The Dispute Resolution Review

Seventh Edition

Editor
Jonathan Cotton

Law Business Research

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EDITOR'S PREFACE

The Dispute Resolution Review covers 48 countries and territories. Disputes have never respected national boundaries and the continued globalisation of business in the 21st century means that it is more important than ever before that clients and lawyers look beyond the horizon of their home jurisdiction.

The Dispute Resolution Review is an excellent resource, written by leading practitioners across the globe. It provides an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. It is written with both in-house and private legal practitioners in mind, as well as the large number of other professionals and businesspeople whose working lives bring them into contact with disputes in jurisdictions around the world.

This Review is testament to the fact that jurisdictions face common problems. Whether the issue is how to control the costs of litigation, which documents litigants are entitled to demand from their opponents, or whether a court should enforce a judgment from another jurisdiction, it is fascinating to see the different ways in which different jurisdictions have grappled with these issues and, in some cases, worked together to produce a harmonised solution to international challenges. We can all learn something from the approaches taken by the 48 jurisdictions set out in this book.

A feature of some of the prefaces to previous editions has been the impact that the turbulent economic times were having in the world of dispute resolution. Although at the time of writing the worst of the global recession that gripped many of the world's economies has largely passed, it is has left its mark. Old and new challenges and risks remain in many parts of the world such as renewed speculation on the future of the eurozone, the sanctions imposed on Russia, and falls in the price of oil. In some regions, the 'green shoots' of recovery have blossomed while in others they continue to need careful nurturing. Both situations bring their different challenges for those involved in disputes and, while the boom in insolvency-related disputes and frauds unearthed in the recession remain, the coming year could see an increase in investment and acquisitions with a subsequent focus on disputes concerning the contracts governing those investments.

I would like to express my gratitude to all of the contributors from all of the jurisdictions represented in *The Dispute Resolution Review*. Their biographies start at p. 739 and highlight the wealth of experience and learning from which we are fortunate enough to benefit. I would also like to thank the whole team at Law Business Research, in particular Nick Barette, Eve Ryle-Hodges and Shani Bans, who have impressed once again in managing a project of this size and scope, and in adding a professional look and finish to the contributions.

Jonathan Cotton
Slaughter and May
London
February 2015

Chapter 7

CANADA

David Morritt and Eric Morgan[1]

I INTRODUCTION

The Canadian legal system is a federal model within which legislative authority for various areas of responsibility is assigned to either the federal parliament or to the provincial legislatures. Court systems have similarly been established at both the federal and provincial levels.

The federal courts have limited jurisdiction to hear claims in certain federally regulated areas such as intellectual property and maritime law and claims against the federal government. They may also review decisions made by federally regulated tribunals. The judges of the Federal Court and the Federal Court of Appeal are appointed by the federal government. The specialised Tax Court of Canada also falls under federal jurisdiction, with matters appealed to the Federal Court of Appeal.

Canada has 10 provinces and three territories. Each province or territory has its own court system, which is generally comprised of a provincial court (which handles civil matters under a certain monetary threshold), a superior court (also called a supreme court or a Court of Queen's Bench in certain jurisdictions) with broad inherent jurisdiction, and an appellate court. Complex commercial matters are generally litigated within the provincial court systems, with Toronto, Canada's largest city, maintaining a commercial list made up of Superior Court judges with experience in commercial litigation where commercial cases can get specialised attention. Final appeals from the provincial appellate courts (and the Federal Court of Appeal) are heard by the Supreme Court of Canada, which has nine federally appointed judges who sit in Ottawa, the nation's capital. Appeals in civil matters require the Supreme Court to grant leave.

There are a number of specialised courts and tribunals in Canada such as employment insurance tribunals, labour relations boards and human rights tribunals. In

1 David Morritt is a partner and Eric Morgan is an associate at Osler, Hoskin & Harcourt LLP.

addition, Canada is a leader in the use of alternative dispute resolution techniques such as arbitration and mediation. It is home to many well-qualified arbitrators, arbitration organisations and experienced counsel, and indeed, arbitration and mediation are statutorily mandated in some jurisdictions for certain situations.

Reflecting its diverse background, the Canadian legal system contains both the common and civil law traditions. The province of Quebec has a civil code descended from the French civil law system. The other provinces and territories follow the English common law tradition. The Supreme Court of Canada and the federal courts adjudicate matters in both civil and common law.

II THE YEAR IN REVIEW

A number of recent developments have occurred regarding contracts, class actions, civil procedure, economic torts, and employment law.

The past year has seen several significant developments in contract law. In *Sattva Capital Corp v. Creston Moly Corp*,[2] the Supreme Court held that contrary to the body of previous jurisprudence, contractual interpretation is a matter of mixed fact and law, and deferred to the interpretation of an arbitrator whose decision was challenged. In *Bhasin v. Hrynew*,[3] the Supreme Court held that contracts are subject to a duty of honest performance, irrespective of the intent of the parties. Under this new general duty, parties must not lie or knowingly mislead one another about matters directly linked to performance of the contract.

