

The Author



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List of Abbreviations

Alta.	Alberta
Alta. L.R.	Alberta Law Reports
Alta. R.	Alberta Rules of Court
ADR	Alternative Dispute Resolution
Art.	Article
AG	Attorney General
AG Can.	Attorney General of Canada
BC	British Columbia
BNA	British North America Act
Can.	Canada
CBA	Canadian Bar Association
CBRev.	Canadian Bar Review
CLIA	Canadian Lawyer's Insurance Plan
CCP	Code of Civil Procedure of Quebec
CCSM	Continuing Consolidation of the Statutes of Manitoba
Ct.	Court
CJA	Ontario Courts of Justice Act
DLR	Dominion Law Reports
ed.	edition
FCA	Federal Courts Act
FCC	Federal Court of Canada
Fed. R.	Federal Rules of Court
Geo	George
L. Rev.	Law Review
lv.	leave
Man.	Manitoba
Man. R.	Manitoba Rules of Court
Man. Rep.	Manitoba Reports
NCA	National Committee on Accreditation
NB	New Brunswick
NBR	New Brunswick Reports
Nfld.	Newfoundland and Labrador
Nfld. & PEI R.	Newfoundland and Prince Edward Island Reports
NS	Nova Scotia
NWT	Northwest Territories

List of Abbreviations

NWTR	Northwest Territories Reports
Ont.	Ontario
OR	Ontario Reports
PC	The Privy Council
PEI	Prince Edward Island
Que.	Quebec
QB	Queen's Bench
QBA	Queen's Bench Act
RSA	Revised Statutes of Alberta
RSBC	Revised Statutes of British Columbia
RSC	Revised Statutes of Canada
RSM	Revised Statutes of Manitoba
RSNB	Revised Statutes of New Brunswick
RSN	Revised Statutes of Newfoundland
RSNWT	Revised Statutes of the Northwest Territories (Adopted by Nunavut, 1999)
RSNS	Revised Statutes of Nova Scotia
RSO	Revised Statutes of Ontario
RSPEI	Revised Statutes of Prince Edward Island
RSQ	Revised Statutes of Quebec
RSS	Revised Statutes of Saskatchewan
RSY	Revised Statutes of the Yukon Territory
R.	Rule
Sask.	Saskatchewan
Sask L.R.	Saskatchewan Law Reports
s.	section
SA	Statutes of Alberta
SBC	Statutes of British Columbia
SC	Statutes of Canada
SM	Statutes of Manitoba
SNB	Statutes of New Brunswick
SN	Statutes of Newfoundland
SNWT	Statutes of the Northwest Territories
SNS	Statutes of Nova Scotia
SO	Statutes of Ontario
SPEI	Statutes of Prince Edward Island
SQ	Statutes of Quebec
SS	Statutes of Saskatchewan
SY	Statutes of the Yukon Territory
SCC	Supreme Court of Canada
SCR	Supreme Court Reports (of the Supreme Court of Canada)
UK	The United Kingdom of Great Britain, Scotland and Ireland
US	The United States of America
UBC Law Rev.	University of British Columbia Law Review
Vict.	Victoria

List of Abbreviations

WLR	Weekly Law Reports
WWR	Western Weekly Reports
Yuk.	The Yukon Territory
YR	Yukon Reports

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Preface

This volume covers fourteen jurisdictions in Canada, and gives an overall view of the civil litigation process. I have chosen examples from the more heavily populated provincial jurisdictions wherever possible, and have attempted to include complete references to the Federal jurisdiction. References to statutes are to the most recent revision, without citing the multitude of amendments since that time. I have, however, used up-to-date versions of the acts that include these changes. I have avoided excessively detailed practice directions since all jurisdictions have their own annotated rules of procedure and guides as well as variations of practice.

Preface

General Introduction

Chapter 1. General Background

1. Canada is a country of ten provinces and three territories.¹ The Constitution is both written and unwritten, meaning that it is made up of legislation and non-legislation. As such, it differs from the United Kingdom, where the Constitution is largely unwritten, and from the United States of America, where it is largely written.

Sovereignty, meaning here the ultimate power of government to pass whatever internal laws it wishes, is divided between the central government in Ottawa and the provincial and territorial governments, according to constitutional documents and what are known as political conventions, rules of conduct with no formal power or origin but which are adhered to by all government officials, as well as usages, practices with less formal binding authority. In addition, some sovereign power is found in the hands of aboriginal governments, partly as a result of land claims and partly because it was never surrendered and was recognized in a Royal Proclamation of 1763.² Thus, Canada could be called a federal state rather than a unitary state such as the United Kingdom or a Confederation such as the original European Economic Community.

Historically, the first significant European influence was French. Much of what is now the eastern part of Canada was settled by the French, largely displacing existing native populations.³ In 1759, however, the British took over the French colony of New France, following a battle at the Plains of Abraham in what is now Quebec City. France ceded the territory to Great Britain in the Treaty of Paris, 1763, and in a royal proclamation in the same year imposed English law on the area. In 1774, however, in the Quebec Act,⁴ the English Parliament restored French-derived civil law in such areas as property and civil rights. This is of considerable significance in civil procedure since the substance of most laws governing relations between people (private law) is within that topic. In what is now the Province of Quebec substantive private law is largely found in the Quebec Civil Code, based on the Napoleonic Code.⁵

The Constitution Act divided the former colony of Quebec into Upper and Lower Canada with limited legislative powers. They were reunited by the Union Act of 1840⁶ into the Province of Canada. By the 1860s strains were developing and there were conferences held in Charlottetown, Quebec City and London, England, involving various combinations of the Maritime Provinces of Nova Scotia, New Brunswick, PEI and Newfoundland, as well as the Province of Canada and the British Government. The Quebec Conference (1864), led to the drafting of the British North America Act⁷ which was passed by the British Parliament and proclaimed on 1 July 1867. The

original provinces were Ontario, Quebec, New Brunswick and Nova Scotia. The preamble to the Act refers to the desire of the original provinces to be united into ‘... One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom ...’.

Provision was made in the legislation for the admission of other lands⁸ and so were added the provinces of Manitoba (1870), British Columbia (1871), Prince Edward Island (1873), Alberta and Saskatchewan (1905), and Newfoundland (1949). All provinces had independent legislative power in certain areas and have gained more since entry through constitutional amendment. The Northwest Territories were added in 1870 and the Yukon Territory in 1898. On 1 April 1999 the Territory of Nunavut was carved from the Northwest Territories.⁹ There remains a large part of the Arctic not included in any formal governmental area but admitted to Canada in 1880. The Territories differ from provinces in that they did not receive sovereign legislative power from the British Parliament, but from the Canadian Parliament. All three Territories now have their own legislative and judicial systems but only as a result of delegation from the central government.

1. According to Statistics Canada, 2004, population figures, rounded up showed:

Total Population	31,946,000
Ontario	12,393,000
Quebec	7,543,000
British Columbia	4,196,000
Alberta	3,202,000
Manitoba	1,170,000
Saskatchewan	995,000
Nova Scotia	937,000
New Brunswick	751,000
Newfoundland	517,000
Prince Edward Is.	138,000
Northwest Territories	43,000
Yukon Territory	31,000
Nunavut	30,000

2. S. 35 of the Constitution Act, 1982 also ‘recognized and affirmed’ then-existing aboriginal and treaty rights. *See infra*, and generally, J. Youngblood Henderson, *et al.*, *Aboriginal Tenure in the Constitution of Canada*, (Toronto, Carswell, 2000). An example of legislation dealing with self government is the Yukon First Nations’ Self Government Act, SC 1994, c. 35.
3. In the Seven Years’ War between France and England, which ended in 1759, aboriginals were part of the forces of each side. The commercial battle for the fur trade, between the French based Northwest Company and the English-owned Hudson Bay Company did not end until 1820 when the latter prevailed. I use the term ‘aboriginal’ to refer to the three main groups in Canada, Indians, Metis, and Inuit.
4. 1774 (UK), 14 Geo. 3, c. 83.
5. 1804. Before this the law was the ‘Custom of Paris’, civilian but customary rather than statutory.
6. 1840 (UK).

7. 1867 (UK), renamed the Constitution Act 1867, in 1982.

8. S. 146.

9. Nunavut Act, SC 1993, c. 28.

2. For the purposes of civil procedure, English law forms the basic procedural law. In Quebec, substantive law is more based upon civil law. The date when local law made by provincial legislatures superseded British law on the same topic is different from province to province, depending upon the date of admission to Canada or the date chosen.¹ What this means is that in each province a different base of English law underlies the substantive and procedural law. While local legislatures could change their internal laws, there remained an overriding power in the British Parliament to pass laws that would apply to the colonies, later the provinces and territories. This power, recognized in the Colonial Laws Validity Act, 1865,² was limited by the Statute of Westminster, 1931, in which the British Parliament enacted that its legislation would only apply to another dominion if that country had so requested. In 1982, of course, this power virtually disappeared, with the ‘patriation’ of the Constitution.

1. English law distinguishes between lands acquired by settlement and those acquired by conquest. In both cases s. 129 of the BNA Act continued in force laws in place in the original four provinces and the terms of admission of other lands dealt with the topic.

2. 28&29 Vict., c. 63.

3. The system of government in Canada is best described as a constitutional monarchy. Governmental power is separated into three basic areas, legislative, executive and judicial, with the separation between executive and judicial being ill-defined.

The executive power is the power of the Crown or the Queen in England, as applied through the Governor General at the central level,¹ the Lieutenant Governor at the provincial level, and the Commissioner at the territorial level. This power was not defined exhaustively in the BNA Act or elsewhere, although the Act did give the Governor General considerable power to, for example, appoint Superior Court Judges, Senators, or Lieutenant Governors of provinces. The executive power is obtained or limited by statute or is residual, found in the common law and called ‘prerogative’. Much of it is formal and almost all of it is exercised on the advice of elected officials, primarily the Prime Minister and the Cabinet. At the federal level, there exists a Privy Council, a body of advisers appointed by the Crown. A smaller group of these, the Cabinet, is by convention, chosen from the elected members of the legislature or from the appointed Senate. The Prime Minister, a position not mentioned in the BNA Act, forms the government by directing the appointment of cabinet members, senators, judges, and senior government officials. Thus, although the executive power seems to be strong, most of it is exercised by direction of elected officials through the Prime Minister and the Cabinet who remain in power only as long as they retain the confidence of the electorate through the House of Commons. This is known as responsible government.²

Examples of executive powers include the appointment of governmental officials, as mentioned, the conduct of foreign affairs, prosecution of offences, raising an army and making war, and concluding treaties. The executive also possesses privileges

and immunities such as immunity from the effect of statutes unless expressly targeted at them, immunity from actions in tort (delicts) unless waived (based on the theory that the Crown can do no wrong.) Most of these are now limited by statute.

1. The power of the current Governor General of Canada is found in a Letters Patent of the King of 1947.
2. See generally, P. Hogg, *Constitutional Law of Canada*, (Toronto, Carswell, 2004), p. 18, and P. Monahan, *Constitutional Law*, (2nd ed., Toronto, Carswell, 2003).

4. A reflection of the formal power of the Crown in Canada is that all government property is held in the name of the Crown, civil actions against the government for its wrongdoing are brought against the Crown in various names such as ‘The Queen in Right of Canada’. Criminal prosecutions are brought in the name of the Crown. All of this is regulated by statute.¹ At the provincial level, Crown power, exercised through the Lieutenant Governor, is similarly controlled through a Cabinet itself controlled by the Premier of the province.

Legislative power at the federal level is exercised through the House of Commons, an elected body, and the Senate, an appointed body.² Government bills can be introduced at either level, except for money bills, which, by convention, are introduced in the House. The power of the Senate to block passage of legislation is also limited, with the result that the Prime Minister, controlling Cabinet (ministers of various government departments and drawn largely from the House) controls the legislative process as well as the executive process.

1. This will be considered, *infra* at p. 113.
2. Powers of each are described, in part in the Parliament of Canada Act, RSC 1985, c. P-1.

5. At the provincial and territorial level, legislative power is exercised through an elected legislature. There were at one time some provincial Senates, but they no longer exist. Again, the provincial cabinet, controlled by the Premier has ultimate control.

Judicial power in Canada involves appointing judges, regulating the conduct of judicial business, setting up and running facilities such as courthouses. I will later deal in detail with these matters but it should be noted that the original constitutional document, the BNA Act, did not set up any courts. Instead, s. 96 provided that ‘The Governor General shall appoint the Judges of the Superior, District, and County Courts in each province ...’. S. 101 gave the Parliament of Canada the power to set up and run a ‘General Court of Appeal for Canada’ and to establish additional ‘Courts for the better Administration of the Laws of Canada’. At the same time provinces were given legislative authority over ‘The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts’. The result is that most civil and criminal courts, as opposed to the judges sitting in them, are under provincial authority. In any one province, you will probably find a high court with trial jurisdiction and an appellate court, in which federally appointed judges sit, as well as other higher level courts such as those doing minor appeals or conducting judicial review. At the same time there will be lower courts in which provincially appointed judges sit, exercising trial and appellate

jurisdiction. All these courts will be known as provincial courts, to distinguish them from the federal courts set up under s. 101. In the Territories the administration of justice is exercised in courts set up by the central government and by the territories themselves.

6. The political landscape described above changed dramatically in 1982 when the ‘Constitution’ was patriated. What this means is that as a result of a process to which only Quebec objected, the British Parliament passed a statute at the request of the central government which passed almost all governmental power to Canada. The Canada Act 1982,¹ is included as Schedule B the Constitution Act 1982. This legislation changed the BNA Act to the Constitution Act 1867, and tried to better define the ‘Constitution’ of Canada by listing many statutes, amendments, orders in council, etc. making up the written constitution of Canada. In addition, the Constitution Act 1982 included a clause, s. 52(1) which reads ‘The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect.’² Included also was a Charter of Rights guaranteeing certain individual and collective rights against actions of government, and an amending formula.

It can be seen from the above that the governmental structure in Canada rests on institutions brought or adopted from the United Kingdom. Most of the provinces and territories were formerly British colonies with their own courts, executive councils or legislatures when they joined the country. The influence of British law and institutions remains strong outside Quebec although there has been a significant US influence on the content of Canadian law and, more recently a wider world view in all jurisdictions throughout the country.

1. UK 1982, c. 11. In this small statute, the British Parliament added s. 2; ‘No Act of the Parliament of the United Kingdom passed after the Constitution Act, 1982 comes into force shall extend to Canada as part of its law.’ Whether a legislature that is sovereign can do this is a nice question. Of course, politically the result is the same. You will note that I use the terms ‘English’ ‘British’, and ‘United Kingdom’ interchangeably. No doubt this will upset some anglophiles but all refer to the Parliament at Westminster, London, England (or UK).
2. This provides courts with a range of remedies including declaring that the law is not enforceable and no longer applies, a clear case of a limitation on the power of provincial and federal legislatures. It can be compared to the situation in some unitary states such as England or New Zealand, in which a law properly passed cannot be struck down by a court. Even under the new Human Rights Act (1998), English courts can only make a declaration of incompatibility, leaving it to the legislature to try to cure the problem.

Chapter 2. Delimitation of the Subject Matter

§1. DEFINITION OF THE TERM 'CIVIL PROCEDURE'

7. It is necessary to define some terms here. There is a distinction between 'civil law' and 'common law'. The terms are sometimes used to distinguish between the private law systems of Quebec as a 'civil law system', based largely upon the Napoleonic Code, and that of the other provinces and territories, based upon a combination of statute and judge-made law, a 'common law system'.

The term 'common law' is used in contrast to the term 'statute law' as well. When used in this way the term refers to decisions of judges involving legal concepts which are judge-made, i.e., the concepts have been created and developed by judges. There can also be a common law in which judges interpret statutes and to understand the statute it is necessary to know not only what the statute says, but also how judges have interpreted it. The reliance on common law is a feature that distinguishes, in a broad way, the English system of law from the continental one, including that of Quebec,¹ although in Quebec the influence of judicial opinion on the meaning of the law is growing.

The term 'statute law' is used to refer not only to legislation passed by an elected body such as a provincial legislature, but also to what is called 'delegated legislation'. Within certain constitutionally-defined limits,² a legislature can provide that other government officials can make laws such as regulations, orders, which will have the same effect as if made by the legislature itself. The delegated legislation may be made by a specially created body such as a tribunal, or by a government department, or by the executive. Most of the rules of court directing how to prepare litigation for trial are of this character.

I use the term 'civil law' as well to distinguish between law governing the relations between subjects and law dealing with crimes (criminal law).

In civil procedure the term 'original jurisdiction' is used in contrast to the term 'appellate, or appeal jurisdiction'. The first refers to the power of a court to hear a matter for the first time, for example, as a trial court. The second refers to the power of a court to take a look at a decision of a judge of first instance such as a trial judge's decision. As you will see, a court will have a defined power or jurisdiction over certain types of litigation. A judge, on the other hand, may have power over different aspects of litigation depending upon the court in which he or she is sitting on a particular day. The judge may at one time exercise an appellate jurisdiction and at another time an original one.

There is also a distinction between exclusive and concurrent jurisdiction. The first term refers to the fact that a court is the only one with power to deal with a question. The second means that more than one court can deal with an issue. For example, superior courts in a province or territory may share jurisdiction over claims of a low value with small claims courts and costs rules will penalize litigants if they bring the claims to the higher level court.

Another distinction to remember is that between appellate review of a decision and judicial review. Generally, in Canada, courts of appeal exercise a statutory power

to oversee decisions of lower courts by way of appeal. This may be a consideration of findings of fact or issues of law, or both.³ At the same time, judges of 'superior courts', usually sitting in the highest court in the province or territory, have powers derived from English superior courts to review decisions of inferior tribunals exercising powers derived from statutes (including delegated legislation). These powers, sometimes said to be part of an 'inherent' jurisdiction of judges of superior courts,⁴ are usually exercised according to rules of procedure. Examples of remedies used by these judges include *habeas corpus*, dealing with the liberty of persons, *mandamus*, requiring the exercise of a discretionary power, or *certiorari*, reviewing a decision of a judicial tribunal.⁵

There is also in Canadian law a recognized power in judges to make decisions about the constitutionality of statutes.⁶ When doing this, a judge is deciding whether the statute or delegated legislation is within the scope of the empowering Act. For example, a judge may be asked, in the context of litigation or even directly on a reference,⁷ to decide if a statute is beyond the power of the body creating it, akin to an '*ultra vires*' question. This will involve looking at the empowering legislation, for example, the Constitution Act, 1867, to see if the level of government that passed the legislation was given the power to do so. In the context of the powers of provincial or federal governments, this is called a 'division of powers' issue.⁸

A final type of review, as opposed to appeal, is that found under the Charter of Rights.⁹ Here a 'court of competent jurisdiction', a term not defined in the Act, can issue various remedies to persons who allege and can prove that actions of 'government' have infringed their Charter rights. These remedies may include a declaration that the law itself is of no force and effect, with interesting consequences, or that the law is fine but the application of it to the person by the government is itself flawed. In the first situation, the complaining person must, by statute in most jurisdictions, give formal notice to the government affected, of the challenge to the legitimacy, as opposed to the application of the law.¹⁰ It will be noted that the power of judges to decide upon the constitutionality of laws, either from a division of powers perspective or under the Charter is an exception to the doctrines of 'Supremacy of Parliament'.¹¹ Much of the time of courts in Canada, particularly in criminal matters but also in civil cases or cases in the administrative law area, in which actions of government are involved, is spent dealing with Charter issues. Charter litigation is a growth industry, subject to the same procedural rules as other civil actions.

1. Reliance on judicial decisions, or 'common law' to determine what the law is, involves doctrines of precedent, *stare decisis*, binding and persuasive authority and others which are beyond the scope of this volume.
2. See P. Hogg, *supra*, Ch. 14. One issue of recent relevance, for example, is that of the power of a legislature to bind itself, in advance, to the result of a referendum of citizens. The Referendum Act SC, 1992, c. 30 provides that the result of a referendum is for the 'opinion' of the legislature. See also Referendum Act, RSQ 1977, c. C-64.1; Constitutional Referendum Act, SA 2000, c. C-25; Referendum Act, RSBC 1996, c. 400; Referendum and Plebiscite Act, SS 1990-1991, c. R-8.01.
3. To preserve the utility and integrity of trial courts, courts of appeal will not usually interfere with a trial finding of fact unless it is quite unreasonable, looking at the evidence.
4. Meaning here the highest courts in the provinces and territories. The Federal Court of Canada in its trial division is thought not to possess an inherent jurisdiction, but only a statutory one.
5. I shall deal with administrative procedure in more detail later in this Part.

6. This power was not given to judges directly through legislation in the BNA Act, now the Constitution Act, 1867, but adopted by the Judicial Committee of the Privy Council when considering appeals involving Canadian cases and later by the Supreme Court of Canada and other levels of Canadian courts. It helped that the Supreme Court in the US had taken to itself the same power in *Marbury v. Madison* (1803), 5 US (1 Cranch) 137. See generally, P. Russell, *The Judiciary in Canada: The Third Branch of Government* (McGraw-Hill Ryerson, Toronto, 1987) at p. 93, and in the US, A.M. Bickel, *The Least Dangerous Branch, The Supreme Court at the Bar of Politics* (New Haven, London: Yale University Press 1986).
7. Reference cases derive from legislation. The Supreme Court Act, RSC 1985, c. S-26 gives the government (the Governor General in Council) the power to ask the court for an opinion on an 'important question of law or fact'. This power, which is duplicated with provincial legislation and provincial courts of appeal (on questions of provincial laws only), is a controversial one and thought by some to be a non-judicial function, is used often to obtain judicial advice about the validity of proposed or existing legislation. See, for example, *Re Secession of Quebec*, [1998] 2 SCR 217. It gives courts of appeal a limited original jurisdiction.
8. In addition to deciding whether or not the legislature had the power to pass a law, courts, even before 1982, could and did strike down laws that violated the specific guarantees in the Constitution Act, 1867, such as those in s. 96 (judicial power), or relating to denominational schools or language rights.
9. Constitution Act, 1982, App. 111.
10. What sorts of challenge requires notice varies from place to place. Some jurisdictions require it only if validity is challenged, others include the raising of a Charter issue. For example, see The Constitutional Questions Act, RSBC 1996, c. 68; RSS 1978, c. C-29, s. 8; RSNS 1989, c. 89, s. 10; CCSM c. C 180, s. 7; CCP, RSQ 1977, c. C-25, s. 95; Courts of Justice Act, RSO 1990, c. C. 43, s. 109; Judicature Act, RSA 2000, c. J-2, s. 25; RSN 1990, c. J-4, s. 57.
11. Discussed, *infra*, in §4. The extent to which courts are prepared to intervene to declare legislation of no force and effect is a controversial one. In the SCC decision in *Vriend v. Alberta*, [1998] 1 SCR 493, the court described its role as a 'trustee' of the *Charter*, required to 'scrutinize the work of the legislature and the executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen'. See, C. Manfredi, *Judicial Power and the Charter* (Oxford University Press, 2nd edn., 2001) p. 3.

§2. DISTINCTION FROM OTHER TYPES OF PROCEDURE

8. Civil Procedure involves the flow of a piece of litigation from the start to execution of judgment. It is to be distinguished from other types of procedure which also involve courts or judicial officials, including inquiries, criminal proceedings, and administrative proceedings.

Judges get involved in various types of investigations, such as coroner's inquests, public inquiries, or royal commissions. They may also be asked by government to act as arbitrators or mediators in cases in which government is involved. Most jurisdictions have statutes regulating these activities and there will be procedures to follow as well.¹

Criminal proceedings, involving judges making decisions in criminal prosecutions take up a large amount of court time, particularly since 1982. The power to legislate to make offences is a federal one, as is the power to create criminal procedure.² The Criminal Code of Canada is a comprehensive statute creating offences of the most serious type and setting out much of the procedure used in prosecuting or defending such cases. At the same time, there are many offences found in other federal legislation, such as those relating to drugs, or income tax, or other areas within federal legislative jurisdiction, and some procedures are to be found in those statutes as well. The matter of offences involving the military is partly dealt with in separate statutes

and in separate courts, with their own procedures, such as courts of court martial, under the general control of the Judge Advocate General.

Legislation, both federal and provincial, gives committees composed largely of judges, power to create rules of procedure in particular criminal matters such as relating to appeals, or to Charter challenges, or judicial review.³

Although criminal law is a matter for the central government, provinces make laws creating offences in aid of enforcement of their legislation.⁴ Highway traffic laws or consumer protection laws, or workplace safety laws are examples. Just as with criminal law, the prosecution of these offences is a matter of Crown power and the prosecutor may well be a representative of the Attorney General,⁵ but the provincial offences are not true crimes in a constitutional sense. Territorial councils also create offences under a grant of power from the central government rather than, like provinces, from the Constitution Act 1867. There exist provincial and territorial rules of procedure for the conduct of these 'criminal-like' prosecutions, either in statutes or in rules made by judicial committees exercising a delegated legislative function. Finally, there are offences created at the municipal or regional level under a grant of power from the province, or in the case of territories, from the territorial council, and there will be procedures to deal with the prosecution of these, as well. Parking or health and safety regulations for food service are examples.

1. See e.g., Inquiry Act, RSBC 1996, c. 224, Inquiries Act, RSC 1985, c. I-11, Public Inquiries Act, RSA 2000, c. P-39; Inquiries Act, RSNB 1973 c. I-11 Public Inquiries Act, RSN 1990, c. P-38; RSNWT 1988, c. P-14 (Nunavut as well); RSNS 1989, c. 372; RSO 1990, c. P. 41; RSPEI 1988, c. P-31; RSS 1978, c. P-38; An Act Respecting Public Inquiry Commissions, RSQ 1977, c. C-37 The limits on this activity will be considered, *infra*, in 'Incompatibilities'.
2. Constitution Act 1867, s. 91(27). 'The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters'.
3. For example, in Ontario the Civil Rules Committee set up under s. 65(1) of the Courts of Justice Act makes rules of procedure for the Court of Appeal, and the Superior Court of Justice in civil matters. The same legislation sets up rules committees for family law matters and for criminal law matters. This method is duplicated in other provinces and at the federal level.
4. Constitution Act 1867, s. 92(15).
5. Recall that prosecution of offenders is a Crown matter. Representatives of the Attorney General of the province or territory or of Canada superintend all prosecutions. Generally, prosecution of Criminal Code matters is left to the provinces, for which Crown Attorneys act.

9. Civil procedure must also be distinguished from administrative procedure. The business of government in Canada is carried out in many different ways. Government departments at the federal, provincial and territorial level as well as the various cabinets exercise many powers that affect individuals. Statutory appeals, first to internal tribunals, then to courts or to cabinet may be provided, all regulated by procedural rules. Municipal governments also conduct a wide range of activities and similar systems of appeal are provided by legislation. There are many Boards, tribunals, agencies at all levels of government regulating various parts of the economy. In addition, business may be carried on by Crown corporations or corporations owned in whole or on part by the government. With respect to the boards, agencies, etc., again internal systems of appeal are usually provided, with appeals to courts as a possible last step. There are very few courts in Canada set up solely to deal with appeals from administrative decisions. No all-embracing administrative courts exist.¹

Instead, appeals go to regular courts on the whole, all regulated and provided by statute.

Behind this system of appeals to courts in administrative matters lies the judicial review function referred to earlier. Superior Court judges, sitting both federally and provincially exercise the power to supervise administrative decision-making, using a range of remedies which are available to, for example, require a government official to exercise a statutory discretion, require a tribunal to conduct a hearing in a 'judicial' way, prevent a tribunal from doing something beyond its statutory power. Sometimes this supervisory power is exercised in regular courts and sometimes in branches of high courts that do it on a regular basis, along with other civil litigation-related business.² It is important to distinguish a statutory appeal from a judicial review, however.

1. This is largely because courts have used s. 96 of the Constitution Act to protect a judicial function and have prevented provinces from weakening it by setting up separate courts or administrative tribunals to deal with matters under provincial legislative authority. *See, generally, MacMillan Bloedel v. Simpson*, [1995] 4 SCR 725 (SCC) in which some of the not that useful tests of when a legislature has gone too far, are set out. At the same time, attempts to give to tribunals a power to decide questions of law and to shield these decisions from judicial review by 'privative clauses' have not been very successful. What is involved in these cases is the question of whether or not there is a protected judicial function in superior courts. Since those are the courts that are deciding the question, the results are hardly surprising. There does exist a federal Tax Court of Canada, established in 1983 to hear income tax appeals. On the role of courts as opposed to administrative tribunals, *see* D. Mullan, *Administrative Law*, (Toronto, Carswell, 2003 (5th ed.)), and H. MacLauchlan, 'Transforming Administrative Law: The Didactic Role of the Supreme Court of Canada', 80 *The Canadian Bar Review* 281 (2001), D. Mullan, 'The Supreme Court of Canada and Tribunals: A Recent Phenomenon or a Return to Basics?', in the same volume at p. 399.
2. The so-called 'prerogative writs' have been replaced by statutory remedies in most jurisdictions. In Ontario, for example, an application for judicial review can lead to an order with the same force. The Judicial Review Procedure Act, RSO 1990, c. J-1 gives optional remedies to a court upon an application for judicial review. Normally a panel of a special branch of the Superior Court of Justice, called the Divisional Court hears these matters, along with others such as appeals in cases of a value below a set sum. In the Federal Court of Canada, Trial Division, and in superior courts in the provinces and territories, this review function is carried out. *See also* Administrative Procedures Act, RSA 2000, c. A-3; An Act Respecting Administrative Justice, RSQ 1977, c. J-3. *Habeas corpus* is often covered by a separate statute.

10. Finally, judges sitting both in court and out of court often carry out a number of functions relating to statute-provided powers, such as issuing process like a summons to compel attendance at a tribunal hearing or registering a decision of a tribunal so that court enforcement mechanisms can be used.¹

1. A decision of an arbitrator acting under a labour relations statute, for example, can be registered with a court so that it becomes like a decision of that court for enforcement purposes. This is called 'homologation'. *See, for example, Quebec, CCP. s. 946.*

§3. ARE THERE SEPARATE COURT SYSTEMS AND RULES OF PROCEDURE?

11. Although the details of the structure of the court system will be considered in the next part, it is useful to set out some of the factors that affect this structure. As

mentioned earlier, at Confederation in 1867, no new courts were established. There were in existence, in the new provinces, superior courts of unlimited jurisdiction throughout the province, and various other courts with jurisdiction limited to counties or districts, as well as some 'inferior courts in which magistrates or justices of the peace dealt with both civil and criminal matters. Ultimate appeals could be taken to a committee of judges who were members of the British Privy Council, known as the Judicial Committee of the Privy Council. Thus, from the start, the courts in the new provinces dealt with matters of both federal and provincial law.

Since the Constitution Act 1867 gave to the provinces most of the power over the administration of justice, most of the court work in both civil and criminal matters is done in courts set up by the provinces. The judges in the highest provincial courts are appointed under s. 96, by the central government but they sit in courts provided by the provinces. By s. 101, the central government could set up courts for the 'better Administration of the Laws of Canada'. It was not until 1875 that it created the Supreme Court of Canada and an Exchequer Court.¹ The latter court dealt largely with revenue matters and issues involving the Crown in right of Canada, but its jurisdiction was gradually enlarged over time to include other matters under federal legislative competence such as copyright, trademarks, admiralty. In 1971 it was replaced by a new Federal Court of Canada.²

The Supreme Court of Canada sits in Ottawa, the nation's capital and part of its role is to superintend the growth of all provincial and territorial law. Thus it is, since abolition of appeals to the Judicial Committee of the Privy Council,³ the ultimate court of appeal in matters of both provincial and federal law. The composition of the Court includes judges from both civil and common law backgrounds and panels are set up to deal with cases from Quebec, the civil law jurisdiction, with judges who are knowledgeable about internal Quebec law. Because it sits as a court of appellate jurisdiction with a limited original jurisdiction in reference matters,⁴ its role in civil litigation is limited to few cases from any one province a year, compared to the mass of cases started in all provinces.

In summary, the Federal Court of Canada has a limited original civil jurisdiction over federal law which it exercises according to a set of procedural rules of its own. All the rest of the original trial work, involving both federal and provincial laws, is conducted in provincial courts (or territorial), set up by the provinces. In the higher provincial courts sit federally appointed judges, while in the lower sit provincially appointed ones.

1. Supreme and Exchequer Courts Act, 1875, SC 1875, c. 11.

2. Federal Courts Act, RSC 1985, c. F-7, c. 1. As a result of a number of cases in the 1970s it was found that this court had serious constitutional problems in dealing with matters under provincial jurisdiction, and most of its original jurisdiction work is now done on a concurrent basis with provincial superior courts. This is in part because the central government could only confer power over 'laws of Canada'. The Federal Court of Canada does, however, have a wide statutory jurisdiction over judicial review of federal administrative tribunals, of which there are many.

3. This was not accomplished easily. Ultimately a federal bill to abolish all civil and criminal appeals to the PC was introduced and referred to the SCC for an opinion as to its constitutionality. An appeal from the SCC decision affirming the validity of the bill, to the PC resulted in an affirmative finding there as well. *AG Ont. v. AG Can* (Privy Council Appeals), [1947] AC 127. When passed, the law provided that no cases 'commenced' after 23 December 1949 could be appealed to the PC. The last of such cases was decided in 1959.

11–11 General Introduction, Ch. 2, Delimitation of the Subject Matter

4. *See* ‘Structure of the Court System’, *infra*.

