties to avoid the rules governing contractual liability where such liability is engaged. In other words, a party cannot elect to invoke only extra-contractual liability (discussed in detail in section C(4)(b) below) where contractual liability is at stake.

(i) Remedies for Breach of Contract

C4.4 Article 1590 sets out several of the remedies available for a breach of contract. In addition to specific performance, resiliation of the contract and resolution of the contract, mentioned in Article 1590, other remedies include reduction of obligations, non-execution, and the right of retention.

C4.5 Unlike in the common law, where specific performance is an exceptional remedy, specific performance is a common remedy in Quebec. The court will refuse to grant specific performance where the obligation to be performed is *intuitu personae* (i.e., requires unique and personal involvement by a physical person). Specific performance will also be denied where the obligation is illegal, dangerous, impossible or prejudices the rights of a third party and where the actions performed are sufficiently complex to render compliance with the order difficult or impossible to verify by the court.

C4.6 The court may also grant the resolution or the resiliation of a contract. The resolution of a contract is the retrospective and prospective annulment of a contract whereas resiliation is only the prospective annulment of a contract. The plaintiff may also withhold execution of his obligations under the contract or retain property in his or her possession belonging to the defendant pending the execution of the contract by his or her

co-contracting party. Where the breach by the defendant is not sufficiently serious to warrant resiliation or resolution, the plaintiff may also petition the court to reduce his or her correlative obligations under a bilateral contract.

(ii) Damages

C4.7 In addition to the remedies listed in the previous section, the plaintiff may apply for damages to compensate a loss he has sustained or a profit of which he has been deprived. Contractual damages are less extensive than extra-contractual damages. The defendant is only liable for damages foreseeable at the time the obligation was contracted, except in cases of intentional or gross fault. Even in the latter case, the defendant can only be held liable for the immediate and direct consequences of the non-performance.

(b) Extra-Contractual Liability in Quebec

C4.8 In Quebec, the general regime for extra-contractual liability (comparable to common law tort liability) is set out in Article 1457 C.C.Q. Note how it mirrors the article for contractual liability:

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

C4.9 Subsequent articles in the CCQ deal with particular cases, such as liability for the act of a minor and liability for the act of a thing. To bring a successful action for extra-contractual liability in Quebec, a plaintiff must prove:

(a) fault on the part of the defendant;
(b) injury suffered by the plaintiff;
(c) a causal link between the fault and the injury.

(i) Duty of Care

C4.10 Unlike the common law, the civil law creates a generalized duty of care between all individuals living together in a society. While at first this may seem to broaden the scope of extra-contractual liability in Quebec, the civil law has adopted a more restrictive approach to both fault and causation to compensate.

C4.11 A typical situation where the common law and the civil law approach differs is the case of the bystander. In a common law jurisdiction, a bystander who comes across a person in distress and does nothing to help them cannot be held responsible, as they have no duty of care towards the person. In a civil law jurisdiction, a bystander is required to take all reasonable steps to help an individual in distress, though he is not required to put his or her own life at risk.

(ii) Standard of Care/Fault

C4.12 The approach of the civil law to fault and the standard of care is substantially similar to that of the common law. Both systems adopted an objective standard to measure

the conduct of the defendant. Whereas the common law archetype is the fictional 'reasonable person', the traditional civilist archetype, doubtless reflecting the prejudices of the age, used to be the *bon père de famille* (literally, the good head of the household). More recently, two new archetypes have become discernible in the literature: the '*honnête citoyen*' (the honest citizen) and the '*personne prudente et diligente*' (the prudent and diligent person).

C4.13 In order to blunt the impact of the generalized duty of care, the courts sometimes have recourse to the language of fault. The '*personne prudente et diligente*' while prudent and diligent, is not expected to foresee all possible consequences of his or her actions. Thus, the court might find that the injury inflicted on the plaintiff is so unexpected or beyond reason that no fault exists on the part of the defendant.

(iii) Injury

C4.14 The law of injury in Quebec and the rest of Canada does not differ by a great deal. If anything, the fact that in Quebec, injury and causation are treated separately has led to a greater emphasis on each one. The Plaintiff is entitled to seek reparation for the injury caused by the party at fault, whether the injury be bodily, moral or material in nature. One particularity of the CCQ is the recognition of moral damages as a recoverable head of damages. Moral damages can stem, on the one hand, from the nature of the right violated. Under Quebec law, violation of 'fundamental rights' (e.g., the right to privacy and to the respect of one's reputation) gives rise to moral damages. On the other hand, moral damages can stem from the type of harm suffered, in particular psychological and aesthetic damages. Under this category, moral damages have been used to compensate *solatium doloris* (the harm felt by a spouse or relative for the death of the plaintiff) and also to compensate the plaintiff in cases of nervous shock.

(iv) Causation

C4.15 Causation, in particular remoteness, is used as a factor by civilist courts to limit the effect of a generalized duty of care. A plaintiff will not be held responsible for losses that are held to be too remote from his fault. The damage (or injury) must be an immediate and direct consequence of the alleged fault.

(c) Recognition of Foreign Judgments

C4.16 The rules governing the enforcement of orders from courts outside Quebec are set out in Book 10 of the CCQ. The same rules apply to the enforcement of orders from courts in other countries and to the enforcement of orders from courts in other provinces of Canada. The application for enforcement is made by an originating application.

C4.17 Article 3155 of the CCQ states that a Quebec authority recognizes and, where applicable, declares enforceable any decision rendered outside Quebec except where: (i) the authority of the country where the decision was rendered had no jurisdiction under the provisions of the Title in the CCQ pertaining to Recognition and Enforcement of Foreign Decisions; (ii) the decision is subject to ordinary remedy or is not final or enforceable in the jurisdiction where it was rendered; (iii) the decision was rendered in contravention of the fundamental principles of procedure; (iv) a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Quebec, or is pending before a Quebec authority, or has been decided in a third country; (v) the outcome of a foreign decision is manifestly inconsistent with public

order as understood in international relations; and (vi) the decision enforces obligations arising from the taxation laws of a foreign country.

C4.18 Article 3158 of the CCQ also provides that the Quebec Court is confined to verifying whether the foreign decision, in respect of which recognition or enforcement is sought, meets the requirements prescribed in the CCQ on Recognition and Enforcement of Foreign Decisions, without entering into any examination of the merits of the decision.

C4.19 Article 3168 of the CCQ, in answer to the criterion dictated in paragraph 1 of Article 3155 of the CCQ, provides that the jurisdiction of a foreign authority is recognized by the Quebec courts only where:

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

C4.20 As such, once the Quebec court has made the determination that the foreign authority was competent and that none of the exceptions stated in Article 3155 of the CCQ are applicable, the decision will be recognized and declared enforceable.