Recent amendments to Ontario's Rules of Civil Procedure aim to increase efficiency in the court system. In *Hryniak v. Mauldin*,[4] the Supreme Court expanded the availability of summary judgment pursuant to these recent amendments. The court held that a motion for summary judgment must be granted whenever there is no genuine issue requiring a trial.

In *West Van Inc v. Daisley*,[5] the Ontario Court of Appeal clarified the doctrine of 'forum of necessity', which grants a court the authority to assume jurisdiction over a claim if there is no other forum in which the plaintiff can 'reasonably' seek relief – even when there is no real and substantial connection between the action and the forum. The court emphasised that this doctrine is reserved for exceptional cases, and that the 'reasonable' requirement will be stringently construed.

Class action procedure has developed further in the past year. In *Green v. Canadian Imperial Bank of Commerce*,[6] the Ontario Court of Appeal modified the limitation period applicable to securities class actions, holding that special rules applicable to class proceedings may take priority over procedures in other statutory regimes. Overturning

2 2014 SCC 53.

3 2014 SCC 71.

4 2014 SCC 7.

5 2014 ONCA 232.

6 2014 ONCA 90.

a recent decision by the same court,[7] a special five-judge panel held that the plaintiffs in securities class actions for secondary market misrepresentation may benefit from the suspended limitations period under Ontario's Class Proceedings Act without first bringing a motion otherwise required by the Ontario Securities Act. In *Vivendi Canada Inc v. Dell'Aniello*,[8] the Supreme Court held that the commonality requirement for certifying a class proceeding is flexible in all Canadian jurisdictions (although more so in Quebec), and will be met as long as the question at issue in the case will serve to advance the resolution of all class members' claims. Commonality does not mean that an identical answer is necessary for all members of the class, or that the answer must benefit each member to the same extent. It is sufficient that the answer does not give rise to conflicting interests among class members.

In *Bank of Montreal et al. v. Réal Marcotte et al*,[9] the Supreme Court held that class action plaintiffs could pursue bank issuers of credit cards under provincial legislation, notwithstanding that banks are regulated by federal legislation. This case may increase the potential exposure of financial institutions to regulatory oversight at the provincial level.

In *AI Enterprises Ltd. v. Bram Enterprises Ltd*,[10] the Supreme Court clarified the scope of the tort of unlawful interference with economic relations. The tort should be kept within narrow bounds, and will be available in three-party situations wherein the defendant commits an unlawful act against a third party and that act intentionally causes economic harm to the plaintiff. Conduct is unlawful for the purposes of the tort only if it would be actionable by the third party, or would have been actionable if the third party had suffered harm.

In an employment context, courts have scrutinised the impact of wrongful acts. In *IBM Canada Limited v. Waterman*,[11] the Supreme Court addressed whether a 'collateral benefit' received by an employee should reduce the damages otherwise payable upon wrongful dismissal. The plaintiff had a vested interest in IBM's defined benefit pension plan. The Supreme Court upheld the trial judge's decision, finding that since (1) the plaintiff's pension was not an indemnity for wage loss and (2) he contributed to the benefit, this was not a case in which a deduction should be made.

In *McCormick v. Fasken Martineau Dumoulin LLP*,[12] the Supreme Court held that a partner in a limited liability partnership is not an employee of the partnership for the purposes of claiming protection under human rights legislation. The retiring partner had sought to avoid the partnership agreement requiring retirement at 65.

In *Shoppers Drug Mart Inc v. 6470360 Canada Inc*,[13] a case involving consequences for a corporation's wrongful acts, the Ontario Court of Appeal held that a court may pierce

7 *Sharma v. Timminco*, 2012 ONCA 107.

8 2014 SCC 1.

9 2014 SCC 55.

10 2014 SCC 12.

11 2013 SCC 70.

12 2014 SCC 39.

13 2014 ONCA 85.

the corporate veil not only when a company is incorporated for an illegal, fraudulent or improper purpose, but also when those in control expressly direct a wrongful act.

III COURT PROCEDURE

i Overview of court procedure

The procedures adopted in Canadian courts vary between the different court systems. Each province has rules of procedure that govern litigation in its superior courts.[14] The federal courts and the Tax Court also have their rules of procedure.[15] In addition to these rules, adjudicative bodies publish practice directions providing guidance on procedural issues on an ongoing basis. Judge-made rules are also a source of law and procedure.

Ontario's Rules of Civil Procedure were recently revised regarding automatic dismissal. An action will be dismissed for delay if it has not been set down for trial within five years of when the action was commenced, without notice to the parties.[16]

Alberta recently updated its procedural legislation with regard to appellate practice.[17] The rules (1) provide a general right to appeal all trial decisions, with leave required only in exceptional cases, (2) alter the deadline to file appeals, and (3) clarify that in the absence of a specific provision to the contrary, the Rules apply to appellate court proceedings as well as proceedings at first instance.