Chapter 3. Sources of Civil Procedure Law

12. The conduct of litigation in the many trial courts in Canada is regulated by procedural rules which come from many sources. In the first place there are statutes which create or recognize courts. In many of these are found sections dealing with procedural issues. Often the statutes set up committees and delegate to these committees the power to make other procedural and even substantive rules for the conduct of litigation.¹

The next level of rules is those made by the rules committees. These are usually in the form of regulations and have the force of statutes.

There develops a body of common law about the statutes and rules as well. Even in Quebec, what judges say about the interpretation of the rules is of great significance.²

Finally, each court, usually through the chief justice of the court makes what are called various names but are 'Practice Directions', which are often published in official law reports and add a gloss to the rules. Whether or not these have the force of law is debatable, but local litigators ignore them at their peril. Additionally, since most jurisdictions are broken into districts or regions for the purposes of court administration, there is often a local practice. This varies considerably from place to place and it is often wise to engage local counsel.

The rules of practice are fairly uniform across Canada, partly because most of them are derived from the rules of superior courts in England. There do exist, significant differences between present British and Canadian practice, however.

I propose to deal with the practice as found in the highest trial courts in each jurisdiction, recognizing that practice in lower courts is often modelled upon it, although often on a somewhat relaxed basis.³

1. Canada: Federal Court Act, RSC 1985, c. F-7; Federal Courts Rules, SOR/98-106. Alberta: Court of Queen's Bench Act, RSA 2000, c. C-31; Alberta Rules of Court, Alta. Reg. 390/68; British Columbia, Court Rules Act, RSBC 1996, c. C. 80; Supreme Court Rules, BC Reg. 221/90; Manitoba, Court of Queen's Bench Act, SM 1988-89, c. 4; The Queen's Bench Rules. M Reg. 533/88; New Brunswick, Judicature Act, RSNB 1973, c. J-2; Rules of Court of New Brunswick, NB Reg. 82-73; Newfoundland, Judicature Act, RSN 1990, c. J-4; Rules of the Supreme Court, 1986; North West Territories, Judicature Act, RSNWT 1988, c. J-1; Rules of the Supreme Court of the North West Territories, NWT Reg. 010-96; Nova Scotia, Judicature Act, RSNS 1989, c. 240; Nunavut, Rules of the Nunavut Court of Justice, Nunavut Act, SC 1993, c. 28, Nunavut Judicial System Implementation Act, SNWT 1998, c. 34 (Adopts most statutes and Rules of the NWT as of 31 March 1999); Ontario, Courts of Justice Act, RSO 1990, c. C-43; Rules of Civil Procedure, RRO 1990, R. 194; Prince Edward Island, Supreme Court Act, RSPEI 1988, c. S-10; Code of Civil Procedure, RSQ 1977, c. C-25; Saskatchewan, Queen's Bench Act, 1998, SS 1998, c. Q-1.01; Rules of the Court of Queen's Bench, 1993; Yukon Territory, Judicature Act, RSY 2000, c. 128;
2. Concerns that the Supreme Court of Canada would impose common law concepts on Quebec have been somewhat alleviated in recent years. See P.G. Jobin, 'La Cour Suprême et la Réforme du Code Civil', (2000), 79 Can. Bar Rev. 27.
3. Small claims are usually dealt with in a way that is designed to achieve 'justice and equity' without too much formality. This includes relaxed rules of evidence, party presentation, often without counsel and low cost recovery.

Chapter 4. General Features of the Administration of Justice in Civil Matters

§1. CHARACTERISTICS OF THE PROCEDURE

13. Procedure in litigation in Canada is influenced by the two main types of procedural and substantive law, common law and equity. In the English courts up to the 18th Century, common law was fairly rigid as to requirements of form and as to remedies. A separate system of courts developed after the 12th Century, around the office of the Lord Chancellor, an official of the royal court who had custody of the royal seal. These courts, courts of chancery, supplemented the common law by creating new remedies or doctrines of law, particularly in the areas of property and contract. Lawyers will be familiar with the concepts of trusts, or the remedy of the injunction, both developed in chancery. As well, the chancery courts began to look after the Crown's guardianship of infants, 'lunatics' and bankrupts, and was heavily involved in the administration of estates.

The procedures developed in chancery were that the claimant for relief petitioned the court in a bill or petition. In this document, factual allegations were made against a defendant, a claim was made that the plaintiff had no remedy in law, and a series of questions was included for the defendant to answer. If the court felt that a case required an answer, a writ of *subpoena* would issue to tell the defendant to appear on a particular day to answer the bill. The defendant would answer the questions or interrogatories in writing in various ways, on oath. The plaintiff could then set the matter down for hearing to decide disputed issues of fact. Whereas in the common law courts, these issues would be decided by a jury hearing testimony given on oath, in chancery, for the most part, they were decided on the basis of written evidence. This evidence would be taken before an examiner appointed by the court who would take down the answers in writing. This document, or 'affidavit' would take the place of oral evidence in the trial which involved counsel arguing points of law. The court could then issue a decree. Should a question of common law arise, it could be referred to a common law court. This process could take a long time, particularly if the administration of an estate was involved, and was attended by the payment of large fees. Delay was also a common problem.

In the common law courts a system of pleading developed, based upon forms of action. Each type of cause of action had its own form of pleading and it was necessary to use the right form. A series of documents would be prepared involving factual allegations on one side, followed by answers on the other side. Eventually the parties would join issue on facts. A writ would issue to a sheriff to collect a jury for the trial which would involve oral evidence.

The availability of two separate court systems for the resolution of civil disputes led to many abuses which reforms in the 19th century tried to address. In England the Common Law Procedure Acts of 1852, 1854, and 1860 made sweeping changes to procedure in the common law courts and formed the basis of modern English and Canadian procedure. At the same time various statutes made some changes to chancery

procedure. In the Judicature Acts of 1873 and 1875, a single system of courts was set up in England to administer both common law and equity. A single code of procedure was legislated and judges were given the power to make rules of procedure.

In Canada in the same period, similar reforms occurred. The systems of courts in the colonies were similar to those in England. In Ontario, for example, before 1867 separate courts of chancery and of common law existed. In the Ontario Judicature Act, 1881, these were largely combined and a single set of procedural rules was prepared.¹

1. See M.A. Banks, 'The Evolution of Ontario Courts 1788–1981', in D. Flaherty (ed.), *Essays in the History of Canadian Law*, Vol. 2. (Toronto, The Osgoode Society, 1983) p. 492.

14. The system of procedure in Canada borrows from both common law and from chancery, or equity. The preparation of a case for trial is the job of the parties, not of the court. This is known as the principle of 'party preparation'. Formal documents known as pleadings are prepared by each side, in an attempt to join issue on what facts are in dispute. A process known as discovery, derived from chancery, is used to enable each side to learn more about the evidence available to the other side. In general, the court does not initiate any action in the litigation, except to try to move it forward as quickly as possible¹. At the trial the parties are responsible for making sure that the evidence is available to the court. They may use court powers to compel the attendance of witnesses, but they decide who will attend. This is the principle of 'party presentation'. If a jury is desired, one side must prepare and serve a jury notice.

Borrowing from the common law courts the trial is continuous from start to finish. This is because of the presence of a jury in those courts.² Problems of surprise, unavailability of witnesses, are dealt with by adjournments, which are not common in civil trials. This is a difference of substance from Continental trials.

Borrowing as well from common law, the evidence introduced by the parties is, as much as possible, oral. Witnesses, including the parties, are compellable and must answer proper questions. They are sworn to do so or are affirmed, and sanctions including that of being found in contempt of court or charged with the criminal offence of perjury are available. The rules of evidence in civil trials, to be considered later, favour oral evidence but do allow a great deal of other evidence such as documents, exhibits of real evidence, pictures, videotapes, computer images, etc. In addition, depositions of witnesses, particularly of those unable to attend the trial may be allowed. Evidence is introduced through witnesses who are subject to questioning by their counsel, then by counsel for the other side, with a limited right of re-examination. The trial judge is allowed to ask questions as well, but cannot go too far to interfere with party presentation, or to become a partisan.

1. When the action is started, a court file is opened and copies of all documents filed by a party are put into it. Not all of these will be before the trial judge. A trial record will be used which will include many of them.
2. Juries are now much less used than most people imagine. *Infra*, Part 4. Although there is a right to a jury in superior court civil trials, it is not generally available for that part of the trial from which a remedy previously available only in chancery is sought. This is because juries were not used in chancery courts.

15. The phrase ‘the adversary process’ is used to describe the system of resolution of civil disputes. It is often contrasted with the system in civil law jurisdictions sometimes called ‘inquisitorial’.¹ Labels can be misleading and modern rules governing litigation in Canada, particularly in the area of discovery go far to eliminate an adversarial approach. Conduct of trials is still the area most identified with the approach.

Although there is no formal right to a speedy civil trial² there are time limits within which most pre-trial procedures must be carried out. In addition, judges are increasingly taking the role of superintending the progress of cases through what is known as ‘case management’. This means that cases may be assigned to various streams with preset timetables and severe sanctions for failure to follow them.

1. In Quebec the system of trials is modelled on the English, rather than the continental one. See generally, R. Peck, ‘The Adversarial System: A Qualified Search for the Truth’, 80 *The Canadian Bar Review* 456 (2001).
2. The provisions of the Charter of Rights and Freedoms, *supra*, p. 7 apply only to ‘the Parliament and government of Canada in respect of all matters within the authority of Parliament ...’ and ‘to the legislature of each province in respect of all matters within the authority of the legislature ...’ Section 32. This includes the Territories. There is a considerable body of jurisprudence about the meaning of these phrases. It includes all situations in which the government at any level, federal, provincial, or municipal, exercises its power. It also includes actions of anyone exercising statutory authority. This may be a branch of government or a private citizen who has, by statute, the power to compel someone to do something. Thus, for example, a corporation although set up under a statute, does not have statutory authority to compel that differs from any other person, and its actions are not subject to *Charter* scrutiny. An adjudicator ordering an employer to provide a remedy to an employee is subject to the *Charter* because the authority to do so came from a statute. See, generally, P. Hogg, *Constitutional Law of Canada*, *supra*, p. 700. Much of the *Charter* litigation involves challenges to the provision of government services. The reference in it to a speedy trial, s. 11(b), applies to persons ‘charged with an offence’. Generally speaking the *Charter* does not cover economic rights.

16. It is also a feature of Canadian trials that they are open to the public and that the names of the parties, and the content of their evidence is of public record.¹ Procedures exist to obtain an order of a judge to conduct a proceeding ‘in camera’ i.e., without the public present, but the applicant must make the case. Access to television cameras or to use of video cameras is a disputed area, with most courts of original jurisdiction barring them.² People paying the proper fee can have access to all documents filed in a court file in civil matters, unless the court orders otherwise.³

Access to judicial decisions themselves is a more debatable issue. It seems reasonable to assert that, unless a valid reason such as privacy is involved, all reasons for judgment of judges should be public. In fact the government, using the doctrine of crown copyright, claims control over the publication of decisions,⁴ and sometimes enters into agreements with private publishers, often the law societies, to publish ‘official’ reports of court decisions. These private publishers exercise editorial control over which decisions get published, and often provide free services to the judiciary. A further problem is that some judges feel that they have control over their decisions and refuse to release them to the public!⁵

1. In *Edmonton Journal v. Alberta (AG)*, [1989] 2 SCR 1326, J. Cory stated, ‘As a result of their significance, the courts must be open to public scrutiny and to public criticism of their operation by the public.’

2. In Ontario, s. 136 of the Courts of Justice Act, RSO 1990 c. C. 43, prohibits most audio and visual coverage of the course of a trial and of the people involved in it coming or going from the courthouse or in it. Reporters and counsel are able to audio record proceedings but only as an alternative to note-taking, and not for publication. These restrictions are being relaxed in some courts, particularly in appellate courts. Many of the proceedings in the SCC are televised on a public channel, and sometimes video recording for educational purposes is allowed.
3. For example, s. 137 of the CJA, Ont. challenges to secrecy orders and the right of the press to do so is a matter of ‘standing’ and governed by the case of *Dagenais v. CBC*, [1994] 3 SCR 835. On openness, see R. Martin, *Media Law*, (Irwin Law, Toronto, 2003).
4. Government publications are done through the ‘Queens Printer’, a statutory agency.
5. Recently a company called LawPost Online tried to establish a database of eastern Canadian legal materials. Having tried to gain access to judicial decisions and having been thwarted by crown copyright and judicial intransigence, it sought a declaration in New Brunswick courts that primary legal materials were in the public domain, and that judges could not withhold their reasons for judgment. The judges applied successfully to have the claim against them struck out on the basis of judicial immunity. The SCC refused to hear the appeal.

§2. FUNDAMENTAL GUARANTEES

17. Civil trials in Canada are not formally guaranteed in the sense that a document such as a Charter of Rights does so. The *Charter* right to a ‘fair and public hearing by an independent and impartial tribunal’ applies only to those ‘charged with an offence’.¹ The many Human Rights Codes of provinces and territories² do not deal with the question. They are more concerned with the provision by persons of services, goods, accommodation, pay equity or the like on a non-discriminatory or equal basis. Various International Conventions treaties, which Canada has ratified, do not have force within the country unless implemented by domestic legislation within the jurisdiction of the particular level of government concerned.³ The ‘rules of natural justice’ which find their origin in the common law and are influential in administrative law, lie behind much of the procedural law that concerns civil trials.

1. Section 11(d).
2. Examples include: Human Rights Code, RSBC 1996, c. 210; SM 1987–88, c. 45; RSN 1990, c. H-14; RSO 1990, c. H-19; Human Rights Act, RSNS 1989, c. 214; RSPEI 1998 c. H. 12; SY 1987, c. 3.
3. See *infra* and W.A. Schabas, *International Human Rights Law and the Canadian Charter*, 2nd edn., 1996 (Carswell, Toronto).

18. One of the most basic principles is that of judicial independence. Recall that judges are appointed by both levels of government and sit, except for the Federal Court of Canada, in courts provided and paid for by the provinces and territories. The judges of the ‘superior district and county courts’ in each province are federally appointed.¹ By s. 99 of the Constitution Act, they hold office ‘during good behaviour’ and can only be removed by joint address of the Senate and House of Commons, something that has never happened, although there have been a few close calls. Their salaries are fixed by Parliament in the Judges’ Act.² This distance from the power of the province in which they sit and their tenure are said to help to guarantee their independence. For those judges appointed by the provinces to sit in the ‘inferior’ provincial courts, no such constitutional-document protection exists. They are appointed as ‘provincial officers’ under s. 92(4) of the Constitution Act, 1867, but

the tradition of independence is strong. They also hold office during ‘good behaviour’ and, like their federal counterparts, are protected by the procedures set up for judicial councils in all provinces except PEI. In addition, the Supreme Court of Canada has ruled that there is an unwritten principle of independence that protects them.³ Finally, provincial judges sit in most of the criminal trials and provide a ‘fair and public hearing by an independent and impartial tribunal’⁴. This is unlikely to change when they are sitting in civil matters.

Independence involves, also, neutrality and impartiality. The first means that the judge is not in a position in which he or she favours, for an improper reason such as a personal or financial interest, one of the parties rather than the other. The other refers to the fact that the decider is not pre-disposed to decide one way or the other on the merits, but approaches the task with an open mind, prepared to consider the evidence fairly and to apply the proper law.

Whether the court in which the justice sits can be eliminated is a more difficult issue. Part of independence is immunity from court action. There is no such judicial immunity for criminal activity. Immunity from civil action includes non-compellability in proceedings (testimonial immunity), as well as protection from being joined as a party for conduct as a judge, as opposed to personal non-judicial activity. With judges involved in the conduct of inquiries or acting as court appointed mediators, the limits on immunity are a current issue.⁵

Judges are allowed to vote using secret ballots, like other citizens, but cannot sit on juries.

1. Section 96, Constitution Act, 1867.

2. RSC 1985, c. J-1.

3. *Re Remuneration of Judges*, [1998] 1 SCR 3 involved salary reductions imposed by three provinces as part of ‘across the board’ reductions to public employee salaries. It was held possible to reduce judges’ salaries but only if an independent salary commission so recommended. See G. Seniuk, ‘Judicial Independence and the Supreme Court of Canada’, (1998), 77 Can. Bar Rev. 381, and generally, G. Seniuk, N. Lyon, ‘The Supreme Court of Canada and the Provincial Court in Canada’ (2000), 79 Can. Bar Rev. 77.

4. *Charter*, s. 11(d).

5. In *MacKeigan v. Hickman* (1989), 94 NSR (2d) 1, the SCC considered testimonial immunity in the context of an inquiry into a wrongful conviction. The judge was immune from testifying about the decision making part of judicial activity. Whether this would extend to conduct of inquiries, for example a more administrative function, is another question.

19. The basic principle of the rule of law provides, among other things, that any decision made by a government official, including a judge, be authorized by law.¹

A further principle that is basic is that of access to justice. In theory, any person subject to the jurisdiction of courts has a right of access to the courts to help resolve their disputes. It is, of course, necessary that they advance a right that the law recognizes, or can convince a court that it should so recognize it. It may also be a part of this principle that costs be non-prohibitive, a difficult goal to achieve, and that in a complicated case at least, they have the assistance of a competent counsel.² The availability of a sound legal aid system may be a part as well. In addition, the substance of the law and procedure should be understandable to a reasonably well informed lay person, and the law itself must be accessible in the sense that it can be found. Rules of procedure in most jurisdictions allow party litigants with legal capacity

to appear in their own cases without counsel. Artificial persons such as corporations and infants, persons of unsound mind, representatives such as trustees, executors, etc., need counsel, usually.

1. See, generally, P. Lasok, 'The Rule of Law in the Legal Order of the European Community', in *Fundamental Values* (Hart Publishing, Oxford and Portland, Oregon, 2000) p. 85. The origins of the rule of law are a matter of debate. Some see it in the writings of Sir Edward Coke in the 17th Century. Others trace it to Roman law. See, J.C. Smith, D.N. Weisstub, *The Western Idea of Law* (Butterworths, Toronto and Vancouver, 1983), p. 398.
2. In *New Brunswick (Minister of Health and Community Services) v. G. (J.)* (1999); 177 D.L.R. (4th) 124, the SCC gave a qualified yes to the question but in the context of taking a child away from a parent. [1999] 3 SCR 46.

20. The content of the right to a fair hearing includes notice, pre-trial discovery, fact finding based only on evidence presented, a duty to consider the case properly and to give reasons, a concept of '*seisin*' in which the decider hears all of the evidence, and a right of appeal on issues of law and probably on the question of whether the fact finding process was flawed.

Notice includes the requirements of pleading, to know something of the case to be met, as well as advance notice of the trial. It may also include notice to persons who will be directly affected by the result.¹

Discovery involves access to most of the relevant documents or real evidence relevant to a case, in advance of the trial, to avoid surprises. It usually involves an opportunity to examine the opposite party under oath which results in a deposition that can be used in various ways at trial.

The requirement that only evidence presented at trial be used is obviously a matter of fairness, since to do otherwise is to negate the opportunity to question its relevance, admissibility and strength. The concept of judicial notice, in which a judge takes notice on his or her own, of notorious facts which no person would dispute, is considered elsewhere. Clearly it must be restricted in the interests of fairness.

The duty to adjudicate and to give reasons forces the decider to do the job properly since reasons give a guide to how the decision was reached.

It is a matter of common sense that the decider have heard all the evidence. Once evidence is led in court, the judge becomes '*seised*' of the case and is the only one who can decide it, barring incapacity or death. A record will be kept, of the oral and other evidence in case another judge must take over the case.

The availability of an appeal helps to direct the course of the trial and to reassure the parties that it is being conducted and decided properly.

A further principle of fairness is that a person should not have their rights affected directly unless they are involved. The notice requirement is one manifestation of this, as are the doctrines of '*res judicata*'. These provide, among other things, that persons are not legally bound by proceedings in which they had no part. Their causes of action are not impaired, no facts are decided against them, and they are free to pursue their cases.²

1. For example, rules of court normally provide for wider notice in cases of status or those in '*rem*', or for notice to others who may as yet be unborn or un-ascertained in some cases, such as those involving estates or trusts.
2. Concepts such as collateral *estoppel*, factual or issue *estoppel* including defensive and offensive use of *estoppel*, and abuse of process are included. See *infra*, Part IV.

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Part I. Judicial Organization

Chapter 1. The Courts

§1. COURTS

I. Structure of the Court System

21. The significant courts at the central level are the Supreme Court of Canada and the Federal Court of Canada. The former, sitting in Ottawa, is largely an appellate court. The Trial Division of the Federal Court of Canada exercises original civil jurisdiction only in matters arising under federal law. What this means is that it has been held not to be able to deal with causes of action which are based upon provincial statute or common law. Most litigation in Canada involving private parties involves law that is provincial. The topic of ‘Property and Civil Rights in the Province’ given in the Constitution Act, 1867 to the provinces covers most property law, torts (delicts), contract law under which causes of action arise. The Federal courts as well as the courts in the provinces were unwilling or unable to develop doctrines of ancillary causes or pendent jurisdiction.¹ The result is that there is not a two-tier system of federal and provincial courts such as exists in the US (Federal and State).

The original, trial jurisdiction of the Trial Division, found in the Federal Court Act² is generally, unless the parties, one of whom is the Crown federal agree, a concurrent original jurisdiction shared with the provincial and territorial courts. If a litigant decides to bring the action in the Trial Division, the cause of action must be a claim against the federal Crown, or a claim for relief under the Crown Liability and Proceedings Act³, or arise in a situation in which there are conflicting issues of liability and the Crown federal may be liable. In addition, it can be brought there (or elsewhere) when the Crown federal or the Attorney General of Canada claims relief, or where the relief sought is against ‘any person for anything done or omitted to be done in the performance of the duties of that person as an officer, servant, or agent of the Crown’.⁴ Concurrent original jurisdiction also exists in matters such as navigation and shipping (admiralty law, in part), Bills of exchange, and other specific heads of federal legislative jurisdiction. There remains a limited original exclusive jurisdiction in intergovernmental disputes⁵ and certain proceedings for impeachment or expungement of intellectual property.⁶

1. The federal courts in the US do a large volume of business and have developed doctrines of pendent jurisdiction. These allow a federal court to consider matters of state law if they arise in the course of a federal law proceeding and from the 'common nucleus of operative fact'. See Hart and Wechsler's *The Federal Courts and the Federal System*, a massive bound and looseleaf publication using current editors (Foundation Press, New York).
2. RSC 1985, c. F-7, s. 17.
3. RSC 1985, c. C-50.
4. *Infra* No. 2 at s. 17(5).
5. Federal Courts Jurisdiction Act, RSBC 1996, c. C. 135; RSM 1987, c. C. 270; SNB C.; RSNB 1973, c. F-8; Courts of Justice Act, RSO 1990, c. 43, s. 148; Federal Courts Act, RSS 1978, c. F-12.
6. Ss. 19 & 20, see E. Meehan, N. Fera, 'Jurisdictional Changes in the Federal Court' (1993), 5 *The Advocates Quarterly* 257.

22. In each province and territory, there exists a superior court of record, possessing an unlimited inherent jurisdiction. What this means is that any action in which the cause of action arises in the province or in which the defendant is served within or attorns to the jurisdiction of the province, can be brought there. This situation exists for several reasons, one of which is that these courts existed in many provinces before the provinces joined Canada, and they already had the powers of similar English courts. The second reason is that the Constitution Act, 1867, did not create new courts, but assumed that these pre-existing ones would continue. Until 1971, there was no court of wide original civil jurisdiction at the central level and the provincial and territorial superior courts were dealing with all causes of action, including federal ones. They did not willingly give this up.

The superior court in each province or territory is often divided into parts to deal with specific types of cases. For example, in many provinces the superior court has a family division.¹ However, some family issues are also dealt with by provincially appointed judges in provincial 'inferior' courts of statutory jurisdiction.² Another variation of this is that family issues may be dealt with in a unified court set up by the province in which judges, who are joint-appointed, sit.

It is common at the superior court level to see either special sittings to deal with probate issues, or special procedures. Special courts devoted solely to probate are less common.³

1. See, e.g., Manitoba, Court of Queen's Bench Act, s. 4; New Brunswick, Judicature Act, s. 9; Nova Scotia, Judicature Act, s. 3; PEI, Supreme Court Act, s. 2; Sask., Queen's Bench Act, s. 23.1.
2. These are usually set up to deal with youth issues, family cases involving support or maintenance, criminal matters, small civil claims, and are often called Provincial Courts.
3. Probate Court Act, SNB 1982, c. P-17.1 is special statute as examples. In fact, since superior court judges sit in them the differences between these and other provinces are minimal.

23. Smaller claims are dealt with in small claims courts which may be either branches of the superior courts or separate courts set up by the provinces. On the whole, except in a few provinces where the small claims courts are part of the superior court system, the small claims judges sit in provincial courts and are provincial appointees. Their jurisdiction varies from jurisdiction to jurisdiction, from CAD 3,000 in Quebec, to CAD 10,000 in Ontario, and is usually changed by regulation every few years. In Quebec, the Court of Quebec which has a province wide jurisdiction which deals with cases up to CAD15,000, and is staffed by provincially appointed

provincial judges. In Quebec as well, there are municipal courts dealing with civil matters where the municipality is collecting revenues or acting as a lessor of property.¹

Wherever there is a division of jurisdiction between courts on monetary lines, there exists a mechanism for transferring cases up or down. For example, a claim may be for an amount within the small claims court but the defendant may counter-claim for a sum over the allowable amount. That defendant will have to either abandon the excess or move to a higher court. Costs penalties are assessed to keep the less valuable monetary claims in the lower courts.

The ‘inferior’ provincial courts in which provincially appointed judges sit do the bulk of the criminal work, sometimes most of the family work, and work with youth cases as well as doing some of the small claims work.

The provinces and territories also have courts of appeal, sometimes part of the superior court and sometimes set up separately. At the federal level, the Federal Court – Appeal Division fulfils a similar function. From these courts, appeals may go to the Supreme Court of Canada.²

1. See Municipal Courts Act, RSQ 1977, c. C. 72.01 and Courts of Justice Act, c. T-16, s. 2. In matters of collection of municipal revenues, the municipal courts have concurrent jurisdiction with the Court of Quebec. CCP, s. 35. All jurisdictions at the provincial or territorial level have justices of the peace who fulfill an important administrative and judicial role, particularly in the criminal and quasi-criminal areas.
2. See e.g., Court of Appeal Act, RSBC, 1996, c. 77; RSM 1987 c. C. 240; RSS 2000, c. C. 42.1; RSY 2002, c. 47. Appeals to the SCC are as of right and with leave. The trend is to reduce the volume of the first group, so that the court has more control over its docket. See, *infra*, Part IV, Ch. 3.

II. Administration of the Court

24. At the federal level, the administration of the courts is divided between the judges and the court officials. In the Supreme Court of Canada, there is a Registrar of the Court and a Deputy Registrar. They act as the chief administrative officials, supervising the day to day business.¹ In the Federal Court of Canada, administration is by an Administrator,² with the Trial Division having a Judicial Administrator (Trial Division). The assignment of judges to panels, sittings, is usually done by the chief justice of the court or a delegate.³

At the provincial and territorial level the administration of courts varies widely from place to place, but the basic pattern of joint judge-court official administration continues.⁴ Until the merger of the superior courts with the county district courts in the last twenty years, each judicial division had its own administration.

As an example, Ontario was divided into counties, districts with separate judges sitting in them. The superior court judges sat in Toronto, the capital of Ontario, and would go out on ‘circuits’ to sit in the outlying counties to hear any cases waiting for them.⁵ Then, as now, criminal cases had scheduling priority. The Registrar and judges of the counties and districts acted as local registrars and local judges of the superior court. There were also ‘masters’, judicial officials who dealt with interlocutory matters, *inter alia*. The local judges would act as local masters. Now, the superior court is the Court of Ontario, with two divisions, the Superior Court of Justice and the Ontario

Court of Justice (the 'provincial' court). The Superior Court of Justice is the trial court and is divided into eight judicial regions, encompassing several counties and/or districts each. Each region of the court has a Regional Senior Judge as well as court registrars.⁶ The latter supervise the court clerks, court reporters, other court staff, unless the judges are doing so. The overall court administration is for the provincial Attorney General's Ministry except for matters assigned to the judiciary. Adding to the complications is the fact that the role of the judges in court administration is partly a creation of precedent and practice rather than formal rule. The facilities in the court house may also be shared by other government departments and their maintenance the responsibility of yet another government Ministry. All matters relating to the assignment of judges to particular sittings, conduct of actual trials, workloads of judges, preparing trial lists, is for the judges, directed by the Chief Justice of the Ontario Court of Justice or Regional Senior Judges.⁷ The supervision of the other judicial officials such as 'masters' or 'case management masters' is by the chief justice or delegates.

Behind this structure are an Ontario Courts Advisory Council, an Ontario Courts Management Advisory Council, and a Regional Courts Management Advisory Council.⁸

Interesting problems can develop. For example, in one judicial district a judge wished to work on the weekend in the winter. The provincial ministry in charge of the facility refused to provide heat, as a cost saving measure!

Similar systems of court administration exist in all the other provinces and territories.⁹

1. The Registrar also fulfils a judicial role, being empowered to sit as a judge in chambers if authorized by statute or rules of court. Supreme Court Act, RSC 1985, c. S-26, s. 12. There exists a Canadian Institute for the Administration of Justice, which is a useful source of information on administration.
2. Federal Court Act, RSC 1985, c. F-7, s. 12.
3. The SCC sits in Ottawa, while the FCA, Trial Div. sits in a number of Canadian cities. Federal Court Act, ss. 14 & 17.
4. The registrars of the courts have different names but all share similar functions. There exist in all jurisdictions officials who have some judicial as well as administrative functions. These are known by various titles, including masters, or in the case of the Federal Court and in Alberta, Nova Scotia, prothonotaries (Prothonotaries and Clerks of the Courts Act, RSNS 1989, c. 364). At the federal level, these persons also conduct trials of monetary actions up to a value of CAD 50,000.00: Federal Court Act, s. 50(2). Jurisdiction of these officials will be considered, *infra* at Part V, Ch. 1, 'Interlocutory Motions'.
5. This was based on the English 'Assize' system, in which judges from the royal courts would go on circuit on a regular basis.
6. Recall that the superior court judges are federally appointed while the 'administration of justice in the province' is a provincial matter.
7. CJA s. 76.
8. Courts of Justice Act, ss. 72-75.
9. Officials involved in enforcement of orders will be considered, *infra*.

III. Bench and '*Ministère Public*'/Public Prosecutor

25. Because the proceedings are in the hands of the parties and they expect an impartial tribunal, there is no function known as that of a '*ministère public*' or *avocat général* as in some European jurisdictions.

The overall administration of both civil and criminal justice is the responsibility of the Attorney General in each of the fourteen jurisdictions covered.¹ The name may be ‘Minister of Justice’, or ‘Attorney General’ but the functions are identical. It is common to have a ‘Crown Law Office’ which is divided into criminal and civil sections. Prosecution of criminal offences is by full-time prosecutors or by counsel, hired to do so and given official powers. In the provinces, a Crown Attorney system exists with career prosecutors, modelled on the Scottish system.²

In civil matters, the Crown will be represented by its own counsel, from one of the crown law offices, or by counsel hired for the purpose, but will not be involved in a case unless a party to it.

1. Canada, ten provinces and three territories.

2. P.C. Stenning, *Appearing For the Crown*, (Brown Legal Publications Inc., Cowansville, PQ., 1986.)

IV. Appointment of Judges

26. There are three basic methods of obtaining judges: appointment, election, or choice from a pool of career judges. In Canada, the method is by appointment by the executive branch of government. Appointments by the central government are to the Supreme Court of Canada, the Federal Court of Canada, the Tax Court of Canada, and to the courts of appeal in all provinces and territories, as well as to all superior courts.¹ The Minister of Justice of Canada takes names to the central Cabinet which makes the decision, and the justice is appointed by the Governor General. In the case of Chief Justices, Associate Chief Justices of the provinces and Senior Judges in the territories, as well as for the Chief Justice of the SCC, the names are brought forward by the Prime Minister, who also plays a significant role in appointments to that court.²

There are a significant number of conventions regarding appointments to the SCC,³ and a statutory requirement that at least three be from Quebec.

There is no statutory requirement that only names provided by nominating committee be used. The Canadian Judicial Council, set up under the Judges Act has no role in appointments.⁴ A great many consultations do occur, particularly with provincial bar associations, with the Canadian Bar Association, an unofficial association of Canadian lawyers, and in particular with the advisory committees.⁵ There is also no statutory requirement that provinces be consulted on SCC appointments, a cause of some concern to some provincial representatives.⁶

Formal requirements to be appointed at the SCC level are: ‘is or has been a judge of a superior court of a province or a barrister or advocate of at least ten years standing at the bar of a province’ (includes territories). For all the 96 judges the requirements are in s. 3 of the Judges Act.⁷

In practice, SCC judges are often appointed from other courts. That is less common for other federally appointed judges, who tend to be from the provincial bars.

It is difficult to quantify the extent of political influence in the appointments process. It has been the case that a number of appointments, particularly to the Federal Court of Canada have been criticized on that basis. Given that successful barristers or solicitors or advocates are likely to be outgoing and gregarious, it is also likely that

many have had connections with various political parties. More common criticisms are that the judges represent the social category of the privileged.

