# Dispute Resolution

Doing Business in Canada

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## CANADA'S COURT SYSTEM

The purpose of Canada's court system is to assist people in resolving their disputes in a just and equitable manner. In fulfilling this mandate, the courts interpret and apply laws and address issues that impact upon all facets of Canadian society. With the exception of the province of Quebec, which administers a predominantly civil law system, the provinces and territories of Canada have a legal system similar to those used in the United States and Great Britain, and administer the common law.

Canada's court system is organized in a four-tier system. At the bottom of the hierarchy are the provincial and territorial courts. These courts hear cases involving either federal or provincial/territorial laws and deal with a wide array of matters including, but not limited to, criminal offences, family law matters (except divorce) and provincial/territorial regulatory offences.

Provincial and territorial court judgments are appealed to the provincial/territorial superior courts.[1] Superior courts have "inherent jurisdiction." As such, superior courts are able to hear cases pertaining to any area that is not specifically limited to another level of court. Within the purview of the superior courts are trials for the most serious criminal offences as well as divorce cases and cases involving large sums of money. Appeals from decisions of the superior courts and provincial/territorial courts are heard by an appellate division or a court of appeal for the applicable province or territory. Constitutional questions raised in appeals involving individuals, governments or governmental agencies are also heard by the court of appeal.

Running parallel to this system is the Federal Court system. Both the Federal Court and Federal Court of Appeal are similar to the superior courts except that they also have jurisdiction over civil law. An important distinction between the federal courts and the superior courts of the provinces and territories is that while the former can only deal with matters specified in federal statutes, the latter have jurisdiction in all matters except those specifically excluded by statute. The Federal Court has jurisdiction over interprovincial and federal-provincial disputes, intellectual property proceedings, citizenship appeals, *Competition Act* cases and cases involving Crown corporations or departments of the Government of Canada. Importantly, only the federal courts have jurisdiction to review decisions, orders and other administrative actions of federal boards, commissions and tribunals.

At the apex of the court structure sits the Supreme Court of Canada. The Supreme Court hears appeals from all other Canadian courts. It has jurisdiction over disputes in all areas of the law, including administrative law, civil law, constitutional law and criminal law.

## THE INDEPENDENCE OF THE COURTS

Judicial independence is a cornerstone of the Canadian judicial system. It is for this reason that Canadian courts are kept separate from the legislature and the executive. This also means that any government action may be reviewed by the courts for compliance with the Constitution of Canada and the *Canadian Charter of Rights and Freedoms*.

Three means are used to ensure judicial independence, namely security of tenure, financial security and administrative independence. In terms of tenure, once appointed, a judge is permitted to serve on the bench until a specified age of retirement and can only be removed if an independent investigation demonstrates good reason. Financial security requires that judges be paid adequately and in a manner that does not leave them in a position of dependence or susceptible to pressure. Canadian governments are also prohibited from altering judges' salaries or benefits without first consulting with an independent commission. Administrative independence means that interference with the way in which courts manage the litigation process and exercise their judicial functions is prohibited.

## CLASS ACTION PROCEEDINGS

Legislation permitting class action proceedings can now be found in all of the Canadian provinces and territories (except Prince Edward Island), as well as the Federal Court of Canada.

Unlike ordinary proceedings, a class action proceeding is commenced on behalf of a "class" of persons. This necessitates that a person/persons who is/are representative of the potential class assume the role of plaintiff and represent the interests of that class. A critical first step in commencing the action is having the action judicially approved or "certified" as a class proceeding. Among other things, a certification order will name the representative plaintiff or plaintiffs, define the "class" and approve a "workable plan." Once the proceeding has been certified, the action will proceed in a similar fashion to a traditional lawsuit, complete with documentary

1 As Nunavut does not have a territorial court, both territorial and superior court matters are heard by the Nunavut Court of Justice, which is a superior court.

and oral discovery, pre-trial procedures, and the exchange of expert reports. If the proceeding is not certified, it continues as a regular action for one plaintiff only. In most Canadian provinces and territories, class actions are case managed by one judge. However, in all of the provinces but Quebec, a new trial judge is assigned once the matter reaches the trial stage.

## ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution ("**ADR**") is a field of law that has grown exponentially over the last 30 years. ADR refers to methods of settling disputes between would-be litigants using means other than court-based traditional litigation. ADR includes a variety of techniques, including negotiation, conciliation, mediation and arbitration. Interest in ADR continues to grow. The most common reasons cited by both lawyers and their clients for choosing ADR processes include: the faster resolution of disputes; the guarantee of privacy, confidentiality and avoidance of adverse publicity; the reduction of legal costs; the ability to choose an adjudicator or mediator; the possibility of mutually-advantageous resolutions/solutions; and the promise that relationships will remain intact.

Two of the most significant ADR techniques are arbitration and mediation. In arbitration, the parties refer their dispute to a neutral third party whom they have selected for judgment. The result is a binding and enforceable ruling. Parties may choose arbitration as a dispute resolution mechanism by specifying so in their contract, or they may jointly elect to submit to arbitration after a dispute arises. In addition, various provincial and territorial statutes either expressly or impliedly provide for arbitration. Examples of these statutes include: the *Expropriations Act*, *Insurance Act*, *Hospital Labour Disputes Arbitration Act* and the *Municipal Arbitrations Act*. With the exception of criminal law matters and matters governed by special statutes, any matter that is properly the subject of litigation may be dealt with by arbitration.

Mediation is an informal process wherein a neutral third party assists the parties to a dispute to reach their own mutually-agreed upon solution. A striking difference between mediation and other forms of dispute resolution processes, such as litigation or arbitration, is that in mediation the mediator has no authority to impose a solution. The mediator's role is simply to ensure communication and facilitate fruitful negotiations. Importantly, mediations are not binding. Parties often enter into mediation on the basis that if an agreement is not reached, they may resume the litigation process.

In the last several years, a strong trend line has developed towards moving disputes to mediation at an early date. Historically, mediation generally occurred after examinations for discovery were complete and expert reports exchanged. These days, parties frequently move cases into mediation before those stages have been completed. As mediation represents an exit strategy from litigation, this is a sound development. It does mean that in planning a dispute and litigating a dispute, parties should be thinking early on about identifying the best possible mediator for the case and exploring and developing strategies for a successful mediation.

While in some cases mediation is voluntary, in other situations it is mandatory. In Ontario, for instance, the Rules of Civil Procedure require that mandatory mediation be used in all case-managed actions, with minor exceptions, within 90 days after the first defence has been filed, unless a court orders otherwise. The goal of mandatory mediation is to help the parties resolve their disputes outside of court early in the litigation process, thus saving them both time and money. The purpose of case management is to decrease the expense and delay in the administration of lawsuits by giving the courts a greater supervisory role over the progress of cases. Currently, case management applies in Ottawa, Windsor and Toronto. Mediation is still popular in areas of Ontario where case management does not apply.

## SERVING FOREIGN PROCESS AND ENFORCING FOREIGN JUDGMENTS

Canada is a signatory to the *Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. The Hague Convention provides for protocols governing the service of foreign process on residents of Canada. When a party is seeking to serve process originating from a jurisdiction that is not a signatory to the Hague Convention, it is important to ensure that the service in Canada complies with the rules of the originating jurisdiction.

In order to enforce a foreign judgment in a civil or commercial matter in Canada, the party seeking to enforce the judgment will first need to have the judgment recognized by one of the superior courts of the provinces and territories. Canada is party to a number of international conventions providing for the reciprocal recognition and enforcement of judgments, and certain provinces have reciprocal enforcement legislation covering additional (albeit limited) foreign jurisdictions, which allow for a streamlined recognition and registration process. In

order to have a foreign judgment from a jurisdiction not covered by convention or legislation recognized, the party will need to bring a proceeding in the superior court for recognition and enforcement.

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## VIRTUAL PROCEEDINGS

Both Canada's courts and ADR processes are becoming increasingly technology friendly, allowing for e-filing of court documents and attendance by video at nearly all attendances which would have previously been conducted in person. In Ontario, for example, recent amendments to the Ontario *Rules of Civil Procedure* provide that a party seeking a hearing or other step in a proceeding may propose that it be conducted by video conference. Any opposing party may object, but the general trend within the profession is to embrace this improved access to court hearings.

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