British Columbia and Alberta have also recently updated their procedural legislation. The new British Columbia rules include a revised system of pleadings, a case planning conference, modified rules for expert witnesses, time limits on examinations for discovery, modifications on document production and a mandatory trial management conference. The new Alberta rules include provisions for the use of electronic service and service outside the jurisdiction without a court order.

ii Procedures and time frames

Canada's adversarial system generally means there are three phases to a court proceeding. The duration of any proceedings between sophisticated commercial parties largely depends on the parties' initiative and responsiveness. Urgent and interim applications,

14 Alberta, Rules of Court, Alta Reg 124/2010; British Columbia Supreme Court Rules, BC Reg 221/90; Manitoba, Court of the Queen's Bench Rules, Man Reg 553/88; New Brunswick, Rules of Court, NB Reg 82-73; Newfoundland and Labrador, Rules of the Supreme Court, SN 1986, c 42, Sched D; Northwest Territories, Rules of the Supreme Court, NWT Reg R-010-96, s 8; Nova Scotia Civil Procedure Rules, NS Civ. Pro Rules 2009; Ontario, Rules of Civil Procedure, RRO 1990, Reg 194; Prince Edward Island, Rules of Civil Procedure, RRO 1990, Reg 194; Quebec, Code of Civil Procedure, RSQ c C-25; Saskatchewan, The Queen's Bench Rules; Yukon Territory, Rules of Court; and Northwest Territories and Nunavut, Rules of the Supreme Court, NWT Reg 010-96.

15 Federal Courts Rules, SOR/98-106; Tax Court of Canada Rules (General Procedure), SOR/90-688a.

16 O Reg 170/14.

17 AR 41/2014.

including those seeking injunctions or freezing orders, may be made at any time as needed during the proceedings.

The first phase of an action is the exchange of written pleadings in which the parties set out their positions, including the material facts on which they rely. The claimant will issue pleadings to be served on the defendant, and the defendant will then respond, usually within a prescribed period of time. The failure to respond gives the plaintiff an opportunity to make a motion for default judgment.

The second stage is called discovery, in which parties identify and produce relevant documents and conduct oral examinations (usually limited to one representative of each party). Motions for interlocutory relief, like injunctions, can be brought based on affidavit evidence on which out-of-court cross-examinations may be done, producing the evidentiary record on which the motion is decided.

When the parties are satisfied with the disclosure they have received from the other side, subject to court backlogs, the matter proceeds to trial. The trial may be before a judge, or (much less frequently) a judge and jury. Following opening statements by counsel summarising the case, civil trials begin with the plaintiff presenting its evidence against the defendant, including calling witnesses to testify or introduce documentary evidence. Counsel has an opportunity to cross-examine all opposing witnesses. The defendant then presents its evidence, or may simply assert that the plaintiff has not proved its case. At the conclusion of the hearing, the plaintiff and defendant make closing submissions summarising their respective cases.

If the judge is adjudicating alone, he or she must consider all the evidence presented before making a decision based on what was proved on a balance of probabilities standard. In a judge and jury trial, the judge decides how the law applies, and it is up to the jury to determine what version of the facts it believes.

In most civil cases, a decision at first instance can be appealed either by right or with leave of the higher court. The higher court may deny the appeal, affirm, reverse or amend the original decision, or order a new trial. The general rule is that an appellate court can interfere with factual findings made at trial only if it concludes that there was a clear and palpable error.

iii Class actions

Class actions are available under statutes in most provinces and are increasingly common.[18]

An action must first be certified by the court as a class proceeding. At the certification stage, which is not a determination on the merits, the court must decide that: the claim discloses a cause of action; there is an identifiable class of plaintiffs; a class action is the preferable procedure (this criterion does not exist in the province of Quebec); the representative plaintiff is appropriate; and there are common issues to be tried. It is not necessary that the common issues predominate over individual issues; only that they be important enough that adjudicating them will significantly advance the action.

18 *Marcotte v. Longueuil (City)* 2009 SCC 43 at paragraph 77, per Lebel J. See, for example, the Class Proceedings Act 1992, SO 1992, Chapter 6.

Once certified, class actions will generally proceed to have the common issues determined in a manner that is similar to standard civil litigation. Determination of any remaining individual issues may follow depending on how the common issues are decided. During the common issues phase, the defendant is entitled to oral and documentary discovery as against the representative plaintiff only, unless broader discovery rights are granted by the court.