1. Section 96, Constitution Act, 1867, the 'Superior, District and County Courts ...'
2. All justices who are not chiefs of one kind or another are known as '*puisne*' judges.
3. There exist conventions regarding regional distribution of SCC justices, for example. At the SCC level the judges are appointed by the Governor in Council (the Cabinet), under the Supreme Court Act, RSC 1985, c. S-26, s. 4(2). The other federal appointments are under the Judges Act, RSC 1985, c. J-1. Conditions of employment of all are under the Judges Act.
4. All applications for federal positions are made to the Commissioner for Federal Judicial Affairs, set up under the Judges Act. There exist advisory committees, on which the public is represented, in all provinces and territories, with three in Ontario and two in Quebec.
5. See, P. Russell, J. Ziegel, 'Federal Judicial Appointments: An Appraisal of the First Mulroney Government's Appointments and the New Judicial Advisory Committees', (1991), 41 L.U. of T.J.L. 4, and A.S. Millar, 'The "New" Federal Judicial Appointments Process: The First Ten Years', (2000), 38 Alta. L. Rev. 616.
6. The centralist-provincial power debate is played out in this process as well. See P. Hogg, 'Is the Supreme Court of Canada Biased in Constitutional Cases?', (1979), 57 Can. Bar Rev. 721, and P. Russell, 'The Supreme Court and Federal-Provincial Relations', (1985), 11 Can. Public Policy 161.
7. '... is a barrister or advocate of at least ten years' standing at the bar of any province; or (b) has, for an aggregate of at least ten years, i. been a barrister or advocate at the bar of any province, and ii. after becoming a barrister or advocate at the bar of any province, exercised powers and performed duties of a judicial nature on a full-time basis in respect of a position held pursuant to a law of Canada or a province.

27. The appointment of judges by the provinces, to other than the superior courts, is more formalized. In many provinces and in the three territories, committees are set up under legislation to advise the government on appointments.¹ They may, in some places be the only source of names to be used. Formal requirements to be provincial judges, by whatever name, vary but almost all require some time of membership in the bar, ranging from five to ten years.² There is not, at either the federal or provincial level, a requirement that the pre-appointment experience had to be spent arguing in court as opposed to practicing law in an office. A few provincial or territorial statutes direct their judicial councils to consider factors other than legal experience, such as 'community awareness', or 'personal characteristics'.³ In others, criteria are developed by the advisory committees and may include factors such as gender, regional representation, diversity, or 'ethnicity'. There is more focus on community involvement at the provincial than at the federal level.

Movement from court to court, whether called elevation or promotion, has become a bit more common than it used to be. When there were intermediate level county or district courts, this was not common, and there was more prestige in being appointed to the superior court. There is, however, no 'career path' for judges. It is usual for the chief or senior justices to be chosen from the court which they will supervise.

1. See, e.g., Judicial Appointments Advisory Committee, Territorial Court Act, RSNWT 1988, c. T-2, s. 5.3; Courts of Justice Act, RSO 1990, c. C. 43, s. 43(1). In other jurisdictions such as BC, Yukon, Newfoundland, for example the same function is exercised by the judicial councils, which exist in all but Prince Edward Island. See *infra*.
2. Saskatchewan recognizes 'other legal or judicial experience': The Provincial Court Act, SS 1998, c. P-30.11, s. 6.
3. NWT.

28. Education of judges when first appointed and on an ongoing basis is a growing area. Federally appointed judges undergo a fairly rigorous period of training provided by the Canadian Judicial Council,¹ and at the provincial level, associations of judges do the same on a less formal basis.²

1. There is a National Judicial Institute which is becoming more heavily involved in the education of judges.
2. The Canadian Association of Provincial Court Judges provides training for new judges as well as existing ones.

§2. MEMBERS OF THE JUDICIARY

I. Incompatibilities

29. There are formal and informal limitations on what judges can do and say. The formal requirements are found in the statutes themselves. They are not permitted to act as arbitrators, mediators (except court-based), adjudicators, referees, conciliators, etc., without approval of the government. Their income from these tasks is also limited to set amounts, perhaps to discourage their involvement.¹ There is quite a demand for judges to sit as chairs of commissions of inquiry of various sorts and the chief justices are careful to limit this, given their need to staff the courts.

Another formal requirement for federally appointed judges is that they are not allowed to ‘... either directly or indirectly, for himself or others, engage in any occupation or business other than his judicial duties ...’.² A further point is that their involvement in the corporate world is limited. Often they put their holdings into blind trusts when appointed. The limitations on occupations probably restrict their holding public offices and some provinces specifically do this.³

The salaries of judges are, as much as possible, made attractive in order to attract candidates and to keep judges. At all levels there exist committees to consider the levels of compensation.⁴ These committees insulate the process of compensation from partisan politics and help to ensure independence. It is the case that until recently, judicial salaries at the provincial and territorial level were low in comparison to federal salaries but this has been largely alleviated.

The issue of how much judges are allowed to discuss judicial matters publicly is a hot one. It seems that they are becoming less reluctant to do so as public criticism of particular decisions or of the administration of justice becomes more common.⁵ In Ontario, for example, the Chief Justice meets regularly with reporters and bureau chiefs to help the media to better report on judicial activity. Some judges even use personal web sites to answer questions about the judicial system. Many courts have established web sites as well.

1. See, e.g., Judges Act, RSC 1985, C. J-1, ss. 55 & 56; Provincial Court Act, RSNS 1989, c. 238, s. 16(2); Courts of Justice Act, RSQ 1977, c. T-16, s. 31. Judges of the Court of Quebec are not to sit in the *Conseil exécutif* or the National Assembly (the legislature) or ‘... hold any other place of profit under the Crown’.
2. Judges Act, RSC 1985, C. J-1, s. 55. Municipal Court judges in Quebec are part-time and allowed to practise law. See, generally, D. Lundy (ed.), *Barristers and Solicitors in Practice*, (Butterworths, Toronto and Vancouver, 1998, plus updates) p. 11.47.

3. British Columbia, for example.
4. Judges Act, RSC 1985, C. J-1, s. 26(1.1) Judicial Compensation, Benefits Commission; NWT, Nunavut, NWT Judicial Remuneration Commission; BC, Judicial Compensation Committee; Ont., Provincial Judges Remuneration Committee; NB, Judicial Remuneration Commission; Que., Committee on the Remuneration of Judges of the Court of Quebec and the Municipal Courts, etc. In the case of some, this was made a requirement by the SCC in *Re Remuneration of Judges*, [1997] 3 SCR 3.
5. For example, see, L. Barry, 'Judicial Free Speech and Judicial Independence: A Trial Judge's Perspective on Judicial Independence', (1996), 45 UNB Law Journal 79; J. Sopinka, 'Must a Judge be a Monk; Revisited', 1995 *Provincial Judges Journal*, No. 3, 19. Both authors were judges when the pieces were written. The Canadian Judicial Council publishes the *Ethical Principles for Judges*.

II. End of Functions

30. All judges are subject to mandatory retirement, although the age varies from sixty-five in many provinces to seventy-five in others.¹ Many statutes allow judges to move to 'supernumerary' status, sometimes before retirement age, and to continue to sit for fixed periods.² In addition, statutes normally deal with the residual matters which exist when a judge retires, resigns, is elevated, or dies. Most put time limits within which old business must be concluded.

Judges may, of course, be disqualified or, in the case of inferior court justices, prohibited from sitting in a particular case. They may also recuse or remove themselves.

1. Mandatory retirement by statute has been subject to challenge under the *Charter*.

2. See, e.g., Judges Act, RSC 1985, C. J-1, s. 29.

III. Discipline

31. Discipline of judges up to, but not including, removal is normally done by judicial councils¹ which can impose a range of sanctions short of removal, or recommend removal. In the case of chief or senior or associate chief justices, a slightly different system exists. All systems are initiated by complaints and followed by investigations, a hearing, if justified, and a decision. Often, mediation is provided.

The bases for discipline or removal include incapacity, disability to a high degree, misconduct, failure in the execution of the office, being in a position incompatible with the execution of the office, or similar terms. Often a mediation process is built into the system. The extent to which non-lawyers sit on these councils varies as well. If removal is recommended, the decision is made by the executive and, in the case of federal judges, must be followed by a formal joint address of both the Senate and the House of Commons, which has never occurred.

In practice the members of the councils realize that judges are human and help is often available to get the justice back on track.

In many jurisdictions, if a judge is falling behind in the issuing of judgements, that person is relieved from sitting to enable him or her to catch up. There are often 'judgment writing' days built into the sitting schedules.

1. The Canadian Judicial Council, representing federal judges from across the country, deals with the federally appointed judges. Similar provincial councils exist in all but PEI. *See* Mr. Justice Cromwell, 'Judicial Conduct Processes for Provincially Appointed Judges: Preliminary Assessment', 1998 Provincial Judges' J. 6.

Chapter 2. The Bar

§1. EXERCISE OF THE LEGAL PROFESSION

I. Conditions of Admission

32. The practise of law is regulated by the provinces and territories. There is no federal statutory regulatory authority. What is meant by the practise of law is something of an open question. Appearing as counsel in a superior court certainly qualifies. Appearance as a non-lawyer on behalf of someone else, in an administrative tribunal or small claims court is a more difficult proposition.¹

The regulation of the practise of law is by professional self-regulating organizations called law societies.² In return for the right to control the practise of law, they agree to work to maintain a high standard of practise, discipline members, control admission, etc.

The normal process for admission involves completion of a law degree from a university recognized by the law society, followed by a period spent working for a lawyer, called ‘articling’, and successful completion of a course run by the law society, called a ‘bar admission course’, taken during or following the articling process.³ After qualification, fitness to practise is assessed,⁴ and a ‘call to the bar’ follows,⁵ but only if the candidate meets requirements of age, citizenship, or residence.⁶

Temporary calls, for example to allow a lawyer to appear in a court of appeal of a province in which he or she does not practise, are available in all jurisdictions.

Entry of non-Canadian trained or educated lawyers is controlled by a committee, the National Committee on Accreditation (NCA), set up by the Federation of Law Societies of Canada, a non-statutory body on which all law societies are represented. Persons wishing to practise in Canada apply to the NCA, which can recommend anything from automatic call to sitting exams, to completion of a Canadian law degree. This latter requirement is fairly common for candidates and the number of spaces in universities is quite limited, making entry difficult.

The English distinction between a barrister and a solicitor, with separate training and qualification procedures did not flourish in Canada. The bar is not divided, and all lawyers are entitled to act in both capacities.

1. Non-lawyers who do legal work are styled as ‘para-legals’ and their regulation something that is subject to much debate. In Ontario, Mr. Justice Cory, formerly of the SCC, released a report in 2000 in which he recommended that para-legals be prohibited from providing such services as acting in serious federal and provincial criminal matters, incorporation of businesses and the giving of business advice, or acting in matters of wills, estates, family law, powers of attorney, personal injury claims and statutory accident benefits, and real estate law. The publication of legal advice books and software has also raised the spectre of unauthorized practice, with little success.
2. See Legal Profession Act, RSA 2000, c. L-8; RSBC 1996, c. 255; RSNWT 1988, c. L-2 (Adopted by Nunavut); RSPEI 1988, c. L-6.1; SS 1990–91, c. L-10.1; RSY 2002, c. 134; The Law Society Act, RSO 1990, c. L-8, CCSM, c. L. 107; SNB 1996, c. 89; RSN 1999, c. L-9.1; RSO 1990, c. L-8 Barristers and Solicitors Act, RSNS 1989, c. 30; An Act Respecting the *Barreau du Québec*, RSQ 1977, c. B-1. The topic is dealt with in considerable detail in D. Lundy (ed.), *Barristers and Solicitors in Practice*, (Butterworths, Markham, Ont., 1998, plus additions).

3. The time spent after graduation from university is usually one year. Some flexibility exists as to where articles can be taken. One option is to clerk for a justice of the SCC, of a superior court, trial or appeal. Largely a research position, it is seen as an excellent opportunity for a litigator or potential academic. In Quebec, notaries take an additional year of formal education beyond that of advocates, followed by the articling year.
4. It is difficult to define or to assess 'good character', something the law societies are required by statute to do. See G. McKenzie, *Lawyers and Ethics – Professional Responsibility and Discipline*, (Carswell, Toronto, 1993) pp. 23–1, G.C. Hazard, A. Dondi, *Legal Ethics: a Comparative Study*, Stanford, Calif.: Stanford Univ. Press, 2004.
5. This derives from the practice in England of appearing at the 'bar' which is a railing in a courtroom in front of the bench upon which the judge sits. The candidate signs the 'roll' of the court, a file of persons allowed to appear as counsel there. If the lawyer is disciplined and ordered not to practice, he or she is 'struck from the rolls' and 'disbarred'. In Quebec the new advocate signs the 'Roll of the Order of Advocates'.
6. The statutory citizenship requirement was held to violate the Charter in 1989, but still appears in the requirements for admission in some provinces. See *Andrews v. Law Society of British Columbia*, [1989] 1 SCR 143, and *Black v. Law Society of Alberta*, [1989] 1 SCR 591.

33. The movement of lawyers within Canada, called transfer, and into Canada from abroad, as well as the increasing tendency of law firms to merge or enter into association with each other across provincial or national boundaries, led to the law societies of the provinces and territories and the Chambre of Notaries of Quebec to enter, in 1994, into a protocol, the 'Federation of Law Societies of Canada, Inter-Jurisdictional Practice Protocol'. It covers occasional practise, insurance requirements, in-house counsel in corporations, federal government lawyers, inter-province transfer, foreign legal consultants, and inter-jurisdictional law firms.¹ Since regulation of practise is a provincial or territorial responsibility, there is a considerable variation across the country.² Before the protocol, lawyers wishing to practise elsewhere either transferred, which involved writing exams at the very least, or obtained an 'occasional appearance permit', which limited the number of matters in which they could act. Under the protocol temporary mobility is available. Recently, British Columbia, Alberta, Saskatchewan and Manitoba agreed to allow this for up to six months, meaning that a lawyer can go to one of these provinces and practise for that time without transfer or obtaining a permit. This is of considerable advantage to firms with offices across the country. The development of a 'national practising certificate' such as is occurring in Australia and in the US, is still in the future.

1. The protocol appears in D. Lundy, *supra* no. 2.

2. *Ibid.*, at p. 1.14. Movement of lawyers between Canada, and the US, and now Mexico, was not greatly facilitated by the Canada-US Free Trade Agreement or by the more recent North American Free Trade Agreement (NAFTA), largely because in Canada treaties are not self-implementing and the provinces have been slow to act in this area.

II. Rights and Duties

34. It is the job of each law society to regulate the practise of law, primarily to protect the public. The structure of the societies will be considered, *infra*. The Canadian Bar Association, a non-statutory body with voluntary membership, created a code of ethics in 1920 and a Code of Professional Conduct for lawyers in 1987. Most law societies now publish professional conduct handbooks which have adopted

many of the CBA rules, modernized and updated regularly plus many new rules to deal with new situations. All facets of legal practise are considered, and many of the handbooks have annotations to the rules dealing with recent interpretations by courts or discipline bodies. Topics include methods of practise, advertising, competence, integrity, honesty, candour, confidentiality, conflict of interest, relationships with other lawyers, judges, the media, employees, students at law, the public, advocacy, taking public office, and the conduct of the practise itself, from requirements to keep records, required bank accounts audits, to insurance. In terms of litigation, relevant topics are integrity, competence and quality of service, confidentiality, conflict of interest between a lawyer's own interest and that of a client, conflict of interest between a lawyer and that of former clients of that lawyer or of a former professional colleague, and duties owed to a court.¹ It is recognized that, in the conduct of litigation, the adversarial nature of the process requires that lawyers put the interests of their clients well in advance of most other ones. They are said to owe a duty to the court as well, but little guidance is given about how to act if the duties conflict. There is a development, in the area of family law practise, toward what is styled as 'collaborative' practise, in which all lawyers in a jurisdiction agree not to go to court in a family matter. They then negotiate without the risk of using up all the assets of the parties in disputing matters that should be resolved outside the court. Of course, all practitioners must agree to use the model.

1. A. Hutchinson, *Legal Ethics and Professional Responsibility*, (Irwin Law, Toronto, 1999); G. McKenzie, *Lawyers and Ethics*, *supra* no. 4; B.G. Smith, *Professional Conduct For Canadian Lawyers*, (Butterworths, Toronto and Vancouver, 1989); M. Orkin, *Legal Ethics*, (Cartwright and Sons Limited, Toronto, 1957); R. Manes, M. Silver, *Solicitor-Client Privilege in Canadian Law*, (Butterworths, Toronto and Vancouver, 1993); M. Ellis, (ed.), *Professional Fiduciary Duties*, (Carswell, Toronto, 1995).

35. Insurance takes two forms. The first is a compensation fund into which all lawyers pay a part of their annual fees. This fund makes grants to victims of lawyers who were dishonest. All jurisdictions have such schemes, with the award of compensation being a matter of choice by the law society rather than of legal obligation. In recent years, the demands upon the funds have far outstripped the amounts available, even with caps on the amounts for any one claimant.

The second type of insurance is indemnity insurance. With the rise in claims in the last twenty years, and the expansion of grounds of liability by the substantive law, the cost of liability insurance increased greatly.¹ It became difficult for law societies to obtain private coverage. As a result, the law societies of Alberta, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island and Saskatchewan established the Canadian Lawyers Insurance Association, with local subordinate associations. Ontario, Quebec,² and British Columbia continued their own systems. The three territories are now in the CLIA plan while Newfoundland is now, with Ontario, covered by the Lawyers' Professional Indemnity Corporation. All the plans are on a 'claims made' basis, which means that coverage is determined when the claim is made rather than when the default occurred. (an 'occurrence' plan). This means that carry-on or run-on coverage is required for lawyers who leave the practise. All have large deductibles, based upon, *inter alia*, the claims experience of the lawyer, and some provide different rates depending upon area of practise, with the lower ones

going to the criminal lawyers. It is the case that coverage is mandatory in the sense that the lawyers must be a part of the plans.³

1. See, S.M. Grant, L.R. Rothstein, *Lawyers' Professional Liability*, (Butterworths, Toronto, 1989).
2. Quebec has separate plans for advocates and for notaries.
3. This was challenged unsuccessfully in *Law Society of Upper Canada v. Canada (Attorney General)* (1996), 28 OR (3d.) 460.

36. One of the rewards of long practise is the conferring of the title 'Queen's Counsel' (QC). Designed originally in England for lawyers who were barristers and could give good counsel to the Crown, the title is conferred in Canada by the Executive, federal and provincial, as an honour. Those upon whom it is bestowed are entitled to wear robes of silk in court, as opposed to robes of 'stuff' (wool), and to approach the bench beyond the bar which keeps mere ordinary advocates at bay. It is available at the federal level to worthy Crown lawyers and in the provinces and territories. Ontario has not made any appointments for many years, partly because the lustre was diminished by political influence in choices for it. It is available not only to barristers but also to solicitors who do not appear as counsel in the superior courts.

III. Discipline

37. Because the legal profession is self-regulating, discipline is the job of the law societies. This does not preclude prosecution of a lawyer for committing a criminal or other offence, or the bringing of a civil action against a lawyer. Discipline involves two aspects; conduct of the practise, and personal activities outside the practise. In Ontario, the Law Society of Upper Canada distinguishes between professional misconduct and 'conduct unbecoming'. Conduct which reflects adversely upon the lawyer, the profession, the integrity of the legal system, or upon the administration of justice as a whole is subject to discipline.¹

The normal procedures, which are jurisdiction specific, include a complaints process, advertised to the public, a screening out of frivolous ones, investigation, including a request to answer in writing or an 'invitation to attend', and a formal inquiry if warranted. Two streams may exist, a competence stream, and a professional misconduct stream. If a formal inquiry is held, the rules of natural justice are legislated or followed, and a wide range of dispositions is used, from short term suspensions, supervised practise, suggested treatment of addictions, to disbarment. Often the complainant has an opportunity to appeal if no action is taken, and in some provinces, notably Ontario and British Colombia, the overall complaints process is reviewed on a regular basis by a complaints review committee. Usually hearing bodies and review committees have on them members of the public. Return to practise of former lawyers or judges is a source of considerable activity. Recently a former lawyer who was convicted of killing his wife applied, after release from prison, leading to much public interest in Alberta and elsewhere. With judges, the issue concerns their acting as advocates in their former courts, *inter alia*.

Much of the time of current governing bodies of law societies is now spent dealing with 'equity' issues arising from membership of female lawyers² or those from visible minority groups.

1. See B.G. Smith, *Professional Conduct for Lawyers and Judges*, (Maritime Law Book Ltd., 2nd edn., 2002, looseleaf).
2. In most jurisdictions, women make up more than half of the classes graduating from the university law programmes.

§2. INSTITUTIONS AND ORGANIZATIONS

38. The legislation concerning the law societies appears elsewhere,¹ as do references to the Federation of Law Societies of Canada, and the Canadian Bar Association. There exist many local bar associations of unofficial status, as well as many organizations devoted to specific areas of practise.² Often these organizations provide skills training conferences. In addition, many private organizations have started to put on seminars for practising lawyers in specific areas. As well, the Ontario Section of the CBA is particularly active in this regard, as are the university-based faculties of law.

The official governing bodies, the law societies share similar structures.³ In some provinces they are set up under an umbrella statute regulating several professions,⁴ while in others they have their own legislation. The basic structure involves a professional staff and an elected body of lawyers, and in the case of all except Quebec, appointed lay 'benchers'. These benchers are divided into several committees and conduct the day to day running of affairs. They meet on a regular basis in full 'convocation' to approve of decisions already made and new ones.⁵

1. *Supra*, at p. 33.
2. For example, the Advocates Society (Ont.), The Trial Lawyers' Association of British Columbia, the Alberta Civil Trial Lawyers' Association, The Ontario Centre for Advocacy Training. Cape Breton, nominally a part of Nova Scotia has its own Cape Breton Barristers Society Act, RSNS 1989, c. 58.
3. See, C. Curtis, 'Alternative Visions of the Legal Profession in Society: A Perspective on Ontario', (1995), 33 Alta. L. Rev. 787. For many years the bar in the Northwest Territories and in the Yukon was not differentiated from that of the bar in the province to the immediate south. Yukon for example, allowed lawyers from BC to practise there. For a time the court of appeal there was the BC Court of Appeal. NWT did the same with Alberta. Nunavut, being new has followed the practice of the NWWT, from which it was created.
4. Quebec, for example.
5. Since they are corporations, this pattern is to be expected.

39. The primary structure within which two or more lawyers have practised traditionally is the partnership. This is a structure based upon contract principles of agency, largely derived from English law.¹ The principle that is paramount is that each partner can be liable for the defaults of the others. All sign a partnership agreement. Many of these make it financially unwise for a partner to leave before normal retirement. Most law 'firms' employ a number of junior associates on salary, as well as law clerks, librarians, office managers, 'secretaries', litigation assistants,

and enter into agreements with accountancy firms, investigators, forensic analysts, etc.

The requirements of partnership law, with its emphasis on trust and confidence in your choice of partner, have proved to be cumbersome in a time of change in the legal profession. Specialization of practise area is common,² and larger firms are required to expand greatly to keep clients. In addition, groups of lawyers who share a ‘hot’ specialty such as intellectual property law, or labour law often prefer to set up separate ‘boutique’ firms. Additionally, many larger firms are setting up offices in several places across Canada and elsewhere in the world, and entering into alliances with other Canadian or non-Canadian firms. This has resulted in considerable mobility for lawyers.

One of the developments that has occurred is that of law firm incorporation. Ontario, for example, allows it. Although the legislation differs from place to place, it is fairly common to restrict share ownership or to require majority ownership by members of the law society.³ One way to limit liability is to have a limited partnership in which partnership assets but not personal ones may be protected in a limited way.⁴ A current issue is the ability of lawyers to set up firms that include other professionals such as accountants. At present, only Ontario allows this.⁵

Many lawyers, particularly newly-called and those in the criminal law areas, practise in association with each other. This means no more than that they share office space, secretarial services, library, etc. They each are taken to be practising alone, for the purposes of the law society, and must each keep their own sets of books and records.

1. In Quebec, the Civil Code of Quebec sets up a somewhat similar legal regime for both advocates, who do counsel and solicitors work, and notaries, who act somewhat like notaries public but have considerably more power and neutrality.
2. Some law societies allow a person to apply for, and be recognized as a specialist in a particular area of law, and, more importantly, advertise themselves as such. Without the specialist label, they can only hold themselves out as practising in a restricted area.
3. See, Lundy, *supra* at pp. 3–23.
4. Standing for limited liability partnership.
5. K. Roach, E. Iacobucci, ‘Multidisciplinary Practices and Partnerships: Prospects, Problems and Policy Options’, (2000), 79 Can. Bar Rev. 1, and J. Cameron, ‘Back to Fundamentals: Multidisciplinary Partnerships and Freedom of Expression under Section 2(d) of the Charter’, (2000), Vol. 50, No. 3 U of T L. J. 261. In the Spring of 2001, the Law Society of Upper Canada approved a controversial regulatory scheme that allows firms to ‘affiliate’ with other professional entities.

40. A considerable number of lawyers in Canada are employed in public administration. This includes as lawyers for government departments or agencies, or as crown attorneys or public defenders.¹ At the federal level, they belong to a provincial or territorial law society.

Some lawyers are employed in legal clinics. This normally means that they are on salary and work in areas of law concerned with the poor. Many clinics are funded under provincial legal aid plans and work in faculties of law in the universities.

Many lawyers are employed as in-house counsel for Canadian corporations. As such they advise the corporation. Unlike a privately retained lawyer, they do not have the luxury of refusing the client and can be put in a difficult position if the corporation wishes to do something illegal or unethical. Often corporations will use their own

counsel on routine matters and retain specialists on matters they do not normally encounter, such as hostile takeovers.

It is also the case that employment opportunities for Canadian lawyers exist outside Canada. Many top juniors from Canada are being lured to the US, particularly to New York City and to Boston, putting pressure on Canadian firms to compete financially.²

1. In some provinces, notably Ontario and Alberta, privatization of government services is ongoing as a cost cutting measure and some government legal work is being contracted out to private firms. Sometimes the firms are required to bid on the work, in a process known as a 'beauty contest'.
2. At least one of the common law faculties of law is now offering a degree of JD, which is a first law degree awarded in most US universities (University of Toronto). Part of the reason for this is to make its graduates more marketable in the US. The normal first degree in law is LL.B.

Chapter 3. The Bailiffs

§1. EXERCISE OF THE PROFESSION

41. The service of documents in a civil action is, until the process of execution of judgments, left to the parties. All writs, statements of claim, notices of motion, etc. can be served by the parties themselves, or by a private process server. Service out of the jurisdiction is a different matter, involving as it does, another legal system. Once the seizure of assets or arrest of persons is in issue, all jurisdictions use court-attached persons. Arrest of persons is left to the police of the jurisdiction. Seizure of assets, whether of real or personal property, is done through the office of the sheriff. An office of some antiquity,¹ all jurisdictions have legislation dealing with it, either as part of the Judicature Act, however called, or as a separate statute.² There is usually a Sheriff and Deputy Sheriffs, who employ the use of bailiffs³ to do the actual service and execution of the documents. In the Federal Court, the same functions are exercised by the sheriff and bailiffs of the county in which the court sits.⁴

In criminal matters, with the exception of a limited power to make citizen's arrests, all taking into custody is done by peace officers.

There is a tendency, particularly in Ontario and in Alberta, to 'privatize' as many functions previously performed by civil servants as possible. This means that court reporters, interpreters, process servers are being replaced by private services.

1. In England, each shire or county had a 'shire reeve' who played a large role in enforcement of the orders of the nobles. One thinks of the Sheriff of Nottingham and Robin Hood, both fictional characters based upon reality. Because their income was fee for service, the office was much sought after.
2. For example, Sheriff Act, RSBC 1996, c. 425; RSM 1987, c. S-100; SN 1991, c. 39; RSPEI 1988, c. S-4.1; RSQ 1977, c. S-7; Courts of Justice Act, RSO 1990, c. C-43, s. 141(1).
3. See, e.g., Bailiffs Act, RSO 1990, c. B-2; Court Bailiffs Act, RSQ 1977, c. H-4.1 (*Members of the Chambre des Huissiers de Justice de Québec*).
4. Federal Court Act, RSC 1985, c. F-7, s. 55.

Part I, Ch. 3, The Bailiffs

Part II. Jurisdiction

Chapter 1. Domestic Jurisdiction

§1. SUBJECT MATTER JURISDICTION

I. Factors to be Taken into Account

42. The issue of jurisdiction is one that is beset by problems of labels and of nomenclature. Earlier, I used the term to refer to a geographic limit, for example, the jurisdiction of Ontario, a reference to the province of Ontario as a place. When looking at the question of jurisdiction of a court over subject matter, or over the person of a defendant, the term means no more than ‘power’. When I say that a court will, for example, take jurisdiction over a defendant who has been served in a province, I mean that the court recognizes that its orders will be enforceable against that person or against his or her property, particularly in the province in question. When a successful plaintiff takes his judgment to another territorial area, be it another province or territory, or even another country, two issues will be whether the province had power or jurisdiction over both the subject matter of the action and over the person of the defendant. It appears from the case law that different degrees of connection to the enacting province may be required according to the subject matter of the dispute (*Unifund Assurance Co. v. Insurance Corp of British Columbia*, [2003] 2 S.C.R. 63).

In terms of subject matter jurisdiction, a Canadian court, whether federal, provincial, or territorial, will not consider that it has power to make an order of title to foreign-situated immovables.¹ It may be, however, that it will consider that it has power to make an order enforceable against the person of the owner, as opposed to making one that is enforceable against the immovable itself. This is a vestige of the old common law rules of venue in England which required that actions involving title to land be brought in the county in which the land was situated so that the jury would have knowledge of the facts.²

1. The best example of an immovable is land.

2. These rules were abolished in England in the 1873–1875 Judicature Acts. See J-G Castel, *Canadian Conflict of Laws*, (Butterworths, Toronto, 5th edn., 2002 (looseleaf) p. 23-1 (ch. 23). The question of equitable as opposed to legal title is beyond the scope of this volume.

43. The distinction between actions in *rem* and *in personam* is not of much importance in Canada. The former involves a court exercising jurisdiction over a

thing rather than over a person. The only example in Canada is the jurisdiction of the Federal Court of Canada over a ship or a *res* associated with it.¹ As will be seen later, service is upon the *res* rather than on a person. Nailing a claim to a mast is not practical since few are of wood, so other methods have been devised.

For all other actions, they are *in personam* and the issue of jurisdiction is largely decided on questions of jurisdiction over the person rather than by questions about subject matter.

One distinction to consider is that between domicile and residence.² For actions involving status, such as divorce, or estate succession, domicile is an important concept. Generally, these should, but not must, be brought where the defendant or deceased was domiciled. This is not so much a question of jurisdiction as one of choice of law, however. By this I mean that the best place to bring such a proceeding is where the domicile of the relevant person was or is, but if the defendant is within the jurisdiction of the court in question, the court can make an order against that person in any event.³ Status actions include those in which the judgment of the court will affect more than the immediate parties, such as declarations of validity of marriage, parenthood, validity of wills, trusts, patents and adjudications in bankruptcy.

1. Federal Court Act, RSC 1985, c. F-7, ss. 22, 43(2,3). This is a concurrent original jurisdiction with provincial and territorial superior courts in maritime and admiralty law. See W. Spicer, 'The Supreme Court, Maritime Law and the Offshore', (1999), 37 Alta. L. Rev. 271.
2. Both domicile and residence are well known concepts in international law and will not be defined herein.
3. The Code of Civil Procedure of Quebec, RSQ 1977, c. C-25, places more emphasis upon domicile than do rules of procedure of the common law jurisdictions, particularly when dealing with service. See CCP, ss. 68-75. This may cause some problems with the recognition of such judgments elsewhere. Some authors define actions to determine status as actions *in rem*. I limit *rem* actions to the admiralty jurisdiction of the Federal Court.

44. In terms of subject matter jurisdiction, the jurisdiction of the Federal Court of Canada has been considered.¹ Since the other superior civil courts are all of unlimited monetary jurisdiction, they can entertain an action for any amount, although, as pointed out, the lower civil courts may also have power over these matters, and the parties may be penalized for bringing the action in the higher court.²

All small claims courts have some limits on their subject matter jurisdiction, in addition to limits on monetary jurisdiction. Some or all actions for libel, slander (defamation), malicious prosecution, municipal non-repair, title to land, concerning wills, trusts, are often excluded by statute.³

The legislation of some provinces purports to grant exclusive jurisdiction to the Federal Court if the Federal Crown is a plaintiff and the province a defendant.⁴

In all provinces and territories, some subjects are set aside for decision by tribunals. There are constitutional limits on this, because of s. 96 of the Constitution Act,⁵ but areas such as workers' compensation (injured workers), landlord and tenant, and no-fault compensation for negligence are examples. These schemes replace the causes of action of the injured persons although final appeals to courts remain.⁶

The issue of enforcement of foreign judgments, as a limitation on subject matter jurisdiction of Canadian courts will follow. Just as with cases of status and foreign domicile, it is not so much that Canadian courts have no jurisdiction over them but

that they will not exercise it. The same issue arises with contracts that choose other places as the place of action. Here, if Canadian courts have jurisdiction except for the contract, they do not lose it but may defer to the other jurisdiction, using a '*forum non conveniens*' approach.

