THE DISPUTE RESOLUTION REVIEW

Tenth Edition

Editor
Damian Taylor

THE LAWREVIEWS

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TENTH EDITION

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PREFACE

The Dispute Resolution Review provides an indispensable overview of the civil court systems of 37 jurisdictions. It offers a guide to those who are faced with disputes that frequently cross international boundaries. As is often the way in law, difficult and complex problems can be solved in a number of ways, and this edition demonstrates that there are many different ways to organise and operate a legal system successfully. At the same time, common problems often submit to common solutions, and the curious practitioner is likely to discover that many of the solutions adopted abroad are not so different to those closer to home.

In my home jurisdiction, all eyes have been fixed firmly on the progress of Brexit negotiations with the EU. This edition includes an updated Brexit chapter that charts the progress (or lack thereof) made over the past year. Hopefully we will be able to write in the next edition with more certainty about the future laws and procedures that will apply to cross-border litigation in the UK and across the EU, much of which will be affected by the outcome of the ongoing negotiations.

Attention has also focused on more common issues. The rules of disclosure tend to have a habit of coming under periodic review and proposed new rules are out for consultation in England and Wales once again. This raises questions that are relevant to all jurisdictions that strive towards the common goal of justice at a reasonable price. Has litigation become too document heavy and expensive? Is technology a help or a hindrance? How can its power be harnessed, without adding to the parties' burdens? Is full disclosure suitable for all cases; should a lighter-touch regime be available, with liberty to apply for specific documents – a solution which this book shows has been adopted in many other jurisdictions and in arbitrations?

This tenth edition follows the pattern of previous editions where leading practitioners in each jurisdiction set out an easily accessible guide to the key aspects of each jurisdiction's dispute resolution rules and practice, and developments over the past 12 months. *The Dispute Resolution Review* is also forward-looking, and the contributors offer their views on the likely future developments in each jurisdiction. Collectively, the chapters illustrate the continually evolving legal landscape, responsive to both global and local developments.

Finally, 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 page 585 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 who have excelled in managing a project of this size and scope, in getting it delivered on time and in adding a professional look and finish to the contributions.

Damian Taylor
Slaughter and May
London
February 2018

Chapter 5

CANADA

Robert W Staley, Jonathan G Bell and Jessica M Starck[1]

I INTRODUCTION TO DISPUTE RESOLUTION FRAMEWORK

Canada's system of government is divided into three distinct branches: the judiciary, the legislature and the executive. The legislature (Parliament) has the power to make, alter and repeal laws. The executive branch is responsible for administering and enforcing the laws. The judiciary resolves disputes by applying and interpreting the law.

Canada has a bi-jural legal system, meaning that two legal traditions co-exist – civil law in Quebec, and common law in the other nine provinces and all three territories. The main difference between these systems is that in Quebec the private law has been codified and can be found in the Civil Code of Quebec[2] (the Civil Code). The Civil Code contains a statement of rules that are designed to deal with any dispute that may arise. In Quebec, unlike in the common law provinces and territories, judges first look to the Civil Code, and then refer to previous court decisions to help properly interpret the Civil Code's provisions.

There are different levels and types of courts in Canada – provincial and territorial courts, superior courts, courts of appeal and the federal courts. The federal courts have limited jurisdiction to hear claims in certain federally regulated areas such as immigration and refugee law, navigation and shipping, intellectual property and tax. They can also deal with matters of national defence, security and international relations.

The provincial and territorial courts are comprised of a first-level trial court, which handles civil matters up to a certain threshold, a superior court, which is a court of general or inherent jurisdiction and is referred to as either the Superior Court, the Supreme Court or the Court of Queen's Bench, depending on the province or territory, and an appellate court. These courts are structured in a hierarchy, with the trial courts being subordinate to the appellate courts.

The Supreme Court of Canada is the final court of appeal from all other Canadian courts. It has nine judges and sits in Ottawa, Canada's capital. Both the Supreme Court of Canada and the Federal Court deal with matters in both civil and common law.

Administrative tribunals run parallel to the provincial or territorial and Federal Court systems. These specialised bodies are created by statute and focus on particular matters of law, including employment insurance, labour relations, human rights and workers' compensation. These tribunals are not part of the court system; however, it is possible to challenge a tribunal's decision to the courts through a 'judicial review' process.

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1 Robert W Staley and Jonathan G Bell are partners at Bennett Jones LLP. Jessica M Starck is an associate at Bennett Jones LLP.

2 CQLR c CCQ-1991.

Private arbitration and mediation as forms of dispute resolution are also available and becoming increasingly popular in Canada. There are many organisations specialised in alternative dispute resolution, and qualified arbitrators and mediators can easily be found throughout the country. Most provinces now require certain alternative dispute resolution procedures (such as mandatory settlement conferences) as a part of the judicial process.