Inter-provincial overlapping class actions can arise because class actions can be joined by non-residents. There is no formal procedure for dealing with multi-jurisdictional class actions, although the Canadian Bar Association has created a national database and has proposed a draft judicial protocol on managing such class actions and Canadian courts generally work with the courts of other provinces in a cooperative way.

iv Representation in proceedings

Representation by counsel in civil proceedings depends on the rules of the particular court. Generally, legal representation is not required unless the party is a corporation, or 'under a disability'. Corporations can be represented by someone who is not a lawyer with leave of the court.[19] A person 'under a disability' refers to someone who is a minor; mentally incapable[20] in respect of an issue in the proceeding; or an absentee.[21]

v Service out of the jurisdiction

The procedure for service outside a jurisdiction varies by court. Expanded rules of service enable plaintiffs to serve a party outside of the jurisdiction without leave of the court in certain circumstances.[22] These circumstances involve cases where property is located in the court's jurisdiction, a contract was made or governed there, a tort was committed or damages were sustained there. These scenarios contain elements that connect the litigation to the jurisdiction where the plaintiff wants to bring the case. If the action is not based on one of these grounds, a plaintiff needs leave of the court to serve a defendant outside the jurisdiction.

Usually, an originating process can be served on a party outside the jurisdiction in the same way it can be served within the jurisdiction, and varies depending on whether the party is a natural person or not. It can be served in any manner provided for in the jurisdiction of the service, or pursuant to the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 1965, which is in force in Canada.

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19 See, for instance, Ont Rules, Rule 15.01(2).

20 Within the meaning of the Substitute Decisions Act 1992, SO 1992 Chapter 30, Sections 6 or 45.

21 Within the meaning of the Absentees Act, RSO 1990, Chapter A3.

22 See for instance BC Rules, Rule 4-5(1); Man Rules, Rule 17.02; NB Rules, Rule 19.01; Ont Rules, Rule 17.02; PEI Rules, Rule 17.02; Sask Rules, Rule 33; Fed Rules, Rule 137; NS Rules, Rule 31.09; Nfld Rules, Rule 6.07(1); Yukon Rules, Rule 13(1), 13(8).

vi Enforcement of foreign judgments

A judgment of a foreign court has no direct effect in Canada. A party who obtains a judgment in a foreign jurisdiction can, however, bring an application or an action in a Canadian court for enforcement of that foreign order. The foreign order must be final and dispositive, such that no potential of appeal remains on the issues. This does not mean that the foreign order must be final as to the merits of all matters that may be in dispute; a foreign judgment that deals with procedural or interlocutory issues is also capable of enforcement in Canada.

A Canadian court will recognise and enforce a final judgment issued by a foreign court if the defendant attorned to the jurisdiction of the foreign court by participating in the hearing on the merits. Otherwise, a litigant seeking to enforce a foreign order must establish that there is a 'real and substantial connection' between the jurisdiction in which the order was obtained and the subject matter of the action and the parties involved.[23] Generally, a real and substantial connection is established if the harm giving rise to the cause of action occurred in the foreign jurisdiction, a material contract was made in that jurisdiction, or the defendant resides in or carries on relevant activities in that jurisdiction. A litigant may establish a connection on other analogous grounds, and each case is judged on its unique circumstances. A foreign judgment will not be enforced, however, if it was obtained by fraud; if the foreign proceedings were in some way contrary to Canadian notions of natural justice; or if the order is somehow repugnant to Canada's public policy.[24]

These same principles apply to the recognition of judgments made in one province by the courts of another province. All common law provinces have reciprocating legislation facilitating interprovincial enforcement,[25] and only Quebec's Civil Code provides slightly different rules for enforcement in Quebec courts.[26] There is similar reciprocating legislation between some provinces and certain foreign states, including those from the United States, Australia and Europe.[27] In addition, judgments from the United Kingdom are recognised in certain provinces pursuant to a bilateral convention between Canada and the United Kingdom.[28]

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23 *Morguard Investments Ltd v. De Savoye* [1990] 3 SCR 1077; *Beals v. Saldhana* 2003 SCC 72.

24 *Beals v. Saldhana* 2003 SCC 72.

25 See, for instance, the Ontario Reciprocal Enforcement of Judgments Act, RSO 1990, Chapter R5.

26 Civil Code of Quebec, LRQ, Chapter C-1991, Book 10, Article 3155.

27 See, for instance, the British Columbia Court Order Enforcement Act, RSBC 1996, Chapter 78, Section 37. Currently, British Columbia has declared the following US states as reciprocating jurisdictions: Washington, Alaska, California, Oregon, Colorado, and Idaho. In addition, orders have been declared for a number of Australian states and European countries.