It seems that no court in Canada will entertain an action in which it is asked to question the validity of the act of a foreign state on international law principles. Again this may be a matter of comity rather than of jurisdiction.⁷

1. *Supra*, at p. 21. *See also*, E. Meehan, N. Fera, 'Jurisdictional Changes in the Federal Court', (1993), 15 *The Advocates Quarterly* 257.
2. *Supra*, at p. 24.
3. This varies from place to place. *See* Ontario, Courts of Justice Act, s. 23, which limits jurisdiction to payment of money or recovery of personal property below a certain value. Other statutes exclude other causes of action; Alberta; Small Claims Act, c. 430, s. 3; Manitoba, Court of Queen's Bench Small Claims Practices Act, c. C. 285, s. 3; New Brunswick, Small Claims Act, c. S-9.1; Newfoundland, Small Claims Act, c. S-16; Quebec, CCP, s. 954; CCP, ss. 34–36 (Court of Quebec).
4. *See*, e.g., Federal Courts Jurisdiction Act, RSM 1987, c. C. 270; RSN 1990, c. F-7.
5. *See supra* at p. 6.
6. *See* Castel, *supra* para. 42, no. 2. For a look at no-fault, both in the vehicle accident field and with respect to injured workers, *see* C. Brown, 'Insurance', *International Encyclopaedia of Laws*, 1998, p. 187.
7. Castel, *supra* no. 6 at p. 11-3 (ch. 11).

45. The more common questions that arise with respect to jurisdiction concern jurisdiction over the person. The basic English rule, adopted in Canada, is that if a defendant is properly served in the territorial jurisdiction of the court, with the originating process such as a statement of claim or petition of divorce, that court has jurisdiction over him or her. This is based upon the principle that if the person is within the territory of the court, they owe allegiance to the Crown there. Since they have chosen to come to the place, they are both entitled to the benefits and subject to the burdens of being there. The theory assumes that the defendant chose to visit or reside there, and excludes persons who have been physically taken there, such as prisoners, or enticed there solely to be served, or perhaps transferred there as part of the armed forces.¹ In the case of corporations, some carrying on of business within the territory is normally required.² It is also the case that Canadian courts will recognize agreements to submit future or existing disputes to them, and will recognize actual or contractual submission by a defendant to their jurisdiction. A plaintiff who brings an action in a Canadian court is taking one of the benefits there and, of course, becomes subject to counterclaims there.

1. W. Williston, R. Rolls, *The Law of Civil Procedure*, (Butterworths, Toronto, 1970) p. 3.
2. Service will be considered, *infra*, at p. 98.

46. Canadian courts also recognize jurisdiction over persons who are served elsewhere in situations in which the jurisdiction has some connection with the cause of action. This jurisdiction, called 'assumed', or 'long-arm' jurisdiction, is a result of English legislation of 1852.¹ The types of causes of action where this jurisdiction will be exercised are ones in which there exists some connection between the defendant or the subject matter of the action, or both, and the jurisdiction, and include those concerning property whether real or personal which is there, interpretation of

instruments such as deeds, wills, contracts, etc. which relate to property there or to persons who were domiciled there at the relevant time, persons normally resident or domiciled there, administration of estates and trusts concerning property there, contracts made or intended to be enforced there, breaches of contract of commission of torts there, or damages flowing in the jurisdiction from them, and claims upon foreign judgments where there is property to be seized. Additionally, persons who are ‘necessary and proper’ parties to an action properly brought in the jurisdiction may be served elsewhere.²

1. The Common Law Procedure Act, 1852, 15 & 16 Vict., c. 76.

2. These are examples, as found in the rules of court of most courts in Canada. See, e.g. Ontario, R.17; Alberta, R.30, Sask. R.31. Quebec allows service outside the province, in Canada, in R.137. Until 1994, Quebec was quite restrictive about allowing service beyond its borders. The Civil Code was revised and now allows Quebec courts to take jurisdiction over non-resident defendants in three basic situations: a fault committed there, damage suffered there, an injurious act occurred there, or one of the obligations of a contract was to be performed there (Article 3148); Consumer contracts where the consumer is domiciled or resident in Quebec (Article 3149); insurance policies wherever purchased, where the holder, insured or beneficiary is domiciled or resident in Quebec (Article 3150). See M. Youssef, P. Finkle, ‘Cross-border Shopping, Consumer Remedies and Long-arm Legislation: To Reach Out and Touch Someone’, (1993), 15 *The Advocates Quarterly* 1.

The distinction between necessary and proper parties is a close one. Any person against whom there exists a cause of action is a proper party in the sense that they can be a party defendant. Some proper parties are also necessary in that the substantive law requires their joinder. An assignee of an equitable chosen in action is an example.

47. When considering long-arm jurisdiction, there is a distinction to be made between places in Canada and places outside Canada. Within the country, courts are likely to recognize the judgments of courts elsewhere in the country if there was a ‘real and substantial’ connection between the place of action and the cause of action. Recognition of foreign judgments is a topic to be considered shortly,¹ but one issue which may be considered a jurisdictional one arises from the decision of the Supreme Court of Canada in *Morguard Investments v. De Savoye*.² The issue is, how much of a connection must a province or territory have with the subject matter of the action or the defendant in order that its judgments will be recognized elsewhere in Canada? It is bound up in the constitutional concept that only the central government has the power to give its legislation extraterritorial effect. What this means is that there are limits on the power of a judge in a province or territory to make an order that is enforceable elsewhere in Canada.³ An example would be if a province enacted a law that purported to bind a debt due between two residents in another province. The debt and the two parties to it would have no connection with the enacting province.⁴ Older cases made a distinction between conferring a benefit on and out of province person, which was permissible constitutionally, and imposing a burden. In *Morguard*, the court was faced with a default judgment from another province and wondered about how much connection the court of the decision making province needed with the defendant or with the cause of action in order for the judgment to be valid for the purposes of recognition in a new province. If the defendant was served ‘long-arm’ and never had any other connection with the jurisdiction where the default judgment was issued, could that place reach across a provincial boundary to impose a burden on him? The required connection was required to be ‘real and substantial’ enough

for a court to infer that the defendant had voluntarily submitted himself to the risk of litigation there, (as opposed to actually appearing and submitting), and the guiding principle was to be one of ‘order and fairness’. In the case itself, the connection was that the defendant had assumed mortgages in Alberta, moved to British Columbia, and defaulted. After judicial sale in Alberta, Morguard obtained a judgement in Alberta in default of appearance, for deficiencies, serving the defendant in British Columbia. It then tried to collect in British Columbia. Clearly the subject matter of the action was well connected with Alberta, but was the connection of Alberta with the defendant ‘real and substantial’? The requirements of ‘order and fairness’ in Canada, given that there is a common citizenship, similar court systems with federally appointed superior court judges, much cross-border commerce between provinces, no trade barriers between provinces, were met. It was not contrary to any constitutional principle to enforce a default judgment in another province.

In so doing, there were suggestions that a principle similar to the ‘full faith and credit’ principles in the US and Australia, governing recognition of decisions of sister states, might be a useful development as a constitutional one. Later cases developed the theme further.⁵

As a matter of jurisdiction, there is reason to doubt the jurisdiction of a province to hear a case involving subsequent damage in that province, from an injury that occurred elsewhere with foreign defendants. It is true that the ‘long arm’ rules described earlier⁶ do allow service outside the province in such a situation, but is the connection to the province ‘real and substantial’ enough if only some medical treatment, for example, occurred there?⁷ In all these cases in which a plaintiff has a choice of where to bring the action (it can always be brought where the defendant is), issues of *forum non conveniens* and forum shopping are raised.⁸

The better question is, what sort of connection must a case have with a non-Canadian jurisdiction for a judgment concerning it in that foreign (non-Canadian) court to be recognized in Canada, and *vice-versa*?

1. *Infra*, at p. 153.

2. [1990] 3 SCR 1077; 76 DLR (4th) 256.

3. *See Re Upper Churchill Water Rights Reversion Act*, [1984] 1 SCR 297.

4. This was struck down in *Delaire v. Delaire*, [1996] 9 WWR 969 (Sask. Q.B.).

5. For example, *Anchem v. BC*, [1993] 1 SCR 897; *Hunt v. T. & N. plc.*, [1993] 4 SCR 289; *Tolofson v. Jensen*, [1994] 3 SCR 1022. It has been suggested that within Canada the test should not be one of ‘the most real’ connection but one of ‘a real’ connection, and that a connection with either the defendant or the cause of action should be enough. G. Watson, F. Au, ‘Constitutional Limits on Service ex Juris: Unanswered Questions from Morguard’, (2000), 23 *The Advocates Quarterly* 167. *See also* J. Swan, ‘Choice of Forum and Choice of Law: The Implications of the New Criteria For Judicial Control’, (1996), 18 *The Advocates Quarterly* 1.

6. *Supra* at p. 46.

7. Damage would include further pain and suffering, medical costs. *See MacDonald v. Lasnier*, (1994), 21 OR (3d) 177, in which a superior court in Ontario doubted if the connection was strong enough to give Ontario courts jurisdiction. The concept of a full faith and credit doctrine in Canada is further explored in W. Tetley, ‘Current Developments in Canadian Private International Law’, (1999), 78 *Can. Bar Rev.* 152, wherein he considers the new 1994 Quebec Civil Code and its adoption of a *forum non conveniens* principle in A. 3135. Factors that should be taken into account in assuming jurisdiction over out-of-province defendant were considered in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20.

8. Considered *infra* at 'Resolution of Jurisdictional Conflicts'. With class proceedings, there is some reason to be concerned about the force of a judgment on an out of jurisdiction person who is within the class description but does not opt out, should the action fail.

II. Main Claims and Ancillary Claims

48. Proceedings in Canadian courts can have many different names and purposes. All are started with some form of originating process, the first document that the other side to the proceeding sees. Whether this is called a writ, or statement of claim, or notice of application, or petition, or, in the case of a new party, a counter-claim, third party claim, or by some other name, court rules require that it be served with some certainty that it will be received. Once a party has been informed of the proceeding in the formal way, service of later documents is usually done in a less formal way, such as service upon the solicitor of record of the party.

The originating process will, as will be seen, make factual allegations against a defendant and a claim for some relief or remedy. It may also make allegations, accompanied by supporting facts, of breaches of various laws. There is no formal distinction in common law jurisdictions, between main claims and ancillary ones. Obviously, some allegations are more important than others, as well as some remedies sought, but their significance is a subjective matter for each party. In addition to factual and legal allegations, originating processes often seek costs, interest both pre-judgment and post-judgment, and sometimes very specific remedies in addition to monetary ones. The rules of court allow also for certain provisional, interlocutory remedies, such as injunctions, appointment of receivers, or certificates of pending litigation (*lis pendens*). The rules allow also for the addition of new legally-connected parties at the option of either party by way of counterclaims, cross-claims, third or subsequent party claims, and new claims or defences between the original parties and others added. In addition, some parties are required by law to be joined, as for example necessary parties, or Attorneys General where the validity of a law is in issue, and sometimes others can apply to be added as parties, such as insurance companies, or intervenors who seek party status. What this means is that the original plaintiff or applicant or petitioner may have little control over the ultimate size of the proceeding,¹ and is by no means '*dominus litus*' in the proceeding.

The overriding concern is that the choice of claims, remedies, whether interlocutory or final, is for the parties, in accordance with the principle of 'party presentation'. It is not until the end of the proceeding when each party makes final argument, that the important and less important issues are finally identified. The result is that, except for interest and costs, it is difficult to categorize claims as main or as ancillary.

1. See *infra*, at 'Actions and Claims'.

§2. VENUE

I. Factors to be Taken into Account

49. Venue means where, within the geographic jurisdiction of the court, the action will be heard. In the case of the Federal Court of Canada this may be anywhere in Canada in a division where the court sits. In the case of a provincial or territorial superior court, this will be anywhere within the province or territory where the court sits, usually in a district or region. There is no power in the rules to transfer, compulsorily, an action not in the Federal Court from one province or territory, to another. A party who wishes to have a case heard in another province or territory will, in the case of a plaintiff, have to start a separate proceeding there and meet arguments from the opposite party of '*forum non conveniens*'.

In the case of the Court of Quebec, or of small claims courts across the country, each has its own rules concerning venue. Usually actions involving title to land are not dealt with in these courts, and the normal place for proceeding in other types of action is where the defendant is found.¹ With title to land and actions of status, the preferred venue is where the land is or the person domiciled.²

The party initiating the proceeding picks where it wishes to have it heard by starting it there. In so doing, the party must consider any requirements of statute or rule. Once the initiating party has chosen the venue, it is for the other side to seek a change of venue by bringing a 'motion' before the court. This is an interlocutory proceeding in which a preliminary issue (usually) is dealt with. Factors which will be of relevance include a substantial balance of convenience or the possibility of that one party will not get a fair trial there, perhaps because of adverse publicity,³ and any prior agreement between the parties concerning venue.

Convenience includes factors raised by both sides, and covers costs, availability of witnesses or of counsel, availability of court space for an early trial, and the degree of connection between the subject matter of the action and the venue chosen or desired. If the motion for a change of venue is successful, all court files are transferred to the new venue.⁴

1. This may be a matter of domicile in Quebec, or residence elsewhere and in Quebec. Since small claims courts are often no more than collection agencies for creditors, lending agencies sometimes try to include a clause in their agreements choosing an inconvenient venue in advance, with limited success.
2. See, e.g., Land Actions Venue Act, RSNS 1989, c. 247.
3. This is uncommon in part because no judge is likely to agree that he or she is biased or that they cannot properly instruct themselves or a jury.
4. Examples of rules dealing with venue are: Rule 46 (Ont.); Alta., R. 6.1; Man., R. 47; NS., R. 28; PEI, R. 46; Que., CCP, ss. 68–75, Sask. R.190. *Forum non conveniens* will be considered, *infra*. See, for Ontario, J. Twohig, J. Pawson, 'Civil Venue in Ontario', (1997), 19 The Advocates Quarterly 129.

§3. RESOLUTION OF JURISDICTION CONFLICTS

50. There are two situations to consider. The first is where a plaintiff starts proceedings in the wrong court. The second is where there are two proceedings ongoing between the same parties in two different jurisdictions. Whether or not these situations raise jurisdictional or non-jurisdictional (convenience) factors, the procedure for resolving the conflicts is the same. Two questions need to be answered: does the court whose power is being questioned have jurisdiction, and if so, should it exercise it? In theory, if the answer to question one is no, the defendant need have no concern for the proceeding, since it will not result in a valid order. In reality, it is necessary to act in order to stop things early and avoid expense. The court itself may be unaware of the problem until it is brought to its attention and the defendant may face an order that will need some explaining.

The plaintiff may have started in the wrong territorial jurisdiction. As mentioned, in Canada, this is not a significant problem, there being few '*rem*' proceedings.

The plaintiff may have started in a court with no jurisdiction over the subject matter of the action. Again, this is unlikely to happen unless the action involves a provincial matter and is started in the Federal Court of Canada. For most other actions, unless a statute states otherwise, superior courts in provinces or territories have unlimited subject matter jurisdiction. It could happen that a plaintiff starts an action in a lower court such as a small claims court or in addition, in Quebec, in a municipal court or the Court of Quebec, which is beyond its statutory jurisdiction. In such cases, the defendant can move in the lower court to have the action struck out.

It is possible that the action was brought in a division of a superior court which was inappropriate. A family matter brought in the trial division instead of the family division is an example. In this situation, it would normally be transferred to the proper division.

More common is the situation of the proceeding of a value within the jurisdiction of a lower court being brought in superior court. This includes a counterclaim by a defendant against a plaintiff, which is a separate action in law. The party objecting to the action being in the higher court will move to have it transferred to the lower. It may be allowed to stay in the higher court if the plaintiff can show that there is a good reason for it to be there, such as a novel principle of law or one of public importance. If no objection to the higher court hearing the case is made, and the plaintiff wins an amount in the jurisdiction of the lower court, costs may be on the lower court scale to the plaintiff.

The converse to the above situation occurs when the case is started, or a counterclaim is made in a lower court, which is higher than the monetary jurisdiction of that court. The party seeking the larger sum will have to abandon the excess in order to continue in the lower court. Usually, the case will be transferred to the higher court. (In Quebec this is called '*evocation*'.)

51. The second type of problem identified is that of two proceedings started or contemplated at the same time.¹

If they are started in the same jurisdiction, this is not a jurisdictional problem. The plaintiff may be required to choose which will proceed, or an order may be made that they be tried together as separate actions with one set of costs or tried consecutively, or they may be consolidated into one action.² Sometimes a defendant in an action will start a separate action against the plaintiff to the first action, instead of counterclaiming back in the first action. In this case the first plaintiff will seek to have the second action joined, or stayed depending upon the circumstances. One type of action of this sort is called a ‘SLAPP’ action (strategic lawsuits against public participation), a proceeding in which a defendant to an action, often a public interest one such as an environmental one, will bring a proceeding solely to cause trouble for the first plaintiff. Often the cause of action will involve an allegation of inducing breach of contract. The second plaintiff, defendant to the first action, has no hope of winning but will exhaust the time and finances of the plaintiff in fighting the second action in which numerous motions will be brought by the new plaintiff.

The second category of cases is the one in which the same parties have two actions started or contemplated in different territorial jurisdictions within Canada, either with the same person as plaintiff or with the roles reversed.

Three factors are significant when considering these issues. The first is that no person can be forced to bring an action. The decision of whether to begin with litigation is for a plaintiff to make. Once litigation is commenced, other parties may be added, but if they do not agree to it, as defendants only.³ The second factor is that it is up to an objecting party to complain by seeking relief in an interlocutory motion. Unless the proceeding is case managed, the court will not intervene, because of the principle of party presentation. The third factor is based upon the distinction between substance and procedure. A difficult one to make, it is significant because the parties take the procedure in the court in which the action is brought as they find it when an issue arises concerning it. For example, rules of procedure of the court are mostly procedural.⁴ Changes to the rules operate retrospectively as well as prospectively, usually, so that the parties use the existing rules, whenever the facts in the case arose. Substantive law that is applied to the case is a matter of choice of law rules and may not be the law of the forum. A fair guide to the difference is to ask whether the law or rule deals with how the case will be dealt with as opposed to what the case is about. The former are procedural rules.⁵

1. I here consider two started or contemplated by the same parties. The presence of other proceedings involving one of the same parties will be looked at later. A series of actions against the same defendant arising out of a single event such as a crash of an aircraft is an example of the latter. The principles which are at work when there are two concurrent proceedings between the same parties, and the remedies of stays or injunctions, are often discussed under the general title ‘*lis alibi pendens*’.
2. See *infra*, ‘Multiple parties or causes of action’.
3. Joinder, compulsory or voluntary, is considered *infra*. A reluctant potential plaintiff whose presence is necessary may be added as a party defendant but never as a plaintiff. This happened in *Lovric v. Federation Insurance Company of Canada* (1989), 71 OR (2d) 403.
4. The issue of whether rules committees can make substantive law is a constitutional one involving delegation of legislative power. Recently it seems to have been allowed. The Civil Rules Committee in Ontario has been authorized by s. 66 of the Courts of Justice Act to make rules ‘... even though they alter ... the substantive law’. *Quaere* the validity of this in terms of excessive delegation of legislative authority.
5. Rules of evidence are normally considered to be procedural. Limitation periods were long considered to be procedural until *Tolofson*, [1994] 3 SCR 1022.

52. Two ways used to deal with this situation are the stay of proceedings, and the anti-suit injunction.

The stay is an order made by a superior court in the exercise of its inherent jurisdiction to control its own process.¹ A defendant who objects on jurisdictional or other grounds to a proceeding can bring a motion to the court in which the proceeding is, to have it stayed, or struck out. The court will strike it out if there is no jurisdiction to hear the matter and it cannot be transferred. If there is jurisdiction it becomes a matter of whether the court should hear it.

Several factors are argued where two proceedings in Canada in different provinces or territories are involved. The defendant will be seeking to have the action stopped in some way, forcing the plaintiff to proceed in the other jurisdiction where a similar motion may ensue.²

The fact that the plaintiff has chosen to bring two proceedings is relevant. There must be a reason for it and it should not lightly be overridden.

The presence or absence of a juridical advantage is a factor. With the two cases in Canada, there is unlikely to be much procedural difference between courts. There may be differences as to speed of getting to trial, limitation periods, quantum of damages, different insurance provisions, absence of no-fault legislation, or some advantage perceived by the plaintiff, who will have to disclose it to the court in argument on the motion.

The strength of connection of the subject matter of the case or the person of the defendant with the jurisdictions is another factor. If the connections are about equal the plaintiff will, all other things being also equal, be allowed to continue with the proceeding. If there is a significantly closer attachment to the other Canadian jurisdiction, the local action may be stayed.

If the local court sees that the plaintiff is abusing the processes of the court, it may stay the action. It is difficult to catalogue what will amount to an abuse, but consecutive actions without obvious merit is one example, dealt with in most jurisdictions by rules about frivolous or vexatious proceedings.

Expense and inconvenience to all parties and witnesses will be relevant.

The presence or absence of property of the defendant in the jurisdiction may be relevant since the plaintiff may be looking to attach it in some way as part of the action³ or when executing on the judgment.

The strength or weakness of the case may be relevant but difficult to assess at the early stage. A case of obvious weakness, for example, one covered by a doctrine of *res judicata*, will be stopped. In the case of *res judicata* because of cause of action *estoppel*, on jurisdictional grounds.

The presence of a forum selection clause in the dealings between the parties is a significant factor. Here, unless the complaining party can show that the case should clearly be heard elsewhere, the clause will be given effect.

Who has the burden of establishing the evidence or of advancing the argument about convenience is a bit of an open issue. Normally the person seeking the order has the burden, on the balance of probability,⁴ but the evidential burden and risk of non-persuasion shifts during the proceeding, from one side to the other. In actual fact, few motions are won solely on the failure to satisfy a legal burden, and the deciding officer looks to the party with the knowledge to clarify matters, wherever the burden is.

If the local court stays or ends the proceeding, the plaintiff will have to proceed in the other Canadian jurisdiction.⁵

1. Dealt with by statute or rule or both. *See*, e.g., Ontario, Courts of Justice Act, s. 106; Federal Court Act, RSC 1985, c. F-7, ss. 50, 50.1; CCP s.164.
2. *See Amchem v. B.C.W.C.B.*, [1993] 1 S.C.R. 897 for a good description of Canadian practice.
3. In which case, the action will probably be kept in the forum as matter of jurisdiction.
4. Part VII, Chapter 1 deals with this issue.
5. The Uniform Law Conference of Canada, a non-governmental law reform group, has proposed simplifying legislation to be applied to the area of judgments within Canada. The Uniform Court Jurisdiction and Proceedings Transfer Act, if adopted by various provinces, would allow transfers of cases within Canada. *See* Uniform Law Conference of Canada, Proceedings of the 1994 Annual Meeting, p. 140.

53. The issue of *forum non conveniens* between Canadian and non-Canadian jurisdictions is similar. The older view of English courts, that only they could give true justice, is outdated.¹ A Canadian court will not automatically assume that it is better able to do so than a foreign one. Choice of forum clauses, juridical advantages and the choice of the plaintiff are stronger factors in Canadian – Foreign cases than in Canadian – Canadian ones. It is likely that there will be differences in procedure or even in choice of law rules which will be argued as part of juridical advantage arguments. All the other above-mentioned factors are of relevance as well.

1. In *Spiliada Maritime Corp. v. Cansulex Limited*, [1987] AC 460, the English House of Lords recognized this explicitly. *See National Bank of Canada v. Clifford Chance* (1996), 30 OR (3d) 746 in which an Ontario action against a firm of British solicitors was stayed.

54. The second method for avoiding having to deal with two proceedings in different jurisdictions, either within or without Canada, is the anti-suit injunction. I will later deal specifically with interlocutory injunctions, but it is enough to note that they involve an order of a court to a person within their power, to do or to refrain from doing something.¹ In addition to going to the foreign jurisdiction and seeking a stay of the action there, a defendant can, in the local forum, seek an order against the plaintiff there preventing it from going ahead with the foreign proceeding. The local court cannot order the foreign court to do anything, because to do so would be an invasion of the sovereignty of that country. In the case of two proceedings in Canada, the local court would not have constitutional competence to do that. The power of the local court is over the plaintiff who has chosen to bring an action there and subjected itself to any burdens that might follow. Unlike the stay, which is purely of local effect, the anti-suit injunction interferes, in an indirect way, with a foreign court. Because of this, it is less easy to obtain. A person seeking the order must show that there is a serious chance of injustice to the defendant, whatever the most convenient forum. If the most convenient place to hear the action is in Canada, that is a strong but not conclusive argument. If it is in the foreign jurisdiction, a stronger case for the injunction will be needed. If the injunction is granted, the defendant often is required to post a bond against possible damage to the interests of the plaintiff. Additionally the defendant will normally be required to have sought, unsuccessfully, a stay from the foreign court.²

1. They are one of the most useful remedies derived from the chancery side of the court, in equity.
2. See *Amchem*, in which the injunction was refused, and McEvoy, 'International Litigation: Canada, Forum Non Conveniens and the Anti-Suit Injunction', (1995), 17 Adv. Q. 1. An example of a successful applicant is *Hudon v. Geos Language Corp.* (1997), 34 OR (3d) 14.

Chapter 2. International Jurisdiction

§1. RULES APPLICABLE IN THE ABSENCE OF A TREATY

55. Officially, only the central government can enter into treaties. No treaties are self-implementing and all require domestic legislation, as mentioned earlier. In the absence of a treaty, the normal rules of private international law apply.

§2. INTERNATIONAL TREATIES

56. As far as being a plaintiff in Canada is concerned, it is only necessary that the plaintiff have capacity in Canadian law. The rules of court of all jurisdictions deal with the different capacities in which persons, whether individual or corporate, can act, and have provisions for representative actions for those without capacity. An enemy alien, a person in a country at war with Canada, is denied capacity.

As far as being joined as a defendant, some persons are exempt from Canadian civil process. The State Immunity Act¹ protects sovereign states and their agencies² in various ways. There is a general grant of immunity, followed by many exceptions including liability for commercial activity, death or personal injury or loss or damage to property in Canada, maritime proceedings *in rem* against a ship or its cargo, and in actions concerning interests in property that arise from succession, gift or *bona vacantia*.³ Special procedural provisions deal with waiver, discovery, execution.⁴

In the case of diplomats and foreign missions, foreign organizations and consuls, the Foreign Missions and International Organizations Act,⁵ the Diplomatic and Consular Privileges and Immunities Act,⁶ the Privileges and Immunities (North Atlantic Treaty Organization) Act,⁷ and the Privileges and Immunities (International Organizations) Act⁸ apply and, for foreign troops, the Visiting Forces Act.⁹ Matters not covered by legislation are dealt with by customary international law.¹⁰

Actions for damage arising from international carriage by air are covered by specific legislation which gives jurisdictional choices to a plaintiff which include the courts of the place of landing.¹¹

1. RSC 1985, c. S-18.

2. This includes the person of the head of state or of any political subdivision of the foreign state, while acting in a public capacity, any government of the foreign state or of any political subdivision of the foreign state, any department or agency of the state. (Section 2). An agency is any 'legal entity that is an organ of the foreign state but that is separate from the foreign state'. It is not always easy to define an agent. In *Walker v. Bank of New York Inc.* (1994), 111 DLR (4th) 186, it was wide enough to cover a bank and its employees who were acting under directions of US law enforcement agencies.

3. Sections 5–8.

4. See *Schreiber v. Canada (Attorney General)*, (2001) 3 S.C.R. 269.

5. SC 1991–92, c. 41.

6. RSC 1985, c. P-22.

7. RSC 1985, c. P-24.

8. RSC 1985, c. P-23.

9. RSC 1985, c. V-2.

10. J-G Castel, *Canadian Conflict of Laws*, (Butterworths, Toronto and Vancouver, 5th edn., ch. 11).

11. Carriage by Air Act, RSC 1985, c. C-26.

Part III. Actions and Claims

Chapter 1. Actions

§1. DEFINITION

57. Civil litigation concerns ‘causes of action’. The phrase is a difficult one to define but essentially it means that a court will be prepared to give a remedy to any person with legal capacity who can show the existence of a state of facts for which a court or a legislature has recognized a right to a remedy in the situation.¹ The state of facts is sometimes treated as a single transaction, and any rights to relief are said to flow from the transaction. This has some significance for the purposes of *res judicata*.² Substantive law defines when this occurs and certain causes of action become recognized, such as actions for breach of contract, fraud, negligence, trespass to land, etc. The concept of cause of action is such that courts recognize that the plaintiff will have to prove certain facts to be entitled to certain remedies. Not all remedies are available for all causes of action. For example, punitive damages may only be available in certain types of actions.

It is useful to distinguish between the cause of action and the type of proceeding used to pursue it. Most litigation in which there are disputed facts is pursued by action, sometimes called a lawsuit, from the term used in chancery courts. If few or no facts are in dispute a procedure known as an application, a procedure which is a type of originating notice of motion can be used. In both cases the person seeking the relief must have a recognized cause of action.

It is useful also to distinguish between a cause of action and the remedy sought. This is not always easy, since the names of causes are often associated with the remedies, particularly with equitable remedies. Thus, for example, there is a cause of action for a declaration, a remedy in which the court makes a statement about legal rights. There are also actions known as actions for an accounting, or for specific performance but in reality the causes of actions are breach of trust or contract and the remedy is the order for an accounting or for specific performance.

1. With the *Charter*, the person is one whose Charter right has been ‘infringed or denied’, per. s. 24.

2. See D.J. Lange, *The Doctrine of Res Judicata in Canada*, (Butterworths, Toronto and Vancouver, 2000).

58. Causes of action are individual specific, in the sense that the law looks to a particular person to pursue them. A party to a contract, for example, is the proper

party to bring an action for breach of that contract. Using a concept of privity of contract, the courts will not usually allow another with no direct interest in the contract to bring the action. This is another way of defining standing, i.e., having sufficient interest in the cause of action that the court will allow you to seek a remedy using it. Courts used to use concepts of maintenance and champerty to discourage persons without sufficient interest from using their facilities,¹ allowing a person who suffered damage as a result of maintenance to bring an action for those damages.

Several persons with the same causes of action may combine to bring one action as plaintiffs,² or bring separate ones, or using a representative plaintiff, bring a class proceeding.²

1. Maintenance is 'the giving of assistance or encouragement to one of the parties to an action by a person who neither has an interest in the action nor any other motive recognized by law as justifying his interference'. Champerty is a part of maintenance in which the maintainer stipulates for a share of the proceeds. Obviously, contingent fees are a form of champerty and allowed in all provinces except Ontario, although existing there in form in class proceedings. See W. Williston, R. Rolls, *The Law of Civil Procedure*, (Butterworths, Canada, 1970) p. 66.
2. Dealt with as a separate topic *infra*, at p. 110. Actions against class defendants are possible also.

59. There are three main sources of causes of action, common law and equity, legislation, and the *Charter*. Common law causes are the creation of judges, recognized as existing by other judges. In theory the list of causes of action at common law is never closed. Recently issues of a possible cause of action for invasion of privacy or for the tort of 'spoliation' (deliberate destruction of potential evidence), have been litigated.¹

Statutory causes of action are ones created by statutes. These may be ones that were formerly common law ones, such as the action for relief under Sale of Goods legislation, they may be new, such as a minority shareholder action under a corporate statute,² or they may, in Quebec, be under the Civil Code.

Charter actions are dealt with specifically although they are statutory as well. As mentioned earlier, '... anyone whose rights or freedoms as guaranteed by this *Charter* have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.'³

1. Compare *Coriale (Litigation Guardian of) v. Sisters of St. Joseph of Sault Ste. Marie* (1998), 41 OR 3d 347 with *Robb Estate v. St. Joseph's Health Care Centre* (2001), O.J. 4605.
2. See Ontario, Business Corporations Act, RSO 1990, c. B.16, s. 248. Not all breaches of a statute provide a cause of action, in fact few do so. Most often breach of a statute is evidence of breach of a duty of care.
3. Constitution Act, 1982, s. 24(1). Remember that only actions of 'government' are covered.

60. There are situations in which the Attorneys General were thought to be the only persons with standing to go to court. These situations are known as 'relator actions'. Actions to end public nuisances such as air pollution are an example. The uniqueness of these is that a citizen could seek approval from a court to bring them, citing that the Attorney General had given his approval. They would then be styled as 'Citizen ex. rel. the Attorney General of ...'. As standing laws have liberalized, these are less common.¹

1. A few jurisdictions still regulate the bringing of these, specifically. *See* NS., R. 5.08.

61. A person may be entitled to bring an action not as the person with the cause of action, but as a representative of that person, or both. A trustee or an executor may be allowed to bring action against someone on behalf of the beneficiaries. At the same time they may have their own causes of action, for example, for libel in the performance of their duties as trustee or executor.¹ A parent may be allowed to bring an action on his or her own behalf and on behalf of infant children injured in the same motor vehicle accident, by acting in two capacities at once.

1. Capacity of parties is considered, *infra*, at p. 69.

62. Sometimes a cause of action exists through another person. This is called a derivative cause of action. An example is that of holders of security, or directors, officers of a corporation may be given judicial permission to bring an action against a third party in the name of the corporation.¹ Should the damage to the corporate interests be by the directors or majority shareholders, the minority may get approval to bring an action against the corporation itself. They would never get corporate approval to do that.² Another example is that of claims against tortfeasors under family law legislation. In Ontario, for example, if a parent is injured by another, the infant children, acting through a representative plaintiff have a derivative cause of action for their own losses, such as care, comfort, etc. The action is derivative in the sense that they can only pursue it if the parent brings one to which they attach their own claims.³

1. For example, under s. 246 of the Ontario Business Corporations Act, RSO 1990, c. B.16, s. 246.
2. *Ibid.*, s. 248. (Known as the oppression remedy.)
3. Family Law Act, RSO 1990, c. F-3.

