Chapter 3
The Resolution of Disputes—The Courts and Alternatives to Litigation

LEARNING OBJECTIVES

1. Describe the court system in Canada
2. Outline the process of civil litigation
3. Explain the nature and function of regulatory bodies
4. Examine the alternative dispute resolution (ADR) methods—negotiation, mediation, arbitration

In addition to hearing criminal matters, the courts have been charged with the duty of adjudicating civil or private disputes, including assessing liability for injuries and awarding compensation when someone has been harmed by the actions of another. But having the court settle those claims can be an expensive and time-consuming process. While it is always a good idea for the parties to try to resolve their own disputes, when this is not possible they can turn to the courts to adjudicate a resolution. In this chapter, we examine the structure of the courts in Canada and then look at the litigation process, from the initial claim to the enforcement of a judgment. Also discussed in this chapter is the important area referred to as administrative law, which concerns itself with decisions made by an expanding government bureaucracy that affect businesses and individuals. These decision-making bodies often look like courts, though they are not, and their decision-making powers are sometimes abused. Restrictions on the powers of such decision makers and how those decisions must be made as well as what we can do when those restrictions are violated will be discussed in the second part of this chapter. The final part of this chapter outlines a variety of alternatives to the litigation process, along with a review of the reasons why businesspeople might choose negotiation, mediation, or arbitration over courts in resolving their disputes.

LO 1 THE COURTS

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Trials open to public

The process described below outlines the various procedures used at the trial level of the superior courts; students should note that the actual procedure may vary with the jurisdiction. Procedural laws ensure that the hearing will be fair, that all litigants have equal access to the courts, and that parties have notice of an action against them and an opportunity to reply.

As a general rule, Canadian courts are open to the public. The principle is that justice not only must be done but also must be seen to be done; no matter how

prominent the citizen and no matter how scandalous the action, the procedures are open and available to the public and the press. There are, however, important exceptions to this rule. When the information coming out at a trial may be prejudicial to the security of the nation,[1] the courts may hold in-camera hearings, which are closed to the public. When children are involved, or in cases involving sexual assaults, the more common practice is to hold an open hearing but prohibit the publication of the names of the parties.[2]

Both criminal and civil functions

The courts in Canada preside over criminal prosecutions or adjudicate in civil disputes. While civil matters are the major concern of this text chapter and criminal law is discussed only incidentally, it should be noted that there are some important differences between civil and criminal actions. In civil actions, two private persons use the court as a referee to adjudicate a dispute, and the judge (or, in some cases, the judge with a jury) chooses between the two positions presented. The decision will be made in favour of the side advocating the more probable position. The judge, in such circumstances, is said to be deciding the matter on the balance of probabilities, which requires the person making the claim to show the court sufficient proof so that there is greater than 50 percent likelihood that the events took place as claimed.

Civil test—balance of probabilities

Criminal prosecutions are quite different. When a crime has been committed, the offence is against the state and the victims of the crime are witnesses at the trial. The government pursues the matter and prosecutes the accused through a Crown prosecutor. Since the action is taken by the government (the Crown) against the accused, such cases are cited as, for example, "*R. v. Jones.*" (The "R." stands for either Rex or Regina, depending on whether a king or queen is enthroned at the time of the prosecution.) While a civil dispute is decided on the balance of probabilities, in a criminal prosecution the judge (or judge and jury) must be convinced beyond a reasonable doubt of the guilt of the accused. This is a much more stringent test in that even when it is likely or probable that the accused committed the crime, the accused must be found "not guilty" if there is any reasonable doubt about guilt.

Criminal test—beyond reasonable doubt

As illustrated by Case Summary 3.1, a person might be faced with both a civil action and a criminal trial over the same conduct, and as occurred here, even though a person was acquitted at the criminal trial he may still be found liable in the civil action. While there may not be enough proof to establish beyond a reasonable doubt that the accused committed the crime, there may be enough evidence to show that he probably committed the wrong. Another recent example involves a woman in British Columbia who won a $50 000 civil judgment against the man she accused of raping her, even after a criminal prosecution had acquitted him of the sexual assault.[3]

May face both criminal and civil trial for same matter

Criminal law is restricted to the matters found in the *Criminal Code*, as well as certain drug control legislation and a few other areas under federal control that have been characterized as criminal matters by the courts. There is a much broader area of law that subjects people to fines and imprisonment but does not qualify as criminal law. This involves regulatory offences, sometimes referred to as quasi-criminal matters, and includes such areas as environmental, fishing, and employment offences as well as offences created under provincial jurisdiction,

Regulatory offences

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1. See *Ruby v. Canada (Solicitor General)*, [2002] 4 S.C.R. 3, 2002 SCC 75, for a discussion by the Supreme Court of Canada of the issue of open courts.

2. *A.B.C. v. Nova Scotia (Attorney General)*, 2011 NSSC 476 (CanLII), provides a concise summary of the law on this issue.

3. *J.L.L. v. Ambrose*. The criminal prosecution is unreported in case reports, but was reported in *The Vancouver Sun* (25 February 2000). See also "Civil Justice for Victims of Crime," www.victimbar.org/vb/AGP.Net/Components/documentViewer/Download.aspxnz?DocumentID=48952. Part IV of this Booklet examines the difference between civil and criminal justice.

CASE SUMMARY 3.1

What Is the Appropriate Burden of Proof? *Rizzo v. Hanover Insurance Co.*[4]

Rizzo owned a restaurant that was seriously damaged by fire. When he made a claim under his insurance policy, the insurer refused to pay on the basis of its belief that Rizzo had started the fire himself. It was clear that the fire was intentionally set and that it was done with careful preparation. Because the restaurant business had not been doing well and Rizzo was in financial difficulties, the finger of blame was pointed at him. Other evidence damaged his credibility. The Ontario High Court in this case had to decide what burden of proof the insurer should meet. Because the conduct that Rizzo was being accused of was a crime, he argued that it should be proved "beyond a reasonable doubt." The Court held that because this was a civil action, it was necessary only that the insurer establish that Rizzo was responsible for setting the fire "on the balance of probabilities" and that it had satisfied that burden. "I have found on balance that it is more likely than not that the plaintiff did take part in the setting of the fire." As a result, Rizzo's action against the insurer was dismissed. Note that the fact that Rizzo had been acquitted of arson in a criminal proceeding was inadmissible in a civil proceeding as proof that he had not committed the arson.

DISCUSSION QUESTIONS

Should there be two different standards of proof? Wouldn't it be better to require the higher standard of proof even in civil matters? What effect would that have on the amount of civil litigation taking place in our courts?

Constitutional authority

including motor vehicle, securities, and hunting offences. See the MyBusLawLab for examples.

The provincial and federal governments have authority to create enforcement provisions including fines and imprisonment for laws that have been enacted under the powers they have been given under the *Constitution Act, 1867*. These regulatory offences are manifestations of the exercise of that power. Only the federal government has the power to make criminal law, and although people may be punished with fines, and sometimes even imprisonment, for violations of these regulatory offences, the violations do not qualify as criminal acts. People charged under these provisions usually go through a process similar to prosecution of a summary conviction offence under the *Criminal Code*.[5]

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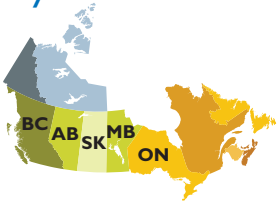


Provincial Courts

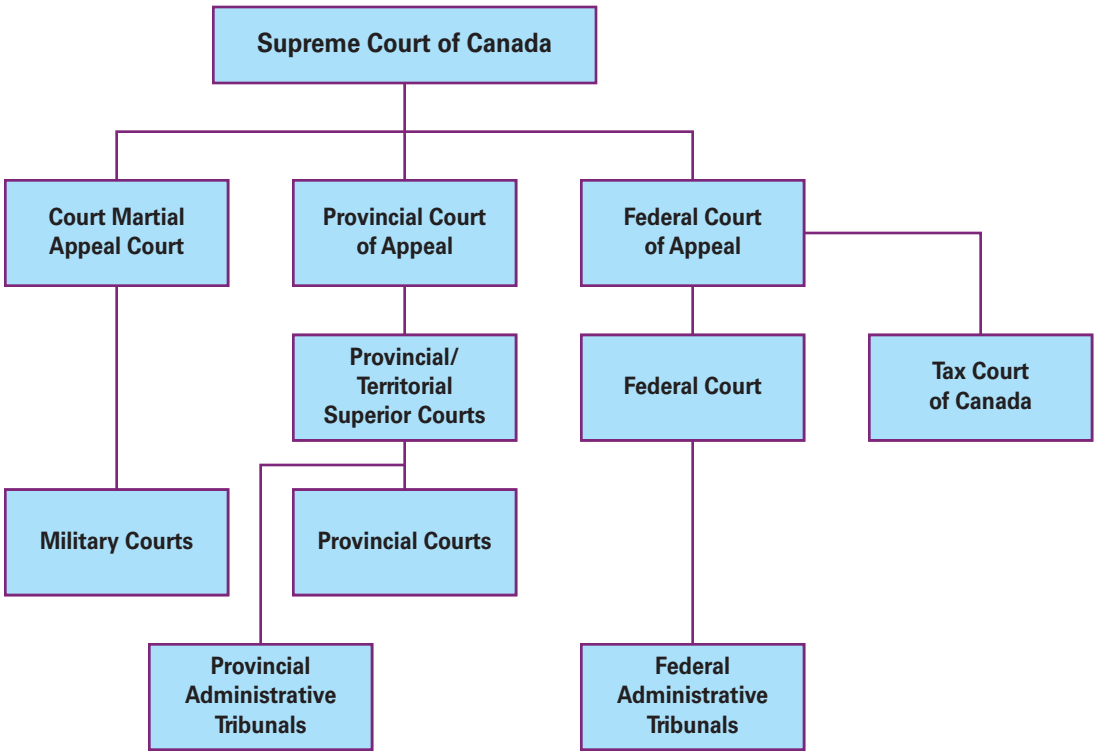
Trial Courts of the Provinces

The nature and structure of the courts vary from province to province, —see the MyBusLawLab to view the court structures in each province—but there are essentially four levels, including the Supreme Court of Canada. (Figure 3.1 provides an outline of Canada's court system.) At the lowest level are the Provincial Courts (their titles may be different in some provinces or territories). These courts have a criminal jurisdiction over the less serious criminal matters that are assigned to magistrates and judges under the *Criminal Code*. As a separate body, but usually as

4. (1993), 14 O.R. (3d) 98 (C.A.), leave to appeal to S.C.C. refused, [1993] S.C.C.A. No. 488.

5. To view a flowchart depicting the criminal justice process followed when adults are prosecuted for commission of a crime, go to "Criminal Prosecutions: Criminal justice process (adults)," www.justice.gov.ab.ca/criminal_pros/process_adults.aspx.

Figure 3.1 Outline of Canada's Court System[11]



a division of the provincial courts, most jurisdictions also have small claims courts and family courts. Small claims courts deal with civil matters that involve relatively small amounts of money, no more than $20 000 to $25 000 depending on the province.[6] Family courts handle family matters, such as custody issues that arise once the parents have separated. Enforcement of maintenance and alimony can also be dealt with by these courts, but they have no jurisdiction to issue divorces, which must be obtained in the superior trial court.[7] Some provinces maintain separate youth justice courts while others designate the family court to fulfill this function. These deal with offences under the *Youth Criminal Justice Act*.[8] In Canada, youth offenders aged 12 to 18 years are subject to the same *Criminal Code* provisions as adults, but are subject to a different level of punishment, and so the role of youth courts is very important.

Provincial judges

The judges in the provincial courts are appointed and paid by the relevant provincial government. The mandatory age of retirement varies from province to province. For example, in Ontario, judges must retire upon reaching the age of 65; in Alberta, upon reaching the age of 70; and in New Brunswick, upon reaching the age of 75.[9]

Superior courts

The highest trial level court, referred to generally as the superior court of a province (the specific name varies with the jurisdiction), has an unlimited monetary

6. In Alberta, British Columbia, Newfoundland and Labrador, Nova Scotia, Ontario and the Yukon, the monetary jurisdiction of the small claims courts is $25 000, while in Saskatchewan the monetary jurisdiction is $20 000.

7. *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, s. 2(1), under "court."

8. S.C. 2002, c. 1. This legislation replaced the *Young Offenders Act* on 1 April 2003.

9. See *Courts of Justice Act*, R.S.O. 1990, c. 43, s. 47, *Provincial Court Act*, R.S.A. 2000, c. P-31, s. 9.22, and *Provincial Court Act*, R.S.N.B. 1973, c. P-21, s. 4.2. In Ontario and Alberta, judges can be reappointed for a term of one year, to the age of 75.

jurisdiction in civil matters and deals with serious criminal matters. Some provinces have also retained specialized courts, referred to as **surrogate** or **probate courts**, dealing with the administration of wills and estates. In most jurisdictions, however, this is now just a specialized function of the superior court. Similarly, bankruptcy courts operate within the superior court system. These courts deal with the legal aspects of bankruptcy and must comply with the procedural rules set out in the *Bankruptcy and Insolvency Act*.[10]

It is before the trial courts that the disputing parties in a civil case first appear and testify, the witnesses give evidence, the lawyers present arguments, and judges make decisions. When both a judge and a jury are present, the judge makes findings of law, and the jury makes findings of fact. When the judge is acting alone, which is much more common, especially in civil matters, the judge decides both matters of fact and matters of law. Matters of fact are those regarding the details of an event. For example, was Erasmus at the corner of Portage and Main in the city of Winnipeg at 7:00 a.m. on 5 March 2007? Did a portion of the building owned by Bereznicki fall on Erasmus? Was he paralyzed as a result of his injury? Was Bereznicki aware of the danger? Had she taken steps to correct it? Questions of law, on the other hand, concern the rules or laws that are to be applied in the situation. For example, was Bereznicki obliged to keep the outside of her building in good repair? Would this obligation be affected if Bereznicki were unaware of the danger? The trial itself is discussed in more detail under "The Process of Civil Litigation," below.