28 See the Canada-United Kingdom Civil and Commercial Judgments Convention Act, RSC, 1985, Chapter C-30, wherein Parliament declared that the bilateral convention had the force of law in Canada, as well as, for instance, the Ontario Reciprocal Enforcement of Judgments (UK) Act, RSO 1990, Chapter R6, wherein Ontario requests of the government of Canada to be designated as a province to which the bilateral convention extends.

vii Assistance to foreign courts

Where a party to litigation in a foreign court requires evidence from a person in Canada, they will generally need to seek letters rogatory requesting a Canadian court to compel a person in its jurisdiction to provide that evidence. In order for the application to be granted, the evidence sought must be relevant and necessary to the action; the request for evidence must be sufficiently particularised; there must be no alternative way of obtaining the evidence; it cannot be contrary to public policy; and providing the evidence must not be 'unduly burdensome'.

viii Access to court files

Canadian courts are generally open to the public both in terms of their proceedings (including pleadings and evidence filed with or given in the court) and their decisions. A party may apply to have a confidentiality order put in place to avoid public disclosure of court files and decisions, however, such orders are difficult to obtain. In camera hearings are closed sessions of court held if the court is satisfied that public access should be denied. The Supreme Court of Canada links all documents related to a proceeding, such as factums, to its dockets. In some provinces, such as British Columbia, online access to court filings is available for a fee. In other provinces, it is necessary to attend at the court registry.

ix Litigation funding

Third-party litigation funding is a recent phenomenon in Canada, with a few firms offering financial support to parties. In *Fehr v. Sun Life Assurance Company of Canada*, the Ontario Superior Court of Justice held that third-party funding agreements are not categorically illegal on the grounds of champerty and maintenance,[29] but that a particular third-party funding agreement might run afoul of the law on those grounds.[30] The party seeking a third-party funding agreement must obtain court approval.[31] Contingency fee arrangements between lawyers and clients are generally permitted, but highly regulated by both legislation and professional codes of conduct.[32] Publicly funded support for class actions is available to a limited extent.

29 Champerty is the process whereby someone bargains with a party to a lawsuit to obtain a share in the proceeds of the suit should it be successful. Maintenance is the support or promotion of another person's suit initiated by intermeddling for personal gain. Both are doctrines in common law jurisdictions that aim to preclude frivolous litigation.

30 2012 ONSC 2715.

31 *Fehr v. Sun Life Assurance Company of Canada* 2012 ONSC 2715 at paragraphs 160-163.

32 See for instance Contingency Fee Agreements, O Reg 195/04, or the upcoming Code of Professional Conduct for British Columbia, 2013 (pending), Section 2.06, available at www.lawsociety.bc.ca/docs/practice/resources/bc-code/bc-code.pdf.

IV LEGAL PRACTICE

i Conflicts of interest and ethical walls

The rules governing conflicts of interest are founded in the duty of loyalty and the law governing fiduciaries. A 'conflict of interest' exists where there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest, or the lawyer's duties to another client, former client or third person.[33]

While the legal profession is largely self-regulated through provincial law societies,[34] the court will address claims of breach of fiduciary duty or conflicts if brought before it. In addition to legal proceedings, lawyers who breach their professional responsibilities can face disciplinary proceedings and penalties.[35]

The duty of loyalty includes the duty to abstain from acting against the interests of the client. A lawyer must not represent one client whose immediate legal interests are directly adverse to the legal interests of another client, without consent.[36] The scope of this 'bright line rule' of managing conflicts was recently clarified by the Supreme Court in *Canadian National Railway Co v. McKercher LLP*.[37]

The current practice in place at larger law firms is to establish 'ethical walls' as screening mechanisms. Ethical walls are erected in order to rebut any inference that the lawyers will share confidential information.[38]

ii Money laundering, proceeds of crime and funds related to terrorism

The self-governing law societies in Canada have developed and adopted requirements for identifying and verifying clients and that prevent legal professionals from receiving large sums of cash in certain circumstances and for certain transactions. The Proceeds of Crime (Money Laundering) and Terrorist Financing Act is the key piece of legislation governing this area.[39] The legislation imposes obligations of record keeping, client identification and reporting. However, in 2011, the British Columbia Supreme Court held that the Act does not apply to lawyers because it violates the Constitution by interfering with the rights of clients to obtain legal advice in confidence from lawyers that are independent from the state.[40] The court stated that it is unnecessary for the legislation to apply to

33 Model Code of Professional Conduct (31 December 2011) Federation of Law Societies of Canada, Section 2.04 and Commentary, available: www.flsc.ca/_documents/ModelCode-June2012.pdf.

34 Such as the Law Society of Upper Canada and the Law Society of British Columbia.

35 'If You Are the Subject of a Complaint' (undated) The Law Society of Upper Canada, available: www.lsuc.on.ca/subject-of-a-complaint/#discipline.

36 *R v. Neil* 2002 SCC 70; Strother v. 3464920 Canada Inc, 2007 SCC 24.

37 2013 SCC 39.

38 More on ethical walls in MD MacNair, *Conflicts of Interest: Principles for the Legal Profession* (Thomson Reuters Canada Ltd, 2011), pp. 4–7.