63. Another term used is that of a ‘subrogated’ cause of action. A person may have a subrogated claim which may be added to the claim of another. An example is the claim of a government which has provided medical facilities to an injured person. The government has a subrogated claim in the sense that it has its own cause of action but by statute, can require the injured person who used the medical services to include its claim in an action against the person who caused the injuries. They must include the claim for loss to the government as part of their own action. A subrogated claim is, as the example shows, often under insurance legislation which will provide that the insurer has the same rights as the insured against the person who caused the loss, and can apply to be added as a plaintiff if it wishes.

Use of civil courts to enforce administrative or arbitration or criminal penalties is not included here.

64. Causes of action are usually defined in terms of ‘if “x” facts occur, you are entitled to go to court to seek “y” remedies’. This means that the cause of action must have accrued before the action is started. There may also be other preliminaries to be followed before the action can be brought, such as obtaining permission of another,¹ or giving notice, or making a demand or presentment. Often these are matters that must be raised as defences rather than stated by the plaintiff. Once the cause of action

has accrued, evidence may be used which arose later, and damages are usually calculated to the date of the judgment.

There is a concept of a continuing cause of action, which may be a misleading term, but refers to a type of situation in which the same kind of acts or omissions continue to occur and continue to cause damage. A continuing trespass to lands, or pollution of a watercourse are examples. The plaintiff may have a series of separate causes of action but is allowed to bring one action seeking damages as far back as the relevant limitation period allows and up to the date of judgment.²

Causes of action may, in some cases, be assigned to others, and actions brought by the assignees.

At common law, causes of action died with the death of the person harmed. This is now changed by statute and, with few exceptions, causes that have accrued survive death and can be brought by others.³ In the case of actions started by persons who die or lose capacity, rules of court allow continuation by others, usually with court approval.⁴

Causes of action may also disappear with a judgment, because of *res judicata*, or by agreement, in the case of a settlement, or perhaps by the passage of time, because of the effect of limitations statutes or equitable doctrines of ‘*laches*’.⁵

1. Such as under the Vexatious Proceedings rules or legislation of most provinces.

2. *Hole v. Chard Union*, [1894] 1 Ch. 293 (CA).

3. Actions for damage to reputation such as libel or slander may not survive. See Trustee Act, RSO 1990, c. T-23, s. 38(1), which exempts these actions from those that personal representatives of deceased persons may pursue. See also, Survival of Actions Act, RSNS 1989, c. 453; RSPEI 1988, c. S-11; SS 1990–91, c. S-66.1.

4. In the case of a plaintiff who dies, the order sought is called, misleadingly, an order of *revivor*. Ontario, Rule 11.01.

5. Whether limitation periods extinguish the right or the remedy, as substantive or as procedural, is still an open issue. See *infra*, at p. 102.

§2. ADMISSIBILITY (STANDING)

65. The concept considered here is the one which regulates who is entitled to bring an action, also known as standing. The issue arises most often in public interest litigation in which a citizen wishes to challenge a decision or the legislation of government. The action is often one for a declaration, and the right of the person to be a party is challenged by way of a motion by the defendant to strike the originating process such as the statement of claim for failure to disclose a cause of action.¹ In actions of the normal sort between parties where the validity of law is not in issue, the concept of the cause of action itself and the law of damages will determine who can raise the issue, usually.

The general rule is that only the Attorney General, as guardian of the public interest can raise the issue, either on his own behalf, through a relator action² or by way of a reference case. Only citizens who are ‘exceptionally prejudiced’ in that the law applies to them differently from others can bring a private action to have its validity challenged. If the law is that of the government to which the Attorney General belongs, there is little chance that a challenge will be brought. As a result, Canadian courts have developed a law of standing to allow citizens or corporations to seek a declaration

of invalidity. Generally, they must show that there is a serious legal question to be decided, for example that the law is arguably bad, that they are affected directly, although not necessarily more than other citizens to which it applies, that they have a genuine interest in resolving the question and can be relied upon to do a proper job, and that there is no other reasonable and effective way to challenge the law or its application.³ Unless the Attorney General is already a party to the action, notice must be given to it. By regulating the law of standing the courts partly control how much public interest litigation is brought, standing being a matter within judicial discretion. The other controlling factor is as I will discuss later,⁴ the question of costs. It is unclear whether or not the Attorney General can intervene in an action to which it is not a party which does not raise the issue of the constitutional validity of a law.

1. As will be seen, *infra*, this is a challenge to the legal as opposed to the factual validity of the claim.
2. See, e.g., NS., R. 5.08.
3. Some recent cases are: *Minister of Justice of Canada v. Borowski*, [1989] 1 SCR 342 (abortion legislation); *Finlay v. Minister of Finance of Canada*, [1986] 2 SCR 607; *Canadian Council of Churches v. Canada*, [1992] 1 SCR 236. A specific standing requirement is in Quebec, CCP., s. 55. See T. Cromwell, *Locus Standi*, (Carswell, Toronto, 1989).
4. *Infra* at *Legal Costs*.

66. Sometimes a person wishes to intervene in an action that is ongoing between others. Normally, rules of court allow them to apply to the court for permission to do so, either as a party or as an ‘*amicus curiae*’ or friend of the court.¹ If added as parties they become liable to costs but have the full range of procedures available to them. In both cases their addition is a matter of judicial discretion and they must show that to do so will add a new and necessary dimension to the case,² as for example new arguments or perspectives to it. As before, intervention, at the original and at the appellate level is most common in public interest litigation.

1. See Ontario, Rules 13.01.02; Fed. R.109; NS., R.8; Man., R.13, Sask. RR.39A, 75.
2. In *Peixeiro v. Haberman* (1994), 20 OR (3d) 666, the Lawyers Professional Indemnity Co. (LPIC), was refused leave to intervene as ‘*amicus*’ in a private action involving the interpretation of its policy which might affect future claims against lawyers. It appears that the LPIC interest was not altogether altruistic or impartial, although why that neutrality would be required is questionable.

67. With private causes of action, they must have accrued before the action is brought. In public interest cases, this is not so easy to decide. The legislation may not be proclaimed but to wait might mean serious problems to those who will be subject to it but seek to have it struck. There is a constitutional doctrine of ‘ripeness’ in the US in which the timing of constitutional litigation is controlled, it not being allowed until the proper moment. Part of this is the need to have a factual base to the challenge, to see how it works in its application, a constant concern in reference cases. This doctrine is in its infancy in Canada.¹

1. See P. Hogg, *Constitutional Law of Canada*, (Carswell, Toronto, looseleaf edn.), part 56.2.

68. Another way that a court may control standing is through the doctrine of ‘mootness’. Some issues become of less importance as time passes, and a court may decide that the need for a decision is past. This may be partly because the court does

not wish to waste time and also that the quality of argument may be reduced if less is in issue. Statutes get repealed, people die, or situations change. A court may decide to withdraw from the issue and the intervenor or party will be out of luck.¹

1. This often happens as the case rises through the appeals courts, a process that may take several years. In *Tremblay v. Daigle*, [1989] 2 SCR 342, a man sought an injunction against his girlfriend to keep her from having an abortion. He was granted standing but when the issue reached the SCC it was learned that she had undergone one. The court decided not to apply the doctrine of mootness and heard the case but denied the injunction.

69. In addition to requirements of standing to be heard, it is necessary also that a party have legal capacity. Adults¹ are assumed to have this capacity to be parties. Corporations and partnerships are recognized as having capacity to bring or to defend actions, with separate procedural rules for each.² Unincorporated associations may not have full legal capacity but rules normally allow them to be joined as parties. For example, trade unions, sports clubs, social clubs can usually be joined in the name of the association.³ Individuals carrying on business under a trade name can also be parties in the name of the business.⁴ Legislation or rules provide for the situation of absentees, persons who have not been heard from for a period of time,⁵ persons who are as yet unborn or unascertained,⁶ and persons under the disability of mental impairment or infancy.⁷ The status of trustees, representatives of deceased persons, persons to whom interests have been transferred, are usually dealt with by separate provisions. Generally, except for parties with full capacity, such as individual adults or partnerships, all other parties must be represented by others. The titles of these representatives vary, but their obligations are similar from jurisdiction to jurisdiction. The persons who represent others must themselves have capacity, be in no conflict of interest with the persons whom they represent, agree to act, and in the case of representatives of defendants rules provide, often, that they must be approved by the court. They may find themselves liable for costs as well. Where no representatives exist, courts will appoint them. In addition most jurisdictions have statutory representatives for infants or trustees in matters of property, who can act in situations in which there is no representative.⁸ Many places provide for persons to designate in advance, others who can make decisions about health care or property matters if they become disabled in future, with government representatives in default.⁹ These will be the litigation representatives.

In terms of class proceedings in which a representative plaintiff with their own cause of action is used, or a representative defendant is named, which is done less commonly, the representative must be approved in advance.¹⁰

1. The age of majority is established by provincial or territorial legislation. Normally it is eighteen.
2. See Ontario, R. 8; CCP, s. 57; BC, R. 7; NS, R. 7, Sask. R. 10.
3. Ontario, R. 8; CCP, s. 60; Fed. R. 111; Man., R. 8.
4. Examples include Federal Court Rule 111; Ontario, Rule 8.
5. Ontario, Absentees Act, RSO 1990, c. A.3.
6. E.g., Ont., R. 10; Alta., R. 50(1), 51(1); Fed., R. 115; NS, R. 5.10; Man., R. 8.
7. E.g., Ont., R. 7; BC, R. 6; Fed. R. 121; Alta., R. 58–65; NS, R. 6; Man., R. 7.
8. These are Public Trustees, Official Guardians, Childrens' Lawyers, who are full-time government employees or hired on an *ad hoc* basis. Courts fulfill a role of '*parens patriae*' in the case of infants, derived from the courts of chancery. One consequence of this is that all settlements or significant

decisions in cases involving infants need court approval. The terms used in Quebec for representatives include tutors, and creators. CCP, ss. 55–61.

9. The normal title for this type of legislation is the ‘Substitute Decisions Act’, or something similar.
10. *Infra*, Class Proceedings.

70. The next question is, who is required to appear by counsel and who is entitled to act in person? Generally, all persons acting in a representative capacity require counsel to appear for them. Thus, in proceedings involving estates, trusts, infants, persons of unsound mind, those parties must have counsel. Corporations usually appear by counsel, although with the court permission may appear by adults of full capacity in some jurisdictions.¹ In Quebec, generally, all parties whether acting in representative capacity or not must be represented by advocates.² In other superior courts, individuals can appear for themselves, although to do so often causes problems for them and for the courts. In lower civil courts such as Small Claims Courts, counsel are often discouraged or not allowed at all. Discouragement is by way of limits on fees. As the jurisdiction of these courts is increased, more counsel will be appearing.³

1. Ont., R. 15; CCP, ss. 61–62; Alta., R. 5.4; Sask. R. 10.
2. CCP, ss. 61–65. *See generally*, Alta., R. 5.3; Fed. R. 119; NS, R. 9.08.
3. Ontario, for example recently raised its jurisdiction to CAD 10,000, partly to ease the load on the superior court. *See supra*, at p. 44.

71. One concept to be aware of is that of ‘solicitor of record’. Once a solicitor, or lawyer, or advocate by whatever name lends his or her name to a case, they are taken to be on the record, which means that they are responsible to the court for that case. This can be accomplished by putting their name on a document as authorizing it, by appearing in court on behalf of the party, or by accepting service of any document in the case.¹ Once looked to by the court, the solicitor may have difficulty in withdrawing from the file, particularly as the date of trial approaches. Most jurisdictions deal with this situation both by rules of court and by rules of professional conduct. Of course, it is not unknown for a person to represent, falsely, that a solicitor acts for them. Procedures exist for the opposite party to challenge the matter by asking the solicitor if in fact they act.

1. In Quebec, the advocate of record must have a domicile within five kilometres of the court house, to facilitate service of documents. CCP, s. 64. All jurisdictions deal with the concept of ‘solicitor of record’ in the rules. *See, e.g.*, Ont. R. 15; Fed. RR. 123–126; NS, R. 44.

§3. VEXATIOUS LITIGATION

72. All jurisdictions in Canada have statutes or rules of court or both which provide that persons who initiate litigation found to be without merit may be barred from further access to the courts unless they seek and are given judicial permission first.¹ In some jurisdictions as well, parties who misuse the procedures for the bringing of interlocutory motions may be similarly barred.²

The problem of vexatious pleadings or other documents filed within the action, is usually dealt with by separate rules which allow the offended party to seek an order to have them struck out.

The more general problem of parties misusing the process in the course of an action is dealt with by rules allowing costs penalties to be assessed against them.

Delay and default are also dealt with by specific rules and procedures or costs sanctions. In case management, these can be draconian, including having the action struck out.

1. Ontario, Courts of Justice Act, RSO 1990, c. 43, s. 140; Sask. R. 662.
2. E.g., Ontario Rule 37.16.

Chapter 2. Claims and Defences

§1. DEFINITION

I have considered, already, the distinction between main and ancillary claims, and the utility of the distinction.³

§2. DISTINCTIONS

73. The rules concerning how many parties and claims or defences may be included in an action in Canada are remarkably similar from jurisdiction to jurisdiction. The background factors include the following: A distinction is made between compulsory joinder and non-compulsory. In only a few cases will a court require a party to be added to an action.¹ In most cases the existing parties, plaintiffs or defendants, have choices to make about who they wish to add and what claims to raise.

The overriding considerations are convenience of dealing with multiple issues, expense, the wish to resolve as much as possible at once, fairness to the plaintiff, ease of separating evidence relating to one issue from that relating to another issue, and *res judicata*. This latter concept involves the possibility that an issue will be decided in an earlier action which will affect a later one and tends to increase the number of claims and parties to the first proceeding if it is liberally applied.

A plaintiff makes the first choices, to bring action in one or more capacities at once. Any number of claims can be included, provided they have common questions of law or of fact, or arise from the same series of transactions.² The key is whether they can be heard together conveniently. In addition, the plaintiff can join with other plaintiffs to bring one action, provided they are all represented by a single solicitor of record. An example of this might be litigation arising from an airplane crash, with representatives of several passengers joining in one action. Should they decide to bring separate actions the defendants may seek to have them joined (consolidated), or to be heard together or consecutively.³

Plaintiffs may also join defendants even though the liability of one may depend upon decisions about the liability of another. This would happen in the case of a plaintiff who suffered consecutive injuries from different persons such as in multiple motor vehicle mishaps (called ‘beautiful losers’), or in cases of professional liability where some loss must first be established before the professional can be found liable for it to his or her former client.⁴ The usual procedure is that a plaintiff makes choices and defendants seek relief from joinder by bringing interlocutory motions.

1. Considered earlier under ‘necessary parties’. See also Sask. R.36 (mandatory joinder with joint claims).

2. Ont. BC, NS, Man., R. 5; Alta., RR. 32–49; Sask. RR. 37–74; Fed. RR. 101–107; CCP, ss. 66–67. If there is to be a jury, the issues appropriate to a jury can be severed and dealt with in the same trial as non-jury issues. See, generally, A. Meagher, *Parties to an Action*, (Butterworths, Toronto, 1988).

3. Ont., R. 6; CCP, ss. 270–273.

4. The rules cover liability ‘jointly, severally, or in the alternative’.

74. Not only the plaintiff may join other claims or parties in the action. Defendants are allowed to claim back against their plaintiffs plus new parties in counterclaims.¹ These are required to be related in the same way as was mentioned earlier, and are separate proceedings heard at the same trial as the plaintiff's claim, although after it. One group of related claims back, known as set-offs, may be raised as a matter of defence by defendants, rather than by separate actions (counter-claims). This is only allowed for mutual debts.²

Defendants are allowed to cross-claim against each other in what are in fact separate actions brought within the main action. The best example of this is a call by one defendant for contribution by another where liability arises under a Negligence Act. The plaintiff may be able to look to any single defendant for recovery, where the liability is joint, and to leave it up to the defendants to sort out their liability to each other to contribute to the total amount owing.³

Defendants are allowed also to claim over against third parties, who may also seek relief from others as fourth parties, etc. Designed originally for claims of contribution (full protection), indemnity (partial protection), or relief over, this flow-through recovery has been extended, except in Quebec,⁴ to other related claims between the defendant and the third parties.⁵ In many Insurance Acts, the carriers are allowed to join themselves as parties to protect their interest earlier. Defendants, aware that they will be able to collect from their insurers, may not defend as strongly as the insurers would like.

Courts are constantly balancing competing claims by parties to be joined or severed from actions, as well as from existing parties to add or excise claims from the action.⁶ It is not necessary that all parties be involved in the same claims against all others, just that they be sufficiently connected that trial of them together is possible.

1. Ont., Man., R. 27; NS, R. 16; Man., R. 27; BC, R. 5, 21; CCP, ss. 66–67; Fed., R. 189; Sask. R. 105.
2. There is some delightfully complex and arcane law on this subject. *See*, generally, K. Palmer, *The Law of Set-off in Canada*, (Canada Law Book, Toronto, 1993). Ont., CJA, s. 111; Man. QB Act, SM. 1988–89, c. 4.s 65; Fed. R. 186, Sask. R. 104A.
3. *See* Ont., Man., R.28; NB, R. 29; Sask., R. 106; NS, R. 77A; Man., R. 28; Fed., R. 189.
4. CCP, ss. 208–215, provides for a third party to join without the consent of a defendant. R. 216–222 allow a defendant to join a third party only in ‘warranty’.
5. Ont., Man., R. 29; NS, R. 17; Man., R. 29; BC, R. 22; Fed. R. 193; Nfld., R. 12; Alta., RR. 66–79; PEI, R. 29; BC, R. 22.
6. Adding claims or parties after the passage of limitation periods is another matter. *See infra* at p. 102.

Chapter 3. Sanctions for Procedural Irregularities

§1. FORMAL REQUIREMENTS

75. It is necessary to make a distinction between a nullity and an irregularity. If a step in a proceeding is a nullity, it has no legal effect. It is as if it was done without jurisdiction. If it is an irregularity, on the other hand, it can be cured and the action proceeds.¹ This distinction was at one time of considerable importance but is becoming of less importance in Canadian litigation. At one time, procedural errors were seen as serious, and consequences were harsh. Starting a proceeding against a deceased person, for example, might be a nullity. Now, the rules provide that very few mistakes in procedure have results fatal to the action, although they are taken seriously. Only a few mistakes are now characterized as nullities. An example would be starting a proceeding without having a cause of action, or raising a defence that is not recognized by law.² This attitude of tolerance for small mistakes can be seen in the Ontario Rules, and in those of the other common law jurisdictions. In Ontario, for example, R. 1.04 requires that the rules be ‘liberally construed’, and that matters be dealt with in a way that ensures a ‘just, most expeditious and least expensive determination’. By R. 2.01, non-compliance with the Rules is to be treated as an irregularity and the courts are to try to achieve a just determination of the ‘real matters in dispute’. Additionally, if a party feels that there is an irregularity in the procedure of the other parties, it must seek relief before going on, otherwise it will waive the irregularity (the fresh-step rule).³ When dealing with formal orders, rules allow their amendment to deal with accidental slips or omissions,⁴ further evidence of tolerance for mistakes.

1. Judges have the authority to regularize matters after the fact by issuing an order ‘*nunc pro tunc*’.
2. Most jurisdictions allow a party to appear to contest jurisdiction, for example, under long-arm provisions, without attorning to jurisdiction of the local court. This is sometimes called a conditional appearance. See, e.g., Fed. R. 208, and *infra*, ‘service outside the jurisdiction’.
3. Rule 2.02.
4. Ont., R. 59.06; NS, RR. 15.07. (the slip rule), Sask. RR. 467–473.

76. Mistakes as to time limits for starting the action will be dealt with next, but errors in meeting time limits for taking proceedings once the action is started are rarely fatal. Even in case managed actions, parties with valid arguments will be given permission to proceed, although it may cost them money. Total default of defence, of course, will lead to a default judgment which may be harder to overturn, just as want of prosecution may lead to the action being struck out.¹

Failure to include claims or defences in the action may mean that they cannot be raised later, such as in an appeal or in another proceeding (because of *res judicata*, in the latter case), just as failure to adduce evidence at trial may preclude the raising of it later on appeal as fresh evidence.

Generally, mistakes about procedure are rectified on terms, which means, usually, that the other side is indemnified by costs for its inconvenience. As will be seen later, the costs systems in common law and civil jurisdictions in Canada are based upon concepts of fault. If you lose an action or part of one, you are assumed to be at fault

and must indemnify the other side at least in part. Additionally, the making of irresponsible, unnecessary or unproved allegations, wasting court time, or misuse of the rules usually attracts a cost sanction.

In summary, sanctions for procedural irregularities are normally financial.

1. Both of these topics are dealt with separately, *infra* at p. 105.

§2. TIME LIMITS

77. There are two different types of time limits to consider; those limiting the starting of a proceeding, true limitation periods, and those concerning the taking of procedural steps once the action has started.

Once a proceeding has started, usually taken to be when the originating process is issued in the court office, time limits on starting the proceeding end. Rules of court provide many time limits for the taking of procedural steps in the action, such as the time for responding to a served statement of claim, for responding to a notice of motion, etc. Where the course of the action is regulated by rules about case management, these may be relatively short, and the consequences of missing them may be harsh, in theory. Generally, the bringing of an interlocutory motion suspends the time limits for the next step in the action. If a time limit is missed, assuming the other side has not moved to a default option, you are entitled still to take the step, although you may need to seek court approval to do so. As with other procedural irregularities, most mistakes can be resolved by costs to the other side. One type of procedural irregularity which causes problems is this:¹ Suppose the action is started in time but the originating process is not served for several months? Is this a limitation problem or a procedural time limit problem? It is seen as the latter and service may still be made, or the time for service extended on motion ‘*ex parte*’, also called ‘without notice’. A similar problem arises if an existing party in a properly instituted proceeding seeks to add new parties or claims after the passage of the limitation period regarding them. On the whole, courts allow this, although practice is by no means uniform.

1. Often the plaintiff is given up to six months to serve this document.

78. The most significant periods of concern to lawyers and their insurance companies are limitation periods on the starting of an action.¹ All jurisdictions have general statutes setting out limitation periods relevant to actions of various kinds,² and many specific statutes relevant to special areas of law such as motor vehicle accidents, professional negligence, etc. It is often a difficult question as to which periods apply to a proceeding. This is complicated by the provisions in the general statutes which either suspend the running of time where a person is incapacitated, such as by infancy or mental impairment, or allow a person to seek relief where it is ‘just’ to grant it. Additionally courts have developed a ‘discoverability’ principle³ which is a common law doctrine that allows a party to delay the running of time against them where the full cause of action (the facts upon which it is based), could not have been discovered earlier through reasonable diligence. In professional

negligence cases such as builders' or architects' negligence, the utility of this principle is obvious although it causes problems for insurers.

1. See G. Mew, *The Law of Limitations* (Lexis Nexis Butterworths Toronto, 2004), J. Williams, *Limitation of Actions* (Butterworths, Toronto, 2nd edn., 1980), *UBC Law Review, Table of Statutory Limitations* (BC only), and *Table of Federal Statutory Limitations* (University of British Columbia, loose-leaf Service), *Alberta Limitations Manual*, (Butterworths, Toronto, looseleaf service), D.A. Proudfoot, *Nova Scotia Annotated Limitation Periods* (Craigieburn Publishing House Ltd., Halifax, looseleaf service).
2. Limitations Act, SO 2002, c. 24. Sched. B; RSA 2000, c. L-12; SS 2004, c. L-16.1; Limitation Act, RSBC 1996, c. 266; Limitation of Actions Act, RSM 1987, c. L. 150; RSNB 1973, c. L-8; Statute of Limitations, RSPEI 1988, c. S-7.
3. *Central Trust v. Rafuse* (1986), 31 DLR (4th) 481 (SCC), and *Peixeiro v. Haberman*, [1997] 3 SCR 549.

79. In addition to statutory limitation periods, there exist many statutes in which notice provisions require potential plaintiffs to notify potential defendants of possible claims. These show up primarily in situations of governmental liability, particularly municipal, and are quite short. Failure to give required notice, or failure to start the action in time normally results in the action being statute barred. Many courts are unhappy with this result and seek ways to avoid it. A common way exists if the defendant has admitted liability before the time ran out.

80. There is some dispute about the characterization of limitation periods. In conflict of laws they used to be considered as procedural rather than substantive, which meant that they could be waived, would be applied as part of the domestic law of the court in which an action was brought, and barred only the remedy. In Canada, the case of *Tolofson*¹ which involved the recognition of judgments of another province in Canada, cast some doubt on the characterization.

1. [1994] 3 SCR 1022.

81. In equity law there exists a doctrine of '*laches*', which bars a plaintiff from success in an equitable (as opposed to a legal) claim if the plaintiff has either acquiesced in the conduct of the defendant or caused the defendant to alter its position in reasonable reliance on the acceptance of the status quo by the plaintiff, or permitted a situation in which it would be unjust to allow the plaintiff to proceed.¹

1. R.P. Meagher, WMC Gummow, *Equity Doctrines and Remedies*, (Butterworths, Sydney, 1984) p. 755.

Part III, Ch. 3, Sanctions for Procedural Irregularities

Part IV. Proceedings

Chapter 1. Pre-Trial Proceedings

82. I have considered already the requirements of giving notice under limitations statutes, and the requirement that the cause of action exists when the action is started. There are times when it is useful to freeze assets that are the subject matter of the action or even those that might be available to a judgement creditor, by obtaining an order before the action is started. Most of the procedures of this sort, including pre-judgment garnishment, certificates of pending litigation, etc., are available once the action has started. In rare cases, however, rules of court allow potential plaintiffs to obtain an order ‘without notice’ before issuing the originating process. Normally it is necessary to bring a motion ‘in an intended proceeding’ and to undertake to issue originating process within a set time. In addition, full disclosure of facts is required and an undertaking to compensate the defendant if the order turns out to be unnecessary is included.¹ Commonly, the duration of an injunction obtained without notice is limited to ten days or two weeks depending upon the jurisdiction.

An example of the type of order sought is the injunction known as a ‘*Mareva*’² injunction. Where a potential plaintiff can show that there is a real risk that the potential defendant is about to remove assets from the jurisdiction and that to do so will make recovery on the judgement there difficult, it can, upon showing a strong ‘*prima facie*’ case on the merits, get an order prohibiting the removal, coupled with a seizure order.³ Unlike the case in some European jurisdictions, such seizure of assets is only available in a proceeding or intended proceeding.⁴

1. Injunctions will be dealt with *infra*, under ‘Provisional Remedies’. When a party is ordered to post security of some sort, for example in cases of injunctions or of security for costs, each jurisdiction has a list of pre-approved bonding companies that are used.
2. Using the name of the English case in which it first gained recognition. *Mareva Compania Naviera, SA v. International Bulk Carriers, SA*, [1980] 1 All ER 213.
3. See, e.g., Ont. CJA s. 101, R. 40; BC, R. 45, 46; Fed. R. 372–379 (in a case of urgency); Man. The Court of Queen's Bench Act, SM 1988–89 s. 55, R. 40; NS, R. 43; CCP, ss. 733–761 (must issue writ first); Alta., R. 392; Nfld., R. 22; Sask. Part XXXII. Limited pre-judgment garnishment of debts owing to the defendant is allowed. See Man., R. 46; Nfld., R. 28 (called attachment orders).
4. L. Newman, M. Burrows, *The Practice of International Litigation*, (Transnational Juris Publications Inc., Irving-on-Hudson, NY, 1992), p. 145.

83. A similar remedy is available to seize assets which might be used as evidence, including those concerning which the action is to be brought. Sometimes called a

civil search warrant, an order may be obtained to go to a place and seize property for ‘custody or preservation’ if it is ‘in question in a proceeding or relevant to an issue in a proceeding’.¹

It should be noted that these orders are useful in cases such as those of patent or copyright infringement or breaches of restrictive covenants of non-competition but are not common in most litigation in Canada. Normally there is time to seek interim remedies once the originating process has been issued. Assets that have been seized are, unless they are perishable, normally kept in the custody of the court to await the judgment.

1. This order is called an Anton Piller order after the English case of *Anton Piller KG v. Manufacturing Processes Ltd.*, [1976] Ch. 55. The wording above is that of Ont. R. 45. See R.J. Sharpe, *Injunctions and Specific Performance*, (Emond Montgomery Publications, Toronto, looseleaf service); S. Gee, *Mareva Injunctions and Anton Piller Relief*, (Longman, London, 1990), and J. Rochon, J. Terry, and E. Gray, *Interlocutory Proceedings: Strategy and Practice*, (Butterworths, Toronto and Vancouver, 1995).

Chapter 2. Proceedings

§1. ADVERSARY PROCEEDINGS

I. Ordinary Proceedings

A. Initiating Proceedings

84. I deal here with the procedure for starting a normal action. The two basic methods for initiating litigation which I call a proceeding, are the action and the application. The procedure in applications, in which few or no facts are in issue is separate and is considered *infra*.¹ In some cases such as divorce actions or applications under specific statutes the initiating document is a petition. The procedure for resolving actions varies. Some, which are case managed, move fairly quickly through the system. Others of lower value are often separated out for a simplified procedure called in this volume, speedy trial, which minimizes discovery and simplifies trial procedure. Lower ones still proceed in the small claims courts, or in Quebec, the Court of Quebec. Cases in which there are no genuine issues of fact may be resolved by a summary judgment procedure. Cases in which there are only legal issues may be determined by a procedure to resolve that legal issue that avoids a trial. Through various settlement procedures and encouragements, only a small proportion of cases reach trial.²

1. Part IV, Ch. 2.

2. Estimates vary but generally it is felt that about 90 to 95 per cent of cases settle before trial.

85. In actions, the generally accepted procedure to initiate the proceeding used to be to issue a writ of summons in the name of the Queen (or King).¹ In most places this has been supplanted by an originating document called in Ontario, Prince Edward Island, Manitoba, and federally, in Alberta, a statement of claim. In British Columbia the writ is still used, in Nova Scotia a document called an originating notice is issued, to be served with a statement of claim. In Quebec, where separatist sentiments exist, a writ still issues in the name of the sovereign on which is endorsed the ‘object of the demand’!²

This originating document is taken to the court office and is ‘issued’ by paying the appropriate fee, getting a file number, and a court seal.³ The original is taken by the plaintiff and a copy left for the file. Formal requirements for documents are set out in the rules, and the requirement of a ‘style of cause’, or in some places a ‘title of the action’ (the names of the parties and the capacity in which they bring or defend the action).

In some cases a ‘concurrent’ originating document may be issued. The originating document is then served, normally within six months.

Should there be some urgency, some jurisdictions such as Ontario, Manitoba and Prince Edward Island allow the plaintiff to issue a ‘Notice of Action’ to initiate proceedings and to serve it later with the claim.

The name of the issuing official varies from place to place; it is usually the clerk in charge of the court office.⁴

In cases such as counterclaims adding new parties or third party claims, or cross-claims adding new parties, some rules require that they be ‘issued’ as well.

1. Based upon the English practice.
2. Ont. R. 14; Man., R. 14; Fed. R. 62–63; Alta., R. 6; PEI R. 14.07; BC, R. 8; NS, R. 9; Que. CCP ss. 110–148; Nfld., R. 5; NB, R. 16. In case-managed jurisdictions, a different document may be used, such as in parts of Ontario, where a ‘Notice of Commencement of Proceedings’ is used.
3. In some places, this may be done electronically, by telephone, or by fax. *See, e.g.,* Sask. R. 15.
4. *E.g.,* clerk, registrar, administrator, prothonotary, clerk of the court. In some places, for example in Toronto, Ontario, electronic filing of documents is done on a trial basis with the law firm and the court having specially-developed software.

86. For service within the jurisdiction, all originating documents are required to be served in a way that makes it virtually certain that the defendants receive notice of the proceeding. Later documents are served in less formal ways. Most rules provide for alternatives to actual personal service of originating documents, such as acceptance by a solicitor, or registered mail. The main requirement is that there be some assurance that the document was received, in order to found the jurisdiction of the court over the defendant. Ways to ensure this are many and varied, and differ from jurisdiction to jurisdiction.¹ It is also necessary for the plaintiff to prove service, which is often done by affidavit. In most places, service is effected by the parties themselves, normally using hired process servers. In Quebec, the normal method is to use a bailiff or sheriff.² A copy is served on the defendant and the original retained by the plaintiff.

Should the party be unable to serve as required, in the case of both originating documents and others, rules provide for an application to allow substituted service. The party may be able to convince a motions judge, or other official hearing the request,³ to allow another method such as advertising in a newspaper, or by billboard. If there is no way to be sure that the defendant actually receives the document, rules allow the party to proceed with the action and leave it to the unserved party to later show some prejudice and re-open the proceedings.

Once the originating documents have been served,⁴ other documents are served in a much less formal way. With the increase in the use of fax machines, and e-mail, the number of options is quite large and varies from place to place. Once a solicitor of record is involved, normal service is on that person.