II THE YEAR IN REVIEW

This past year has brought exciting new legal developments in Canada. The following provides a brief overview of some of the most significant legal disputes recently adjudicated throughout the country.

i Deloitte & Touche v. Livent Inc (Receiver of)

In *Deloitte & Touche v. Livent Inc (Receiver of)*,[3] the Supreme Court clarified the proper analytical framework for establishing tort liability in cases of negligent misrepresentation or performance of services by an auditor. Applying this framework, the Supreme Court upheld the lower court's decision finding Deloitte liable for the increase in Livent's liquidation deficit following a statutory audit.

ii Wilson v. Alharayeri

In a unanimous decision, the Supreme Court in *Wilson v. Alharayeri*,[4] clarified when directors should be held personally liable for oppressive conduct under the statutory oppression remedy. While an oppression claim must always be judged on its own unique facts, the Court held it is more appropriate to hold directors personally liable where they acted in bad faith, in breach of their duties, or in order to obtain a personal benefit.

iii Uniprix inc v. Gestion Goselin et Bérubé

In *Uniprix inc v. Gestion Goselin et Bérubé*,[5] the Supreme Court considered the validity of an unlimited renewal clause giving only one party the power to terminate. The Court held that while the contract at issue was not indeterminate, there is nothing in the Civil Code that prohibits contracts from having effects that might be perpetual, and further there is no basis for finding perpetual contracts to be contrary to public policy.

iv R v. Peers; R v. Aitkens

In two recent decisions, *R v. Peers*, and *R v. Aitkens*,[6] the Supreme Court held that those accused of securities law offences do not have the right to a trial by jury. Section 11(f) of the Charter only grants the right to a trial by jury 'where the maximum punishment for the offence is imprisonment for five years or a more severe punishment'. Under securities law offences, where the maximum punishment is five years less one day, plus a US$5-million fine, the right to a jury trial is not triggered. In upholding the decision of the Court of Appeal of

3 2017 SCC 63.
4 2017 SCC 39.
5 2017 SCC 43.
6 2017SCC 13; 2017 SCC 14.

Alberta, the Supreme Court confirmed that 'more severe punishment' should be interpreted as engaging the deprivation of liberty inherent in the maximum sentence of imprisonment, and is not triggered because of a collateral negative consequence, such as a fine.

v Yaiguaje v. Chevron Corporation

In *Yaiguaje v. Chevron Corporation*,[7] the Ontario Court of Appeal clarified the test to be applied when security for costs are sought before an appeal is heard. The decision emphasises that courts must be vigilant to ensure that security for costs orders are not used as a litigation tactic to prevent a case from being heard on the merits. A holistic assessment must be made in determining whether the order should be granted, with reference to the circumstances of the case and the overriding interests of justice.

vi Google Inc v. Equustek Solutions Inc; AstraZeneca Canada Inc. v. Apotex Inc

In *Google Inc v. Equustek Solutions Inc*, and *AstraZeneca Canada Inc. v. Apotex Inc*,[8] the Supreme Court issued two intellectual property (IP) decisions in a span of three days, both favouring IP rightsholders. In *Google v. Equustek*, the Court upheld an injunction with worldwide effect. In doing so, the Court recognized that an IP rightsholder may obtain an injunction against an innocent third party, if that party is unwittingly 'facilitating' a defendant's breach of a court order designed to prevent irreparable harm to IP rights. In *AstraZeneca v. Apotex*, the Court extinguished what has become known as the 'promise doctrine', which has served as the basis of several successful patent challenges in Canada. A patent can no longer be held invalid because it failed to live up to the statements of an invention's promise made in the patent specification. The consequences of these cases for IP rightsholders create stronger patents and long-arm injunctions in appropriate circumstances.

vii Asselin v. Desjardins Cabinet de services financiers Inc

In *Asselin v. Desjardins Cabinet de services financiers Inc*,[9] the Quebec Court of Appeal overturned the lower court's decision refusing the authorisation of the class action, reinforcing the 'flexible, liberal, and generous' approach to class action authorisation in Quebec.

viii Garcia v. Tahoe Resources Inc

In *Garcia v. Tahoe Resources Inc*,[10] the British Columbia Court of Appeal provided further insight regarding the application of the *forum non conveniens* test. The case involved a claim for damages brought by Guatemalan plaintiffs against a Canadian parent mining company over the actions of mine security personnel at a subsidiary mine in Guatemala. In overturning a lower court's decision granting a stay on grounds of *forum non conveniens*, the British Columbia Court of Appeal confirmed that the risk of an unfair trial process in a foreign court is a relevant factor in assessing whether an alternative jurisdiction is in fact a more appropriate forum. Leave to appeal the decision was subsequently refused by the Supreme Court of Canada.

7 2017 ONCA 827.

8 2017 SCC 34; 2017 SCC 36.

9 2017 QCCA 1673.

10 2017 BCCA 39, leave to appeal to SCC refused, 37492 (June 8, 2017).

III COURT PROCEDURE

i Overview of court procedure

Each province and territory has enacted a distinct set of procedural rules governing practice within its courts.[11] In addition, Federal Courts have their own rules of procedure. Practice directions are published by adjudicative bodies on an ongoing basis.