Questions of law and fact

RECENT DEVELOPMENTS

Court reforms dictate change

Canada's system of courts is dynamic; it is constantly changing to reflect changes in Canadian society. For example, several innovations have recently been made by various governments. For a full understanding of the court system, it is necessary to review these innovations. The MyBusLawLab outlines provincial differences.[12]

Drug treatment courts

Drug treatment courts have been established in several large Canadian cities. The emphasis in these courts is on the treatment of addicts, not incarceration. Non-violent offenders involved in minor drug offences agree to be bound by the terms of a structured outpatient program designed to reduce their dependence on drugs. They are released on bail, subject to random drug tests, and must appear regularly in court. If they demonstrate control of their addiction, the criminal charges are stayed, or the offender receives a non-custodial sentence. If they cannot demonstrate such control, they are sentenced in the normal way. Research appears to indicate that drug treatment courts are more successful in preventing addicts from re-offending than the traditional court system involving incarceration, and that the yearly cost per participant is far below what it costs per year to maintain an offender in jail.[13]

Domestic violence courts

Domestic violence courts have been established in several provinces in Canada. Ontario has a Domestic Violence Court Program in each of the province's 54 court jurisdictions.[14] These courts deal with spousal, elder, and child abuse. While the

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10. R.S.C. 1985, c. B-3.

11. Department of Justice Canada, http://canada.justice.gc.ca/eng/dept-min/pub/ccs-ajc/page3.html. Note: The Federal Court Trial Division changed its name to Federal Court on 2 July 2003. See explanation on p. XX.

12. Inspiration and information for this section came from a series of articles included in "Feature on Evolution of the Courts," in *LawNow* 26:4 (February/March 2002), a series of articles included in "Feature Report on Specialized Courts," in *LawNow* 33:2 (November/December 2008), and Department of Justice Canada, "Canada's Court System," http://canada.justice.gc.ca/eng/dept-min/pub/ccs-ajc/page5.html.

13. "Canada's First Drug Court Breaks the Cycle of Drugs and Crime," *LawNow* 26:4 (February/March 2002), "Drug Treatment Court: Not a Free Ride," *LawNow* 33:2 (November/December 2008). The federal government provided funding to establish drug treatment courts in several provinces. See www.justice.gc.ca/eng/news-nouv/nr-cp/2005/doc_31552.html.

14. Ontario Ministry of the Attorney General, Domestic Violence Court (DVC) Program, www.attorneygeneral.jus.gov.on.ca/english/about/vw/dvc.asp. See the Ontario Courts web page on the Integrated Domestic Violence Court, at www.ontariocourts.ca/ocj/integrated-domestic-violence-court.

structure and jurisdiction of these courts vary from province to province, most of them offer specialized investigations by police, counselling for first-time offenders, prosecution of repeat offenders by specialized prosecutors, and support services for victims.

Unified family courts

Unified family courts have jurisdiction over all legal issues related to the family and do not deal with any other types of cases. Such courts have been created in several provinces. This simplifies the court process, which can be extremely complicated due to the overlapping jurisdiction of the federal government and the provincial governments. In addition, the court procedures and rules for family cases have been simplified. As is the case with all specialized courts, judges in unified family courts develop expertise in family law.

Mental health courts

As health-care services involving mentally ill persons have declined in recent years, the criminal justice system has seen an increase in the number of accused persons with mental illnesses. As criminal courts are not designed to identify and address the mental health concerns of accused persons, several of the provinces have implemented "mental health courts." These are specialized courts that focus on the treatment and rehabilitation (rather than the punishment) of those who have committed criminal acts due to mental disorders. Judicially monitored programs involving a multidisciplinary team (judges, lawyers, psychologists, nurses, community caregivers) encourage voluntary treatment over punishment. This allows accused persons with mental disorders the opportunity to access appropriate resources and services while ensuring public safety.

Nunavut Court of Justice

The Nunavut Court of Justice, established in 1999, is Canada's first single-level court. Judges in this court are given the powers of both the superior trial courts and the territorial courts. These judges can, therefore, hear all of the cases that arise in the territory. The court is a "circuit court," which travels throughout the territory hearing cases.

Sentencing circles

Sentencing circles are found in several provinces and are used primarily at the provincial court level for cases involving Aboriginal offenders and victims. Sentencing circles are not courts. They involve all interested persons meeting in a circle to discuss the offence, including sentencing options. The circle may suggest restorative community sentences, including restitution to the victim and treatment or counselling of the accused. The judge is not bound to accept a circle sentence. A judge in Saskatchewan created controversy when he granted a sentencing circle in a recent high-profile case involving two young children who froze to death.[15]

Aboriginal courts

Aboriginal persons have been over-represented in Canadian prisons in recent years. An initiative to try to remedy this involves the establishment of specialized courts dedicated to serving Aboriginal persons. In these courts, charges against Aboriginal accused are heard such that cultural sensitivity and respect are incorporated into the criminal justice process. Alberta, British Columbia, Ontario, and Saskatchewan have established Aboriginal courts.

Criminal justice reform

The criminal justice system is constantly under scrutiny by many different groups in our society, from governments and their employees, to defence lawyers, victim service workers, and the media. There are many problems, such as a significant backlog of cases, that need to be addressed. There are various initiatives underway, such as the Justice Reform Initiative, a formal review of British Columbia's criminal justice system.[16] The objective of this and other initiatives is to identify and recommend reforms to improve the efficiency and effectiveness of the criminal justice system.

Not all are in favour of reforms

It is clear that the Canadian court system will continue to evolve in an effort to improve its success in helping Canadians resolve their disputes fairly. These reforms are taking place with respect to the structure of the courts themselves, as well as the processes involved at both the criminal and civil level. It must be clearly understood, however, that many of the suggested reforms are strenuously resisted on the grounds

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15. "Father of Girls Who Froze to Death Gets Sentencing Circle" (7 January 2009), CBC News Online, www.cbc.ca/canada/saskatchewan/story/2009/01/07/pauchay-sentencing.html.

16. See the web site for the Initiative at: http://bcjusticereform.ca.

that they threaten to damage a very effective system that is the envy of much of the world. Retired Supreme Court Justice Frank Iacobucci has urged caution before we embark on such reforms. "We must not take what we have for granted, and we must be particularly vigilant so that in our quest for improvement, we don't desert the values and procedures that have brought us to this level of excellence."[17]

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Appellate courts

Courts of Appeal of the Provinces

Each province's appellate court hears appeals from the lower courts of that province. They must hear a matter before it can go to the Supreme Court of Canada. In most cases, this is the court of last resort. When one of the parties is dissatisfied with the decision of a provincial trial court and an error in law or procedure is identified, the decision may be successfully appealed. As a general rule, an appeal court will consider a case only when questions of law are in dispute, not questions of fact. But many appeals are based upon questions of mixed law and fact, where the rules that are applied are inseparably connected to the facts that are found. Whether a person lived up to the standards of a reasonable person in a given situation would be an example of such a question of mixed law and fact. Refer to the MyBusLawLab to determine specific provincial structures and jurisdiction.

Not a new trial

The court exercising an appellate jurisdiction does not hold a new trial. The assumption is that the judge (or judge and jury) who saw and heard all of the evidence presented at trial is (are) best qualified to determine questions of fact. The appeal court judges (usually three) read the transcript of the trial, as well as the trial judge's reasons for decision. They then deal with the specific objections to the trial judge's decision submitted by the appellant's lawyers, hearing the arguments of both the appellant and the respondent.

Superior court judges

The judges who serve on provincial superior and appeal courts are appointed by the federal government from a list of candidates supplied by the provinces.[18] Once appointed, the judges have tenure until they retire (by age 75) or are appointed to new positions. They can be removed from the bench only for serious misconduct,[19] but not as the result of making an unpopular decision or one that is unfavourable to the government.

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Federal Court and Federal Court of Appeal

Courts at the Federal Level

The Federal Court and the Federal Court of Appeal serve a function similar to that of the provincial superior courts. Until 2 July 2003, the Federal Court of Canada had a trial division and an appellate division. On that date, the *Courts Administration Service Act*[20] came into effect, making the two divisions of the Federal Court separate courts. The Trial Division became the Federal Court, a trial court. It hears disputes that fall within the federal sphere of power, such as those concerning copyrights and patents, federal boards and commissions, federal lands or money, and federal government contracts. The Federal Court of Appeal kept its previous name; it is an appellate court. It hears appeals from the Federal Court. Both of the federal courts can hear appeals from decisions of federal regulatory bodies and administrative tribunals. The role of these quasi-judicial bodies will be discussed below under the heading "Administrative Law." An appeal from the Federal Court of Appeal goes directly to the Supreme Court of Canada.

Tax Court of Canada

The Tax Court of Canada is another very specialized court, which was established in 1983 to hear disputes concerning federal tax matters. This body hears appeals from assessment decisions made by various federal agencies enforcing taxation

17. *Lawyers Weekly* 24:9 (2 July 2004.)
18. Part VII of the *Constitution Act, 1867*.
19. *Judges Act*, R.S.C. 1985, c.J-1, s. 65(2).
20. S.C. 2002, c. 8.

statutes, such as the *Income Tax Act*, the *Employment Insurance Act*, and the *Old Age Security Act*. Pursuant to the *Courts Administration Service Act*, the Tax Court of Canada became a superior court on 2 July 2003; its powers and jurisdiction did not change. The courts that hear cases involving the military are also specialized courts; a discussion of these courts is beyond the scope of this text chapter.

Supreme Court of Canada

The Supreme Court of Canada is the highest court in the land. It has a strictly appellate function as far as private citizens are concerned. There are nine judges appointed by the Government of Canada, according to a pattern of regional representation.[21] A quorum consists of five judges, but most appeals are heard by a panel of seven or nine judges. There is no longer an automatic right of appeal to the Supreme Court of Canada (except in criminal cases where a judge in the appellate court dissented on a point of law, or when an appellate court sets aside an acquittal and enters a verdict of guilty).[22] In all other cases, leave to appeal must be obtained from the Supreme Court, and such leave will be granted only if a case has some national significance. The Supreme Court hears both criminal and civil cases. In addition, it is sometimes asked to rule directly on constitutional disputes involving federal and provincial governments. For example, the federal government submitted a Reference to the Supreme Court of Canada in February 1998, asking whether Quebec could unilaterally secede from Canada.[23] Decisions of the Supreme Court are binding precedents for all other courts in Canada.

Supreme Court decisions set binding precedents

THE PROCESS OF CIVIL LITIGATION

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Most of this text chapter deals with matters of substantive law (that is, law that summarizes rights and obligations of the "you can" or "you can't" variety) rather than procedural law (that is, law that deals with the process by which we enforce those rights and obligations). But it is important to be familiar with the procedures involved in bringing a dispute to trial, if only to understand the function of lawyers and the reasons for the expense and delay involved. Before a decision is made to sue someone, all avenues for settling the dispute outside of litigation ought to be exhausted. Alternative methods for resolving legal disputes have been developed, including negotiation, mediation, and arbitration. Often the court requires the disputing parties to have tried these dispute-resolution mechanisms before a trial procedure will be instigated. The litigation procedures may vary somewhat from province to province, but they are substantially the same in all common law jurisdictions. They apply to most superior courts. (One of the distinguishing characteristics of small claims courts is that this involved procedure has been streamlined significantly, eliminating many of the steps described.) Figure 3.2 sets out the process of civil litigation in jurisdictions in which a writ of summons is not utilized. Refer to the MyBusLawLab for the procedures used in each of the provinces.[24]

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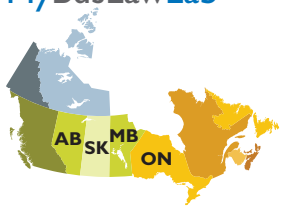

Should try to settle dispute

Limitation Periods

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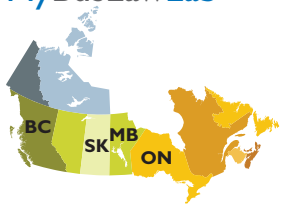

Whether to remove ongoing uncertainty or to ensure fairness when memories fade or witnesses become unavailable, court action must be brought within a relatively