Service in ‘*rem*’ actions in the Federal Court of Canada may be made upon the *res* itself, although it is possible to bring such a proceeding *in personam* and to serve in the normal way.⁵

1. Ont., R. 16; NS, R. 10A; Man., R. 16; BC, R. 11, 12; Fed., R. 127–136, 138–148; Alta., R. 13–29; PEI, R. 16; Nfld., R. 6; NB, R. 18; Sask. R. 18–30. Particular rules provide for service upon parties that are corporations, the Crown, disabled (infants or mentally impaired), partnerships, etc.
2. CCP, s. 120.
3. *See infra*, at Part V, Interlocutory Motions.
4. If not served within the time provided in the rules, the plaintiff may, even after the time, apply to have time to serve extended. (*Ex parte*, of course).
5. Federal Court Act, RSC 1985, c. F-7, s. 43.

87. Service outside the jurisdiction is more complicated, since it involves the invasion of the jurisdiction of another government, and some are more touchy than others about that. Within Canada, that is not such a problem. Generally, service within Canada of originating documents may be made in the same way as within the jurisdiction, or by a method allowed in the other province or territory provided that method is reasonably certain to be effective.¹ With jurisdictions outside Canada, the provisions of the Hague Convention² or of international agreements entered into by Canada apply. Under the Convention, service depends upon whether the contracting state is an objecting or non-objecting state, in the sense that it agrees to allow personal service within its boundaries or not. If non-objecting, such as in USA or the UK, service need not be through the Central Authority but may be by other methods, including by mail,³ or through ‘judicial officers, officials, or other competent persons of the state of destination’.⁴

In the case of jurisdictions which object to private service, service is through the Central Authority.⁵

Canada has as well, entered into a number of bilateral treaties with a number of countries, not including the USA or the UK, which provide very specific methods for service through diplomatic or consular officials. Some of these countries are also signatories to the Hague Convention.⁶

In some Canadian jurisdictions, long-arm jurisdiction can be exercised only upon application to the court for leave. In others, if within certain classes of case, no leave is required.⁷

1. E.g., Ont., R. 17.05(2); Que., CCP, s. 137; NB, R. 19; Nfld., R. 6; Sask. R. 31. The government of Switzerland seems particularly sensitive.
2. Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965. (Ratified by Canada 26 September 1988, and implemented by domestic legislation.) It applies to service upon private parties only. *See* Sask. R.686–687.
3. In Canada, service by mail without more, is not adequate for originating documents, however.
4. Article 10.
5. *See*, generally, J.W. Horn, ‘Service of Process Abroad – The Hague Convention and Other Matters,’ (1991), 49 *The Advocate* 177.
6. J. Castel, *Canadian Conflict of Laws*, (Butterworths, Toronto, 5th edn. 2002) p. 11–42 (Ch. 11).
7. *See* the provisions generally, Ont., Man., PEI, R. 17; NS, R. 10.07; s. 137; Man., R. 17; BC, R. 13; Fed., R. 137; Alta., R. 30–31.1; Nfld., R. 6.07–09; NB, R. 19; Sask. R. 28–29.

B. *Progress of Proceedings*

1. Pleadings

88. The major purpose of pre-trial procedure is to identify for the parties, what issues of fact or of law exist between them. Any two parties who are opposed in interest on the record are required to exchange written documents known as pleadings, until the factual issues between them are identified.¹ Under the former writ of summons procedure, a case would be treated in the normal way or, if a debt or liquidated demand was involved, a ‘specially endorsed writ’ could be used by the plaintiff. A system for moving to an early judgment existed in such a case. In most

places, this has been replaced by a default judgment procedure and normal pleadings are required.

The usual pleadings are statement of claim, statement of defence, and reply, if necessary.² Pleading can go on until the two have joined issue on all facts alleged. The statement of claim prepared by the plaintiff is required to identify, in a fairly strict formal way, all allegations of fact against each defendant, but not the evidence, and to make specific claims for relief, as well as for interest,³ costs, etc. The rules of common law pleading are quite complicated, and are set out in the rules of court of each jurisdiction. What is necessary is that the claim be concise but clear and unambiguous enough so that the opposite party can read it and know what is the factual basis of the claim and what relief the plaintiff is seeking against it, and be able to decide whether the action is within the jurisdiction of the court and how to respond to it. It must be internally consistent and not make inconsistent allegations (called ‘repugnancy’). At the same time, however, it may make allegations in the alternative, so long as it is doing so clearly. The rules allow the pleading of a legal conclusion, such as the naming of the cause of action or an allegation of breach of a statute, but do not demand it. The facts to support it must be pleaded. In reality, many plaintiffs refer to the cause of action specifically. Most jurisdictions have practice books with ample precedents and law firms engaged in litigation keep extensive precedents on their computers.⁴

1. For example, a plaintiff and a defendant, a defendant who is plaintiff by counterclaim and the original plaintiff who is a defendant to the counterclaim, a defendant who delivers a third party notice and the third party who is the defendant to it.
2. The formal requirements of the pleadings are found in Ont., R. 25; Que., CCP, s. 76–93; Man., R. 25; NS, R. 14; BC, R. 19–23; Sask. R. 138–163; Fed., R. 171–188; Alta., R. 104–128, for example. The English texts are the best source of pleading direction. See *Odgers on Pleading and Practice* (Stevens & Sons, London, 19th edn., 1966), Bullen and Leake and Jacobs, *Precedents of Pleadings* (Sweet and Maxwell, London, 13th edn., 1990).
3. There is a distinction between pre-judgment interest and post-judgment interest. The former used to have to be claimed specifically, although in most jurisdictions this is no longer required. See, e.g., Ont. CJA, RSO 1990, c. C. 43, ss. 127–129; Interest on Judgments Act, RSNS 1989, c. 233, Pre-Judgment Interest Act, RSS 1984–85–86, c. P-22.2. In all cases in which some monetary relief is sought interest is a significant factor, in part because it takes a considerable time to get to court. See *infra* at ‘case management’.
4. In Quebec, the original demand includes the ‘object of the demand and the causes thereof’, and is required to be served with ‘proofs’, which include written exhibits. CCP, ss. 117 and 147.

89. Service of the claim will have been done with the originating document, if a part of it or if required to be served with it, or it will be served separately.¹

The defendant then has several options.² By way of example, some of these are:

- 1 Some jurisdictions require a defendant to enter a formal appearance, either conditional or otherwise,³ after being served with the originating document. In others, the filing of a statement of defence or the bringing of motion which does not challenge the jurisdiction of the court is enough.
- 2 A defendant may choose to do nothing, and let the plaintiff proceed to default judgment.
- 3 A defendant may move to set aside service alleging that the claim is not within the court jurisdiction, particularly if served outside the jurisdiction. This will not

amount to attornment. The motion may be coupled with an argument of ‘*forum non conveniens*’.

- 4 A motion for interlocutory relief may be brought, such as for security for costs, or to change the venue, to challenge the claim for procedural as opposed to substantive validity,⁴ or for a provisional remedy such as an interim injunction.
- 5 Even if already done, an offer to settle may be served.
- 6 A challenge to the legal validity of the claim may be brought, to show that the plaintiff has no capacity, or no valid cause of action, or on another jurisdictional ground.
- 7 A defendant may bring a motion for particulars, alleging that the claim is so imprecise that it is impossible to answer it.
- 8 A motion for a summary judgment may be brought, alleging that there is no genuine issue of fact between them.
- 9 The defendant may deliver a statement of defence, preceded in some jurisdictions in cases of urgency by a notice of intent to defend.⁵

1. The rules often require this within sixty days of original service.
2. Even before any service a defendant may make an ‘*appearance gratis*’ to get things moving. In Quebec, the options other than pleading are called ‘preliminary exceptions’ and dealt with in part in ss. 159–171. These include declinatory exceptions or exceptions to dismiss actions (jurisdictional), and dilatory exceptions such as seeking particulars before answering.
3. Even before service, a defendant who is aware of the originating process can file an ‘*appearance gratis*’ and move matters along. Since the time for service is often six months, and it may be possible for the plaintiff to have it extended, the defendant may want to do this. See *Vigeon v. Northcote* (1892), 12 CLT 101 (Ont.).
4. For example, that it is ‘frivolous or vexatious’, which really means irrelevant.
5. Ontario, R. 18.02; Manitoba, PEI, R. 18; or Sask. R. 100.

90. The formal requirements of the statement of defence are also set out from jurisdiction to jurisdiction.¹ They are fairly similar. What the defendant must do is address all of the factual allegations specifically by either admitting them, denying them, or stating that he or she has no knowledge of them. Usually, rules provide that unadmitted allegations are taken to be admitted, although this does not always apply to damages. A denial is called a ‘traverse’. If the defendant is planning to allege that a different state of facts existed, it is required to state what it says the facts really are. If it admits some and adds an explanation, it is called a ‘confession and avoidance’. There are a number of specific defences that must be specifically pleaded.

1. *Supra*, no. 16.

91. If new factual allegations are made by the defendant, the plaintiff will respond to them in a reply. If no reply is required, the issues of fact are joined, and the pleadings will close automatically, or the jurisdiction will provide for a more formal closure by way of ‘noting them closed’, or both options will exist.

All documents that the one side prepares for the attention of the other side must be served, as set out above. In addition, any that the rules require to be ‘delivered’ must be then filed in the court office with proof of service.

92. The significance of the end of the pleadings is that all future steps in the proceeding are directed by them. Discovery is limited to matters relevant to what has been alleged. Evidence offered on motions or at trial is similarly limited. Should a party seek to go beyond the pleadings, by introducing evidence not relevant to an issue joined there, a 'variance' will exist, and the pleading will have to be amended or the evidence will be rejected. Closure of the pleadings also means that no more changes may be made to them without getting leave from the court. As with almost all pre-trial procedure, if the parties consent, they can make whatever changes they wish.

93. Amendments are fairly common as the parties learn more about the case, and the trial approaches.¹ Indeed, it is fairly common for them to occur at trial. An example is if a party wishes to advance a new legal argument and needs new facts to support it. The opposite party will object, but if no real prejudice except the possible loss of the action will result, the amendment will probably be allowed. The side that sought the change may be hit with a costs order. Another example is if a jury returns an award higher than that sought by the plaintiff in its prayer for relief in the statement of claim. This is less common now that juries are given a bit of guidance as to possible awards. The plaintiff is embarrassed and seeks to increase its demand in the claim. The defendant argues that it defended on the basis of a certain risk and the change should not be made.

1. Ont., R. 26; Man., R. 26; NS, R. 15; BC, R. 24; Fed., R. 200-201; Alta., R. 130-141; Que., CCP, ss. 199-207; Nfld., R. 15; PEI, R. 26; Sask. R. 165-172.

94. It can be seen that the requirements of the pleadings are fairly technical and a reasonable amount of information about the case must be divulged to the opposite party. What the parties wish at this stage is to disclose as little as possible while obtaining as much as possible from the other side. Because they are not sworn documents but merely unsworn allegations,¹ their ability to identify completely the boundaries of the case are limited. Bear in mind as well that the parties may not have as yet a complete idea of what the case involves. Their knowledge of it increases through the discovery process. It is a delicate balance between pleadings and discovery, as to how much the rules will require. If pleading rules are too demanding, and later changes difficult to make, pleadings will be so extensive that they will convey little real information. The alternative is to require only a brief statement of the case in the pleading, called 'notice pleading' as is done in the US. There the discovery process is much more extensive because the limits of the case are still so broad. Canada has opted for fairly detailed pleading, modelled on the English system in which less discovery is available.

1. The parties do not sign them, and the name of the lawyer who prepared them appears without any signature attesting to their truth or accuracy.

2. Discovery

95. The second major procedural step in a proceeding is discovery. Although the civil process in Canadian law is sometimes seen as adversarial in nature, in the discovery stage the parties are required to divulge a considerable amount of information to each other. For convenience, I separate discovery in common law jurisdictions from that in Quebec.

In common law jurisdictions, the main types of discovery are discovery of documents, oral examination under oath of parties or others, medical examinations, and inspection of property. Some features general to all discovery will be considered first. Privileges, particularly that of solicitor-client, protect communications between clients and their solicitors or those acting for them. With exceptions, the solicitors acting in litigation may refuse to produce or give evidence about communications received by them from clients.¹ There is also a privilege sometimes called litigation privilege, or work product privilege, which protects communications to the solicitor or his or her agents from others both in the solicitor's office and elsewhere, during the preparation of the case. Generally, these doctrines are not well understood and their scope is overstated. The privileges are those of the client, who may waive them. The information in the communication is not protected, only the communication itself. There is a distinction between disclosure of the communication and its production. The former is almost always required. No court will let a privilege stand in the way of a fair hearing and, if necessary, will find a way to obtain the information it needs, even if it means weakening the privileges. Generally, courts are not as generous about recognizing these as they used to be. Should a party claim privilege over the compulsory production of a document for example, the normal procedure is that it may not use it at trial without permission of the court. It may even be required to produce it to the other side prior to its use.

1. R. Manes, M. Silver, *Solicitor-Client Privilege in Canadian Law*, (Butterworths, Toronto and Vancouver, 1993). Other privileges are claimed as well, including Crown, inter-spousal, priest-penitent etc. See also G. Cudmore, *Choate on Discovery*, (Carswell, Toronto, looseleaf volume).

96. A second doctrine is that of continuing discovery. The obligation to disclose continues up to trial, and information that was inaccurate when given must be corrected, new information or documents produced to the other side when obtained.

97. A third doctrine that is developing is that of the implied undertaking. Documents or information are required to be given to the opposite party in discovery. Some of the information is only available to the opposite party because of discovery. Suppose, for example, a report prepared by a person who later becomes a party is critical of another. In document discovery, the party who is the subject of the report sees it and decides he or she has been defamed. Can they use it as the basis of a separate libel action against the maker of it? To allow that would make it less likely that parties would fully disclose the existence of such materials on discovery. This situation arose in Ontario and a common law principle was adopted that prevented the use as evidence

of such a document or information derived from it in other proceedings unless the party obtained leave from the court. Use for impeachment of a witness in other proceedings is allowed.¹ Later the principle was converted to a rule of court.² The concept has been accepted in other jurisdictions as well.

1. *Goodman v. Rossi* (1995), 24 OR 3d 359 (CA for Ont.).

2. Ont., R. 30.1. In NS, see *Horn Abbot Ltd. v. Reeves* (2000), 47 CPC (4th) 44 NSCA, and PEI, R. 30.1.

98. The final general matter is that in some cases a party may be given permission to divide discovery and not produce all at once. An example of this would be if a plaintiff seeks an accounting, making allegations of fraud or misrepresentation. The defendant may be able to resist opening its books until a ruling is made that it has been guilty of such conduct and that the accounting is justified.¹

1. Fed. R. 247; Ont., R. 30.04(8); Ont., Man., R. 30; Man., R. 30; Fed., RR. 222–233; BC, R. 26; Alta., RR. 186–199; NS, R. 20; Nfld., R. 32; PEI, R. 30; NB, R. 31; Sask. RR. 211–221.

99. The first discovery process usually followed is document discovery. Using the pleadings as determining relevance, each party is required to produce an affidavit to the other side disclosing all relevant documents it has or has had, to the opposite side. It may claim privilege for some, and prevent production. A court will examine documents if asked, to see if the privilege is properly claimed. Each side is entitled to examine the documents and make copies.¹ Parties are often slow to understand or accept the wide requirements of disclosure in the rules, and further affidavits are often required, and some jurisdictions require counsel of record to add a jurat that they have explained such matters to their clients.

If there are insurance policies in place that may cover the claims, the parties are required to disclose and produce these absolutely.

1. ‘Document’ is usually defined widely to cover videos, plans, electronically stored information.

100. The second major part of discovery is examination under oath.¹ Parties opposed in interest in the pleadings are allowed to question each other under oath before examiners concerning a broad range of relevant topics, including facts, names of possible witnesses, reports of experts that they plan to use at trial, etc.² The parties examined are entitled to be represented by counsel and often answers are given by counsel or they undertake to obtain information.³ Parties are required to inform themselves before the discovery.⁴ If the parties refuse to answer questions, the refusals are noted, with reasons, and later a motion will be brought by the other side to compel answers. These motions, called ‘refusal motions’ are the bane of existence for judges who dislike them intensely.⁵ There is often conduct of parties or their counsel which makes the continuation of the examination difficult, since this is the first formal opportunity of the opposites to see each other. Various sanctions exist in most rules to discourage or to remedy this.

Once the examination is over, each party is entitled to have a transcript made if wished. These do not become part of the court file unless to be used on a motion or at trial.⁶

The examination of parties who are outside the jurisdiction can be done in two ways. They may be summoned into the jurisdiction by the issue of an interprovincial summons. They are then examined within the jurisdiction. If the examination is to be outside the jurisdiction, the procedure used depends upon where they are. If elsewhere in Canada, a commission and letter of request (letters *rogatory*) will be obtained on motion. The examination will then be held according to the rules of procedure of the jurisdiction in which it is being held. If outside Canada, similar procedures in the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters⁷ can be used. If the jurisdiction in which the discovery is to be held is not a contracting state, or if the rules of discovery are there more attractive than in the Convention, they will be used.

1. Ont., PEI RR. 31, 34; Fed. RR. 234–246; BC, R. 27; Man., R. 31; Alta., RR. 200–216; NS, R. 18; Nfld., R. 30; PEI, R. 31, 34; NB, R. 33; Sask., RR. 222–228. This may be done before a video camera in some places, and even by way of video-conference. See Ont., R. 34.19.
2. The scope of allowable questioning is wide and parties are normally required to answer to their best ‘knowledge, information and belief.’ Answers given on discovery do not become admissible at trial, for that reason alone, and must pass the requirements of the rules of evidence at trial. Parties are required to have available any documents disclosed in document discovery.
3. Answers of counsel are those of the client unless contradicted in some places, or must be adopted by the client on the record in others. Except in matrimonial cases, the opposite parties are often present. An undertaking is a promise of the solicitor, enforced through professional discipline. Before being examined parties are required to inform themselves.
4. Discovery of corporations or of representative parties is where this is most relevant.
5. The persons before whom the examination is held are not usually qualified to make rulings on the legal requirements of whether questions need to be answered. In some jurisdictions, they are court clerks or others, working outside regular hours. In others they are professionals working in special private hearing rooms. The procedure for the conduct of such examinations is often found in rules providing for the taking of oral evidence generally, as for example, taking evidence from a potential witness before trial, or cross-examining on an affidavit. See, e.g., Ont., Man., R. 34.
6. One party can read in as its own evidence, the transcript of the oral examination of the other party, who is entitled to have read in qualifying parts. Requirements of fairness dictate the use to which a defendant can use a plaintiff’s examination without addressing it during the plaintiff’s case. In exceptional cases, a party may introduce its own transcript as part of its case. In all cases it may be used to impeach the oral testimony of a party at trial by showing that the party made an earlier inconsistent statement.
7. 1970.

101. In English practice, oral examination of parties is rare. The procedure used is to require the opposite party to answer written questions called interrogatories. This procedure exists in common law jurisdictions in Canada, usually as an alternative to the oral examination.¹ Although it allows a party to obtain admissions from the other side and to learn more about the case, it does not have the advantage of preserving testimony or allowing the party examining to get a reading on the ability of the party to stand up under cross-examination should they testify at trial.² A sworn affidavit is available to be used later.

1. Ont., R. 35; BC, R. 29; Man., R. 35; NS, R. 19; Nfld., R. 31; NB, R. 34; PEI, R. 35.
2. Some leading counsel do not conduct the examination, to avoid the opposite party becoming familiar with their style.

102. Rules of court provide for the inspection of any real or personal property that is the subject of the litigation. In addition, unless the integrity of the property is at risk, the taking of samples or the doing of tests on the property may be done, with leave.¹

1. Ont., R. 32; Fed., R. 249; BC, R. 30; Man., R. 32; Alta., RR. 467–469; NS, R. 24; NB, R. 35; PEI, R. 32. This is not the same as an order to preserve property until a trial, or to have perishable property sold and the money kept until trial. These are provisional remedies, to be considered, *infra*.

103. Finally, a party that has put its own physical or mental state in issue, may be examined by a medical practitioner chosen by the other side, concerning that state. Although the rules differ a bit from jurisdiction to jurisdiction, this procedure is essentially followed in personal injury cases and those in which a remedy is sought for personal injury. They are called ‘defence medicals’ and result in a report which is available to both sides, normally. On occasion, if one side puts the condition of the other in issue, and can make a case for doing so, they may be ordered.¹

Sanctions for incomplete disclosure, improper conduct, or misuse of the process range from inability to use the document at trial, to costs, to re-doing the step at own cost, to outright dismissal of the action.

1. In a custody dispute, for example, the side opposing custody may make allegations of unfitness based upon mental condition (he/she is mentally unsound and an unfit parent).

104. In Quebec, the discovery process is somewhat similar. The plaintiff will already have filed proofs and exhibits with the court.¹ With documents, the court will issue a summons that must be answered. Oral examination is available as of right of parties and potential witnesses.² This is in contrast to the common law which allows oral examination of non-parties only with leave. With interrogatories, which do not seem to be alternatives to oral discovery, a court issues a writ and the party is required to attend before a judge or the clerk to answer under oath.³ Medical exams are provided for as well.⁴ As in common law jurisdictions, material collected on discovery is available if the matter goes on to trial.

It should be apparent that one result of discovery is that a good many cases settle at that stage or shortly thereafter. Rules provide for moving for judgment on admissions made there, or elsewhere in the pre-trial process.⁵

1. CCP, ss. 147–148.
2. *Ibid.*, s. 402 (documents), s. 397 (oral).
3. *Ibid.*, ss. 405–413.
4. *Ibid.*, ss. 399–400.
5. *Infra*, at p. 125. See *Code de Procédure Civile du Québec* (Wilson and LaFleur, Montreal, annual volumes).

3. Pre-Trials

105. The extent to which the court becomes involved in the pre-trial aspects of the case varies from place to place. In those jurisdictions in which some or all of the

actions are case managed, involvement is constant, from start to finish. There is a tendency to case manage the more complex actions, or those that are likely to take a long time to try.¹ In any action the parties themselves may seek the advice of the court as to the next step by one bringing a ‘motion for directions’. In those places where the action is heavily court supervised, case conferences are scheduled often and the parties must be prepared to tell the court what is going on in the way of progress. All jurisdictions have formal pre-trial conferences for actions proceeding to trial.²

These can be called by the parties and by the court on its own initiative. Often the rules will allow the court to schedule status hearings for cases in which no formal step has occurred for a period of time.

1. *Infra*, at p. 112. In Alberta, for example, actions styled as ‘Very Long Trial Actions’ are more intensely managed by the court than others. In Ontario and in Toronto the ‘Commercial List’ of cases assigned to a separate class early in their progress, are case managed, as are many others.
2. In places with compulsory mediation, this usually occurs before the pre-trial. See *infra*, at ‘ADR’.

106. In the normal progress of an action, the next step after discoveries is setting the matter down for trial. How this is done varies. In some places, for example, a certificate of readiness is used once all parties are ready.¹ In others, the parties individually can deliver a notice of trial or can schedule by setting it down for trial. In Quebec this is called ‘inscribe the case for proof and hearing’.² It is significant that usually, once a party has indicated a readiness for trial, it cannot take any further steps in the proceeding other than moving forward. It is now too late to amend documents, do discoveries, etc., without leave.³

Under the Federal Rules, a compulsory conference between opposing counsel is held within sixty days after the close of pleadings.⁴

1. Alberta, R. 236.
2. CCP, s. 274. Local practice there may require a certificate of readiness. In Ont., NS, Man. and PEI, the parties ‘set it down’.
3. See, for example, Ont., R. 48.07.
4. Fed., R. 257.

107. The pre-trial conference is normally held once the action is set down for trial, which may even mean that it has been assigned a trial date. Practice for scheduling trials and assigning judges is so affected by local practice that general statements are misleading. Most commonly, before an actual trial date is set, the pre-trial occurs. Held before a judicial official who is unlikely to be the trial judge, these proceedings require a considerable amount of preparation by the parties, in the making up of material in advance. In addition, they are normally required to be prepared to discuss a wide range of topics, including possible settlement, admissions, length of trial, witnesses, damages, narrowing of issues, possible court appointed experts or references. If the parties themselves take the matter seriously and if the judicial official¹ has read the material in advance the hearings can be quite useful. It is at this stage that much of what has come to be known as ADR occurs. A realistic look at the case, with the help of a practiced judge, often results in a settlement, even in very

complex proceedings. Any matters agreed are included in a formal memorandum and bind the parties.²

Once the pre-trial is concluded, the matter proceeds to trial.

1. In Quebec this will be a retired judge or counsel of ten years of relevant experience. CCP, s. 279. *See also*, NB, RR. 47, 50; PEI, R. 50, 75.1.07; Sask. R. 191. In some places, the attendance of the parties with authority to settle is required, and is very helpful in resolving cases without trial.
2. In BC the options at this stage are ‘pre-trial conference, mini-trial, or settlement conference’. R. 35. The mini-trial is held before a judge or master *in camera* without witnesses and a non-binding opinion on the merits is given.

4. Trial

108. The date upon which the trial is to be held is often difficult to predict. Local practice may involve an ‘assignment court’ at which some idea of start date may be given. All cases on the list for trial will be addressed at that time. The problem is that criminal cases normally get scheduling priority and often settle late. Jury cases, in addition, usually go ahead before non-jury ones, although generalizations are difficult. Sometimes, the best the parties know is that in a ‘window’ of several days they may go ahead. Summoning witnesses, preparing for trial is difficult under those circumstances.

109. When considering the procedures followed at trial, it is important to remember that there is a certain similarity from jurisdiction to jurisdiction, but local practice may vary.¹ The relevant Evidence Act plays an important part in determining admissibility.² The procedure followed in jury trials differs somewhat from that in non-jury trials which are by far the most common.

In both, the parties must obtain the attendance of witnesses by issuing or getting from the court office a summons or *subpoena*,³ and arranging for service.

All rules of court require that any experts to be called by the parties prepare reports on their evidence and that these be made available to the other side before trial.⁴ Any claims of privilege must be abandoned in these. Some places have special provisions for medical experts, often in the relevant Evidence Acts, which encourage the giving of their evidence by report rather than orally, although the other side may be able to secure their attendance for cross-examination.

In all jurisdictions, rules exist that allow parties to gather evidence for use at trial by deposition. Given the preference for oral testimony, these rules allow this in a limited range of circumstances, such as infirmity or age of the witness, cost of travel, etc.⁵ If the witness is one of the parties, it is more difficult to introduce their evidence in such a manner. Where the witness is out of the jurisdiction, an order for a commission is required and letters of request (letters *rogatory*) necessary, normally.⁶ It is becoming more common for parties to use these provisions, particularly because of the problems of a guaranteed trial date.⁷ In many places videotaping of these is encouraged.

The giving of evidence by affidavit in trials is discouraged because of the non-availability of the deponent for cross-examination at the trial, although allowed, with leave.

Another matter to be considered before trial is the possible use of exhibits, documentary evidence, demonstrative evidence, etc. Rules normally require that anything not already seen by the other side be shown to it well before the trial. Some counsel are becoming quite inventive in terms of demonstrative evidence, utilizing computer imaging.⁸

Parties arrange also to have any documents produced in the discovery process available at trial.

A trial record, made up of those parts of the court file that will be used at trial is prepared by the parties to ensure that the trial judge has the necessary information. Such documents as notices of motion, interlocutory matters are not normally available to the trial judge until the issue of costs arises after the judgement on the merits. If one of the parties plans to use the transcript of an oral examination for discovery at trial, for any purpose, it is included in the trial record but sealed until the trial judge approves its use at trial.⁹

1. All litigation firms use litigation software to manage their cases; the managing of complex litigation is a complicated matter.
2. *Infra*, at Part VII.
3. In some places the parties themselves can issue these; in others they issue from the court office. See Ont., PEI, Man., R. 53.04,.05; BC, R. 28(5); Que., CCP, s. 280; NB, R. 55.03; Nfld., R. 46.23; Man., PEI, R. 50; Sask., R. 305, as examples, and Subpoena (Interprovincial Act), RSBC 1996, c. 442; Interprovincial Subpoena Act, RSM 1987, c. S212 RSN 1990, c. I-20; SNS 1996, c. 1; RSPEI, 1988, c. I-9; RSS 1978, c. I-12.1; RSY 2002, c. 126; Interprovincial Subpoenas Act, RSNWT 1988, c. I-9 (Nunavut as well); Interprovincial Summonses Act, RSO 1990, c. I.12.
4. For example, Ont., R. 53.03; BC, R. 40A; Que., CCP, s. 294.1; NB, R. 52.01–03.
5. The taking of evidence outside court but within the jurisdiction, for use in court, is called taking evidence ‘*de bene esse*’, and involves the appearance of the person before an examiner, like an examination of a party for discovery. Cross-examination by opposing counsel is allowed. Taking the evidence outside the jurisdiction requires a commission and letters of request. All jurisdictions in Canada have procedures in place to deal with incoming letters of request, in their rules of court. Quebec has a statute, the Special Procedure Act, RSQ 1977, c. P-27, and the matter is covered in many Evidence Acts.
6. Discovery of a person outside the jurisdiction is an similar to the taking of evidence on commission. Full cross-examination of the person is provided for, in the commission. See *supra*.
7. See, e.g., Ont., R. 36; BC, R. 38; Fed., RR. 271, 272. Sask., RR. 289, 300.
8. E.g., Ont., R. 53; BC, R. 40.13; Nfld., R. 46.06; Fed., R. 287.
9. Ont., R. 48.03; NB, R. 47.06; Fed., RR. 268–269. The most important documents in the record are the pleadings, since they determine the relevance of any evidence offered at the trial. The trial judge will read the record before the trial starts.

110. The procedures to be followed at trial and the rules of evidence that supplement the relevant Evidence Acts are normally in the rules of court. In addition, some provisions are in other statutes. In the rules, there are usually provisions governing the order of address, a preference for oral testimony, exhibits, allowable examination in chief and cross-examination, calling the other side, use of discovery transcripts or affidavits as evidence or for the purposes of impeachment, interpreters, etc.¹

In addition rules allow for the taking of a ‘view’ by the court, to better understand the evidence, the ordering of the taking of deposition evidence by commission, introduction of affidavit evidence, a motion for a non-suit by the defendant, the requirement of a trial transcript, and many other matters of detail. In appropriate

cases, the parties may agree that the trial judge call in an expert appointed by the court to advise it on an issue requiring specialized knowledge.² In addition, the court may refer a matter to referees or assessors outside the trial to investigate certain matters and report back. For example, with consent of the parties, a referee might be appointed to conduct an extended examination of documents, or a taking of accounts, and the trial adjourned until this is completed.³ An assessor might be appointed to assess damages for the court. These procedures are the exception rather than the rule given that there is a preference for an uninterrupted trial.

1. Generally, *see* Ont., Man., PEI, R. 52–55; BC, R. 39–40A; Que., CCP, ss. 278–318, 324–330; NB, R. 47–57; Nfld., R. 42–47; NS, RR. 30–35; Fed., RR. 274–291, Sask. Part XXV.
2. Ont., R. 52.03 allows this and requires that, where possible the expert be one agreed upon by the parties. The person might be instructed to conduct an inspection of property or a medical examination of a party.
3. Ont., R. 54 & 55. *See* D. Peppiatt, R. Linton, *Practice on Motions and References*, (Butterworths, Toronto and Vancouver, 1988). The referee might even be an arbitrator.

111. Normal order of events is that the plaintiff opens with a statement of its case, then calls its witnesses and introduces its exhibits through witnesses or on consent of the other side. Each witness is examined in chief, and the other side is allowed to cross-examine if it wishes, followed by any re-examination. Each side is allowed to call the other side as its own witness if it wishes. There is no absolute requirement that a party attend the trial but it is common. After the plaintiff has put its case in, it closes. The defendant can then bring a motion for a non-suit, or no-evidence motion, alleging that there is no case that requires an answer.¹ Inadvertence of the plaintiff to prove some issue can be corrected. In some places, the defendant may be required to elect whether or not to call evidence before bringing such a motion. In others, not.

Assuming it is unsuccessful, the defendant then opens with a statement and calls its case. When it closes, the plaintiff is allowed a limited right of reply or rebuttal to address new matters not anticipated earlier. The judge then allows argument, normally in the same order, and then delivers a judgment orally or reserves.

Should the matter settle in the interim, either during or after the trial before judgement, the parties are required to inform the registrar of the court.

1. J. Sopinka, S. Lederman, A. Bryant, *The Law of Evidence in Canada* (Butterworths, Toronto and Vancouver, 2nd edn., 1999), p. 138.

112. In cases in which there are cross-claims, counter-claims, third party claims, etc., these are dealt with after the main claims, because they are, in concept, separate actions. In the case of a third party claim, of course, it is not addressed until the finding of liability on the defendant, at which time the limitation period starts to run against the third party claim. In cases of several parties, the order of presentation in the main trial is determined by consent among them or by the order in which they appear in the style of cause or title of the action. Intervenor who are parties are treated as such and non-party intervenors or *amicus curiae* argue at the end.¹

1. There is a considerable amount of literature available in Canada on advocacy and the conduct of trials. A good many of the continuing education programmes put on by law societies, advocate

societies, or private businesses address these issues. A good example of the sort of guide that is available is J. Olah, *The Art and Science of Advocacy* (Carswell, Toronto, 1995).