The Ontario Rules of Civil Procedure were recently revised with regard to automatic dismissal. As of 1 January 2017, matters commenced on or after 1 January 2012 will be automatically dismissed five years after they were commenced if not yet set down for trial.[12]

Quebec introduced a new Code of Civil Procedure in December 2015.[13] The new code has a strong focus on the principle of proportionality, requiring parties to ensure that each step in the proceedings is proportionate, in terms of the cost and time involved, to the nature and complexity of the matter.

In Canada, civil actions and proceedings are adversarial in nature. As such, the lawyer takes on the role of the advocate and the judge determines the case based on the evidence presented by the parties.

ii Procedures and time frames

The time within which a party must bring a claim is prescribed by each province. Several of the common law provinces, including Ontario, have adopted a basic limitation period of two years for claims in contract and tort, subject to discoverability.[14] In addition to these prescribed limitation periods, a claim can be barred for delay by equitable doctrines such as laches or acquiescence in the common law provinces and territories.

In the first stage of litigation, the plaintiff initiates proceedings by delivering (i.e., serving and filing) an originating process (i.e., a notice of action, notice of civil claim (British Columbia) or statement of claim). The defendant must then respond, within a prescribed period. The prescribed period varies by province, and by the jurisdiction in which the defendant is served. If the defendant fails to deliver a statement of defence within the relevant amount of time, the claimant can obtain default judgment. Canadian pleadings are confined to a concise statement of the material facts of the case. A defendant may also file a counterclaim, cross-claim or third-party claim to join all necessary issues and parties.

Following the close of pleadings, the parties enter the 'discovery' stage. In this stage, the parties identify and exchange relevant documents and conduct examinations for discovery.

In all provinces and territories other than Quebec, a party can move for summary judgment at this stage. This allows for a claim to be expeditiously disposed of without a full

11 Alberta, Rules of Court, Alta Reg 124/2010 [Alberta Rules]; British Columbia, Supreme Court Civil Rules, BC Reg 168/2009 [BC Rules]; Manitoba, Court of Queen's Bench Rules, Man Reg 553/88 [MB Rules]; New Brunswick, Rules of Court, NB Reg 82-73 [NB Rules]; Newfoundland and Labrador, Rules of the Supreme Court, SNL 1986, c 42, Sched D [NL Rules]; Nova Scotia, Civil Procedure Rules, NS Civ Pro Rules 2008 [NS Rules]; Ontario, Rules of Civil Procedure, RRO 1990, Reg 194 [ON Rules]; Prince Edward Island, Rules of Civil Procedure [PEI Rules]; Québec, Code of Civil Procedure, CQLR c C-25.01 [QC Rules]; Saskatchewan, The Queen's Bench Rules, Sask. Gaz. 21 June 2013, 1370 [SK Rules]; Yukon Territory, Rules of Court, YOIC 2009/65 [YK Rules]; and Northwest Territories and Nunavut, Rules of the Supreme Court of the Northwest Territories, NWT Reg 010-96 [NWT Rules].

12 Rule 48, ON Rules; See also *Daniels v. Grizzell*, 2016 ONSC 7351.

13 Code of Civil Procedure, CQLR c C-25.01.

14 Limitations Act, 2002, SO 2002, c 24, Sched B, Section 4.

trial. When faced with a motion for summary judgment, a judge must determine if there is a genuine issue requiring a trial. This determination is made by considering affidavit evidence, examination transcripts and, in some cases, oral testimony. As the Supreme Court of Canada has explained, summary judgment should be used as an approach to achieve a necessary culture shift towards more efficient and affordable access to justice.[15]

Two types of injunctions are available before trial in Canada: an interim injunction and an interlocutory injunction. An interim injunction can be obtained without prior notice to the other party and may be granted on the same day in urgent cases. This type of injunction is generally only granted for brief periods, lasting until an application for an interlocutory injunction is made. The interlocutory injunction serves to preserve the status quo or enjoin certain conduct until a final determination of the parties' rights is rendered. Courts also have the power to order the interim preservation of property prior to a trial.

The third and final stage of litigation is the trial. Most Canadian civil matters are tried before a judge alone. Counsel provide the judge with an overview of the case in their opening statements, and the plaintiff then presents its evidence. This may involve calling witnesses to testify or presenting documentary evidence. Opposing counsel then has the opportunity to present its evidence. All witnesses are subject to cross-examination. The trial concludes with closing submissions from counsel.

iii Class actions

Each Canadian jurisdiction (with the exception of Prince Edward Island and the three territories) has adopted specific class proceedings legislation or amended their rules of court so as to recognise class proceedings and set out the fundamental rules governing collective relief on behalf of a class of litigants.[16]

The first step in commencing a class action involves filing a statement of claim or complaint, and then having the action 'certified' as a class proceeding. At the certification stage, the court applies the certification requirements set out under statute to assess whether the claims are suitable for a class. In making this determination, the court will consider whether:

a there was a common issue among the proposed class;
b the damages could be determined on an aggregate basis; and
c a class action is the preferable procedure.[17]

The general process for class certification is similar in Quebec, in that a representative must seek 'authorisation' of a class action under the Code of Civil Procedure as a first step in the proceeding.[18]

Recently, in *Airia Brands Inc v. Air Canada*,[19] the Ontario Court of Appeal held that Ontario courts can take jurisdiction in class actions over plaintiffs who are not Canadian, do not live or work in Canada, and who have not consented to a Canadian court's jurisdiction,

15 *Hryniak v. Mauldin*, 2014 SCC 7.