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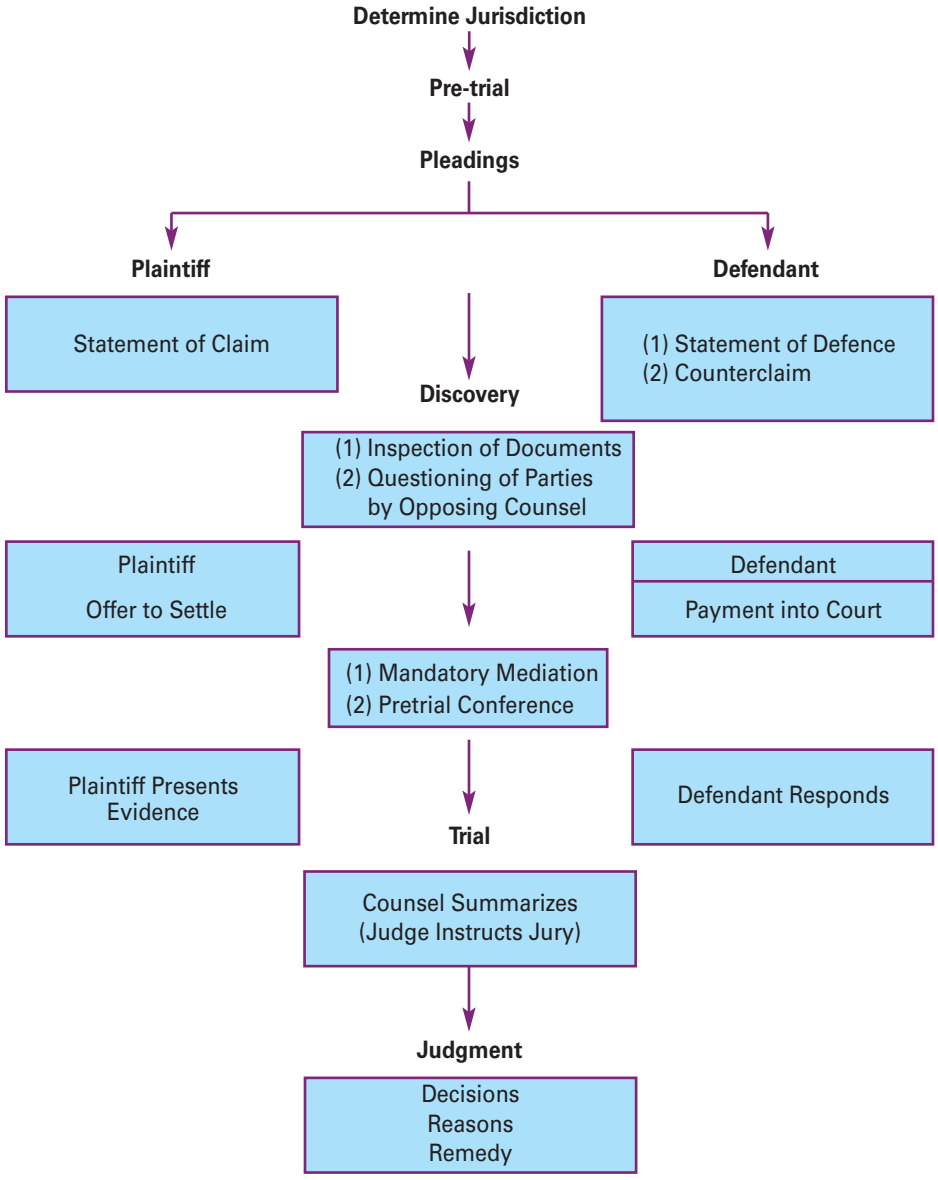
21. Three of the judges must be from the province of Quebec, pursuant to the *Supreme Court Act*, R.S.C. 1985, c. S-26, s. 6.

22. *Criminal Code*, R.S.C. 1985, c. C-46, s. 691.

23. *Reference Re Secession of Quebec*, [1998] 2 S.C.R. 217. Another reference to the Supreme Court was submitted to determine whether the federal government had the power to authorize same-sex marriages. That positive decision was rendered 9 December 2004. *Reference Re Same-Sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79.

24. Alberta, British Columbia, and Ontario recently made significant changes to their rules of civil procedure. The new Alberta *Rules of Court* (Alta. Reg. 124/2010) came into force on 1 November 2010. The *Supreme Court Civil Rules* (B.C. Reg. 168/2009) came into effect on 1 July 2010. Significant changes to Ontario's *Rules of Civil Procedure* (R.R.O. 1990, Reg. 194) were effective as of 1 January 2010. The Saskatchewan *Revised Queen's Bench Rules* are scheduled to come into force on 1 July 2013.

Figure 3.2 Process of Civil Litigation



Timely start to action necessary

short time from the event giving rise to the complaint. This time is referred to as a **limitation period**. In most provinces, for example, a person who is owed money from a simple sale of goods transaction must bring an action against the debtor within six years of the failure to pay the debt.[25] The plaintiff must commence an action by filing the appropriate pleading (the writ of summons, the statement of claim, or the notice of civil claim) with the appropriate court. Failure to fulfill that step within the limitation period will result in the plaintiff being barred from pursuing the action.

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25. But in Alberta, the *Limitations Act* (R.S.A. 2000, c. L-2), in s. 3(1), states that most lawsuits (including those for breach of contract and tort) must be commenced within two years of discovering the claim, or within 10 years from the date when the claim arose, whichever period expires first. Ontario has a similar system, except that the ultimate limitation period is 15, rather than 10, years, pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24, s. 15(2). Both the Alberta *Act* (ss. 8–9) and the Ontario legislation (s. 13) carry forward the rule that a written acknowledgment, or part payment, of a debt before a limitation period expires revives the limitation period, which begins again at the time of the acknowledgment or part payment. The Alberta legislation (s. 7) also allows the parties to extend a limitation period, by agreement. In British Columbia, no action may be brought after 30 years from the time the right to do so arose (*Limitation Act*, R.S.B.C. 1996, c. 266, s. 8(1)(c)).

This time limitation will vary depending on the jurisdiction and the nature of the complaint involved, and may be embodied in several different statutes in a province. Refer to the MyBusLawLab.

With the expiry of the limitation period and the threat of court action removed, the potential defendant is not likely to settle out of court and the plaintiff is left with no recourse. For this reason, it is important for a person involved in a potential lawsuit to quickly get the advice of a lawyer regarding the relevant limitation period. Whether the limitation period had expired is the problem facing the Court in the Canada's Wonderland case discussed in Case Summary 3.2. This case shows that a person not only has to sue for the right thing—in this case, negligence—but he also has to do so in a timely manner.

Expiration of limitation period prohibits suing

Jurisdiction

The first step when suing is to determine which court should hear the action. The proper geographic jurisdiction in which to bring an action can be a very difficult question, but generally the plaintiff or person bringing the action can choose a court

Where to sue?

CASE SUMMARY 3.2

Does a Judge Have Discretion to Extend a Limitation Period? *Joseph v. Paramount Canada's Wonderland*[26]

Joseph suffered an injury at Paramount's amusement park. His lawyer prepared a statement of claim, but his assistant did not file it before the limitation period expired. She believed that the relevant limitation period was six years. However, in Ontario, the *Limitations Act, 2002* established a basic two-year limitation period and an ultimate limitation period of 15 years. (The basic limitation period runs from when the claim is discovered.) When the lawyer realized the error that had been made, he filed and served the statement of claim. The Defendant applied for a ruling that the action was barred, as the limitation period had expired. A Judge of the Superior Court of Justice held that the action was barred by the two-year limitation period provided by the new *Act*. The Judge also held, however, that he had discretion under the common law doctrine of special circumstances to extend the time to commence an action, as long as there was no prejudice to the defendant that could not be compensated for with either costs or an adjournment.

The Court of Appeal briefly discussed the aim of the new *Act* ("to balance the right of claimants to sue with the right of defendants to have some certainty and finality in managing their affairs"). It also discussed some of the reforms introduced by the new *Act*, such as the doctrine of discoverability. With respect to the special circumstances doctrine, the Court held that the Ontario legislature did not intend that the courts would continue to have discretion to extend the limitation periods under the new *Act*, which was intended to be comprehensive.

DISCUSSION QUESTIONS

If the special circumstances doctrine no longer applies, and a claim is not filed prior to the expiration of the limitation period because of a mistake by a lawyer's assistant, is the plaintiff out of luck? Is there anyone who could be held liable for the damages she may have recovered if her lawsuit had proceeded? If there is an ultimate limitation period, claims that have not been discovered prior to the expiration of the period can never be pursued. Is that fair?

26. (2008), 90 O.R. (3d) 401 (C.A), 2008 ONCA 469 (CanLII).

in the area where the defendant resides or in the area where the matter complained about arose. If a traffic accident that happened in Alberta involved one driver from British Columbia and one from Ontario, the Ontario driver would have to sue in British Columbia or Alberta.

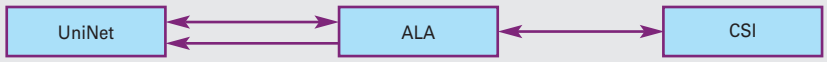
Cases involving the internet

The internet has complicated this to some extent since its messages are received in all jurisdictions. Where the internet is involved, a court is more likely to allow an action to proceed if there has been some sort of interaction or transaction over the internet with a resident of that province.[27] Still a court can refuse to hear a case if it believes that another jurisdiction would be more appropriate. There can also be serious jurisdictional problems when a successful litigant tries to enforce that judgment in another jurisdiction.

CASE SUMMARY 3.3

When Does a Court Have Jurisdiction? *UniNet Technologies Inc. v. Communications Services Inc.*[28]

1. Entered licence agreement



2. Entered licence agreement
3. Terminated licence agreement

"ALA," a corporation formed in St. Vincent and the Grenadines, granted UniNet, a B.C. corporation, a 99-year licence to use a domain name for the development and operation of an online gambling licence. UniNet sublicensed the name to Poker.com, a Florida corporation. Communication Services Inc. (CSI) was incorporated, by the principals of ALA, in Samoa, a country with strong asset protection laws that would protect the assets of the directors and officers of CSI and ALA from foreign claims and judgments. UniNet claimed that ALA wrongfully terminated the licence agreement and then transferred the domain name to CSI. The issue was whether B.C. courts had jurisdiction over the court proceeding. The lower court held that the B.C. courts had such jurisdiction.

The licence agreement between ALA and UniNet indicated that it was to be interpreted by the laws of British Columbia and that the B.C. courts were to have jurisdiction over any relevant litigation. It also required that any dispute arising out of the licence agreement was to be resolved by arbitration under B.C. legislation. UniNet had commenced such arbitration with respect to the termination of the agreement.

The Court of Appeal held that the test as to whether a court has jurisdiction is "whether the plaintiff has established that there is a 'real and substantial connection between the court and either the defendant or the subject-matter of the litigation.'" The Court considered that the licence agreement was governed by the law of British Columbia, that the parties had agreed to the jurisdiction of B.C. courts, that the right to use and own the domain name was being determined in arbitration in British Columbia, that the licence agreement was entered into in British Columbia, and that the agreement may have been performed, at least in part, in British Columbia. CSI argued that it was not a party to the licence agreement. The Court held that the litigation was about whether CSI received the domain name from ALA in breach of its obligations under the licence agreement with UniNet, and was therefore a natural continuation of the arbitration being held in British Columbia. The Court ruled that the cumulative effect of all of these factors gave the B.C. courts jurisdiction over the litigation.

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27. *Easthaven Ltd. v. Nutrisystem.com Inc.* (2001), 55 O.R. (3d) 334 (Sup. Ct.), 2001 CanLII 27992 (ON SC).
28. (2005), 251 D.L.R. (4th) 464, (2005), 38 B.C.L.R. (4th) 366 (C.A.), 2005 BCCA 114 (CanLII).

REDUCING RISK 3.1

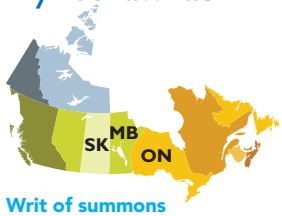
To avoid problems, a sophisticated client doing business over the internet would specify what law is to apply to transactions entered into with customers and which courts are to have jurisdiction over relevant litigation. When business is solicited, he would also include disclaimers setting limits on the parties who can enter into such transactions. Such disclaimers would be similar to those contained in product warranties, namely: "Void where prohibited by law" or "Available only to residents of Canada." If a business creates a website and uses it to do business in other jurisdictions, not only will it be subject to the law of those jurisdictions, but also any resulting litigation may be conducted in the courts of those jurisdictions. See Chapter 14 for a more detailed discussion of this topic.

Once the province has been chosen, the plaintiff must then choose the court in which to commence the litigation. In a civil action, this is either the province's small claims court or its superior court. The monetary jurisdiction of the small claims court varies from province to province, as discussed above. Although it is simpler and less expensive to bring an action in the small claims court, a disadvantage is that that court is restricted in the costs it can award. The costs incurred for representation by a lawyer usually cannot be recovered. On the other hand, the procedure followed at the small claims court has been significantly streamlined. It is designed to enable ordinary people to present their legal problems without the need to hire a lawyer. Hiring a lawyer, asking a friend to assist in court, or handling the action on one's own are all options.

Small claims court is simple but only minimal costs are recoverable

Pre-Trial Procedures

MyBusLawLab



The traditional way to commence an action in a superior court was for the plaintiff to issue a **writ of summons**. This process has been abandoned in most provinces, including British Columbia, which passed the *Supreme Court Civil Rules*[29] eliminating writs of summons effective 1 July 2010. Where the writ of summons is still in use, if the defendant chooses to dispute the claim, he must promptly file an **appearance** with the court clerk. The second step (the first in provinces where the writ of summons is not used) requires a **statement of claim** (a notice of claim in British Columbia) to be served on the defendant. The statement of claim sets out in detail the plaintiff's allegations. It must be filed with the court clerk and served on the defendant. The defendant must then prepare and file a **statement of defence** (a **response to civil claim** in British Columbia), in which he provides answers to the claims of the plaintiff stating areas of agreement, disputed claims, and contrary allegations.

Writ of summons

Appearance

Statement of claim

Statement of defence

If the defendant believes that he is the real victim, he can also file a **counterclaim**. This is similar to a statement of claim. A counterclaim requires the filing of a statement of defence from the plaintiff in response.

Counterclaim

The documents used to start and defend a lawsuit constitute the **pleadings**. The purpose of the pleadings is not to argue and justify positions; rather, the parties are merely stating the claims giving rise to the dispute and establishing the required elements of the legal action. If either party believes that the documents do not make the other party's position completely clear, she may ask for clarification or further information. Once the pleadings have closed, the parties have the right to apply to set a date for trial and begin the process of discovery. Throughout the pre-trial process, the parties have the right to—and often do—make applications to the court for direction regarding what details have to be disclosed, what questions have to be answered, and other matters that may arise.

Pleadings

29. *Supra* note 24.

The process of discovery has two distinct parts:

Documents may be used at trial

1. **Discovery of documents.** Each party has the right to inspect any document in the possession of the other party that may be used as evidence in the trial. This includes email and computer files on a disk or a hard drive.