113. The procedure followed in jury trials is similar but more complicated. In the pre-trial stage, either side can seek the use of a jury to resolve disputed issues of fact by delivering a jury notice.¹ Not all issues are allowed to be decided by a jury. Although they are available in all common law jurisdictions, except Quebec, there are some types of cases in which they are not allowed. In particular, cases involving municipal liability are frequently excepted, as are actions against the crown federal, provincial and territorial.² In addition any part of a proceeding in which equitable relief is sought is not normally done before a jury.³ The provisions vary: In some places juries are required for some actions such as libel and in others they are optional. In others certain named causes of action only are allowed to be tried by jury.⁴ In addition, if the opposite party objects to the use of a jury, it may seek to have the jury notice struck out on different bases, including that the statute does not allow it, complexity, or pre-trial publicity, for example.⁵ The jury may be used for some issues and for some parties and not for others.

Before the trial session in which juries are to be used, the chief justice or delegate will have delivered a 'precept' to the sheriff to gather enough jurors to allow the selection for both criminal and civil trials that are scheduled. Under the provisions of the Jury Act, by whatever name⁶ these are summoned for the opening of the session. A group of these, often chosen by the sheriff from the recent municipal voter rolls, is then taken to the relevant court room. From this group, the jury is chosen by the parties. Challenges for cause and peremptory challenges are allowed, although the process is in no way as lengthy or dramatic as portrayed on US television or in the movies.⁷ Once the full jury is chosen, opening addresses commence. Should issues of admissibility of evidence be raised, the jury may be required to withdraw while a 'voir dire' is held. A motion for a non-suit is heard in the absence of the jury and decided by the trial judge. A jury may be lost (dismissed) if the case becomes too complex, or if one of the parties or the judge makes inflammatory remarks or introduces improper materials. It is no longer an automatic dismissal of the jury if insurance is mentioned. If the jury is dismissed during the trial, a mistrial may result if one of the parties insists on its use, and a new jury empanelled in the same session if possible.

After all of the final arguments, the jury will be charged by the judge, and will retire to consider its verdict. In many jurisdictions, some direction may be given as to quantum of damages, and as well specific questions may be asked so that a general verdict is not used.⁸ The charge must follow a certain pattern and instruct the jury properly on its role as fact finder, the law to be applied, the burden of proof (in civil cases, on the balance of probabilities).

There are practical and legal limits on how long a jury may take to decide before it will be taken to be deadlocked, and how much a judge is allowed to exhort it to reach a verdict. Normally, it is not sequestered until it retires to consider its verdict. Any questions it has may be returned to the court and answered by the trial judge. Often the parties are asked for their views on whether the charge and answers to any questions were adequate. Re-charges may be necessary.

Once it indicates that it has reached its verdict, it returns. Each member is polled by the sheriff's officer as to whether he or she has reached a verdict. If it is so indicated, it delivers the verdict and the winning side moves for judgement in accordance with the verdict. The losing side may bring a motion for a judgment 'notwithstanding the verdict', which is unlikely to be granted.⁹ If it is clear to the judge that the jury has misunderstood the issues, it may be sent back to reconsider, with more instructions before the verdict is accepted. It is then discharged.

Should the verdict be in favour of the defendant, the trial judge may assess the damages in case the matter is reversed on appeal.

The use of juries in civil cases has been diminishing in Canada in recent years. In 1996, the Ontario Law Reform Commission reported that,¹⁰ except in Ontario, they were almost never used. In that province, they were used less than formerly, and most often in motor vehicle cases. In 1994/5, they were used in about 22 per cent of the cases and with the increase of no fault liability, their use was expected to diminish rapidly.

1. Ont., R. 47, CJA ss. 108, 118; BC, R. 39(25,26); Nfld., R. 45; NS, R. 34; NB, R. 46; Alta., RR. 234 & 235; Man., R. 48; NB, R. 46; PEI, R. 47; Sask., R. 196. This is often required before the close of pleadings.
2. Crown Liability and Proceedings Act, RSC 1985, c. C-50; Proceedings Against the Crown Act, RSO 1990, c. P.27; Crown Proceedings Act, RSPEI 1988, c. C-32.
3. CJA, Ont., s. 108(2), for example.
4. See *Report on the Use of Jury Trials in Civil Cases* (Ontario Law Reform Commission, 1996), p. 13 and J. Sopinka, D. Houston, M. Sopinka, *The Trial of an Action* (Butterworths, Toronto and Vancouver, 2nd edn. 1998), p. 4.
5. It is no longer assumed that a civil jury will be unable to understand complex matters.
6. Jury Act, RSA 2000, c. J-3; RSBC 1996, c. 242; RSM 1987, c. J30; SN 1991, c. 16; SPEI 1992, c. 37; SS 1998, c. J-4.2; (Nunavut), RSNWT 1988, c. J-2; Juries Act, RSNS 1998, c. 16. The size of the jury is determined by each jurisdiction. In most places it is six.
7. Peremptory challenges are those for which no reason need be given. In Ontario, each party has four of these.
8. In Ontario, for example, in libel actions or actions for damages in tort (CJA, s. 108(5)). The jury need not be unanimous, as required in criminal cases. Majority verdicts are allowed.
9. Whether this is possible depends upon specific legislation. See J. Sopinka *et al.*, *supra* no. 4 at p. 178. Refusing to accept a jury verdict, particularly as to damages is not common, even where it is allowed.
10. *Supra*, no. 4.

C. Judgment

1. Deliberation

114. When the deciding officer, whether a judge or otherwise, has made up his or her mind as to who succeeds on the substantive law and what remedies to grant, they will endorse that information on the court record and sign it. With a jury verdict the accepted jury verdict is endorsed. If a reference was directed or an accounting, the report will have to be received and considered first.

It is fairly common in a complex case for the judge to reserve, or take under advisement.¹ This means that the decision is delayed and the parties must wait. In some places, judges get extra time for consideration or judgement writing, and if they

are behind are not scheduled to sit. In all cases, the chief justice of the court will try to be sure that cases do not rest for too long. It is difficult for the parties to have a hand in spurring the judge on to decision, for obvious reasons. Occasionally a joint submission to get on with it may be made.

Should the judge die or leave the bench or become incapacitated in the meantime, each jurisdiction has specific rules that normally allow another judge to use the trial transcript and exhibits to decide the case. Former judges are allowed to finish their cases.²

1. In Quebec, the decision is required to be made within six months. CCP, ss. 463–465.

2. See, e.g., Court of Queen's Bench Act, SM 1988–1989, c. 4, s. 31, and, in Quebec, CCP, s. 464; Judicature Act, RSNS 1989, c. 240, s. 36 (allowed eight weeks).

115. The endorsement on the record may be done in open court when the judgment is delivered orally, or otherwise. It is the judgment but it does not take effect until a formal order is prepared and entered. It is essential to distinguish between the judgment and the reasons for it. Where the judge gives reasons, either orally or in writing, they do not form part of the judgment. They will be what is published in the law reports but the judgment itself is the brief note endorsed on the record, which is confirmed by the formal order taken out by the parties. When a party appeals, it does so from the judgment, not from the reasons, which may or may not give a guide to where the judge went astray. On appeal, if the judgment can be supported by one reason, even if the other was wrong, the judgment will be upheld.¹

1. This happened in *Canadian Express Ltd. v. Blair, Enfield Corp. et al.* (1991), 6 OR (3d). 212.

2. Different Kinds of Judgments

116. All proceedings result in a decision. Once the judgment is endorsed on the record and a formal order taken out, the winning side can execute on it. The order of the court will be a final order. During the course of the proceeding, interlocutory motions will have been brought, which will also have resulted in decisions and orders. Depending upon what was decided, these orders will be either final or interlocutory. If an action was brought against several defendants, for example, one or more of these may have brought a motion to have the action against them struck out on the basis that there did not exist a cause of action against them.¹ This is a legal issue and, if successful, the action against that defendant will be struck out. As far as that defendant is concerned, the order is final. Should the plaintiff succeed on the motion and the defendant be retained in the action, the order is interlocutory only, dismissing the motion. Whether the order is final or interlocutory determines the route of any appeal, as well as the timing of it. Rules of appeal discourage the taking of appeals from interlocutory orders because the appeals delay the proceeding and may be unnecessary if the final result goes in a particular way.

1. Considered *infra* at 'Interlocutory motions'.

117. The range of possible final orders, which include judgments, is vast. Some of them are ones in which the reach of the court goes into the future and require the involvement of the court in the future. This was always a characteristic of decisions in the chancery as opposed to the common law courts. A remedy of specific performance, or tracing of assets, or an accounting, requires the ongoing supervision of the court, as do those of appointment of receivers or compliance orders in public interest litigation.¹ In personal injury cases, the judgment may be structured to require payments over a period of years, requiring the back-up of the court.² If a provisional remedy such as an interim injunction was obtained, it will be made final and, if mandatory, may require court supervision into the future. All final judgments will deal with the issue of interest, if a monetary relief is awarded, and usually, costs.

1. See, generally, K. Roach, *Constitutional Remedies in Canada* (Canada Law Book Co., Toronto, looseleaf service); D. Stratas, *The Charter of Rights in Litigation* (Canada Law Book Co., Toronto, looseleaf service); J. Cassels, *Remedies: The Law of Damages* (Irwin Law, Toronto, 2000); K. Cooper-Stephenson, *Personal Injury Damages in Canada* (Carswell, Toronto, 2nd edn., 1996); L. Klar *et al.*, *Damages and Remedies in Tort* (Carswell, Toronto, 1995); *Mayne's Treatise on Damages* (London, Sweet and Maxwell, 1946); J. Berryman, *The Law of Equitable Remedies* (Irwin Law, Toronto, 2000). H. Wooli, *The Declaration Judgment* (London, Sweet and Maxwell, 2002).
2. This may, in some places, be done on consent. Ontario CJA, s. 116. In Quebec, the issue of damages for bodily injury may be reopened in the future if reserved at the time of the judgment. CCP, s. 469.1.

3. Formal Aspects of the Judgment

118. Each order which formalizes a decision made on a motion or at trial, is required to contain certain information. Although the details differ from place to place, the essentials are an identification of the case through the style of cause, the name of the deciding officer, such as the judge, master, prothonotary, etc., the proceedings upon which the order is based, e.g., trial dates, date of hearing of the motion, a note about the evidence used, e.g., affidavits if a motion, the operative order that was endorsed on the record, the date of the formal order, and the signature of the officer who signs the formal order.¹

Except where the decision was a default one, all parties must approve the order. It is drawn up by the winning side, although if that side delays, other parties may do it. This is called the 'preparation' or 'drafting' of the order. It is then circulated and consents obtained, and filed. If a party resists the wording of it, a motion is brought to have the matter argued and it will then be 'settled'. It is then 'signed'. Normally signing is by a court official such as a clerk, rather than by the deciding officer. Should the official balk at signing, for example, on the basis that the order is not true to the endorsement, it will have to be argued before the deciding officer and signed. Once it is signed, it is 'entered', by being filed in the court entry office, where a copy is left. Often a large, impressive seal is attached. The order is then capable of being used as a basis of execution. Should it be satisfied, rules require the filing of a 'satisfaction piece'. The order takes effect after being entered, but the effective date of it is normally the earlier date upon which it was endorsed.

1. See, Ont., R. 59; Que., CCP, ss. 457–490; Alta., RR. 315–339; PEI, R. 59; NB, R. 60; NS, R. 51; Man., R. 59; Nfld., R. 49; BC, R. 41; Fed., RR. 392–399, Sask. RR. 467–473.

4. Notice and Service

119. Because the parties all have a hand in the preparation of the order, they have notice of it. Formal service on the losing side is made, as well. For a default judgment, the defendant will find out about it when the bailiff shows up at the door with process to execute on it.

5. *Res Judicata*

120. Subject to being changed as indicated in the next part, for fraud or newly discovered facts, or set aside on appeal,¹ final judgments bind the parties and those in a position of privity to them in different ways. The three doctrines which appear most in Canadian legal argument are cause of action *estoppel*, also called claim preclusion or the doctrines of merger and bar, issue *estoppel*, also called factual or collateral *estoppel* or issue preclusion, and abuse of process. It is safe to say that courts do not always make clear which of these is being applied in a particular case and imposing a conceptual structure on the jurisprudence is not easy.

One recurring concept is that of a party and his ‘privies’. The idea is wider than simple privity of contract; it covers the actual parties as identified in the style of cause, and those in so close a relationship with them that the court treats them as if they were parties. Examples would be a nominal party and the person on whose behalf the action was brought, the majority shareholder of a corporate party, or a person on whose behalf a representative party is involved. They are treated as if they were parties and the reach of *res judicata* extends to them.² Another way of expressing the idea is to talk of mutuality. If they are bound by the decision, no matter which way it goes, the necessary connection of privity exists.

Res judicata is different from *stare decisis*. The latter concept deals with the force of a decision overall – what was decided and how should later cases deal with the same concept? It is more a question of what the law is, than who is bound by a particular court decision.

1. There is some dispute about the force of a decision that could be appealed. Most commentators allow the doctrines to attach to decisions that are not appealed, once the time for filing an appeal runs out. They generally delay the application of the doctrines until a case that has been appealed runs its course.
2. A long list of examples appears in Lange, *infra* para. 121, no. 1 at p. 73. Courts define the closeness of the identification of the party and the ‘privity’ in terms of blood, title, or interest. See *Saskatoon Credit Union Ltd. v. Central Park Enterprises* (1984), 47 DLR (4th) 431, and *Banque National de Paris (Canada) v. CIBC* (2001), 52 OR (3d) 161.

121. Cause of action *estoppel* precludes the parties and their privies from re-litigating a cause of action, in certain circumstances. If the plaintiff won, the cause merges in the judgment, and disappears. If the plaintiff lost, the further litigation is barred by the judgment. Clearly, the meaning of cause of action helps to determine

the breadth of the doctrine. I suggested earlier that a transactional approach is taken, and any possible claims and defences open to the parties on the facts of the transaction must be included in the one action. This encourages the parties to join as many claims and parties as possible from the start.

However a cause of action is defined, the concept of cause of action *estoppel* requires certain factors. The decision must have been a judicial one, within the jurisdiction of the tribunal, final in nature, and on the merits.¹ Where these factors are present, the parties and their privies are precluded from bringing other actions arising from the same transaction, or raising new defences. Sometimes this is applied to the ability of a defendant in an earlier proceeding to bring a new action when it could have set off in the first action, or even when it could have brought a counterclaim there.

Whether the doctrine applies to default judgments, decisions of administrative tribunals acting in a ‘judicial’ way, consent decisions such as settlements, or foreign decisions, are separate questions. In principle, there is no reason not to so apply them if the party against whom the doctrine is invoked had a full opportunity to address the issues earlier. In fact there is a developing tendency to force parties to choose one tribunal to decide an issue and not to allow the same person to go to an administrative tribunal and a court with the same problem. An example is in the area of employment law. If a tribunal decides that the person was properly discharged for cause and cannot draw unemployment benefits, under the quaintly named Employment Insurance Act, that person may be precluded from bringing a wrongful dismissal action in court.² Similarly, if two issues are essentially the same a court may require a person to choose between tribunals, or even require her to use the tribunal set up especially to deal with the issue, such as an arbitration board, and not allow a court action at all.³

1. See D.J. Lange, *The Doctrine of Res Judicata in Canada* (Butterworths, Toronto and Vancouver, 2000), p. 111, and P. Perell, ‘Res Judicata and Abuse of Process’, 24 *The Advocates' Quarterly* 189 (2001) and R. Mulheron, *Some Comparative Observations on Res Judicata for Canada's Newest Class Actions Regime*, 30 *Man L.J.* 171, 2004.
2. See the examples in *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 OR (3d) 267; *Minott v. O'Shanter Development Co.* (1999), 42 OR (3d) 321; *Danyluk v. Ainsworth Technologies Inc.* (1998), 32 OR (3d) 235, lv. to SCC granted. See, generally, J. Sopinka, S. Lederman, A. Bryant, *The Law of Evidence in Canada* (Butterworths, Toronto and Vancouver, 2nd edn., 1999), pp. 1068–1125.
3. E.g., as discussed in *Pilon v. International Minerals and Chemical Corporation (Canada) Ltd.* (1996), 31 OR (3d) 210; *Weber v. Ontario Hydro*, [1995] 2 SCR 929.

122. The second main branch of *res judicata* is issue *estoppel*. At its narrowest, it precludes the parties to an action or their privies from trying to prove a fact in another proceeding between them that is inconsistent with a fact decided in the earlier action. Seen as such it has the look of a rule of evidence, precluding the introduction of evidence to prove a fact inconsistent with an earlier decided fact. The same requirements of jurisdiction, finality, merits, privity, as above, apply. To these is added the requirement that the earlier issue have been essential to the earlier decision, or fundamental to it.

The developments in Canadian law that are interesting involve extension of this concept to affect parties other than the original ones. The term ‘abandoning the mutuality requirement’ is used. An example would be if a plaintiff brought an action

against one defendant involved in a multiple motor vehicle accident, and the court decided that the plaintiff lost the action because on facts as found, it was at fault completely. If the same plaintiff brought another action against a new defendant, could that defendant rely on facts as found in the first trial? This is known as defensive use of issue *estoppel*. The new defendant was not at all a party to the first proceeding, nor was it conducted on its behalf. Canadian courts seem to be embracing this concept in a tentative way at least.

The more problematic extension of non-mutual issue *estoppel* is in offensive use of it. This would occur if a plaintiff in an air crash brought an action against the airline and succeeded, on the basis of certain findings of fact, such as a failure to inspect or fix certain defective parts. If other plaintiffs were allowed to use the doctrine, it would prevent the defendant from trying to prove any facts inconsistent with those found in the first action. All later plaintiffs would be sure of success. There are some problems in allowing extension of non-mutual issue *estoppel* offensively, such as the vagaries of a trial and the ‘wait and see’ plaintiff.¹ To the extent that it is possible to see any development in Canada it seems that this extension is slow to develop.² The significance of all *res judicata* is that if applied widely, the doctrines force parties to add as many parties and claims as possible to the first action thereby adding to judicial economy.

1. See G.D. Watson, ‘Duplicative Litigation: Issue Estoppel, Abuse of Process, and the Death of Mutuality’ (1990), 69 Can. Bar Rev. 623, and Lange, *supra* para. 121, no. 1 at 23.
2. But see *Vos v. Hospital for Sick Children*, 18 March 1998 (Ont. Gen. Div.).

123. The more general way of expressing *res judicata* is to speak of abuse of process. The term covers all aspects of the doctrine and expresses a view that it is unfair to allow a party to divide a transaction into parts and litigate separate parts. It developed in England in proceedings in which decisions made in a criminal trial precluded the defendants in the first trial from being successful plaintiffs in a civil trial based upon the incident.¹ In Canada, the doctrine precluded a man who was convicted of non-capital murder of his wife from contesting the defence of the insurance company to that effect in a civil trial. His case was dismissed as an abuse of process and he did not collect on her insurance.²

Application of these variations on *res judicata* to interlocutory decisions between the same parties in the same or a subsequent proceeding is a different issue. On the whole, courts discourage the use of the doctrines in such cases.

Because the doctrines are based on the law of evidence, they are required to be specifically pleaded. If successful, the proceeding may come to an end and accordingly, the procedure that is sometimes followed is that the issue is separated out to be decided in a preliminary motion on a point of law. It is necessary to have the record from the former proceedings to argue the point effectively.

1. As it turned out, the facts in the first trial were found to have been based on doctored evidence and false testimony of police officers, and were not as reliable as they were thought to be. See *McIlkenny v. Chief Constable of the West Midlands*, [1980] QB 283 (English Court of Appeal).
2. *Demeter v. British Pacific Life Insurance Company* (1983), 150 DLR (3d) 249. Generally a conviction in a criminal proceeding is *prima facie* evidence of the facts on which it rests in a later civil trial, given that it is based on proof beyond a reasonable doubt.

6. Interpretation and Rectification of Judgments

124. The formal provisions for challenging or for changing orders differ a bit from place to place but all allow certain amendments to orders, even after being entered. Before being entered, the decision is not final, and the deciding officer may alter it, unless it was based on a jury verdict. It is not common, but the judge may even change his mind on the merits, and alter the endorsement. Any matters such as costs may have to be decided before the taking out of the formal order. They may even be excepted, to be assessed later.

125. Once entered, the range of options to alter it narrows. All jurisdictions have what is called a ‘slip rule’. This allows the court to change the order if there was an ‘accidental slip or omission’.¹ If there was a matter which was argued but on which the judge did not adjudicate, the order may be amended to include it. Of less obvious inclusion is something that one side failed to raise, which it now wishes to argue. This is not, probably, within the slip rules. The scope of language of the different jurisdictions is not always so clear. In Quebec, the rule allows a change where the order does not address ‘all essential grounds’.² The Federal rule allows a change where there was something ‘overlooked or accidentally omitted’.³ Given the wisdom of finality after judgment in court, the scope of these rules is normally narrow.

The extent to which parties may raise matters of new evidence at this stage, rather than on appeal is also a problem. At some stage there must be finality at the trial level. If there appears evidence of newly discovered fraud which probably had an effect on the decision, such as perjured evidence on a significant issue of fact, it may be reopened.⁴ If no fraud, but the appearance of new evidence which the party seeking to introduce could not have discovered by ‘reasonable diligence’, it may be allowed if its effect is likely to be significant. The extent to which courts allow this varies greatly.⁵ A defendant who was in default is allowed to apply to re-open the decision on certain terms, including a requirement that it be useful to do so. This may involve a showing of a defence on the merits.⁶ In all cases in which a party seeks to change an entered order, it must bring a motion and ask to be allowed to do so. It is unlikely that a judge can do so on his or her own motion.⁷

Once the order is final and unchanged, the judge is ‘*functus officio*’, and an unhappy party must appeal. The filing of a notice of appeal does not normally amount to a stay of the order.

1. An erroneous figure, for example. See Ont., R. 59.06.

2. CCP, s. 483.

3. R. 397.

4. See *International Corona Resources Ltd v. LAC Minerals Ltd.* (1988), 54 DLR (4th) 647, and further reasons at 40 OR (3d) 347 for a comprehensive discussion of this issue in the context of a fight over an extremely rich gold deposit.

5. The Quebec rule talks of evidence not available earlier because of ‘irresistible force or an act of the adverse party’ s. 483.

6. See *infra*, at ‘Default Judgments’.

7. Called, in Quebec, a motion in revocation.

7. Penalty in Case of Non-compliance

126. Inherent in the jurisdiction of a superior court is the power to punish for contempt of court. Contempt may be civil or it may be criminal. In the case of criminal contempt, the offence is the only undefined, common law offence in the Criminal Code of Canada.¹ It has been described as ‘... a strange, anomalous, and, most important of all, unclear element of our criminal law.’²

Civil contempt could be described in the same way. Essentially, civil contempt deals with the disobedience of orders of the court, and criminal contempt with matters that should be of interest to the Attorneys General since they involve bringing a public institution into disrepute.

As far as execution of judgments, is concerned, the party that won is required to take out the appropriate orders and to see to their execution. Orders may or may not require the payment of money.³ There is a difference between being unable to satisfy a money judgment, such as because of having no assets, and being unwilling to do so and placing roadblocks in the way of execution.

Where a court makes a specific order that a party pay money, and the party resists it, the court itself may punish the party by finding it in civil contempt of court. The debtor could be sent to gaol for deliberately flouting the order. The conduct goes beyond mere inability to pay.⁴ There is a reluctance to put an impecunious person in jail, without more. Orders not for the payment of money, for example an order of specific performance of a contract, or for the execution of a deed of land, if refused, lead to contempt proceedings. Often, the civil contempt power is used where a respondent to a provisional remedy such as an injunction refuses to obey it. This happens often in labour matters. The individual may find himself in prison.

Conduct in court may lead to a finding of criminal contempt ‘in the face of the court’, although the boundaries between conduct in the face of the court and not, are uncertain. The literature is full of interesting anecdotes about this concept. A classic has the judge asking a litigant or counsel for one, ‘Are you showing contempt for this court?’ The individual replies, ‘No, My Lord, I am doing my best to conceal it.’ The Federal Rules refer to a person who may also be counsel who ‘... fails to maintain a respectful attitude, remain silent or refrain from showing approval or disapproval of the proceeding,’ or does something that will ‘... impair the authority or dignity of the court.’ The same conduct may at the same time be a civil and a criminal contempt. The Federal rules deal also with persons who ‘... disobey[s] a process or order of the court’.⁵

Normally in the case of civil contempt, attachment, or criminal contempt, the person in trouble is given precise notice of the wish of the judge to make such a finding, and is permitted to appear and to contest it, often with counsel. Penalties are normally a spell in custody, with the party being brought back to court occasionally to be asked if they have ‘purged their contempt’,⁶ a set time in gaol, or a fine.⁷ Because the matter of civil contempt borders on criminal conduct, the burden of proof of the contempt is a higher one than the normal civil standard of balance of probabilities.⁸

1. RSC 1985, c. C-46, s. 9.

2. R. Martin, *Media Law* (Irwin Law, Toronto, 2003).
3. At common law, orders not concerned with the payment of money, such as orders for specific performance of a contract, were enforced by civil committal for contempt or by attachment of the person with the same result. Contempt was used if the person performed an act prohibited by the order, and attachment of the person for neglect to observe it. This distinction is not preserved in most jurisdictions. In the case of orders for the payment of money, the remedy for failure to pay was for the court to order sequestration of the property of the defaulter and payment into court of it.
4. The power is sometimes used in a matrimonial case if the husband (as is normally the case) makes extreme efforts not to pay.
5. I.e. Rule 466 deals with both civil and criminal contempt.
6. See the provisions in Fed. R. 467 & 468 and Nfld., R. 53; BC, R. 56; NS, R. 55; Alta., R. 703; Sask. R. 376. In many jurisdictions the matter of contempt is not legislated in statutes or rules and is a matter of common law.
7. See generally, C.J. Miller, *Contempt of Court* (Oxford University Press, Oxford, 3rd edn. 2000).
8. *Northwest Territories Public Service Association v. Commissioner of the Northwest Territories* (1980), 107 DLR (3d) 458.

II. Other Types of Proceedings

A. Applications

127. Applications are a different way to bring a proceeding before a court. Because the procedure used is essentially a motion procedure, they used to be called originating notices of motion. Not only are proceedings resolved by application, but also most types of judicial review use the procedure. The types of proceeding in which an application is used are those in which it is unlikely that there are many material facts in dispute. Examples include seeking advice from a court on the interpretation of a trust document, or during the administration of an estate, the determination of rights that depend on the interpretation of a deed, will, contract or similar document, the interpretation of a statute, regulation, municipal by-law, or of similar delegated legislation, approval of an arrangement, sale or mortgage, or variation of a trust, a remedy sought under the Charter, provisional relief in an application.¹ Some jurisdictions set out in detail the sorts of cases in which an application may be used, others do not. The basic rules seem to be that in judicial review proceedings or in those involving few if any disputed facts, applications are encouraged. In all jurisdictions, applications are often authorized in matters involving property both real and personal, either in the rules of court or by separate statute.

The name of the procedure varies from ‘Application’ in several jurisdictions, to ‘Originating Application’ in others.² The originating document is a notice to the respondent, issued by the applicant, in most places.³ After this is served in the manner of other originating documents, if the respondent plans to have any involvement in the procedure, it files an appearance.

The formal hearing is normally before a judicial official such as a judge or, in some cases, a prothonotary who has judicial power up to a certain value of claim.⁴ Some jurisdictions retain the distinction between a ‘judge in chambers’ and one in open court.⁵ Of some antiquity, when a judge was in chambers, counsel for the parties did not have to robe (gown), and the procedure could be less formal. Often the parties

were not present. Other officials such as masters, prothonotaries, hearing certain motions would do so in chambers also.⁶

1. Ontario, R. 14.05; BC, R. 10(1); Fed., R. 300–316; Que., CCP, ss. 448–456, 774; NS, R. 37; PEI, R. 14; Nfld., R. 5.02; Sask. RR. 451–465 (Originating notice).
2. E.g., BC, Nfld.
3. Notice of Application, Ont., Fed., PEI, NS; Petition, BC; Notice, Que.
4. E.g., under the Federal rules, up to CAD 50,000.
5. For example, BC, NS, Nfld., Alta.
6. See *infra*, ‘Interlocutory Motions’. Some places allow these to be heard by telephone or video conference. Ont., R. 1.03.

128. Evidence on motions, including originating ones such as applications is normally given by affidavit, with oral evidence allowed only with leave. There is no pleading or discovery although the notice of the proceeding is required to contain some information such as the grounds to be argued and a list of the evidence to be used. Some places require a record like a trial record to contain the needed documents. Some require the preparation and filing of memoranda of law, called *facta*, in advance. Because there are not normally facts in dispute, and perhaps because the contents of affidavits can be so broad, cross-examination of the deponent of an affidavit is discouraged in various ways such as requiring leave to do so, or imposing serious cost penalties for misuse.¹ Unlike normal interlocutory motions, although information and belief (hearsay evidence, opinion evidence) are allowed to be included in affidavits and would not normally be admissible in court, the basis of the information and belief must be given and direct evidence of contested or key facts is preferred.

Once the matter has been argued, the decider has some options which include sending any part of the matter where there are serious disputes about the facts, to trial in open court (i.e., convert the matter into an action). Normally this is not done and the decision is endorsed on the application record, after which an order must be drawn up and entered.

1. See, generally, Ont., R. 14.05, 38 & 39; Fed., R. 300–316; Que., CCP, ss. 448–456, 762–771 (Applications involving persons or property); NS, R. 37 & 38; PEI, R. 38 & 39; Nfld., R. 5.02 & 29; BC, R. 10, 51, 52.

B. Default Proceedings

129. I deal here with situations in which the defendant or respondent does not respond to the originating process. Elsewhere I deal with other defaults of both sides.

When a defendant is served with the originating process, on its face it usually informs it to take some steps or risk that the plaintiff will go ahead without it. Sometimes the process is not served at all in the sense that the rules were followed but the document never came to the attention of the defendant, or that the server did not serve but swore that it did.¹ With substituted service, for example, it does not always reach the attention of the defendant. Rules allow parties who did not receive notice of the proceedings to apply to have them re-opened.²

1. This was at one time fairly common in some small claims jurisdictions in the US, where the majority of plaintiffs were commercial creditors. Process would be dumped and a false affidavit of service prepared. The procedure was known as ‘sewer service’.
2. In Ontario, R. 38.11 allows a person affected by a judgment on an application made without notice or who did not appear because of ‘accident, mistake or insufficient notice’ to apply to have the judgment varied or set aside. Speed is required.

130. The more common way in which the term ‘default proceedings’ is used is where the party is served but does nothing to defend the action. In the case of an application, no steps are made to enter an appearance. This becomes apparent when the time for delivery of a statement of defence passes without it being done.¹ At this stage the plaintiff will seek default judgment against one or more of the defendants on one or more of the claims. Some jurisdictions require that the defendant requisition the registrar to note the defendant in default.² It is still possible for the defendant to deliver a statement of defence when in default, until the pleadings are closed, and after, with leave.

1. Time for delivery varies, but thirty days after receiving the claim, if served in Canada is common. More is allowed if served outside the country.
2. The ‘requisition’ is a document also called a ‘*praecipe*’ in which a party directs the court to take a step in the proceeding which does not require court approval.

131. The consequences of being noted in default, where it is done, are that the defendant is taken to admit all necessary facts as alleged in the claim, but not always the amount of the damages, and is entitled to no more notice of the proceedings. The next step varies a bit from place to place. In some jurisdictions, the plaintiff is allowed to requisition a default judgment as soon as the default is known, without the step of noting in default. Here the plaintiff brings a motion for judgment *ex parte*, swears to completed service, and gets the judgment.¹

In other places a distinction between certain types of claim is made. Some, called ‘debt or liquidated demand in money’ plus certain property claims, are treated separately,² and a requisition for judgment may be filed and it will be given without more,³ assuming the proper information about service and the details of the claim are made.⁴ If the court official such as the registrar does not wish to give the judgment, for example if he feels that the claim is not within the rule, he will refuse, and a motion for judgment will be brought. For all other claims, the motion is required, and proof of both a valid legal claim and damages, by affidavit, is required.

Although there is a conceptual difference between setting aside a noting in default and setting aside a default judgment, it is of little significance because the first occurs rarely. All jurisdictions allow a defendant against whom judgment has been entered to apply to have it set aside. The requirements are different from place to place but the essentials are similar. The defendant is required to move promptly, explain the failure to defend the proceeding, and show a valid defence on the merits, often by including in the motion record a draft statement of defence in which it swears to the truth of the allegations. It is not necessary to guarantee success of the defence but to show a triable issue. If the motion is allowed, it may be done on terms which include posting security for costs or even payment into court.

Should the position of the defendant be that some procedure to obtain the judgment was followed improperly, the motion may not require the defendant to show a defence on the merits.

Default proceedings need not be for all claims or for all party defendants. Where there are parties who are represented by others because of a disability it is sometimes necessary to obtain court approval for all proceedings in default.

1. Fed., R. 210 (motion in writing, R. 369). In Quebec, if witnesses are at the hearing, they are called. CCP, ss. 192–196.1.
2. A liquidated demand is one in which the amount owing is already calculated or can be calculated easily by reference to an agreed scale of some sort. Anyone looking at the claim should be able to do so from what is stated in it. *See Holden Day Wilson v. Ashton* (1993), 14 OR (3d) 306 (an account for legal services).
3. Ont., R. 19; BC, R. 17 & 25; Man., R. 19; PEI, R. 19; Sask. RR. 113–128.
4. In the case of service outside Canada, the Hague Convention re service is followed. In Man., for example, R. 69 incorporates some of its provisions.