16 For an in-depth discussion of class actions in Canada, see Michael A Eizenga et al., *Class Actions Law and Practice* (Toronto: Butterworths) (loose-leaf).

17 *Pro-Sys Consultants Ltd v. Microsoft Corporation*, 2013 SCC 57; *Sun-Rype Products Ltd v. Archer Daniels Midland Company*, 2013 SCC 58.

18 QC Rules, *supra* note 12, Article 574.

19 2017 ONCA 792.

even at the risk of the judgment being unenforceable outside Canada. The decision clarified that a court can take jurisdiction over a proposed class action involving absent foreign claimants if three conditions are met: (1) a real and substantial connection exists between the subject matter of the dispute and Ontario; (2) there are common issues between the claims of the representative plaintiff(s) and the absent foreign plaintiffs; and (3) the procedural safeguards of adequacy of representation, adequacy of notice, and the right to opt out are provided, enhancing the real and substantial connection.

Once the action is certified as a class proceeding, the claimant is designated as a 'representative plaintiff' and speaks on behalf of members of the class. Persons who fall within this defined class will be bound by the result of the class proceeding, unless they take steps to opt out of the class.[20]

Class actions are unique in terms of the high level of judicial supervision and case management throughout the proceeding. In addition, throughout the life of a class action, the court has the power to make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination.

In the vast majority of cases, a class action will be settled before proceeding to trial. A class action that is not resolved by the parties will undergo a trial of the common issues. The same rules of procedure and evidence that apply to a regular civil trial apply to a class action proceeding. A final judgment on the merits in a class action is binding on all members of the class, other than those who have opted out.

iv Representation in proceedings

Every party has the right to be represented by a lawyer. However, individual litigants are not generally obliged to be represented by counsel, unless special circumstances render representation mandatory, such as a litigant who is under disability or who acts in a representative capacity. In most Canadian provinces, corporations must be represented by a lawyer, unless leave of the court is obtained.[21]

v Service out of the jurisdiction

Canadian courts have limited jurisdiction over parties who are not within the court's territorial jurisdiction. However, expanded rules of service enable plaintiffs to serve a party outside the jurisdiction without leave of the court in certain circumstances. These circumstances involve some form of connection between the litigation and the jurisdiction where the plaintiff seeks to bring the case – for example, if the contract in dispute was made in that province or otherwise governed by the law of that province, or if a tort was committed or damages sustained within that province. In cases where these special circumstances do not exist, the court may grant leave to serve a party outside of the jurisdiction.

Normally, an originating process can be served outside Canada in the same manner as it can be served within the jurisdiction, pursuant to the rules of service in the jurisdiction where service is made, or pursuant to the Hague Convention on the Service Abroad of

20 British Columbia, Newfoundland and New Brunswick have adopted a hybrid opt-in/out model that depends on the residence of the class member.

21 *Halsbury's Laws of Canada*, 'Civil Procedure' (Markham, Ont: Lexis Nexis Canada, 2012) at 324.

Extrajudicial Documents in Civil or Commercial Matters of 1965. With respect to natural persons, personal service is generally required. The rules of service will vary in cases where the party is not a natural person.

vi Enforcement of foreign judgments

Canadian courts have adopted a generous and liberal approach to the recognition and enforcement of foreign judgments.[22] Enforcement of foreign judgments is a matter of provincial law. Judgments from the United Kingdom, for example, are recognised in certain provinces through a bilateral convention between Canada and the United Kingdom. If no such statutory recognition of judgments exists, the common law may serve as an alternative method for enforcing a foreign judgment.

The foreign judgment must be final and dispositive to be enforced in Canada. The judgment must have originated from a court that had jurisdiction under the principles of private international law as applied by Canadian courts and be for a definite and ascertainable sum of money; or if not a monetary judgment, its terms must be sufficiently clear and limited in scope. If the foreign judgment meets all of these criteria, it may nevertheless be denied enforcement if it:

a is based on a foreign penal, revenue or public law;
b was obtained by fraud;
c is contrary to natural justice; or
d violates public policy.[23]

Articles 3155 and following of the Civil Code govern the substantive rules applicable to the recognition and enforcement of foreign judgments by Quebec courts, and the procedural rules are governed by Articles 507 and 508 of the Code of Civil Procedure.[24]

In Canada, the enforcement of a judgment by one province in another province is considered to be the enforcement of a foreign judgment, although, in practice, Canadian courts will generally scrutinise the judgments of those issued in another Canadian province or territory with less rigour than they will scrutinise judgments coming from another country.

vii Assistance to foreign courts

When a litigant seeks to obtain evidence from a non-party Canadian resident for use in a proceeding outside Canada, they must do so by way of letters rogatory. In determining whether to give effect to such a request, a Canadian court will consider whether:

a the evidence sought is relevant;
b the evidence sought is necessary for trial and will be adduced at trial, if admissible;
c the evidence is not otherwise obtainable;
d the order sought is not contrary to public policy;
e the documents sought are identified with reasonable specificity; and
f the order sought is not unduly burdensome.[25]