39 SC 2000, Chapter 17.

40 *Federation of Law Societies of Canada v. Canada (Attorney General)* 2011 BCSC 1270.

lawyers because of their law society obligations. The British Columbia Court of Appeal dismissed the Attorney General's appeal. The Supreme Court has granted leave to appeal.

iii Data protection

The Personal Information Protection and Electronic Documents Act[41] (PIPEDA) applies to organisations that collect, use or disclose personal information in the course of commercial activities. Privacy laws in Alberta, British Columbia, Quebec, Ontario, and lately Manitoba[42] will apply instead of PIPEDA, but PIPEDA continues to apply to interprovincial and international transfers of personal information. The Office of the Privacy Commissioner of Canada has published a handbook to assist and guide lawyers in the application of PIPEDA to their legal practice.[43]

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

There are two main types of privilege: solicitor–client privilege and litigation privilege. Privilege belongs to the client, not the lawyer. It can only be waived through informed consent, or where the client is expressly taken as having waived privilege through conduct.[44]

Solicitor–client privilege protects communications between a lawyer and his or her client involving the giving or seeking of legal advice, which is intended to be confidential between the parties.[45] It covers any consultation for legal advice, whether or not the advice is in contemplation of litigation. It applies in the regulatory context and extends to both external and in-house counsel. It does not apply to those working in quasi-legal capacities such as patent agents and accountants. Its purpose is to facilitate full and frank communication between the client and the lawyer. It has evolved from an evidentiary rule, into a substantive right, and then into a quasi-constitutional right.[46] Quebec formally entrenched the right to professional secrecy as a fundamental, yet relative

41 SC 2005, c 5.

42 Personal Information Protection Act, SA 2003, c P-6.5; Personal Information Protection Act, SBC 2003, c 63; An Act respecting the protection of personal information in the private sector, RSQ, c P-39.1; Freedom of Information and Protection of Privacy Act, RSO 1990, c F.31; Personal Information Protection and Identity Theft Prevention Act, SM 2013, c 17.

43 Office of the Privacy Commissioner of Canada, A Privacy Handbook for Lawyers: PIPEDA and Your Practice, available: www.priv.gc.ca/information/pub/gd_phl_201106_e.asp.

44 Examples of waiving privilege through informed consent can be seen in the following cases which were heard together by the Supreme Court of Canada: *Lavallee, Rackel & Heintz v. Canada (Attorney General)*, *White, Ottenheimer & Baker v. Canada (Attorney General)*, *R v. Fink* 2002 SCC 61 at paragraph 39. For an example of waiving privilege through conduct, see *R. v. Campbell* [1999] 1 SCR 565 at paragraph 49.

45 *Pritchard v. Ontario (Human Rights Commission)* 2004 SCC 31 at paragraph 15; *Solosky v.* The Queen [1980] 1 SCR 821, pp. 834 and 837.

46 *Lavallee, Rackel & Heintz v. Canada (Attorney General)* 2002 SCC 61.

right, which may be yielded by an express provision of law.[47] Whether privilege applies to communications with foreign lawyers may depend on whether the communication is privileged in the foreign jurisdiction and whether there is an expectation of privilege.

There are some limited exceptions to solicitor–client privilege. It does not extend to communications: (1) where legal advice is not sought or offered; (2) that are not intended to be confidential; or (3) that have the purpose of furthering unlawful conduct.[48] Solicitor–client privilege is generally accepted by a court when the public interest in confidentiality outweighs the interests of justice served by full disclosure.[49] It will only be set aside by the courts where it is 'absolutely necessary'.[50]

Within this branch of privilege is common interest privilege.[51] This permits a party to share privileged information with others under certain circumstances, for example, if their common interest is the successful completion of a transaction.[52]

Litigation privilege protects documents prepared and communications made in anticipation of or during litigation. It covers communications between a solicitor and client or third parties consulted in preparation for litigation that need to be made in private and without fear of permanent disclosure.[53] The Supreme Court of Canada has adopted a test that requires that the 'dominant purpose' of the communication be for use in the anticipated or existing litigation, noting that 'litigation privilege should be viewed as a limited exception to the principle of full disclosure and not as an equal partner of the broadly interpreted solicitor–client privilege'.[54]

Litigation privilege does not exist outside the realm of contemplated or existing litigation, whereas solicitor–client privilege protects the relationship between client and lawyer, not the process of the adversarial system. Litigation privilege ends with the litigation, though it survives in 'closely related' litigation.[55] Despite being distinct concepts, litigation and solicitor–client privilege are complementary; they serve the common cause of efficacy in the administration of justice.[56]

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47 Charter of Human Rights and Freedoms, RSQ, Chapter C-12, Section 9.

48 *Pritchard v. Ontario (Human Rights Commission)* 2004 SCC 31 at paragraph 16.

49 *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* 2010 SCC 23 at paragraph 39, as referenced in Mahmud Jamal, 'The Supreme Court of Canada on Solicitor-Client Privilege: What Every Practitioner Needs to Know' (17 June 2011) Canadian Bar Association, PEI Branch.