Statements made under oath may be used at trial

2. **Examination for discovery.**[30] The parties (with their lawyers) meet before a court reporter and, under oath, are asked detailed questions relevant to the problem to be tried. The parties are required to answer these questions fully and truthfully. Everything said is recorded, and may be used later at the trial. This examination process generally applies to only the parties to the action, not to witnesses. When corporations are involved, a representative who has personal knowledge of the matter may be examined. As part of a general reform of the litigation process in some provinces, and in an attempt to reduce the costs of an action, the examination for discovery has been eliminated in actions involving smaller amounts.[31] Other provinces have limited the amount of time given to the examination process.[32]

Pre-trial conference

In most jurisdictions, a pre-trial conference must be scheduled. This is a meeting of the parties, their lawyers, and the judge. It is held to determine which issues remain to be tried and whether the parties can themselves resolve the dispute. In fact, most disputes are resolved by the parties during these pre-trial processes.

Offer to settle

Another tool often available to parties before a trial is an **offer to settle**. Either party can make an official offer to settle; if it is accepted, that ends the matter. If it is refused and the judgment at the trial is different from the offer made, the costs awarded are adjusted to punish the parties for failing to act more reasonably.

Payment into court

If Jones was claiming $200 000 against Smith for an automobile accident, Smith could make an offer to settle (a "payment into court") of $150 000. The judge would know nothing about such a payment. If the eventual judgment was for more than $150 000, costs would be awarded as normal, since Jones acted reasonably in refusing to accept the offer. But if the judgment was for less than $150 000, obviously Jones would have been better off accepting the payment. Because he acted unreasonably in not doing so, he would be denied compensation for the legal expenses incurred from the time of his refusal of the offer. The plaintiff can also make an offer to settle, showing a willingness to take less than originally claimed. If this is unreasonably refused by the defendant, he will be required to pay greater costs due to his failure to accept a fair settlement.

REDUCING RISK 3.2

The discovery stage is an extremely important part of the litigation process; cases are often won or lost at this point. When parties testify under oath at discovery, they often make admissions or incorrect statements that come back to haunt them at the trial. Admissions of fact that may not seem important at the time may become crucial at the actual trial, and a party is bound by those admissions. A false claim can be investigated before trial, and the party can be forced to recant at the trial, bringing her credibility into question. This means that what is said at the discovery stage often determines the outcome of the case, compelling the parties to come to a settlement. A sophisticated client will understand the role that the discovery process plays in litigation. She will know that documents must be produced during the discovery of documents and will appreciate the importance of her testimony and its potential impact on the legal action. She will therefore ensure that she is very well prepared.

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30. In Alberta, Part 5 of the new *Rules of Court* (*supra* note 24) refers to the discovery of documents as "disclosure" and the examination for discovery as "questioning," which may be done orally under oath or through written questions, by affidavit.

31. Under Ontario's Simplified Procedure, for example, examination for discovery is not permitted for actions involving less than $100 000 (*Rules of Civil Procedure* (*supra* note 24), r. 76).

32. In British Columbia, for example, there is a two-hour limit on examinations for discovery for Fast Track Litigation (*Supreme Court Civil Rules* (*supra* note 24), r. 15-1).

RECENT INITIATIVES

Recent initiatives

While it is obvious that the purpose of this long, involved, and expensive pre-trial process is to encourage the parties to reach a settlement and thereby avoid a trial, it is also clear that such a process results in frustrating delays for the parties. For this reason, the provinces have implemented reforms to speed up the litigation process, especially when smaller amounts are involved. Alberta and British Columbia, for example, allow for Summary Trials, in which evidence is adduced by **affidavit** instead of by the testimony of witnesses.[33] British Columbia also provides for Fast Track Litigation for trials that can be completed within two days.[34] Ontario has a Simplified Procedure for claims of $100 000 or less,[35] New Brunswick[36] and Prince Edward Island[37] have procedures for Quick Rulings, and Manitoba has implemented Expedited Trials and Expedited Actions.[38] Some provinces, including Ontario and Saskatchewan, have introduced Mandatory Mediation.[39] Several provinces, including Ontario, have started mandatory case management, which involves judicial supervision of the specific steps in the litigation process.[40] Ontario now regulates paralegals, which provides people involved in disputes with an alternative to hiring lawyers.[41] The objectives of reducing costs and delay—and of making the justice system more accessible—have motivated all jurisdictions to create small claims courts where the procedures have been dramatically simplified and costs reduced accordingly.

(Refer to the MyBusLawLab for provincial variations.) It is important for businesspeople to understand that these changes, and all of the other changes to the justice system discussed above, have provided them with increased opportunity to utilize the system when necessary.

The Trial

MyBusLawLab

Plaintiff presents its case first—defendant cross-examines

Because the burden of proof at trial rests with the plaintiff, the plaintiff's case and witnesses are presented first. The plaintiff's lawyer assists witnesses in their testimony by asking specific questions, but the types of questions that may be asked are very restricted. For example, the plaintiff's lawyer is prohibited from asking leading questions, in which the answer is suggested (such as, "You were there on Saturday, weren't you?"). When the plaintiff's lawyer completes this direct examination of the witness, the defendant's lawyer is given the opportunity to cross-examine the witness. In cross-examination, the defence has more latitude in the type of questions asked and so is permitted to ask leading questions. When the opposing lawyer believes that the lawyer questioning the witness is abusing the process by asking prohibited questions, she can object to the question. The judge rules on the objection, deciding whether to permit the question or order the lawyer to withdraw it. The rules governing the type of testimony that can be obtained from witnesses—and, indeed, all other types of evidence to be submitted at a trial—are referred to as the **rules of evidence**. (These rules are very complex and beyond the scope of this text chapter .) If something new arises from the cross-examination, the plaintiff's lawyer re-examines the witnesses on those matters. When the plaintiff has completed presenting evidence,

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33. Alberta, *Rules of Court, supra* note 24, Part 7, Div. 3, and British Columbia, *Supreme Court Civil Rules, ibid.* r. 9-7.

34. *Supreme Court Civil Rules, ibid.* r. 15-1.

35. *Rules of Civil Procedure, supra* note 24, r. 76.

36. New Brunswick, *Rules of Court*, Rule 77.

37. Prince Edward Island, *Rules of Civil Procedure*, Rule 75.

38. Manitoba, *Court of Queen's Bench Rules*, Rule 20 and Rule 20A.

39. Ontario, *Rules of Civil Procedure, supra* note 24, r. 24.1, and Saskatchewan, *Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01, s. 42.

40. *Ibid.* r. 77.

41. Paralegals are regulated by the Law Society of Upper Canada. See the Paralegal Society of Ontario website at www.paralegalsociety.on.ca. See the material For Paralegals on the LSUC website at www.lsuc.on.ca.

When the plaintiff is finished, the defence then presents its case

the lawyer for the defence will then present its case calling witnesses and presenting evidence that supports its side, and the plaintiff cross-examines. After both sides have finished calling witnesses, the plaintiff's lawyer and then the defendant's lawyer are allowed to summarize the evidence and make arguments to the court. Again, if anything new comes up, the other party is given a chance to respond to it.

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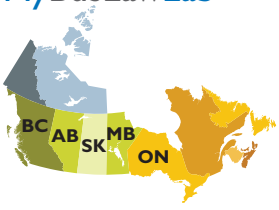

Judgment

If a jury is involved (which is not very common in civil cases), the judge will instruct it on matters of law. The jury then retires to consider the case and returns to announce its decision to the judge. The function of the jury is to decide questions of fact; the judge decides questions of law. Where the matter is heard by a judge alone, a decision may be delivered immediately; however, it is more common for the judge to hand down a judgment in writing some time later that includes reasons for the decision. These reasons can form the basis for an appeal.

COSTS

Litigation costs are high

The cost of retaining a lawyer to sue someone is often prohibitive; some creditors may decide to write off a debt rather than incur this outlay. In small claims courts, the presence of a lawyer is the exception rather than the rule, mainly because the winning party usually will not recover the costs of obtaining the services of a lawyer from the losing party. In higher-level courts, lawyers are generally essential, although parties do have the right to represent themselves. Although legal fees are usually the greater part, other expenses are often incurred, such as the costs of obtaining transcripts from the discovery process and the fees paid to secure specialized reports from experts.

Losing party usually pays costs

Even the winning party must pay her own legal expenses. She may, however, obtain as part of the judgment an order for "costs." This means that the defendant will be required to compensate the successful plaintiff for at least a portion of her legal expenses. While a judge always has discretion when awarding costs, **party and party costs** are usually awarded to the victorious party in a civil action. Party and party costs are determined using a predetermined scale and normally fall short of the actual fees charged.[42] Consequently, the plaintiff will usually have to pay some legal expenses even when she is successful. There is, of course, always the risk that a party may lose the action and have to pay all of her own legal expenses as well as the winning party's costs. If the judge finds the conduct of the losing party objectionable (for example, if an action is "frivolous and vexatious"), then he may award the winning party the higher **solicitor and client costs**, making the losing party liable for all of the legal expenses of the winning party.

Legal expenses usually not completely recoverable

REDUCING RISK 3.3

The delay and costs associated with litigation, as well as the lack of control over the process and outcome, have contributed to its decreasing popularity. For sophisticated clients, finding themselves in court should normally be viewed as a failure. Considerable care should be taken to avoid disputes, or to attempt to settle them before litigation becomes necessary.

When a settlement cannot be reached by the parties, and both parties are willing, it is sometimes advantageous to explore some of the alternatives to litigation that are available. (These are discussed below.) However, in some situations—especially when it may be necessary to enforce the court's decision—even a sophisticated client may decide that litigation is the best option.

42. In Alberta, for example, party and party costs are usually awarded for actions in the Court of Queen's Bench pursuant to Schedule C of the *Rules of Court, supra* note 24.

REMEDIES

One of the things that must be decided when a civil suit is begun is what the plaintiff will ask the court to do. The most common remedy requested in a court action is monetary payment in the form of **damages**, which are designed to compensate the victim for any loss suffered. **General damages** are based on estimates, such as when the court awards compensation to a litigant for pain and suffering or for future lost wages. **Special damages**, on the other hand, are calculated to reimburse the litigant for expenses or costs incurred before the trial. **Punitive** or **exemplary damages** are intended not to compensate the victim but rather to punish the wrongdoer for outrageous or extreme behaviour. This may result in a windfall for the victim. Punitive damages will be awarded only in very serious cases, such as a sadistic physical attack, or when an insurer pursued an unfounded allegation of arson against a vulnerable insured.[43]

Damages involve payment of money

In rare cases, remedies other than damages may be awarded. The court can order money incorrectly paid to the defendant to be restored to the rightful owner. In some circumstances, it is also possible to obtain an **accounting**, which results in any profits derived from the defendant's wrongful conduct to be paid over to the victim. The court also has the power to order an **injunction** stopping wrongful conduct or correcting some continuing wrong. The court may compel proper performance of a legal obligation by **specific performance**. In some situations, it may be appropriate for the courts to simply make a **declaration** as to the law and the legal rights of the parties.

Other remedies

CASE SUMMARY 3.4

Is Specific Performance Always an Appropriate Remedy for Land Transactions? *Semelhago v. Paramadevan*[44]

Although damages or monetary compensation is the common remedy in a civil action, sometimes the court will order the equitable remedy of specific performance. In land transactions, it was thought that because all land is unique, specific performance would always be available—at least until this case was decided by the Supreme Court of Canada. Semelhago agreed to purchase from Paramadevan a house that was under construction, for $205 000. When it was time to perform the contract, Paramadevan refused, and this action was brought. Semelhago asked for the remedy of *specific performance*—or, as permitted by statute, damages in lieu of specific performance. At the trial he elected to receive damages, and the Court awarded him $125 000 damages in lieu of specific performance. The reason for this high award was that the market value of the house had risen from the $205 000 agreed upon at the time the contract was made to $325 000 at the time of trial. Paramadevan appealed the award, and the Appeal Court reduced it by the amount of the interest that Semelhago would have had to pay to finance the purchase of the house over the period from when the contract was entered into until the trial, saying that damages should reflect not only the increase in the value of the house from the time of the contract, but also the interest that would have been paid out had the deal closed as required by the contract. This reduced the damages to just less than $82 000.

The purpose of such damages is to put the victim in the position he would have been in had the contract been properly performed—and, so, the interest he would have had to pay should have been taken into consideration. The Supreme Court of Canada stated

43. Whiten v. Pilot Insurance Co., [2002] 1 S.C.R. 595, 2002 SCC 18.

44. [1996] 2 S.C.R. 415.

that specific performance should not always be considered the appropriate remedy in such land transaction disputes. It then refused to further reduce the award, and also refused to take into consideration the increased value of the house that Semelhago had intended to sell to acquire the one in question, but which he had instead retained. This case shows the factors that will be taken into consideration when assessing damages to be paid. An important statement that came out of the case was that it should no longer be thought that all land is unique, and that specific performance is therefore not always appropriate in a land transaction.

DISCUSSION QUESTIONS

Consider the remedies available to a court in a civil action. Here the Court refused to grant specific performance, but took into consideration the increasing values of the property and interest costs that would have been incurred when awarding damages. Were these appropriate considerations in the circumstances? Should remedies be limited to monetary compensation in most cases? Should damages always simply compensate or are there situations where punitive damages should be awarded?

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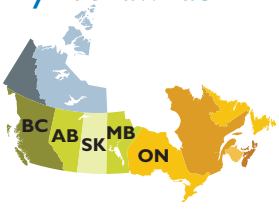


A judgment does not ensure payment

Enforcement

Even when the litigation process is completed and judgment is obtained, there is no guarantee that the amount awarded will be paid. There may no longer be a dispute over liability, but if the **judgment debtor** refuses to pay, steps must be taken by the plaintiff, now the **judgment creditor**, to enforce the judgment. If the judgment debtor cannot pay and owns no assets (a "dry judgment"), it was likely unwise to have pursued the action in the first place. The successful plaintiff not only will get nothing from the defendant, but also will have to pay his own legal expenses. On the other hand, if the judgment debtor has prospects of owning future assets, the judgment does remain enforceable for several years and could be enforced in the future. The plaintiff must consider all of these factors—as well as the risk of losing the action—when deciding whether to proceed with an action against the defendant.