22 *Chevron Corp v. Yaiguaje*, 2015 SCC 42 at para. 27.
23 *Pro Swing Inc v. ELTA Golf Inc*, 2006 SCC 52.
24 CQLR c C-25.01.
25 *Friction Division Products Inc v. EI Du Pont de Nemours & Co (No. 2)* (1986), 56 OR (2d) 722 at para. 25.

viii Access to court files

Canada has an open court policy, meaning that, with certain limited exceptions, courts are open to the public. Courtroom access may be limited when it is not in the interests of justice to have a public hearing; for example, in the case of a proceeding involving trade secrets. Publication of court files and decisions are also generally made available to the public. It is possible, however, to obtain a publication ban in cases where such a ban is necessary to prevent a real and substantial risk to the fairness of the trial, and the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.[26]

ix Litigation funding

Litigation funding in Canada originally developed to help reduce risk for representative plaintiffs seeking remediation in personal injury and class action cases. The process continues to evolve, with the most recent expansion to commercial cases.[27] Currently, litigation funding in Canada is more strictly regulated than in the United States and requires court approval prior to the advancement of funding. In a recent decision, the Federal Court opted not to provide approval for litigation funding in a patent infringement suit, holding that the Court's jurisdiction does not extend to matters of contract and civil law.[28] Litigation funding may also be available for fees, disbursements, and adverse costs in class actions, depending on particular circumstances.[29]

IV LEGAL PRACTICE

i Conflicts of interest and ethical walls

The Canadian Bar Association defines a conflict of interest as an interest that gives rise to a substantial risk of material and adverse effect on the representation.[30] The legal profession in Canada is largely self-regulated, and each provincial law society has a code of professional conduct outlining a lawyer's duties with regard to avoiding and handling conflicts of interest.[31] A court will, however, address claims of breach of fiduciary duty or conflicts if they are brought before it.

In *Canadian National Railway Co v. McKercher LLP*,[32] the Supreme Court of Canada clarified the scope of the 'bright-line' rule that applies to conflicts of interest among current clients. This bright-line rule provides that a lawyer may not represent one client whose interests are directly adverse to the immediate interests of another current client – even if the two mandates are unrelated – unless both clients consent after receiving full disclosure and the lawyer reasonably believes that he or she is able to represent each client without adversely

26 *Dagenais v. Canadian Broadcasting Corp* [1994] 3 SCR 835 at para. 77.

27 *Schenk v. Valeant Pharmaceuticals International Inc.*, 2015 CarswellOnt 8651.

28 *Seeding Life Science Ventures LLC v. Pfizer Canada Inc.*, 2017 FC 826.

29 *Houle v. St. Jude Medical Inc.*, 2017 ONSC 5129.

30 The Canadian Bar Association, 'Conflicts of Interest Toolkit'. Available online: https://www.cba.org/Publications-Resources/Practice-Tools/Ethics-and-Professional-Responsibility-(1)/Resources/Resources/Conflicts-of-Interest/Conflicts-of-Interest-Toolkit.

31 See for example, Law Society of Upper Canada, Rules of Professional Conduct, Section 3.4.

32 2013 SCC 39 at para. 32.

affecting the other.[33] In *McKercher*, the Supreme Court held that the rule is engaged only where the immediate interests of clients are directly adverse in the matters on which the lawyer is acting, and that the rule does not apply in unrelated matters where it is unreasonable for a client to expect that its law firm will not act against it.

In some circumstances, ethical walls may be put in place to prevent the involved lawyer or lawyers (and staff) from being exposed to confidential information relating to a matter currently or previously handled by other lawyers or staff. Erecting ethical walls is a common practice in large Canadian law firms.

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

The provincial law societies enforce specific requirements for verifying clients' identities and specific practices when receiving funds over a certain monetary threshold. These professional regulations and ethical standards seek to ensure lawyers will not unknowingly assist in or turn a blind eye to money laundering or terrorism financing. Although the Proceeds of Crime (Money Laundering) and Terrorist Financing Act[34] (PCTFA) regulates these issues with respect to other institutions such as banks and accounting firms, the Supreme Court of Canada has confirmed that lawyers, notaries and law offices are exempt from the PCTFA's record-keeping, client-identification and disclosure obligations.[35]

iii Data protection

The collection, use, disclosure and management of personal information in Canada is governed by the Federal Personal Information Protection and Electronic Document Act (PIPEDA). PIPEDA governs the inter-provincial and international collection, use and disclosure of personal information, and also applies to organisations that collect, use and disclose personal information during a commercial activity that takes place within a province. Certain provinces have enacted separate privacy statutes, which apply instead of PIPEDA.[36]

In addition, Canada has also enacted anti-spam legislation (Canada's Anti-Spam Law (CASL)), which prohibits numerous technology-related activities, including sending commercial electronic messages (CEMs) to an electronic address without consent. Foreign entities that communicate to Canadians should be aware that CASL applies to any CEM received by a computer system located in Canada. Accordingly, communications sent from outside the country may attract liability under CASL.