50 *Goodis v. Ontario (Ministry of Correctional Services)* 2006 SCC 31 at paragraph 20.

51 Sometimes referred to as 'common interest transactional privilege' to distinguish it from 'common interest litigation privilege' or 'joint defence privilege.'

52 *Fraser Milner Casgrain LLP v. Minister of National Revenue* 2002 BCSC 1344 at paragraph 12.

53 *Blank v. Canada (Minister of Justice)* 2006 SCC 39 at paragraph 27.

54 *Blank v. Canada (Minister of Justice)* 2006 SCC 39 at paragraphs 60–61.

55 *Blank v. Canada (Minister of Justice)* 2006 SCC 39 at paragraphs 34, 37.

56 *Blank v. Canada (Minister of Justice)* 2006 SCC 39 at paragraph 31.

ii Production of documents

Litigants are expected to disclose and produce all documents over which they have possession, power, or control that are relevant to any matter in issue.[57] This does not include documents that are privileged. Documents include physical documents and 'any other device on which information is recorded or stored' (i.e., electronic documents).[58]

A document can be in a party's 'possession, power or control' regardless of where it is in the world. In some jurisdictions, the production obligation can extend to documents over which a subsidiary, affiliated corporation or corporation directly or indirectly controlled by a party has possession, power or control.[59] In the Federal Court, the Rules specifically provide that a document shall be considered to be within a party's power or control if the party is entitled to obtain the original document, or a copy of it, and no adverse party is so entitled.[60]

A court order is required to compel the production of a document by a person who is not a party to a proceeding and not controlled by a party to the proceeding.[61] A document is considered 'relevant' if the party intends to rely on it, or if the document tends to adversely affect the party's case, or to support another party's case.[62] These rules vary by province.

Across the country, rules governing civil procedure are undergoing revisions to incorporate a wider scope of electronic discovery. Practice directions have been authored to clarify the scope of e-discovery and articulate how electronic documents should be produced.[63] The Sedona Principles Addressing Electronic Document Production are also used by courts to inform e-discovery procedures.[64]

Ontario's Rules are embedded with the principle of proportionality in the discovery process, including the obligation to produce documents. Proportionality in this context means that the time and expense devoted to a proceeding ought to be proportionate to what is at stake in the litigation, its jurisprudential importance and the inherent complexity of the issues before the court.[65]

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57 See, for instance, Ont Rules, Rule 30.02(1) or BC Rules, Rule 7-1(11).

58 Fed Rules, Rule 222(1).

59 Ont Rules, Rule 30.02(4) and Man Rules, 30.02(4).

60 Fed Rules, Rule 223(3).

61 Ont Rules, Rule 30.10; Alta Rules, Rule 5.13; Man Rules, Rule 30.10; NB Rules, Rule 31.11; NWT Rules, Rule 231; PEI Rules, Rule 30.10; Yukon Rules, Rules 25(25)-(28); Fed Rules, Rule 233.

62 Fed Rules, Rule 222(2).

63 See, for instance, the practice direction in Ontario, available: www.oba.org/en/pdf/Practice%20Direction%20Oct.3_2012.pdf.

64 The Sedona Principles Addressing Electronic Document Production, Second Edition (June 2007), available: https://thesedonaconference.org/publication/The%20Sedona%20Principles.

65 Honourable Coulter A Osborne, QC, 'Civil Justice Reforms Project: Summary of Findings and Recommendations' (November 2007), available: www.attorneygeneral.jus.gov.on.ca/english/about/pubs/cjrp/CJRP-Report_EN.pdf.

VI ALTERNATIVES TO LITIGATION

Several types of dispute resolution mechanisms are used as alternatives to litigation. The most commonly used methods are arbitration and mediation.

i Arbitration

Arbitration in Canada is a popular alternative to traditional litigation, especially in labour and employment, commercial, and international commercial disputes. The legislation by which arbitral awards are recognised and enforced in specific disputes will vary depending on the nature of the dispute, whether it is domestic or international, where the arbitration takes place in Canada, the subject matter of the dispute and the award. As a general rule, the arbitration rules and procedures selected by the parties will govern, including those for appeals of arbitral awards (whether to the courts if a domestic arbitration or to a private appeal panel).

Any contract in which parties agree to submit any forthcoming dispute to arbitration is an 'arbitration agreement'. Parties may agree that any arbitration will be governed by the applicable arbitration statute, by particular arbitration rules offered by institutions, or by rules the parties have developed. The federal Commercial Arbitration Act applies when one or more of the parties to the arbitration is the federal government, or where the arbitration is in relation to maritime or admiralty matters.[66] Canada is home to many experienced arbitrators, including retired judges, senior legal practitioners and individuals from other specialities.