ENFORCING JUDGMENT

Hearing to enforce judgment

The process to follow when enforcing a judgment is set out in Figure 3.3. Once judgment has been obtained, most provinces provide for a further hearing, sometimes called an **examination in aid of execution**[45] to determine the judgment debtor's assets and income that can be seized or garnished to satisfy the judgment. The plaintiff can question the judgment debtor (who is under oath) about her property, income, debts, recent property transfers, and present and future means of satisfying the judgment. At the conclusion of the process, the plaintiff can take appropriate steps to execute against particular property or income to recover the judgment.

SEIZURE OF PROPERTY

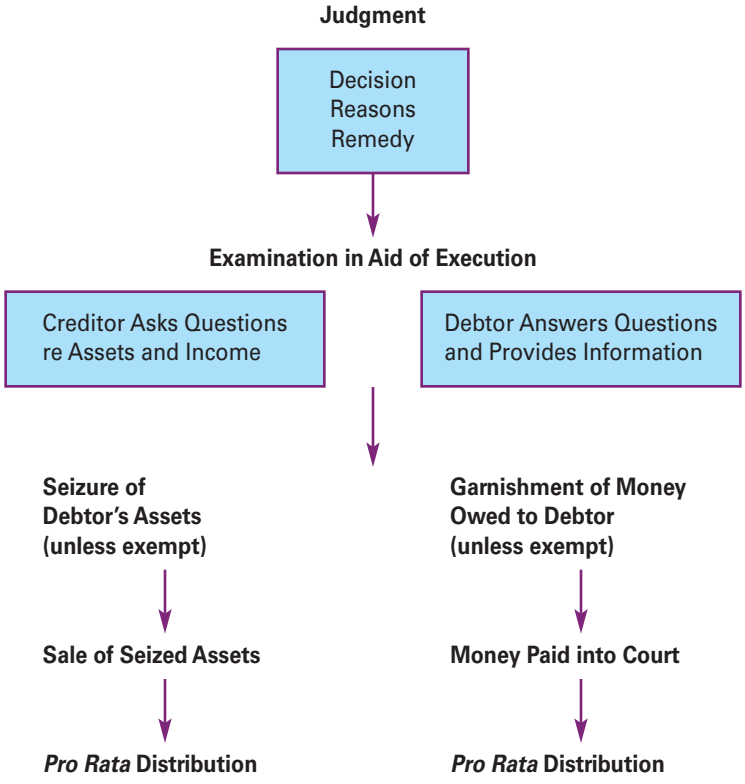
Property may be seized and sold

The execution process allows for the **seizure** and eventual sale of the debtor's property to satisfy the judgment. The property is seized by a government official (or in some provinces by a private business designated for that purpose[46]) who, after deducting a fee, sells it, usually through public auction. The proceeds are distributed

45. In Alberta, this hearing is called an examination in aid of enforcement. Instead of conducting an examination, the plaintiff may attempt to determine the information by requiring the judgment debtor to complete a financial report, verified by statutory declaration. See *Civil Enforcement Regulation*, Alta. Reg. 276/95, Part 1.3.

46. In Alberta, a "civil enforcement agency" pursuant to the *Civil Enforcement Act*, R.S.A. 2000, c. C-15.

Figure 3.3 Enforcement of Judgment



Proceeds of sale shared by all creditors

first to **secured creditors**, then to preferred creditors and, finally, on a pro rata or proportionate basis, to the remaining unsecured creditors, including the judgment creditor. **Secured creditors** used the property in question as security for a loan or other indebtedness, and so they have first claim to the proceeds from its sale, up to the amount secured. **Preferred creditors** are those who, by legislation, must be paid before other unsecured creditors. Landlords, owed unpaid rent, and employees, owed unpaid wages (both for a limited number of months), are examples of preferred creditors.

Some properties are exempt from seizure

Not all property is subject to seizure. The "necessities of life" are exempt from seizure. Exempt assets vary from province to province, but generally include—within specified limits—food, clothing, household furnishings, tools or other personal property needed to earn income, motor vehicles, and medical and dental aids. It should be noted that real property (land and buildings) can be seized to satisfy a judgment, but that the method employed varies with the jurisdiction. Often, registering the judgment against the real property is enough to pressure the debtor to pay. But when this is not enough, the property can be sold to satisfy the judgment.

Funds owed to debtor can be garnished

Garnishment involves the interception of funds owed to the judgment debtor and the payment of those funds into court. A creditor may garnish funds such as wages earned by the debtor but not yet paid to him, or the balance of the debtor's bank account. The legislation governing garnishment varies from province to province. Typically, when wages are garnished, the judgment debtor is entitled to an employment earnings exemption, which will vary depending on such factors as the amount earned and the debtor's number of dependants.[47] Once the required

47. In Ontario, for example, 80 percent of a person's wages are usually exempt from garnishment—*Wages Act*, R.S.O. 1990, c. W. 1, s. 7.

documentation is served on the garnishee (the person owing money to the judgment debtor), she must pay the amount owing (less the employment earnings exemption, if applicable) to the court, which then disburses the funds to the creditors. Refer to the MyBusLawLab for provincial variations.

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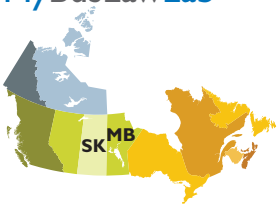

Pre-judgment remedies limited

Judicial Remedies Before Judgment

Although most methods of execution require that a judgment first be obtained, some judicial remedies may be available to a creditor even before judgment. These are extraordinary remedies that are normally granted only when there is risk that the debtor's property will be removed from the jurisdiction or otherwise made unavailable to the creditor. While bank accounts and other debts can sometimes be attached before judgment, garnishing wages before judgment is usually not permitted.[48] New Brunswick and Nova Scotia do not permit any form of garnishment before judgment. When property other than money is involved, and there is risk of its being removed or sold, the creditor may be able to obtain a court order allowing seizure. This is not a judgment, but rather an interim order granted by the court before the actual trial to ensure that the goods will be available to satisfy a judgment if one is ultimately granted. Another remedy available in some situations is an injunction to a third party from paying out money owed to the debtor. This remedy does not direct those funds to the creditor, but it does prevent them from going to the debtor—who may dissipate or abscond with them.[49]

Class Actions

One definition of **class action** is "a legal action undertaken by one or more plaintiffs on behalf of themselves and all other persons having an identical interest in the alleged wrong."[50] Class actions (also called "class proceedings") allow individuals to pool their resources and hire lawyers who will represent all of them. This reduces the number of lawsuits, thereby lowering the total cost and

REDUCING RISK 3.4

The process of collection and enforcement of judgments as described above may appear cumbersome, but it can be quite effective because of the diversity of options available. The process can be expensive, however, and may therefore not be justifiable economically depending on the amount of the debt and the likelihood of recovery. Note that when property has been used to secure a debt, and the security has been properly registered, the creditor has a right to seize the property upon default, without recourse to the courts. Bankruptcy will also affect the debtor's obligation to pay. (Secured transactions involving personal property as well as the bankruptcy process are dealt with in Chapter 15.) A businessperson should consider the various ways to structure a transaction ("Should I take security or not?" or "Should I take a personal guarantee from the corporation's principal?") before she enters into a business arrangement. This will require an analysis of whether the other party will be able to fulfill his obligations ("Is his business plan reasonable?"), and if not, whether it will be possible to collect any resulting shortfall through the litigation process ("What other assets does he own that could be used to satisfy the debt?"). An understanding of the process of collection and the enforcement of judgments will enable a sophisticated client to make better decisions, thereby reducing the risk associated with her business arrangements.

48. See, for example, s. 3(4) of the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78.

49. In Alberta, the *Civil Enforcement Act*, *supra* note 46, Part 3, enables claimants to apply for attachment orders, which can allow both seizure and garnishment before judgment is obtained.

50. Merriam-Webster Dictionary online: www.merriam-webster.com/dictionary/class%20action.

avoiding inconsistent results. Consumers often commence class proceedings against businesses.[51]

All of the provinces allow class proceedings.[52] Typically, a court must certify the litigation as a class proceeding and appoint a representative plaintiff. There must be an identifiable class of persons, with common issues. A judgment by the court on these issues binds every member of the class.

DEALING WITH REGULATORY BODIES

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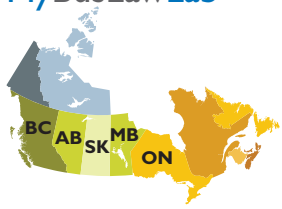

Most people are aware of the significant growth of government regulation and bureaucracy over the last 50 years. Sometimes these government regulators abuse their positions or go beyond their authority when making decisions that affect individuals or businesses. This section deals with an examination of our rights before these regulatory bodies.

Government can be divided into three different functions: legislative, judicial, and executive. The legislative branch in Canada consists of the federal Parliament and its provincial counterparts. The judicial branch consists of the courts at both the federal and provincial levels. The executive branch includes the Prime Minister, the Premiers of the provinces, the Cabinet Ministers, and all of the civil servants in the various government departments. In Canada, the theoretical head of the executive branch is the Queen, and so this aspect of government is often referred to as "the Crown."

Government consists of legislative branch, judicial branch, and executive branch

Executive branch also known as the Crown

Civil servants, or the bureaucracy of the executive branch at both federal and provincial levels, assist people in their dealings with government. They provide service functions such as security, education, health, and welfare; they administer departments such as customs and revenue; and they manage government affairs generally. They also regulate such matters as human rights, the environment, and employment. Government agents exercise their powers directly through the enforcement of rules and the imposition of penalties, and indirectly through funding or education.

Government objectives achieved through rule enforcement, economic incentives, and education

Government departments establish regulatory bodies or **administrative tribunals** such as labour relations boards, human rights commissions, and workers' compensation boards to implement and enforce their policies. These bodies may look and act like courts, but it is important to keep in mind that they are not part of the judicial branch and therefore not subject to the same regulations that govern the courts. Because administrative tribunals make decisions that profoundly impact businesses and individuals and have powers of enforcement that can be abused, the courts have some jurisdiction, albeit limited, to supervise their actions.

Tribunals implement and enforce policies

It is important to keep in mind that there are some significant advantages to administrative tribunals. Government employees who make up the decision-making panels usually have specific expertise in the matter being decided and the tribunals generally have more discretion than a judge. This flexibility creates a more efficient, quicker, and less costly process. To protect the public interest, courts are empowered to review the process by which these decisions are made. When a decision is challenged, the court determines whether the decision maker acted within his authority and whether the procedure used to come to the decision was fair. It is a review, rather than an appeal, of the decision. In fact, the Supreme Court of Canada has established a standard that significantly restricts when the decision of such a body can be challenged. As long as the administrative decision maker acted within

When powers are abused, judicial review available

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51. See, for example, "Regina Lawyer Launches Facebook Class-Action Lawsuit" (8 June 2012), CBC News Online, www.cbc.ca/news/canada/saskatchewan/story/2012/06/08/sk-facebook-class-action-120608.html, which discusses the lawsuit against Facebook relating to its initial public offering.

52. See, for example, *Class Proceedings Act*, S.A. 2003, c. C-16.5, *Class Proceedings Act*, R.S.B.C. 1996, c. 50, and *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

the authority granted, and any discretion was exercised in a fair and honest way so that the decision can be said to be reasonable, the decision will stand.[53]

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Procedural Fairness in Tribunals

To determine our rights before administrative tribunals, there are three questions that must be addressed:

1. From where did the tribunal derive its authority?
2. Was the decision-making process fair?
3. What recourse is there if there has been a failure in jurisdiction or procedure?

1. THE AUTHORITY OF THE DECISION MAKER

Decision maker must have authority

Decision makers cannot act arbitrarily. They must be able to point to some statutory authority that empowers them to make a decision. Authority is granted by statute or by a regulation created pursuant to that statute. Either can be the source of authority for the decision maker, but the provisions must clearly authorize the conduct.

Rules of statutory interpretation

The statutes usually start out with a definition section, which must be used to interpret the terms used in the statute. Most jurisdictions provide a general **interpretation statute** to provide further guidance. Usually, the application of a little common sense with reliance on the statutory definitions and the rules of interpretation provided solves most difficulties. The words of a statute are read in their ordinary grammatical sense unless it is clear from the overall statute that a different meaning was intended. The words should then be read in such a way as to be in harmony with the objective and other provisions of the statute. (Note that these rules apply to courts as well as administrative tribunals.)

Statutes must be passed by appropriate level of government

Remember that the *Constitution Act, 1867* divides powers between the provincial and federal governments. If the statute goes beyond the powers of the level of government enacting it, whether federal or provincial, it will be void and will not support the actions of the decision maker who relied on it. Similarly, if the statute, the regulation, or the conduct of the decision maker is found to violate a provision of the *Charter of Rights and Freedoms*, the decision can be successfully challenged. A court may determine that a statute has the effect of discriminating on the basis of gender, religion, or ethnic origin, or that it restricted freedom of the press or religion, and is, therefore, invalid. And even where the statute is valid, if the decision maker, in reaching that decision, has violated a provision of the *Charter*, that decision can be set aside.