V DOCUMENTS AND THE PROTECTION OF PRIVILEGE

i Privilege

In Canadian civil litigation, all relevant and material evidence relating to the issues before a court must generally be disclosed to all parties. This requirement is subject to a number of exceptions in which Canadian law recognises that the public interest in preserving and

33 *R v. Neil* [2002] 3 SCR 631 at para. 29.

34 SC 2000, c 17.

35 *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7 at para. 79.

36 British Columbia's Personal Information Protection Act, SBC 2003, c 63; Alberta's Personal Information Protection Act, SA 2003, c P-6.5; Quebec's 'An act respecting the protection of personal information in the private sector', CQLR c P-39.1.

encouraging particular confidential relationships justifies a departure from the general rule that all relevant and material evidence be disclosed. Canadian law allows for such communications to remain privileged and be exempt from disclosure.

Legal privilege is one of the most well-recognised privileges. By successfully invoking legal privilege, a person is entitled to resist the disclosure of information or the production of documents to which an opposing litigant would otherwise be entitled.[37] Canadian law generally recognises two main categories of legal privilege: solicitor–client privilege and litigation privilege. Solicitor–client privilege, also known as legal advice privilege, prevents disclosure of information communicated to the lawyer for the purpose of obtaining legal advice, as well as information communicated to the client by the lawyer to give legal advice. Litigation privilege protects any documents or communications created for the dominant purpose of preparing for existing or anticipated litigation.

The Supreme Court of Canada recently released two decisions on privilege, both of which further demonstrate the court's recognition of the fundamental role that both solicitor–client and litigation privilege play in ensuring access to justice.[38]

In Canada, both categories of legal privilege apply equally to the advice and activities of in-house lawyers and to the advice and activities of external lawyers. In *R v. Campbell*,[39] the Supreme Court of Canada expressly endorsed the right of in-house counsel to claim privilege. The in-house designation did not affect 'the creation or character of the privilege'.[40] With respect to solicitor–client privilege, in-house lawyers must be acting in their capacity as legal advisors. A lawyer cannot assert this privilege over non-legal advice, for example, business advice given to a client.

At present, there is uncertainty surrounding the applicability of privilege to foreign lawyers. Although some cases have protected communication with a foreign lawyer in Canada regarding Canadian law even though the lawyer is not entitled to practise law in Canada, others have not. Whether legal advice regarding foreign law is protected if given outside Canada is also unclear. Traditionally, legal privilege has been characterised as a procedural matter for conflict-of-laws analysis, meaning that its existence will be governed by the law of the place in which the litigation occurs. Thus, even if the advice is not privileged in the foreign jurisdiction, it would still be protected in Canadian proceedings. However, the Supreme Court of Canada in *R v. National Post*[41] stated that legal advice privilege is a matter of substantive law, which would, under traditional conflict-of-laws rules, mean that its existence would be governed by foreign law. Such a characterisation would result in the risk of foreign legal advice provided outside Canada not being recognised in Canadian proceedings as privileged, depending on the particular laws of the foreign jurisdiction and the facts of the particular case.[42]

37 *Blood Tribe Department of Health v. Canada (Privacy Commissioner)*, 2008 SCC 44.

38 *Lizotte v. Aviva Insurance Company of Canada*, 2016 SCC 52; *Alberta (Information Privacy Commissioner) v. University of Calgary*, 2016 SCC 53.

39 [1999] 1 SCR 565.

40 This position was confirmed in *Pritchard v. Ontario (Human Rights Commission)*, 2004 SCC 31 at para. 21.

41 2010 SCC 16.

42 For further discussion on this topic, see Brandon Kain, 'Solicitor–Client Privilege and the Conflict of Laws' (2011) 50 *The Canadian Bar Review* 243.

ii Production of documents

In Canada, the rules for documentary production are governed by each province's rules of civil procedure or rules of court. The obligation of documentary disclosure in civil litigation is limited by the fact that only relevant documents must be disclosed. In most provinces, the rules governing the scope of disclosure provide that parties must disclose every document relating to or relevant to a matter in issue that is in their power, possession or control.[43] The determination of what qualifies as 'relevant' varies slightly between provinces. Under the Federal Court Rules, a document is 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.[44]

Canadian courts generally apply a broad interpretation of the term 'document' to include sound recordings, videotapes, files, charts and data and information in electronic form. With respect to electronic documents, the principle of proportionality governs – the scope of electronic discovery depends on the necessity and availability of electronic evidence as balanced by the costs of retrieving, reviewing and producing that evidence.[45]

Only in exceptional circumstances will a person who is not party to the proceeding be ordered to produce documents for discovery. A court order is required to compel such production, and will only be granted in situations where it would be unfair to require the moving party to proceed to trial without having discovery of the documents in question. The following factors will be considered when making such a determination:

a the importance of the documents in the litigation;

b whether production at the discovery stage is necessary to avoid unfairness to the appellant; and

c whether the discovery of the defendants with respect to the issues to which the documents are relevant is adequate and, if not, whether responsibility for that inadequacy rests with the defendants.[46]

Parties are required to disclose and produce not only documents in their possession, but also those within their 'control or power'. This includes documents that the party has the ability to obtain from others. In some jurisdictions, this production obligation extends to documents in the control of a subsidiary or parent company of the litigant.[47]

VI ALTERNATIVES TO LITIGATION

i Overview of alternatives to litigation

Canada offers a wide variety of methods and procedures for arriving at a solution to a dispute other than a judicial decision. Some examples of these alternatives, each falling under the category of alternative dispute resolution, include negotiation, mediation, arbitration (and hybrid procedures like med-arb) and expert determination.