In certain limited circumstances arbitration agreements are mandated by statute. For example, the Ontario Labour Relations Act directs that every collective agreement shall provide for arbitration.[67]

In 1986, Canada became the first country to adopt the United Nations UNCITRAL Model Law (the Model Law) for commercial arbitration. Although the Model Law was originally designed for international arbitration, the majority of provinces have adopted its framework through parallel legislation for domestic arbitration.

Canadian courts have traditionally granted deference to international arbitral awards. Canada's adoption of the Model Law, and its accession to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, significantly limited the grounds on which Canadian courts have jurisdiction to set aside international arbitral awards. Subject to this, a foreign arbitral award shall be recognised as binding and shall be enforced upon application in writing to the competent Canadian court. Once the court permits the foreign award to be enforced, the options available are the same as if it were a judgment of a domestic court.

ii Mediation

The escalation of legal costs and its accompanying effects on access to justice has led to a rise in the use of mediation in Canada. Indeed, the law societies of some provinces

66 Commercial Arbitration Act, RSC 1985, c 17 (2nd Supp).

67 SO 1995, Chapter 1, Section 48.

mandate that lawyers advise their clients of the availability of mediation. In most jurisdictions, parties will select their own mediator and come to agreement on the process for their mediation. In certain provinces, however, mediation has been made mandatory in specific situations, and rules have been enacted to govern the mediation process.

iii Other forms of alternative dispute resolution

Other forms of alternative dispute resolution used in Canada include court-mandated settlement conferences, expert determinations and hybrid techniques such as a combination of mediation and arbitration.

VII OUTLOOK AND CONCLUSIONS

Cases currently under reserve or appeal are anticipated to address key areas of class actions, solicitor-client privilege, jurisdiction, and civil liability under securities law.

In *Meeking v. The Cash Store*,[68] the Supreme Court will address the authority of a provincial superior court to assume jurisdiction over a plaintiff class that includes and purports to bind non-residents. The case should clarify the application of the 'real and substantial connection' test in multi-jurisdiction class actions and shed light on whether and to what extent a provincial court's ordinary jurisdiction expands in the class action context.

In *Thompson v. Canada (National Revenue)*,[69] the Supreme Court will address whether a lawyer can claim solicitor–client privilege as the basis for refusing to comply with a request for information under the Income Tax Act. The lawyer was ordered to disclose information about his accounts receivable, but argued that his clients' names and amounts owing were protected by solicitor–client privilege and out of the reach of the Minister of National Revenue.

In *Tervita Corporation, et al v. Commission of Competition*, the Supreme Court will address the proper test for determining when a merger gives rise to a substantial prevention of competition under the Competition Act. The case also raises the issue of the exception where the merger results in efficiency gains.

In *Abdula v. Canadian Solar Inc*,[70] the Ontario Superior Court of Justice granted leave to commence a civil action under the Ontario Securities Act for alleged misrepresentations in documents filed outside Canada. The defendant was incorporated in Canada but its shares trade only on an American exchange and its disclosure documents were filed in the United States. The court granted leave to commence a class action for secondary market disclosure, holding that there was a reasonable possibility the American disclosures fell within the ambit of the Securities Act. If the action goes to a trial on the merits, it could broaden the reach of Ontario disclosure requirements beyond the province's geographical borders.

68 2013 MBCA 81.

69 2013 FCA 197.

70 2014 ONSC 5167.

Appendix 1

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David Morritt was called to the Bar of Ontario in 1984 after obtaining an LLB degree from the University of Western Ontario, a BCL degree from the University of Oxford, and serving as law clerk to Mr Justice Estey at the Supreme Court of Canada. He has been a partner with Osler, Hoskin & Harcourt LLP in Toronto since 1989 and his practice covers a broad range of corporate and commercial litigation, including corporate governance and securities, product and professional liability and defamation. Mr Morritt has extensive experience in defending class actions and in providing advice to corporate officers and directors, product manufacturers and professionals, and businesses generally. He has acted as counsel in cases in many Canadian jurisdictions, in all levels of the courts and numerous commercial arbitrations.

Mr Morritt has served as a member of the board of directors of the Advocates' Society and other professional organisations. In addition to numerous papers and articles, he is the co-author of two books: *The Oppression Remedy* and *Canadian Defamation Law and Practice*. He was selected for inclusion in the inaugural and subsequent editions of *The Best Lawyers in Canada*, and has been recognised as a 'litigation star' in *Benchmark Litigation Canada* and as a 'leading lawyer' in *Chambers Global* and *Lexpert*

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Eric Morgan is an associate in the litigation department of Osler, Hoskin & Harcourt LLP. Eric's practice covers a broad range of civil litigation, arbitration and ADR, including banking, class actions, securities, administrative law, and employment matters. He has appeared as counsel before the Supreme Court of Canada, the Ontario Court of Appeal and the Ontario Superior Court of Justice. Mr Morgan also advises on anti-corruption issues and acts in international trade matters, having appeared before the Canadian International

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