Statutes and regulations must comply with *Charter*

2. THE FAIRNESS OF THE PROCESS

Administrator must act fairly

Once it is determined that the decision maker acted under proper authority, the question to be considered is whether that authority was exercised properly. Essentially, the decision maker is required to act fairly when making a decision. What constitutes fair treatment will vary with the circumstances, but the minimum standards of procedural fairness, otherwise known as the **rules of natural justice**, set a basic standard. The first requirement is a fair hearing. The person affected by the decision must be notified that a decision was going to be made and he must be given an opportunity to respond.

Notice must be given and all information must be disclosed

There is no fair hearing without notice that includes the disclosure before the hearing of any evidence or information that will affect the decision so that an effective

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53. In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, the Supreme Court reconsidered the approach to judicial review and decided that there will be only two (instead of three) standards of review: correctness and reasonableness.

defence can be prepared. There must also be an opportunity to cross-examine witnesses presenting material evidence, to refute written declarations, and to present supporting evidence and arguments. But again, what constitutes fairness will be dictated by the circumstances. The strict rules of evidence need not be followed, nor is there a general right to be represented by a lawyer (unless provided for in legislation or where criminal charges can result). The decision maker is not required to give reasons for the decision unless required by the supporting statute. The test is reasonableness and in some cases the right to submit a letter for consideration by the decision maker is sufficient to satisfy the requirement of procedural fairness.

Decision must be made by persons hearing all evidence

Another requirement of the rules of natural justice is that the decision be made by the persons hearing the evidence. If, for example, a panel of five is hearing a case and one member has to leave because of illness, that person cannot be replaced by another part way through the proceedings because the replacement would not have heard all of the evidence.

Decision maker must be free of bias

A third requirement is that the decision makers must be impartial. As shown by Case Summary 3.5, any indication of **bias** will normally be sufficient grounds to have the decision overturned. Even the appearance of bias must be avoided, and any indication of hostility or bad feelings, or the involvement of a relative, friend, or business acquaintance of the decision maker, will taint the decision. Of course, when it can be demonstrated that the decision maker has an interest (especially a financial interest) in the matter being decided, or where he has already made his decision before the hearing, the decision can be challenged. Note, however, that in some types of panels a bias seems to be built in. For example, in labour matters such panels are often composed of three members, one with a union background, one from the business side, and a third (who normally becomes the chair) chosen by the two of them. Thus any appearance of bias is balanced by both sides being represented.

Sometimes these basic procedural standards will be modified by statute, either increasing or decreasing the requirements. Thus a statute will often require a written decision or set out specific procedural requirements and time limits that must be met. When a statute attempts to remove or significantly reduce these basic rights, certain requirements set out in the Canadian *Charter of Rights and Freedoms* may come into play. Section 7 of the *Charter* states that everyone has the right to "life, liberty, and the security of person," and it requires that all decisions depriving a person of them must be made "in accordance with the principles of fundamental justice." The **principles of fundamental justice** include the procedural fairness and natural justice rules set out above, but go further. Even when a proper hearing has taken place with appropriate notice and all other procedural requirements have been met, if the statute offends our basic concepts of justice such as offending the rule of law or requiring the imposition of retroactive penalties, it is likely to offend the principles of fundamental justice and be overturned.

Principles of fundamental judgment

CASE SUMMARY 3.5

Was There a Fair Hearing? *Baker v. Canada (Minister of Citizenship and Immigration)*[54]

A woman was ordered deported. She applied, on humanitarian and compassionate grounds, for an exemption from the rule that an application for permanent residency had to be made from outside of Canada. Her application was supported by letters about the availability of medical care in her home country and the effect of her departure on her Canadian-born children. An immigration officer refused her application by letter, without providing reasons for his decision.

54. [1999] 2 S.C.R. 817.

The Supreme Court indicated that the duty of procedural fairness is flexible and variable. The extent of the duty depends on several factors, including the nature of the decision (the more an administrative tribunal is designed like a court, the higher the duty of fairness), the relevant legislation (greater procedural fairness is required if there is no appeal process, the decision is determinative/final, and there are no further requests that can be made of the tribunal), the importance of the decision to the individual affected (the higher the stakes, the higher the requirement of fairness), and the procedure followed in making it (legitimate expectations of the party(ies) regarding the level of procedural fairness that ought to be part of the decision-making process). Here the claimant had to have an opportunity to present evidence and to have it fully and fairly considered. An oral hearing was not required; the chance to provide written documentation was sufficient. Written notes prepared by a junior officer that were provided to the claimant's lawyer were a sufficient explanation of the decision. The claimant was successful, however, as these notes gave rise to a reasonable apprehension of bias. The decision appeared to be based on the fact that the claimant was a single mother with several children and had been diagnosed with a psychiatric illness. This was inappropriate; decisions of this nature should instead be made impartially, based on the evidence. The Court ordered that another hearing be held, in front of a different immigration officer.

DISCUSSION QUESTIONS

Are the standards imposed on administrative tribunals too onerous? Should the courts ever have the power to interfere with the operation of statutory tribunals in the execution of their function? Should such tribunals remain unfettered from the restrictions of rules and procedures found in the court process? What do you think?

3. REVIEWING A DECISION

Many statutes establishing administrative boards and panels provide for appeals of their decisions to another level of decision maker. The rights under any such appeal process must be exhausted before asking the courts to exercise their right to review the decision. Remember that judicial review is not an appeal on the merits of the case, but instead refers to the court's right to supervise the process by which the decision was reached. For the courts to exercise their right of judicial review, one of the following must be present:

Judicial review can follow from

1. When the validity of the statute or regulation (or provision under it) relied on by the decision maker is in question. This usually relates to a challenge of the statute or regulation based on the *Charter of Rights and Freedoms* or the division of powers under the *Constitution Act, 1867*.
   - **invalid statute or regulation**
2. When the decision maker has acted outside his authority under the statute or regulation. Sometimes a decision maker will act beyond his jurisdiction in deciding to deal with the matter in the first place, or render a decision or impose a penalty not authorized under the statute.
   - **action outside prescribed jurisdiction**
3. When an error of law on the record has been made. The record consists of the decision and any documents associated with the process of reaching that decision. The courts will not tolerate such an error and will generally overturn a decision based on it.
   - **error of law on record**
4. When the decision-making process itself has failed to follow the requirement of procedural fairness (the rules of natural justice), as discussed above.
   - **failure to follow procedural fairness**
5. When there has been an abuse of power (including discretionary power) by the decision maker. Any decision directed by malice, dishonesty, or fraud is reviewable by the courts. A decision must not be made for an improper
   - **abuse of discretionary power**

purpose and the exercise of any discretion must be a genuine exercise. For example, a decision maker in exercising discretionary power cannot merely follow the direction of a superior.

CASE SUMMARY 3.6

Was There a Breach of Natural Justice? *Dhaliwal v. Canada (Citizenship and Immigration)*[55]

Dhaliwal immigrated to Canada in 1991 with her husband and her four children. She separated from her husband in 1999 and was divorced from him in March 2005. She was introduced to Paul, a citizen of India, by telephone. Dhaliwal travelled to India to meet Paul in November 2005 and again in 2005. Dhaliwal allegedly made a marriage proposal to Paul over the telephone in November 2005. A second proposal was made in India in December 2005. Dhaliwal married Paul in India in January 2006, and returned to Canada in February 2006. Dhaliwal was in India to visit Paul in April and May 2006. On May 1, 2007, Dhaliwal applied to sponsor Paul to come to Canada.

A visa officer interviewed Paul in October 2007. He found Dhaliwal and Paul to be incompatible in terms of age and social background. He also had doubts as to the *bona fides* of the marriage, based on the evidence (no members of Dhaliwal's family present, only 15 wedding attendees, and the wedding seemed "staged"). The visa officer was not satisfied with Paul's answers and therefore refused to issue him a permanent residence visa.

Dhaliwal appealed to the Immigration Appeal Division, which upheld the visa officer's decision. The IAD found neither Dhaliwal nor Paul to be credible, because of their vague, contradictory and inconsistent testimony. It therefore dismissed Dhaliwal's appeal. She then appealed to the Federal Court, claiming that the IAD breached the principles of fundamental justice by demonstrating a bias against her. The claim related to statements by the IAD referring to "a disabled, unemployed, divorced woman with four adult children" and Paul's inability to explain why he chose a woman who "is older than him, has mental and other health issues… is less educated… to be a suitable candidate for marriage."

DISCUSSION QUESTIONS

What is the standard of review the Court must meet? Can the Court substitute its opinion for that of the IAD with respect to the genuineness of the marriage? What could the Court decide? What decision did it make?

Methods of Judicial Review

Historically, the right to judicial review of the decision of a board or tribunal involved obtaining a prerogative writ (an order used to control lower courts) from the court. The three main writs are the writs of *certiorari* (an order that quashes and sets aside a tribunal's decision as void and of no effect), prohibition (an order that prohibits a tribunal from proceeding), and *mandamus* (an order compelling a government to perform its duties). In addition, the courts always had the right to declare the law in these situations, making a **declaratory judgment**, and then providing remedies such as damages, or an injunction, to enforce that declaration. Today many provinces have consolidated and simplified this procedure by statutory enactment.[56] Whether the person challenging the tribunal proceeds by statute or by writ, it must be kept

Prerogative writs

Judicial review only if decision is "incorrect" or "unreasonable"

55. 2010 FC 7 (CanLII).

in mind that any remedy provided by the court is completely discretionary when judicial review is involved. There is a reluctance to exercise this discretion except in situations in which the decisions of the tribunal can be demonstrated to be "incorrect" or "unreasonable."[57]

Governments use privative clauses

Governments are naturally reluctant to have the courts interfere with boards that they have empowered to make such decisions. To prevent such judicial review, they will include statutory provisions that are designed to stop the courts from reviewing the board's decision. **Privative clauses** take several different forms, but a typical example is found in the current *Ontario Labour Relations Act*:

> No decision, order, direction, declaration or ruling of the Board shall be questioned or reviewed in any court, and no order shall be made or process entered, or proceedings taken in any court, whether by way of injunction, declaratory judgment, certiorari, mandamus, prohibition, quo warranto, or otherwise, to question, review, prohibit or restrain the Board or any of its proceedings.[58]

Courts resist operation of privative clauses

The intent of this kind of provision is obvious, but the courts interpret it to apply only when the Board is acting within its jurisdiction. Thus, the original question as to whether the administrator has jurisdiction is still open to review. In fact, the way the courts have interpreted this type of privative clause varies with circumstances. If the courts wish to review a decision, they will often find a way to do so, despite the presence of a privative clause. And, of course, such privative clauses cannot remove rights given under the *Charter of Rights and Freedoms* such as the right that the rules of fundamental justice be followed when a person's right to "life, liberty, and the security of person" is compromised.

It must be remembered that, because of recent Supreme Court of Canada decisions, courts today are generally reluctant to exercise their right of judicial review even when there is no privative clause involved. As stated by the Supreme Court of Canada, "Courts, while exercising their constitutional functions of judicial review, must be sensitive not only to the need to uphold the rule of law, but also to the necessity of avoiding undue interference with the discharge of administrative functions in respect of the matters delegated to administrative bodies by Parliament and legislatures."[59]

Challenging administrative decisions may be futile and costly

Finally, it must be emphasized that anyone adversely affected by the decision of an administrative board or tribunal should think long and hard before attempting to exercise any of the rights outlined above. It is generally very expensive to go through the process of judicial review and often the resulting remedy is hollow. For example, when an order of *certiorari* is obtained, quashing a board's decision, that board will often simply reconvene, making sure that it does everything right, and make the same decision again. The result of this approach is that the whole process of challenging a decision becomes futile. Also, when a government agency is involved, it can usually afford to pay the legal costs involved, and it may prefer to incur those costs rather than face an embarrassing court decision. There is more than a little truth in the old adage that, "You can't fight city hall." For these reasons, even when rights have been clearly violated, it is often more appropriate, especially when dealing with government, to turn to the alternative methods of dispute resolution that are described below.

Alternative dispute resolution may provide better resolution

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56. See, for example, *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, *Judicial Review Procedure Act*, R.S.O. 1990, c. J-1., Alberta, *Rules of Court*, *supra* note 24, Parts 56.1 and 60, and Saskatchewan, ***The Queen's Bench Rules***, Part Fifty-Two, www.qp.gov.sk.ca/documents/English/Rules/qbrules.pdf.

57. As these words are explained in *Dunsmuir v. New Brunswick*, *supra* note 50.

58. S.O. 1995, c. 1, Sch. A, s. 116.

59. *Dunsmuir v. New Brunswick*, *supra* note 50 at 27.

REDUCING RISK 3.5

It is vital that businesspeople remember that challenging government regulators and administrators should be done only as a last resort. As with litigation, an administrative proceeding can be a frustrating, costly, and often fruitless exercise that should be avoided if at all possible. Further, this is a specialized field in which the costs incurred may be even higher than the expense of litigation. The complainant must deal with officials who have access to government funds and who may be more than willing to spend those funds to save themselves the embarrassment of being found in the wrong. A sophisticated client will carefully consider all of the costs and benefits before making a complaint against a government body.

ALTERNATIVES TO COURT ACTION

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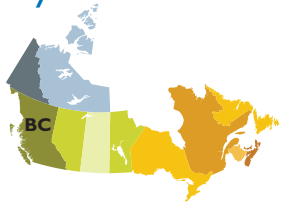

Need for alternatives

Businesspeople involved in private disputes are well advised to avoid litigation whenever possible because of the high costs, long delays, and likelihood of dissatisfaction with the results. In this section, we will discuss the various alternatives that can be used instead of—or in conjunction with—the litigation process. Many jurisdictions are now questioning the efficiency of the present civil justice system and are looking for better alternatives. Compulsory mediation, for example, has been incorporated as part of the litigation system in several jurisdictions. (In Ontario, the mandatory mediation component of the case management system was successful in increasing the resolution rate of disputes before trial and in reducing costs to the parties.[60])

ADR can be used at any time

Alternative dispute resolution (ADR) and litigation can work hand in hand, with the threat of one encouraging the parties to take advantage of the other. (The "Collaborative Family Law Process" involves an ADR approach in which the parties and their lawyers sign a contact agreeing not to go to court..[61]) Even if the matter does go to court, negotiation and mediation can be used at any stage in the litigation process, including post-judgment, when the parties wish to avoid an appeal. Note that the comments below with respect to the value of ADR apply equally to processes before administrative tribunals and other government decision-making bodies.