43 MB Rules, *supra* note 12, r. 30.02; NB Rules, *supra* note 12, r.31.02, NWT Rules, *supra* note 12, rr. 219 and 222; ON Rules, *supra* note 12, r. 30.02; PEI Rules, *supra* note 12, r. 30.02.

44 Federal Court Rules, SOR/98-106, Rule 222(2).

45 *Siemens Canada Limited v. Sapient Canada Inc*, 2014 ONSC 2314. See also: 'The Sedona Canada Principles Addressing Electronic Discovery'.

46 *Ontario (Attorney General) v. Stavro* (1995), 26 OR (3d) 39 (CA).

47 ON Rules, *supra* note 12 r. 30.02(4) and MB Rules, *supra* note 12, r. 30.02(4).

ii Arbitration

Each jurisdiction in Canada has enacted legislation regulating international and domestic arbitrations, and every province has adopted the UNCITRAL Model Law on International Commercial Arbitration 1985 (the Model Law) into its international arbitration legislation.

In addition, Canada is a signatory to the New York Convention and every Canadian jurisdiction has enacted legislation to give it effect. Outside Quebec, the Convention only applies to relationships considered 'commercial' under the laws of Canada.

There are many arbitral institutions present in Canada, including the ADR Chambers, the ADR Institute of Canada, the Canadian Arbitration Association, the Canadian Commercial Arbitration Centre, the International Centre for Dispute Resolution and the International Chamber of Commerce.[48]

For international arbitration, an award cannot be appealed on its merits to a court. A court may, however, set aside the award under Article 34 of the Model Law.[49] For domestic arbitrations, there are limited rights of appeal, usually only on a question of law. Appeal rights vary by province and territory. Some provinces and territories do not provide for any right of appeal, whereas others provide a right to appeal after having obtained leave.

A party can apply to the court for an order staying a court proceeding where an agreement to arbitrate is in place. Courts must stay the proceeding if the arbitration agreement is not void, inoperative or incapable of being performed.

Canadian courts generally enforce foreign arbitral awards, pursuant to the New York Convention and the Model Law. A party must file the award, along with evidence of the arbitration agreement on which it was founded.

iii Mediation

Mediation is extremely common in Canada and is encouraged by the legal profession as well as the judiciary. In fact, in some cases, mediation is required by statute. Although mediation is not a new phenomenon in Canada, it has become much more prominent in recent years, particularly in commercial disputes.

In Ontario, the proliferation of mediation is at least in part related to the enactment of the Commercial Mediation Act (CMA).[50] The CMA ensures that parties settling a commercial dispute through mediation will be able to register their settlement agreement with the court, gaining the advantage of having it treated like a judgment for enforcement purposes. Ontario was the second province, after Nova Scotia, to enact legislation of this nature.

Judicial mediation is also available in certain provinces. This type of mediation allows for a judge to preside over pretrial conferences, either on an *ad hoc* basis[51] or on application by the parties.[52] In Quebec, the Code of Civil Procedure sets out a formal legislative scheme for judicial mediation.

48 For a full list, see Department of Justice, 'Dispute Prevention and Resolution', online: www.justice.gc.ca/eng/abt-apd/dprs-sprd/index.html.

49 Article 34 states that an arbitral award may be set aside only if: (1) the party was legally incapable; (2) the party was not given proper notice of the appointment of the arbitrator; (3) the party was not given proper notice of the proceeding; (4) the party was denied the opportunity to present its case; or (5) the tribunal's decision went beyond the scope of what the parties agreed was arbitrable.

50 2010, SO 2010, c 16, Sch 3.

51 As is the case in Alberta.

52 As is the case in Ontario.

One of the attractive features of mediation is the confidentiality that shrouds the process. The Supreme Court of Canada has confirmed that in the context of mediation, parties can agree to a higher degree of confidentiality than is afforded under the common law. This can be done if the parties clearly stipulate in the mediation contract that they intend to override the exception to common law settlement privilege that allows a party to disclose protected communications to prove the existence or scope of a settlement.[53]

iv Other forms of alternative dispute resolution

Med-arb is a hybrid approach that combines the benefits of both mediation and arbitration. Parties first attempt to reach an agreement through mediation. If the issues remain unresolved, the parties move on to arbitration.

Sometimes parties will insert an expert determination clause rather than an arbitration clause in their agreement – the main difference being that the dispute will be determined by a third-party 'expert' rather than an arbitrator. This generally occurs when the agreement involves some specialised or technical field. It is important to note that, in certain provinces, expert determination clauses will not attract the same legal regulation as they would if structured as an arbitration clause.[54]

VII OUTLOOK AND CONCLUSIONS

Cases currently under reserve or appeal will likely lead to developments in the areas of administrative law, civility in the legal profession, interprovincial trade, the duty of good faith in contract performance, and the duty to consult with aboriginal groups.

In *Delta Air Lines Inc v. Gábor Lukács*,[55] the Supreme Court heard an appeal from the Federal Court of Appeal on standing in administrative tribunals. The Supreme Court reserved judgment and will decide whether the Canadian Transportation Agency has the authority to decline to hear complaints on the basis of lack of standing.

In *Groia v. Law Society of Upper Canada*,[56] the Supreme Court heard an appeal from the Ontario Court of Appeal, upholding the Law Society Appeal Panel's decision that Mr Groia engaged in professional misconduct, ordering a suspension of his licence to practise law for one month. The Supreme Court reserved judgment and will rule on the ability of a regulatory body to bring proceedings for misconduct arising out of a lawyer's submissions to a judge in open court.

In *R v. Comeau*,[57] the Supreme Court considered whether the prohibition on transporting liquor between provinces violated the free trade guarantee in Section 121 of the Constitution Act 1867. The Supreme Court reserved judgment and will determine whether section 121 of the Constitution prohibits both non-tariff as well as tariff barriers to interprovincial trade.

In *Churchill Falls (Labrador) Corporation Limited v. Hydro-Québec*,[58] the Supreme Court heard an appeal from the Québec Court of Appeal, dismissing an action alleging the duty

53 *Bombardier Inc v. Union Carbide Canada Inc*, 2014 SCC 35.

54 *Sport Maska Inc v. Zittrer* [1988] 1 SCR 564.

55 SCC File No. 37276.

56 SCC File No. 37112.

57 SCC File No. 37398.

58 SCC File No. 37238.

of good faith in contract law required renegotiation of the contract at issue. The Supreme Court reserved judgment and will rule on the contents of the duty of good faith in contract performance as governed by the Civil Code.

In Chief Steve Courtoreille on behalf of himself and the members of the Mikisew Cree First Nation v. Governor General in Council, et al,[59] the Supreme Court will consider whether the duty to consult in respect of the legislative processes is only triggered by legislation targeted specifically at First Nations and whether the separation of powers precludes the duty to consult arising as a justiciable legal duty on the executive in respect of development of legislation until its introduction in Parliament.

59 SCC File No. 37441.

Appendix 1

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Robert Staley is a commercial, securities and class action litigation lawyer at Bennett Jones Toronto. He is a partner, and is head of the shareholder activism and critical situations group.

Rob's practice focuses on complex commercial and securities litigation, securities regulation, shareholder activism and class actions. He has extensive experience in Canadian and cross-border securities regulatory and enforcement matters, class actions, takeover bid litigation, foreign corrupt practices, appraisal and share valuation remedies, derivative actions, arrangements and the oppression remedy. Rob regularly advises corporations, boards of directors, audit committees and special committees in connection with internal and regulatory investigations and in connection with proxy contests and contested transactions. Rob has a broad trial and appellate practice in the Ontario Superior Court of Justice, Ontario Court of Appeal, Federal Court of Canada, Federal Court of Appeal and Supreme Court of Canada. Rob has appeared before the Ontario, British Columbia and Alberta Securities Commissions. Rob also has a robust pro bono practice, including in significant constitutional cases. Rob has served as chair of the firm's securities litigation practice group, as co-chair of the firm's litigation department and as a member of the firm's partnership board.

Rob is listed in *Chambers Global* as one of the world's leading lawyers for dispute resolution – the publication has commended him in 2009, 2010, 2011, 2012, 2014 and 2015. In both 2014 and 2015, Legal Media Group's Benchmark Canada, which has consistently recognised Rob in its rankings in securities litigation and class actions, conferred on Rob Benchmark's award as Canada's Securities Litigator of the Year. Rob is recognised by *The Canadian Legal Expert Directory* in the securities litigation, corporate and commercial litigation and directors' and officers' liability litigation categories. He is repeatedly recognised in the *Lexpert/American Lawyer Guide to the Leading 500 Lawyers in Canada* in the securities litigation and corporate commercial litigation categories.

Rob has served as a member of the board of directors of the Advocates' Society.

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Jon has motion, application, trial and appeal experience before all courts in Ontario, as well as a number of administrative and regulatory boards and tribunals. He has experience in matters pertaining to securities regulatory and enforcement matters, internal investigations, shareholder and partnership disputes, directors' and officers' liability, professional negligence, product liability, domestic and international arbitration, oppression proceedings and class proceedings, among others.

Jon has extensive experience in managing the unique e-discovery and record management challenges of complicated litigation. He has presented to peers at professional conferences, as well as to a number of industry and professional organisations on how corporate litigants can best address the new challenges of the e-discovery age.

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