What Is Alternative Dispute Resolution?

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Negotiation

Mediation

Arbitration

Any strategy that is used as a substitute for court action qualifies as a method of ADR, but there are three main approaches: (1) **Negotiation**—when the decision making is left in the hands of the disputing parties to work out for themselves; (2) **Mediation**—when a neutral third party assists the parties in coming to a resolution on their own; and (3) **Arbitration**—when a third party makes a binding decision in the matter under dispute.

Table 3.1 compares these methods with litigation. They are discussed in more detail later in this section.

ADVANTAGES OF ADR VERSUS LITIGATION

ADR leaves control in the hands of the parties

There are some significant advantages in choosing an alternative to litigation. One is the retention of control of the matter by the people most affected by it. Rarely does a court judgment compensate the parties for all their time, money, and personal and business resources expended. It is, therefore, vitally important that businesspeople maintain control over the problem-solving process and appreciate the disadvantages of placing the matter in the hands of lawyers and the court when doing so can be avoided.

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60. See Helen Burnett, "Pilot Project Meets Many of its Goals" *Law Times*, (21 April 2008), www.lawtimesnews.com/200804213999/Headline-News/Pilot-project-meets-many-of-its-goals.

61. See the discussion at www.collaborativepractice.ca.

Table 3.1 Summary and Comparison of Litigation and ADR Methods

	Litigation	Arbitration	Mediation	Negotiation
Control	Low	Low	High	Highest
Delay	Lengthy	Moderate	Brief	Briefest
Cost	High	Moderate	Low	Low
Privacy	Low	Moderate	High	Complete
Flexibility	Low	Moderate	High	Highest
Good Will	Unlikely	Possible	Likely	Ensured
Predictability	High	Reasonable	Low	Low
Appealability	Usually	Moderate	None	None
Visibility	High	Moderate	None	None

Less delay with ADR

Most of the delays in litigation occur because of the lengthy pre-trial process and the problems of scheduling court personnel and facilities. When other resolution processes are used, there are fewer procedural and scheduling delays because these matters are controlled by the parties themselves.

Less distraction with ADR

An ongoing court battle can be very distracting to a corporation's directors, managers, and employees. Key people may find themselves involved over a considerable period of time in overseeing the process, providing information, or preparing to testify. Much of this can be avoided by looking to an alternative method of resolving these disputes.

Less expense with ADR

The fact that there is faster resolution of the matter with a simplified process involving fewer parties and fewer lawyers but with continued access to expert witnesses if needed contributes to a significant cost saving.[62] Also, indirect considerations, such as the fact that the matter can be kept private, avoiding negative publicity and the disclosure of sensitive information, as well as the reduced risk of an adverse judgment, make an ADR approach more attractive.

Risk of adverse judgment reduced

An American case against fast-food chain McDonald's illustrates the risk of insisting on litigation. In that case, a woman was injured when a cup of extremely hot coffee spilled on her as she removed the lid to add sugar. She suffered serious burns and spent some time in hospital. She had asked for some small compensation from McDonald's and was rebuffed. When the matter went to trial, the jury awarded more than $2.7 million in punitive damages. (Note that the trial judge later reduced the punitive damages to $480 000; the $160 000 compensatory damages award remained intact.) This could have been avoided had the representatives of McDonald's simply negotiated reasonably with the complainant in the first place.[63]

Good relationship can be retained with ADR

One of the costs of a protracted conflict is the breakdown in the relationship between the parties. Litigation—in which questioning the opposition's credibility and honesty is routine—is adversarial in nature, often resulting in bitterness and animosity between the parties, thereby poisoning any future business relationship. In contrast, a quick settlement using ADR techniques may actually strengthen the relationship.

ADR provides more flexibility

Another attractive feature of ADR is its flexibility. The parties remain in control, allowing them to accommodate the needs of multiple parties and competing interests. Even cultural differences can be taken into consideration. ADR can even be

62. See "Nortel Bankruptcy Mediation Begins with $9 Billion on the Table" at www.thestar.com/business/article/1167146–nortel-bankruptcy-mediation-begins-with-9-billion-on-the-table. The mediator warned the parties that litigation "would delete much of the money now available to creditors" and encouraged the parties to settle their claims through mediation.

63. *Liebeck v. McDonald's Restaurants, P.T.S. Inc.*, 1995 WL 360309 (N.M. Dist. Ct. 1994).

used to resolve internal disputes within an organization, often in an informal atmosphere with a quick resolution that is satisfactory to all.

It should also be noted that when international trade is involved, ADR methods are much more common, especially when dealing with businesses that are in a civil law jurisdiction. Organizations have been established throughout Canada to assist in the conduct of such processes.[64] Legislation enabling the enforcement of arbitrated awards strengthens their usefulness.[65]

ADR can resolve conflicts between businesses operating internationally

DISADVANTAGES OF ADR VERSUS LITIGATION

It must also be emphasized that there are many situations in which ADR should be avoided. The qualities of judicial fairness and impartiality associated with the litigation process are not always present in ADR. The court has no prior interest in the parties or their problems, but it does have extraordinary powers to extract information from the parties, powers that do not exist outside the litigation process. A mediator cannot ensure that all relevant information has been brought forward. In the court system, there are safeguards and rules in place to ensure that each side gets a fair hearing. Because there are few rules or required procedures, ADR may not be able to provide this assurance. The court strives to balance the process so that neither side can take unfair advantage of the other, although this balance may be compromised when only one side can afford extensive legal help. If parties are using ADR, and there is a power imbalance, there is the danger that the stronger party will take advantage of the weaker. In contrast, the discovery process does much to level the playing field where such inequality exists.

ADR cannot ensure a fair hearing

ADR does little to overcome a power imbalance

Other advantages of litigation are that the decision will be based on, or set a precedent, and that the decisions will normally be made public and thus be an effective deterrent to similar behaviour. (In fact, concern has been expressed by judges and academics that the case law will not develop because mediation and arbitration are becoming much more popular than litigation, and they are private.[66]) There are also effective tools available for enforcing the judgment. Finally, there is a right to appeal a court's decision.

ADR cannot ensure consistent outcomes

ADR agreements not enforceable or appealable

It must always be remembered that what is a disadvantage to one party may be the most attractive feature of the chosen process to another. As in all business decisions, sound, properly informed judgment is needed in deciding between ADR and litigation in any given situation.

ADR Mechanisms

Upon concluding that ADR is a viable option, the businessperson must then decide which of the various strategies would be most effective in resolving the dispute.

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NEGOTIATION

Negotiation should be the first recourse for people who find themselves in a disagreement—too often, it is the last. Negotiation involves the parties or their representatives meeting to discuss the problem to come to an agreement as to how it should be resolved. Both sides must be willing to enter into negotiations, and the goal must be to find a solution even if that means making concessions. Negotiation can be as simple as a phone conversation, an exchange of correspondence, or sitting down together in a private meeting; any meeting with the goal of resolving a dispute qualifies as a negotiation.

Negotiation should be tried first

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64. For example, the British Columbia International Commercial Arbitration Centre at www.bcicac.com.

65. See, for example, *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233.

66. See Daryl-Lynn Carlson, "Family Lawyers Flocking to ADR" *Law Times* (11 June 2007), online: http://www.lawtimesnews.com/200706182260/Headline-News/Family-lawyers-flocking-to-ADR.

Because the process is cooperative and non-binding, either side can withdraw from the negotiations if the other is being unreasonable or intransigent; the parties may then elect to move on to some other means of dealing with the matter. An understanding of the law surrounding the dispute will help the parties recognize the consequences of a failure to settle as well as the relative strength or weakness of the position they are taking.

Parties can withdraw from negotiation

Negotiation requires cooperation and compromise

Successful negotiation requires an understanding of the issues and a willingness to cooperate and compromise. A competitive approach that tries to best the other party will likely not resolve underlying issues. Similarly, there is danger in being too willing to accommodate demands from the other side. It may not always be possible to reach a win–win solution, but satisfactory results often involve both sides cooperating to minimize their losses. Of course, there is always the danger of being subjected to unethical behaviour or coercion, and since not everyone can be a skilled negotiator, any decision to take this course of action must be made weighing all of the advantages and disadvantages.

Representatives may conduct negotiation

When there is a lack of skill or experience, or when one party is in a more powerful position, it is often wise to negotiate through a representative. While this involves extra costs and a certain amount of loss of control, it has the advantage of overcoming the lack of skill problem and creates a buffer between the parties so that a more powerful personality can be resisted. When lawyers are used, care must be exercised to choose one that is skilled in negotiation and not simply predisposed to litigation. There is a further advantage of the lawyer's better understanding of the legal issues involved, and if the matter does proceed to litigation, the lawyer is already involved in the process. It should also be kept in mind that any legal concession, admission, or compromise made during these negotiations when made "**without prejudice**" will not hurt the parties if the negotiations fail and litigation results. And it may also be true that successful negotiation, when there has been concession and compromise between the parties, can actually improve the business relationship.

Relationship may be enhanced

MEDIATION

Neutral third party facilitates communication but does not make decision

Mediation also has a long history in resolving disputes. Its use in labour relations has been mandated by statutes for most of the last century, and its mandated use has been expanded to other areas of litigation in various jurisdictions, as discussed above.[67] In addition to Ontario and Saskatchewan, Alberta recently introduced mandatory dispute resolution for litigation unless the Court says otherwise. See *Rules of Court, supra* note 24. Mediation has always played a role in commercial relations but has become much more vital in recent years. The main difference between negotiation and mediation is that mediation involves a neutral third party, hopefully properly trained, who assists the parties to come to an agreement. The **mediator** does not make decisions but facilitates the discussion, making sure that each side has the opportunity to put his sid e forward, eliciting information, finding areas of possible compromise, identifying potential problems and solutions, and encouraging settlement.

Mediator finds common ground

The mediation process can be very informal or it can be carefully structured with rules of procedure and a set timeframe. Often only a few meetings are necessary, with the main objective of the mediator being to find some common ground between the parties. The mediator will meet with both parties together and separately, using a variety of techniques to find some area of agreement and developing compromises between the parties, which can be used to encourage a settlement. It is this degree of flexibility and creativity that makes the process effective in the hands

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67. Ontario has introduced a Mandatory Mediation pilot project, which requires that a mediation session take place after a statement of defence has been filed. See *supra* note 39. In several provinces, including Alberta and British Columbia, parties involved in small claims litigation may be required to attempt mediation before a trial date will be fixed. See *Mediation Rules of the Provincial Court—Civil Division*, Alta. Reg. 271/1997 and *Small Claims Rules*, B.C. Reg. 261/93 Rule 7.2.

of a skilled mediator. Mediation has been so successful because the persuasiveness, skills, and neutrality of a trained third party are introduced, while control of the problem is retained by each party. While the parties are not bound by any solutions suggested by the mediator, once an agreement is reached it can be enforced just like any other contract.

Mediators are trained

Successful mediators require considerable specialized training. There are organizations that provide membership and certification, and that set recognized professional standards.[68] The disputing parties will normally choose a mediator who is a member in good standing with such an organization. They may, in fact, choose a mediator from a list provided by the organization.

When mediation is appropriate

Mediation works well when highly confidential or sensitive information that should not be disclosed to the public is involved, a speedy resolution is vital, good ongoing relations must be maintained, there is some trust involved, or both parties are desirous of reaching a settlement.

Disadvantages of Mediation

Mediation may be inappropriate

Mediation depends on cooperation and good will between the disputing parties. When there has been some wrongdoing involved, or blame is to be attached, it is unlikely that proper disclosure will be made, and crucial information may be withheld. Mediators have little power to compel parties to produce evidence and documentation when they are unwilling to do so.

Successful mediation requires balance of power and willingness to act in good faith

Also, when one of the parties is weaker, mediation may just exacerbate that weakness. This can be a serious problem in family disputes, when the weakness of one of the parties—or his desire to accommodate—leads to an unbalanced result. Also, when one of the parties is suspected of acting in bad faith, mediation is simply inappropriate, because trust is such an important component of the mediation process.

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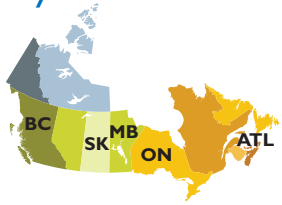

ARBITRATION

Arbitration involves third-party decision maker

The third major category of alternative dispute resolution involves surrendering the decision making to a third party. In most cases, arbitration is voluntary, but in some situations, such as labour relations, the parties are required by statute to agree to some arbitration mechanism as part of the collective agreement process.[69] In some instances, arbitration is agreed upon before any dispute has arisen by including, in the original contract, a requirement to arbitrate. Often, however, the parties agree to arbitrate after a dispute arises. Arbitration can be very effective when external disputes

REDUCING RISK 3.6

There are a variety of circumstances in which mediation might be preferable to and more productive than other means of dispute resolution. One example would be when the benefits of a continuing relationship outweigh the benefits of securing a damage award. In the construction industry, for example, it may appear that a contractor is about to fail to complete the building on time or on budget, leading to a dispute with the owner. Rather than expending time, energy, and expense on litigation, with the likelihood of further delay of the project, it may be more reasonable to call in a mediator who has knowledge of the construction industry. This mediator could help the parties arrive at an understanding of the problems each has faced, such as unexpected illness, increased costs, or the unavailability of materials. This could lead to a solution acceptable to both sides, resulting in the completion of the building and the maintenance of the relationship. In fact, in the construction sector, it is reported that millions of dollars are saved annually in jurisdictions where the first recourse in the event of problems is to mediate rather than to litigate. A sophisticated client working in any industry will be aware of the potential advantages of mediation whenever he is faced with a disagreement that could end up in litigation.

68. One example of such an organization is the ADR Institute of Canada, www.adrcanada.ca.

69. See, for example, s. 48 of Ontario's *Labour Relations Act, 1995*, S.O. 1995, c. 1, Sch. A.

arise with creditors, suppliers, or customers, and even internally with employees and shareholders or between departments. Arbitration is commonly used in resolving disputes arising from international trade agreements.[70]

Arbitrators are chosen by parties

Arbitrators may be experts in the field

Typically, the **arbitrator** is chosen from a pool of trained and certified professionals, often with expertise in the subject matter of the dispute. Organizations of professional arbitrators have been established, and the members offer their services like any other professionals.[71] These organizations not only provide training and certification, but also set professional and ethical standards requiring that their members be properly trained, avoid conflicts of interest, be free of bias, and keep in strict confidence all information they obtain. In more formal instances, retired judges are hired to hold what is essentially a private trial, rendering a decision much like a court but without the attendant publicity or delay.

Parties can stipulate in their contract the requirement for arbitration, how the arbitrator is to be chosen and, if they want, that provincial arbitration legislation apply to the process. The specific process to be followed may be left to the arbitrator or, alternatively, the procedure may be set out in the agreement,[72] but such procedures, whether determined by the parties or by the arbitrator, must be fair.

Procedure must be fair

Usually, before an arbitration hearing takes place, there is a requirement that information relating to the matter be disclosed by both sides. At the hearing itself, lawyers or other representatives of the parties usually examine witnesses, present documents, make arguments and summarize their cases. Formal rules of evidence need not be adhered to, nor is the arbitrator required to follow precedent in reaching the decision. When the process is mandated by statute, as in labour disputes, the requirements are much more stringent and more closely resemble an actual court hearing. An arbitrator's decision is binding on the parties and is generally not appealable, but it is important to remember that the courts still have the right to supervise and review the decision-making process as discussed above under the heading "Dealing with Regulatory Bodies."

Decision cannot be appealed but process may be reviewed by court

The unique feature of arbitration is that a third party makes the decision. To be effective, it is vital that the parties be required to honour that decision. Most jurisdictions provide that the decisions reached by arbitrators are binding and enforceable.[73] As a result, arbitration is usually an effective process.

Third party makes a decision that is binding

Similar to litigation, but cheaper

Arbitration is, however, still essentially adversarial in nature. In this sense, it is like litigation, with the attendant danger that bitterness and hard feelings may be aggravated. Arbitration is more costly than other forms of ADR, because it is more formal and involves more people, but it is still much less expensive than the litigation process.

Mandatory arbitration more common now

Ideally, arbitration should be voluntary, but clauses requiring arbitration are finding their way into standard form contracts at an alarming rate. These contracts often cover consumer transactions, with the consumer unaware that he has surrendered the right to a court hearing until the dispute arises. Because the decision is binding and non-appealable, the disgruntled party may challenge the validity of the arbitration clause in court, compounding an already complex resolution procedure.

Arbitration is private

Arbitration may look much like litigation, but it is still private and still usually within the control of the parties. When expertise is important, an arbitrator with that expertise can be chosen. Arbitration is faster, less costly, and more private than litigation, but it also has disadvantages. Arbitration is still more costly and likely more time consuming than other forms of ADR. Also, there may be little certainty or predictability, as precedents are usually not binding and animosity between the parties may actually increase as a result of this adversarial process.

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70. See the discussion regarding International Commercial Arbitration, at www.bcicac.com/about/international-arbitration-process.

71. One such organization is the ADR Institute of Canada, *supra* note 65.

72. The ADR Institute of Canada has published National Arbitration Rules, which the parties can agree to use to resolve their contractual disputes, www.adrcanada.ca/rules/arbitration.cfm.

73. See, for example, *Arbitration Act*, 1991, S.O. 1991, c. 17, ss. 37, 50.

It should be noted that these ADR mechanisms are not mutually exclusive. Sometimes the tools of mediation and arbitration will be brought together when the outsider starts out as a mediator and, if it grows clear that the parties cannot reach a settlement even with the mediator's help, she becomes an arbitrator, making a decision that is binding on both parties. Of course, such a change of roles must be agreed upon by the parties.

Mediator may become an arbitrator

Finally, mediation and arbitration are becoming more common in resolving online disputes.[74] There are many advantages to using ADR in the context of e-commerce. Many internet transactions involve relatively small amounts of money, so litigation is not practical. Using ADR for online disputes overcomes geographical issues, reduces costs, and enables a quick resolution of disputes. Confidentiality is often important to online businesses, which do not want publicity about problems with their sites or security systems.

ADR used in online disputes

Online dispute resolution (ODR) programs have been developed to help resolve disputes between parties.[75] Such programs will continue to improve and become more cost effective. Over time, this may enable businesses to impose mandatory ODR systems that would be effective and acceptable to consumers.[76]

REDUCING RISK 3.7

ADR services are now being offered online. Such services can be very helpful in attempting to mediate between corporations and their customers, when information, services, or products do not meet expectations, or when customers have not fulfilled their obligations. In addition, such intermediaries may serve to set standards, monitor compliance, and warn potential customers when problems exist. As there is little regulation controlling ADR generally, it is likely that there will be even less in the electronic environment. A sophisticated businessperson making purchases online would therefore ensure that the online ADR services are being offered by qualified professionals and be aware that she may have little recourse if things go wrong.

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Be sure to visit the MyBusLawLab that accompanies this book. You will find practice tests, a personalized study plan, province-specific material, and much more!

SUMMARY

The courts

- Procedural rules govern structure and function, which may vary with jurisdiction
- Open to the public, with some exceptions
- Both criminal and civil functions at trial and appellate levels
- All but lower-level provincial court judges are appointed by federal government

Provincial courts

- Handle less serious criminal offences, civil matters under a set amount, custody and maintenance in family divisions, youth offenders

74. See Derek Hill, "ADR Picking up in Internet and E-commerce Law" *Law Times* (1 August 2008), www.lawtimesnews.com/200808014192/Headline-News/ADR-picking-up-in-internet-and-e-commerce-law.

75. Glenn Kauth, "ODR in Canada Getting a Boost" *Law Times* (8 December 2008), www.lawtimesnews.com/200812084400/Headline-News/ODR-in-Canada-getting-a-boost.

76. See Gary Oakes, "Your Virtual Day in Court: How Online Dispute Resolution Is Transforming the Practice of ADR" *Lawyers Weekly* (16 January 2009), www.lawyersweekly.ca/index.php?section=article&articleid=737. This article indicates that ODR is "the next step to traditional ADR" and that "it's not just for commercial transactions." It can be used for small claims litigation, divorce actions, and even "in the context of world peace or interstate conflict"!

- Provinces have recently created new specialized courts to deal with societal changes and problems

Superior courts

- Handle serious criminal offences, civil matters with unlimited monetary jurisdiction, divorces

Appellate courts

- Deal with appeals of law from trial courts, usually have three judges, do not rehear the facts, usually hold final hearing for most criminal and civil matters

Federal courts

- Tax Court hears cases involving federal tax matters
- Federal Court hears disputes within federal jurisdiction and appeals from some administrative tribunals
- Federal Court of Appeal hears appeals from Federal Court, Tax Court, and some administrative tribunals

Supreme Court of Canada

- Highest-level appeal court
- Deals primarily with Constitutional and *Charter* matters, as well as cases of national importance

Process of civil litigation

- Limitation periods
  - Set by statute
- Pre-trial
  - Plaintiff files writ of summons (if required) and statement of claim
  - Defendant responds with appearance (if required) and statement of defence
  - Discovery of documents and questioning of parties by opposing counsel
  - Payment into court or offer of settlement to encourage reasonable demands and offers
  - Purpose—to bring information to light and encourage settlement
- Trial
  - Examination of witnesses and presentation of evidence
  - Judgment
  - Jury decides questions of fact
  - Judge decides questions of law
  - Loser usually pays some legal costs
- Enforcement
  - Examination in aid of execution
  - Seizure of property
  - Garnishment
- Remedies
  - Damages—general, special, punitive
  - Accounting, injunction, specific performance, declaration

Dealing with regulatory bodies

- Decisions of government bureaucrats are reviewable by the courts

Administrative tribunals

- Enforce government policies and resolve disputes
- Act within the jurisdiction granted by the enabling statute
- Comply with the Charter of Rights and Freedoms
- Maintain a minimum standard of procedural fairness
- Rules of natural justice require
  - Fair hearing with adequate notice
  - Decision made by person who heard the evidence
  - Absence of bias in process

- Role of the courts
  - Courts can review administrative decisions when the administrative tribunal did not have jurisdiction or did not follow the rules of natural justice
  - Can issue prerogative writs including *certiorari*, *mandamus*, and prohibition
  - Can make a declaration or order an injunction
  - Privative clauses are statutory provisions that attempt to prevent judicial review, which sometimes are resisted by the courts

Alternative dispute resolution (ADR)

- Recent trend to avoid costs and delays associated with litigation
- Advantages
  - Control, timeliness, productivity, cost, privacy, good will, flexibility
- Disadvantages
  - Unpredictable, no precedents set, cannot deal with complex legal problems
  - Must be voluntary, must have a balance of power between the parties
  - Parties must cooperate to ensure agreement and resolution
- Methods
  - Negotiation—direct discussion between parties
  - Mediation—neutral third party facilitates discussion
  - Arbitration—neutral expert makes a binding decision

QUESTIONS FOR REVIEW

1. Describe the court hierarchy in Canada, including provincial and federal courts.
2. Distinguish between questions of law and questions of fact, and explain why this distinction is significant.
3. Who appoints provincial superior court judges? Provincial court judges?
4. How would the expiration of a limitation period affect the rights of parties to litigate a matter in dispute?
5. What are the pleadings used to commence an action in the superior trial court in your jurisdiction?
6. How does the discovery process take place, and what is its significance in civil litigation?
7. Explain how an offer to settle can affect the judgment award made by the court to the plaintiff.
8. Describe the recent initiatives taken in your jurisdiction to "speed up" the litigation process.
9. Explain the trial process.
10. Compare party–party costs with solicitor–client costs. To whom are these costs generally awarded?
11. Distinguish among the various remedies available to a successful plaintiff in a civil action.
12. Explain the role of the examination in aid of execution in enforcing those remedies (from Question 11), and indicate what methods are available to enforce a judgment against a debtor who is trying to avoid payment.
13. Explain the value of an injunction as a pre-judgment remedy. Discuss other pre-judgment remedies available to aid in the collection of debt.

14. Under what circumstances will the courts review a decision made by a government bureaucrat or administrative tribunal?
15. What must be examined to determine whether a decision maker has acted within her authority?
16. What are the requirements for a fair hearing and what is necessary to satisfy the rules of natural justice?
17. Distinguish between *certiorari*, prohibition, *mandamus*, and a declaration.
18. What is a privative clause? How do courts usually react to them?
19. List and describe the principal advantages of alternative dispute resolution.
20. Distinguish between negotiation, mediation, and arbitration, and discuss the advantages and disadvantages of each of them.

CASES AND DISCUSSION QUESTIONS

1. *C.M.G. v. R.G.*, 2012 ONSC 2496 (CanLII).

A husband and wife were involved in matrimonial litigation. Both asked for an order sealing their court file and stating that they and their children were to be identified by their initials. The basis for the request was the risk of harm to the children, given their vulnerable state, the family's high profile and the nature of the intended proceedings.

The Court accepted that the children were at risk of significant emotional harm and negative repercussions, but it refused to seal the entire court file. Why wouldn't the Court seal the entire file, when both parties requested that it be sealed? What type of information did the Court decide would be left open to the public? Discuss the arguments for giving the public access to such personal and private matters.

2. *Angelo's Gold Factory Inc. v. Anthony Pipolo Incorporated*, 2007 CanLII 80119 (ON SC).

The plaintiff had been unsuccessful in its attempts to serve the defendants by personal service. The plaintiff's lawyer then served the Statement of Claim on a lawyer who was representing the defendants in other matters. The lawyer had not obtained his clients' authorization to accept service of the Statement of Claim. None of the defendants responded to the Statement of Claim, so the plaintiff obtained default judgment against them.

In this action, the defendants applied to have the default judgment set aside. Explain the nature of their complaint and the likely outcome. In your answer consider the role of fairness in the administration of justice and whether practical requirements should be permitted to overrule this requirement of procedural fairness within court processes or when dealing with government tribunals.

3. *Community Panel of the Adams Lake Indian Band v. Adams Lake Band*, 2011 FCA 37 (CanLII).

Dennis ran for election to the Band Council but was unsuccessful. He appealed the election result, alleging irregularities and improprieties. The Election Rules required the Community Panel (which handles any appeals) to have five persons "to govern and decide all proceedings…" On the last day of deliberations of the Panel, after deliberations had been completed, and halfway through the voting process, one of the five members of the Panel resigned. His reasons for resigning related to the merits of the appeal; it was clear that he had made a decision on the appeal and that he knew he was going to be outvoted by the other four members of the Panel. The remaining members completed the voting process and dismissed the appeal. The Federal Court held that the

Panel did not have jurisdiction to rule on the appeal because it did not have a five-person quorum. The decision of the Panel was quashed. The Panel appealed.

What was the decision of the Federal Court of Appeal? Should a member of an administrative tribunal be allowed to frustrate the work of the tribunal by resigning at an inopportune time?Be sure to visit the MyBusLawLab that accompanies this book. You will find practice tests, a personalized study plan, province-specific material, and much more!