C. *Summary Judgment*

132. The major reason for having a trial is to resolve disputed issues of fact. In many actions the law is clear and the trial judge applies it to facts as found at the trial from evidence presented there. In Canadian civil procedure there are a number of procedures available to both parties to preclude the necessity of going to trial. Two of these are the motion to decide a question of law, based on the theory that even if the party proves the facts alleged, the law does not allow for recovery or recognize a valid defence. This motion challenges the substantive legal validity of a claim or defence.¹ The other is the motion for summary judgment, which challenges the factual adequacy of a claim or defence. By way of example, if a defendant can show that the claim is based on facts which the plaintiff will be unable to prove at trial, there will be no reason to proceed to trial. If the facts can only be proved by admission of evidence which is clearly against the rules of evidence, why go on?² The more difficult question is whether the weight of evidence can be tested on such a motion before a trial. Because this involves issues of credibility of witnesses, most evidence at trial being oral, when is a party entitled to proceed to trial even with a weak case? The summary judgment motion allows the court to ‘pierce the pleadings’ and assess whether a factual dispute on the pleadings, on which issue is joined, is a real or genuine one or a sham.³

All jurisdictions have similar rules. The party trying to end the proceeding, in whole or in part,⁴ brings a motion, supported by evidence to have the claim or defence, or part of it, struck out.⁵ Unlike many motions, the evidence used is required to be as complete as the parties can make it. They are not allowed to hold back and resist the motion by stating that better evidence will be available at trial. In addition, essential facts sworn to in affidavits must be based on stronger grounds than ‘information and belief’. Cases speak of parties ‘putting their best foot forward’. Cross examination on affidavits is essential at this stage.

1. *See* ‘Issue of Law’, next.

2. For example, an action against a government minister for libel based solely on statements made in Parliament will fail because the rules of evidence impose a privilege on those statements precluding their admissibility in court.
3. Rules have a test of 'is there a genuine (factual) issue for trial.'
4. The defendant may admit certain liability and this will allow the plaintiff to obtain partial relief.
5. Ont., Man., PEI, R. 20; Alta., R. 158.1, 159–164; BC, R. 18; NB, R. 22; Nfld., R. 17; NWT, R. 174; NS, R. 13; Que., CCP, ss. 75.1, 75.2, 453–456; Sask., R. 129 (debt or liquidated claim, normally); Fed., RR. 213–219, and generally, S.J. Page, T. Pinos, *Summary Judgment* (Canada Law Book Inc., Toronto, 1998). The test applied in this type of procedure is similar to that used in a motion for judgment on admissions, *infra*, or on setting aside a default judgment.

133. The major issue that these proceedings raise is the one of assessing credibility, something normally done at trial by a jury or judge alone if there is no jury. The more it is done on a motion for summary judgment, the fewer trials there will be. In the 1980s, when the procedure was in its infancy, there was a tendency to scrutinize credibility carefully and many motions succeeded. Recently, this has changed and more cases are allowed to go forward to trial, although practice varies.¹ Any issues of the substantive (legal) validity of claims or of defences can be resolved in the same motion.

Because the procedure is time-consuming and costly to the parties, there being much at stake, it is capable of misuse. Almost all jurisdictions have specific rules allowing the court to impose severe sanctions. The judges hearing the motion are given wide powers to resolve issues or separate them and send some to trial, granting judgment on others.

The procedure has been used widely, and appeals from decisions made on motions for summary judgment have clogged the dockets of courts of appeal in some places, particularly in Ontario. Where the appeals from granting judgment are allowed, the matter goes back to where it was interrupted.

1. See K. Kelertas, 'The Evolution of Summary Judgment in Ontario' (1999), 21 *The Advocates' Quarterly* 265 and E.J. Van Kessel, *Summary Judgment and Dispositions Before Trial*, Toronto: Butterworths, 2002.

134. At least two provinces have added another type of early trial proceeding to the options. These are called 'summary trials' and are different from 'speedy trials' provided in most places for actions of lower value. British Columbia in R. 18A provides for a separate procedure to force the matter to resolution without a full trial. Essentially, after pleadings are over, either side can move for judgment in a situation in which the decision could be made on the basis of evidence short of a full trial, where oral evidence is preferred. Issues of fact may be resolved by affidavit evidence, and the judge in chambers has a broadly worded power to direct how the proceedings will be conducted and what evidence is to be used. It differs from the summary judgment procedure in that even a genuine factual issue may be resolved without a full trial.¹

Similarly, in Manitoba, even if there is a genuine factual issue, the court can direct an 'expedited trial' on evidence short of that used in a full trial. The procedure is the same as that used for actions of a lower value, which I call 'speedy trials'.²

Under the federal rules, on a motion for summary judgment, even if there is found to be a genuine issue for trial, the decider may decide it, if, for example the issue is

one of damages only, or a legal one, or send the issue to be decided in a specially-managed action, where some flexibility of modes of trial exists.³

1. See *Inspiration Management v. McDermid St. Lawrence Limited* (1989), 36 BCLR (2d) 202.
2. Man., R. 20A.
3. Fed., R. 216.

D. Issue of Law

135. All jurisdictions in Canada have provisions that allow parties to test the legal validity of the case as well as jurisdictional issues, short of trial. Jurisdictional issues can be resolved on a motion without attornment to the court.¹ In addition, motions to test such matters as capacity, *res judicata*, limitations, no valid legal cause of action (including standing), no recognized legal defence, abuse of process, *forum non conveniens* are allowed. If the issue is simply one of law, no evidence is normally used, and argument on the basis of *facta* is given.² Successful motions result in final orders. Where the legal issue is one of whether the cause of action is a valid one or whether a defence is recognized at law, the decider, normally a judge, has to balance the need to develop the law against the fact that one of the parties may be put to extra expense. Often a reasonably generous test of ‘is it bad beyond argument’ is used and the matter goes forward to trial where the issue will be raised again.

1. See *supra*, service *ex juris*, and Que., CCP, s. 164, Fed., R. 208 for example.
2. Ont., Man., PEI, R. 21; Fed., RR. 208, 220 & 221; NS, RR. 11.05, 13; Alta., R. 220; Nfld., R. 38; Que., CCP, ss. 75.1, 164 & 165; Sask. RR. 188–189.

136. Rules also allow the opposite parties to agree on a legal issue and state a special case for the opinion of the court. Some rules allow judges to do so to the relevant court of appeal as well. The theory is that if a decision on one issue of law may resolve or shorten the matter, it is useful to decide it early.¹

1. Alta., R. 232; Nfld., R. 37; Ont., Man., PEI, R. 22; Fed., R. 220; Sask. R. 263; NS, R. 27; BC, R. 33.

E. Simplified Procedure

137. Terminology is a problem here. The generally used term for this procedure is ‘summary trial’. This can be confused with the term ‘summary judgment’ which is used in cases of no genuine (factual) issue. Whether called summary trial, simplified procedure, fast track litigation, expedited action, simplified action, or streamlined procedure,¹ the essential procedure is similar from place to place. Except in NS and BC,² the procedure is required in actions limited in value, unless the parties consent.³

Usually the plaintiff labels the originating process as intended for this route, and it is up to the defendant to object. Since counter-claims, cross-claims, third party claims are separate actions, these rules apply to them as well, as do all rules applicable to actions unless otherwise indicated.

1. Ont., PEI, BC, Man., Fed., Alta, respectively. I have limited my coverage of the jurisdictions to these six, as examples. *See* Ont., R. 76; PEI, R. 75.1; BC, R. 66; Man., R. 20A; Fed., RR. 292–299 [simplified action]; Alta., R. 659. *See also* Nfld., R. 17A.09; Que., CCP, s. 481.1; Sask., RR. 477–489 [simplified procedure].
2. In BC, it is limited to cases which the parties agree can be tried without a jury in two days. R. 66, but in both jurisdictions there is no ceiling on the value of the claim.
3. Ont., Man., Que., Sask., Fed., (trial before a prothonotary) CAD 50,000, PEI, CAD 25,000; Alta., CAD 75,000; Nfld., CAD 15,000.

138. The common features of the procedure are limited discovery and evidence at trial, and considerable judicial involvement in planning how the trial will be conducted. Oral discovery examination of parties or witnesses is either not allowed or time limited to two or six hours.¹

The affidavit of documents that each party normally prepares is increased to include a list of potential witnesses. Cross-examinations on affidavits are restricted or prohibited. Compulsory pre-trial settlement or case conferences are held. Sometimes a trial brief containing facts in issue and law is required, as in Alberta.

When it comes to the trial, cross-examination on affidavits which form the basis of the evidence at the trial is allowed. The entire procedure is intended to speed up the resolution of the dispute without the necessity of a full trial, and I refer to it as a ‘speedy trial’.

It is fairly common, unless prohibited as in the Federal Rules, to have a motion for summary judgment brought at some stage in this procedure. Recall that Manitoba in R. 20A expressly recognizes that, as does Saskatchewan. The speedy trial procedure is one that is likely to be utilized more and more as pressure on the courts to be efficient increases. The involvement of judges from the early stages of the action, whether called case management or otherwise, is likely to increase as well.

1. BC, Alta. K. Kelertas, in an article about summary judgments, a topic considered earlier, looks at the simplified procedures in Ontario, BC, and Manitoba as well. ‘The Evolution of Summary Judgment in Ontario’ (1999), 21 *The Advocates Quarterly* 265.

F. *Class Proceedings*

139. Earlier, I dealt with the joinder of parties and of claims, as well as the consolidation or trial together of actions involving the same plaintiff or defendant. Here the issue is actions involving a single representative party, acting on behalf of others. There can be plaintiff and defendant class actions, although as rules allow the joinder of unincorporated entities such as unions, defendant class actions are less common,¹ and I will consider only plaintiff class actions in detail.

Although all jurisdictions have rules of court that allow representative actions, Quebec, Ontario, and British Columbia have statutes dealing with them expressly.²

In principle, class proceedings foster judicial economy, access to the courts (when coupled with funding opportunities),³ and behaviour modification of defendants, most of whom are corporations or government institutions. One representative is selected and, with court approval, brings the action on behalf of all with the same cause of action. They are becoming common in some provinces in areas of law that

include environment, securities, misrepresentation,⁴ fraud on the market, products liability, consumer protection, institutional abuse.

1. In a few jurisdictions, a defendant in two or more actions may seek an order of the court to have a representative plaintiff appointed. Defendant class actions are used in areas such as patent infringement, securities, land claims, environment claims. *See generally*, M. Eizinga, M. Peerless, and C. Wright, *Class Actions, Law and Practice* (Butterworths, Toronto and Vancouver, looseleaf service).
2. Ont., R. 12; BC, R. 5; NS, R. 5.09; Nfld., R. 7.11; Man., R. 12; PEI, R. 12; Fed., RR. 299.1–299.42; Alta., R. 42. Quebec, CCP, Book IX, ss. 999–1052; Class Proceedings Act, 1992, SO 1992, c. 6; Class Proceedings Act, RSBC 1996, c. 50. Quebec was the first jurisdiction in Canada to enact specific class proceedings legislation. Class Action Act, RSQ 1997, c. R-2.1.
3. *Infra*, 'Costs'.
4. *See*, J. Campion, 'Misrepresentation in Class Proceedings: The Cardozo Nightmare?', 24 *The Advocates' Quarterly* 129 (2001).

140. The action is started and labelled by the plaintiff as a representative action. All are case managed. The action must then be certified by the court as appropriate for class proceedings. This is often a two or more stage process, with the court needing to be satisfied that the plaintiff has a cause of action, the class is identifiable and capable of description, (although all members need not yet be identified), the class size can be determined at some stage,¹ that there are common issues among the members that make a representative proceeding useful and the 'preferable procedure', that there are not so many individual issues that the action will become unmanageable, that the plaintiff and particularly the counsel for the plaintiff are up to the task, that they have a litigation plan and that is realistic, and that there are no conflicts of interest among the members of the class. Conflict of interest between the counsel for the plaintiff and defendants is also an issue, given the nature of the normal defendants. As it happens, smaller firms have tended to become involved in these actions because the lawyers are less likely to have acted, or to have been working with lawyers who have acted for the defendants in the past. Sole practitioners rarely have the resources to take on this type of action.

1. There are some constitutional problems that have surfaced in the context of classes which include out of jurisdiction persons. There is reason to doubt whether the decisions can impose '*res judicata*' on out of jurisdiction class members who do not opt out.

141. Once the action is certified, party members are given notice in various ways, and given the option of opting out. Limitation periods stop or 'toll' against all those who stay in the class, when the action is started. Discovery of the plaintiff and other plaintiffs with leave, and of the defendant follows. This can take a considerable amount of time.

142. At trial, the common issues are decided, then some procedure is used to decide the individual issues, e.g., did the individual rely on the misrepresentation? An aggregate of damages is assessed, assuming success on the merits, and individual damages assessed by separate court proceedings or reference to an outside body such as another law firm or accountancy firm.

Many class proceedings settle, and indeed many are started on the assumption that they will settle. The risk to the counsel for the plaintiff, who normally waits for a fee

until the end of the action, and sometimes bankrolls the disbursements and costs, is considerable.¹

1. It has been suggested that counsel may find themselves in a conflict of interest position with the plaintiff, when deciding whether or not to settle, and when seeking a higher fee from the court than is normal for ordinary actions. Some form of contingent fee is always available in class actions.

143. All persons in the class who did not opt out, are bound by *res judicata* in the result.¹ On settlement if there is more than one defendant, the non-settling party defendant may seek an order limiting its future liability, called a bar order.²

Either a contingent fee or a fee multiplier is allowed to increase the fees paid to the successful plaintiff counsel. In Ontario, legislation allows legal aid to have a hand in funding these actions.³

Should the action not be certified, individuals are required to bring their own actions, and the risk of inconsistent results follows, and the issue of collateral *estoppel* becomes important.

It is safe to say that, like public interest litigation, plaintiff class action litigation is a growth industry.

1. But *see* para. 140, no. 1, *supra*.
2. Eizinga, *supra* para. 139, no. 1 at p. 9.29.
3. Law Society Amendment (Class Proceedings Funding) Act, SO 1992, c. 6.

G. Case Management

144. The term ‘case management’ is something of a generic one referring to the involvement of a judicial official in the pre-trial preparation of a civil case. Even without the formal case management rules which are developing, some judges have always been interventionist in cases, pushing the parties to take certain steps, including to settle. Additionally, under such rules as ‘speedy trial’ rules, or summary judgment rules, much judicial control is possible. Under case management rules, judges and those hearing interlocutory motions¹ are given very specific powers to intervene and control the litigation.

Started as pilot projects in some provinces in the early 1990's,² the procedures have proved to be popular with the courts at least, and their use is spreading. The purpose of case management is to move cases to trial quickly. In some jurisdictions, the parties themselves chose to have their case managed.³ In others, cases are required to use the procedure.⁴ The two choices are to have each case with its own arranged timetable or to have tracks called ‘fast (expedited), regular or standard, and complex’. In Ontario where tracks are used, the plaintiff selects the track initially. Once on a track, or with a schedule set, the case is expected to be advanced according to the timetable. To motivate the parties and to facilitate this, regular case conferences are scheduled with case management judicial officials who follow the entire case to trial. In addition, settlement or dispute resolution conferences are required to be held, and pre-trial conferences as well. The powers of the judicial officials to order how the case will proceed are wide, and sanctions for failure to follow the timetable are severe, from having the action or defence struck out to costs penalties. Interlocutory motions may

be informal, and a trial date is required to be set within a set period. Timetables can be changed but not easily. Although the case management judge does not normally hear the trial except with consent of the parties, the judge will make a number of decisions about the conduct of the trial, and include them in a memorandum which binds the parties. An example of the kind of order might be one limiting the number of experts and requiring an expert brief in advance.⁵

All jurisdictions have rules that require court officials to conduct ‘status reviews’ of any cases, whether formally case managed or not, that seem to be stalled. Usually the registrar is authorized to seek information from the parties after a set period of inactivity and to dismiss proceedings if no reasonable explanation is given.⁶

Experience with formal case management is limited, but it is clear that the more complex commercial or public interest cases do not fit easily into moulds.

1. Called case management masters, or prothonotaries in some places.
2. In three regions of Ontario, for example, and in BC.
3. Under Rule 78, proposed in Manitoba in 1999, or under Fed., RR. 383–385 (specially managed proceedings), for example.
4. In Ontario, as of 1 July 2001, for all Superior Court of Justice civil actions started, all on the ‘commercial list’ there, and all in a few other regions. See R. 77. In Alberta, all ‘very long trial actions’, R. 218.1.
5. Alberta, R. 218.2.
6. See Part V, ‘Discontinuance’.

H. Estates, Family Matters, Mortgages, Divorce, etc.

145. Earlier, the structure of the court systems of the fourteen jurisdictions considered here was explained. Most Superior Courts in the provinces and territories are divided into branches to deal with different types of cases. There will be a general trial court, dealing with the matters that require a regular proceeding, using the procedures set out in this Part. In addition, there will be separate rules that cover particular types of dispute. The procedures will be variations of the above two: actions or applications. The types of dispute usually covered by separate rules and sometimes by separate statutes are estate administration,¹ family law, marriage, divorce, mortgage actions, partition of property, mental incompetency proceedings, reciprocal enforcement of judgments of various sorts, and judicial review. Because most but not all of these matters are under provincial jurisdiction, the Federal Court of Canada has fewer separate rules, as it does not deal with them.

Many of the issues dealt with here, such as the administration of estates are non-contentious and the role of the court is as an administrator.

1. For example, see Estate Administration Act, RSBC 1996, c. 122, Probate Recognition Act, RSBC, c. 376; Probate Court Act, RSNB 1973, c. P-17.1; Probate Act, RSNS 2000, c. 31, RSPEI 1988, c. P-21.

I. *Proceedings Against the Crown*

146. Because the Crown is seen as the source of all governmental power, it makes the rules about how much exposure to litigation it has. In England, until 1947 the model in place for actions against the Crown required the plaintiff to petition the King (or Queen) for recourse for a legal right. If the Crown agreed to be tried in its own courts, the petition of right would be endorsed '*fiat justitiae*' or 'let right be done'. The difficulties with this procedure are obvious, and added to these were the fact that tort liability was not available since the Crown could do no wrong, discovery was not available, and remedies were limited. The Crown power came to Canada with the reception of English law, and it was not until the legislation in England in 1947 that the picture began to change.¹

Under existing provincial and federal legislation the position of the Crown and its agents and servants, whether federal or provincial, in terms of litigation, is similar to that of any citizen.² Tort and contract liability is provided. The 'government' is also subject to the 'Charter' and remedies there, although these are not normally the types of remedies granted in most civil litigation.³

1. Crown Proceedings Act, 1947, 11 Geo. 6, c. 44. See P. Hogg, *supra* para. 3, no. 2.

2. Crown Proceeding Act, RSBC 1996, c. 89; Crown Proceedings Act, RSPEI 1988, c. C-32; Crown Liability and Proceedings Act, RSC 1985, c. C-50; Proceedings Against the Crown Act, RSO 1990, c. P-27; RSA 2000, c. P-25; RSM 1987, C. P1400; RSNB 1973, c. P-18; RSN 1990, c. P-26; RSNS 1989, c. 360; RSS 1978, c. P-27; RSQ 1977, c. C-25 (CCP); and see Crown Suits (Costs) Act, RSS 1978, c. C-51. The test of whether a person was a servant or agent of the crown at the relevant time is a 'control' test. See P. Hogg, *supra*. The position of the governments of the territories, regional governments, or municipal governments is essentially the same as that of an ordinary citizen.

3. The normal remedies relate to the validity of the law, not to damages for its execution. See K. Roach, *Constitutional Remedies in Canada* (Canada Law Book, Toronto, looseleaf service).

147. In civil litigation, there are, however, some residual advantages held by the Crown. Those exercising judicial roles are generally immune from civil action unless they knowingly act outside their jurisdiction. Many statutes, which only bind the Crown if it chooses to be bound,¹ protect the actions of crown servants or agents if they were acting in good faith in the execution of their duties. In addition, short notice provisions or limitation periods often apply to such actions.² Remedies of injunction or of specific performance of a contract are not available although declarations of rights are. Discovery is available but might be limited by special provisions and is certainly limited by claims of crown privilege, also known as the public interest privilege.³

Execution of judgments, whether on the property or pensions of crown servants or agents or on crown property, is covered by restrictive rules. Jury trials are not available, as indicated. Actions of the central government in defence of Canada, whether in war or otherwise, or in the training of the armed forces do not attract liability as of right.

1. Under the above legislation or under Interpretation Acts, most statutes bind the crown. Sometimes the legislation must expressly so state, in other jurisdictions it is bound unless exempt.

2. E.g., a seven-day notice of claim in the federal legislation, s. 12. The Public Authorities Protection Act, RSO 1990, c. P-38 has a six month period. *See* the Public Officers' Protection Act, RSS 1978, c. P-40.
3. This is probably the most protective of the remaining prerogatives of the crown as applied to litigation. *See infra*, ' "Evidence" and *Mulroney v. Coates*' (1986), 54 OR (2d) 353, in which an Ontario judge refused to act on a letter of request (*rogatory*) from the Nova Scotia Supreme Court to have the then Prime Minister of Canada attend a discovery in a libel action to which he was a party. It is unclear whether the Minister was not compellable (required to attend), or just not required to answer questions because of a public interest immunity. The latter would be most consistent with principle. To some extent, Freedom of Information legislation is weakening the immunity.

Chapter 3. Review Proceedings

§1. APPEAL

148. The right to appeal decisions made in trial courts is a statutory one. It should be distinguished from judicial review, which is a function of the inherent jurisdiction of judges of superior courts and does not depend upon statutory authority.¹ This part will address appeals of decisions made at the superior court level in the provinces and territories, as well as in the Federal Court of Canada, Trial Division. It will also consider briefly appeals from the highest appeal court in the relevant jurisdiction to the Supreme Court of Canada.²

The statutes setting up the appeal courts provide for the making of rules of procedure to govern appeals. All jurisdictions have these, sometimes as part of the rules that govern trial preparation and sometimes as separate sets of rules.³ All have a similar format and content.

The statutory right to appeal is described in the legislation as involving questions of fact, questions of law, and mixed questions of law and fact. Normally the first appeal from a final order of a judge can be on issues of law as of right, and on mixed issues or ones of fact with leave. One of the issues must be a legal one. Second appeals are usually restricted to issues of law or mixed ones.

1. *See supra*, at p. 9.

2. I shall not deal with appeals from small claims courts or the territorial courts or the court of Quebec.

3. Judicature Act, RSA 2000, c. J-2; Court of Appeal Act, c. C-30; Supreme Court Act, RSBC 1996, c. 443; Court of Appeal Act, c. 77; Supreme Court Act, RSC 1985, c. S-26; Federal Court Act, c. F-7; Court of Queen's Bench Act, SM 1988–1989, c. 280; Court of Appeal Act, CCSM c. 240; Judicature Act, RSNB 1973, c. J-2; Judicature Act, RSN 1990, c. J-4; Judicature Act, RSNWT 1988 (Nunavut also), c. J-1; RSNS 1989, c. 240; Courts of Justice Act, RSO 1990, c. C.43; Supreme Court Act, RSPEI 1988, c. S-10; Appeals Act, c. A-13; Que. CCP, Court of Appeal Reference Act, RSQ 1977, c. R-23; Queen's Bench Act, SS 1998, c. Q-1.01; Court of Appeal Act, SS 2000, c. C-42.1; Supreme Court Act, RSY 2002, c. 211; Court of Appeal Act, c. 47. The justices of the Court of Appeal of Alberta sit in the NWT and in Nunavut Courts of Appeal and those in the British Columbia Court of Appeal sit in the Yukon.

149. The route of the appeal depends upon who decided the question and whether the order was final or interlocutory. Generally, final interlocutory orders of judicial officials other than judges, such as masters or prothonotaries, go to an intermediate level, often to the judges of the superior court sitting in a separate division (often called a divisional court). Interlocutory orders from non-judges in interlocutory matters such as motions go to the same place but may require leave to appeal. Final decisions of judges go to the court of appeal as of right,¹ while interlocutory orders of judges usually require leave to appeal to that court. Since each jurisdiction has its own system, these statements are to be taken as a general guide only.

Statutory appeals from decisions of administrative bodies, of which there are many provided, are usually as of right. It is often a requirement of judicial review that, unless obviously futile, the statutory appeals must be exhausted first.²

1. Except that costs orders made by judges may require leave to be appealed since costs are so much a matter of the discretion of the trial judge. Those made on assessment, by non-judges may not require leave. In a few jurisdictions such as Ontario and at the federal level, cases below a certain value, be it CAD 25,000 or CAD 50,000 respectively, go to intermediate level appeal judges, such as superior court judges sitting in a separate division.
2. A clear case of bias in a tribunal means that the person complaining need not wait until the decision on the merits to seek relief by way of judicial review.

150. Normally the appellant has thirty days to file a notice of appeal, from the date of the decision (when pronounced in court), although time can be extended, on application to the appeal court. The notice must specify clearly the grounds of the appeal. Cross-appeals by the respondent are possible. A transcript of the matter appealed from, such as a trial record is necessary, and an appeal book is prepared. Each side, appellant and respondent, prepares a factum of fact and law and often a book of authorities to guide the judges. As in trial courts, the court itself can allow interventions by interested parties. Once all documents are ready, the appeal is said to be ‘perfected’ and a hearing date is set. Because this process can be time-consuming and expensive, appeals are generally reserved for important questions. No matters that were resolved by a valid consent can be appealed. On the appeal, the normal quorum is three justices, although in important cases, it may be increased to five.

151. The statutes give the judges of the courts of appeal a considerable amount of power to control the appeal. Introduction of new evidence, limits on the length of oral argument, stays of the order appealed from, are examples of matters which often arise.¹

The real question when considering appeals is the extent to which a first appeal court will interfere with the decision below. When deciding a case, a trial court makes findings of fact based on the evidence. If the findings are those of a jury it is not always easy to see where the jury may have gone wrong, particularly if the verdict was a general one. The test is a strict one: The appeal court will only interfere with facts found by a jury if it is clearly recorded that the jury either did not appreciate its duty or that it acted wilfully in violation of it.² Where the findings are by a judge, there is a distinction made between facts and inferences from facts. Assuming enough evidence to found a finding of fact, a legal issue, decisions on the weight of the evidence and on credibility of witnesses are very much the role of the trier, not of the appeal court. A test of ‘manifestly wrong’ or ‘palpable error’ is applied, in order not to re-try the case.³ When it comes to inferences from primary facts, however, an appeal court will see itself as much qualified as a trial court to make such inferences but will normally be cautious about interfering.⁴ Discretionary orders, such as costs orders, are normally left as made unless clearly wrong. This statement is somewhat incomplete because if the order is a key one in the appeal, such as an order striking out a claim for failure to show a cause of action, the appeal court may be more inclined to interfere.⁵

Assessment of damages by a jury is not normally changed on appeal unless inordinately wrong. Assessment by a trial judge is left unless it is wholly erroneous, or based on a clear mistake of principle.⁶

Perhaps the best example of a mixed question of law and fact is a finding of negligence. It sounds like a legal issue but, if there is a jury, it is decided by the jury.

Interference in such a finding is treated in the same way as is a finding of fact, assuming the proper legal test was applied.

With questions of law, the decider must have been correct in the statement of the law and in its application to found facts. Much of the time of appeal courts in civil matters is spent dealing with issues surrounding the admissibility of evidence, a legal question.

1. See J. Sopinka, M. Gelowitz, *The Conduct of an Appeal* (Butterworths, Toronto and Vancouver, 2nd edn. 2000); R. White, J. Stratton, *The Appeal Book* (Canada Law Book, Toronto, 1999); J. Hunter, *Conducting a Civil Appeal* (Carswell, Toronto, 1995) (BC Practice); J.E. Cote, *Slow Appeals: Causes and Cures* (Edmonton, self-published, 2000) (Alberta practice).
2. *Vancouver-Fraser Park District v. Olmstead* (1975), 51 DLR (3d) 416 (SCC). See I. Greene *et al.*, *Final Appeal: Decision Making in Canadian Courts of Appeal* (J. Lorimer, Toronto, 1987).
3. *Stein v. The 'Kathy K'*, [1996] 2 SCR 802.
4. *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 SCR 114.
5. *R. v. Carosella*, [1997] 1 SCR 80, at p. 111.
6. J. Sopinka, *supra* no. 1 at p. 60.

152. The statutes give the appeal court judges wide powers in terms of disposition, should a ground of appeal succeed. Obviously, not all errors will have had an effect on the verdict, particularly those dealing with the admissibility of evidence. Appeal courts can make their own findings of fact on the record, and decide how important the errors were. In many cases, the courts will issue an order that determines the matter rather than sending it back to a new trial. This is particularly the case if new evidence has been admitted to the appeal. Once the decision is rendered, an order must be taken out by the parties, as is done in the trial courts. The issue of costs, both at the appeal level and at trial will be considered by the appeal court. Decisions of the courts of appeal, at the highest level in the provinces and territories and in the Federal Court of Appeal,¹ are appealable to the Supreme Court of Canada under restricted circumstances.

1. See J. Sopinka, *supra* para. 152, no. 1 at ch. 6.

153. Practice and procedure in Supreme Court of Canada appeals is somewhat different from that in courts of appeal because there are few appeals as of right.¹ The appellate jurisdiction of the court in civil matters is governed by the Supreme Court Act, and other federal statutes such as the Federal Court Act. It is of two kinds: Cases in which some court other than the SCC grants leave, and cases in which the SCC itself grants leave. The first group arise under sections 37, 37.1 of the Supreme Court Act. The judges of the highest court of appeal in provinces, territories or in the Federal Court of Appeal may decide that a question is of such importance that it '... ought to be submitted ...' The second group have the SCC itself deciding the question of whether it will hear a case. Under s. 38, it may grant leave in cases from trial courts in the system in which federally appointed judges sit if the question is one of law alone. This appeal '*per saltum*' (by a leap), bypasses the highest court of appeal in the relevant jurisdiction and is now rarely used. The main body of civil cases that it hears arise under s. 40 in which it grants leave to appeal in cases in which it is of the opinion that '... any question involved therein is, by reason of its public importance or the importance of any issue of mixed law and fact involved in that question, one

that ought to be decided by the Supreme Court or is, for any other reason, of such a nature or significance to warrant decision by it'. Because most courts of appeal are willing to let the SCC decide what is an important case, the control of the docket by the SCC judges in civil cases is strong.² The sorts of cases in which it grants leave are those raising a novel constitutional issue, those in which a statute of general application requires interpretation, ones in which there are conflicting decisions in courts of appeal, and ones in which its own decisions need to be revisited.³

Much of the focus in the Rules of the Supreme Court of Canada⁴ is on the leave granting process, and most are done in writing. Once leave is given, which is in about 12 per cent of the cases,⁵ the appeal proceeds much as if it were in a provincial court of appeal and once the parties and intervenors are ready, is 'inscribed' for hearing. Recent practice has the court limiting oral argument greatly and focusing on the *facta* of the parties.

As can be seen, the first appeal from a final decision of a judge at trial can raise issues of both fact and law. Second appeals require leave and are normally restricted to important issues beyond the significance of the case to the parties themselves.

1. Mostly in criminal cases, whether or not Charter issues arise. See Criminal Code of Canada, RSC 1985, c. C-46, s. 691 ff., and see Symposium on the 125th Anniversary of the Supreme Court of Canada: Legacy and Challenges, 80 The Canadian Bar Review (2001).
2. Disputes in the Federal Court of Appeal between Canada and the provinces or between provinces go automatically, if grounds exist. S. 35.1.
3. J. Sopinka, *supra* para. 152, no. 1 at p. 235.
4. Generally, see B. Crane, H Brown, 'Supreme Court of Canada Practice' (Carswell, Toronto, annual volumes); E. Meehan *et al.*, 'Supreme Court of Canada Manual' (Canada Law Book, Toronto, 1999); E. Meehan, 'Supreme Court of Canada – Process and Advocacy – a Practical Guide for Practitioners' (1996), 75 Can. Bar Rev. 81; G. Hall, 'Applications for Leave to Appeal: The Paramount Importance of Public Importance' (1999), 22 The Advocates' Quarterly 87.
5. J. Sopinka, *supra* no. 3 at p. 234.

154. The approach to supervision of trial courts may be contrasted to supervision by way of judicial review. Most of this supervision of inferior tribunals or of those government officials exercising a statutory discretion is directed to ensuring that they do the job which they were intended to do. It is more supervision of jurisdiction than a look at the merits of its exercise. Speaking generally, when looking at the decisions that involve interpretation of statutes, the tribunal should be 'correct', but in the rest of its functioning, assuming it asks the right questions, follows the proper procedures, and addresses the right issues, it is safe from review if it is not 'patently unreasonable'.¹

1. See D. Mullan, *Administrative Law* (Irwin Law, Toronto, 2003).

§2. CASSATION

155. In Canada, the language of cassation is the language of 'quashing' and is normally applied to decisions beyond the jurisdiction of the decision-maker. It is used also in terms relating to appeals beyond the jurisdiction of the court of appeal i.e., quash the appeal, as opposed to allowing or dismissing it on the merits. If the

decision-maker was sitting in an inferior court, judicial review is available. If a superior court appeal is required, judicial review is only available against inferior courts or tribunals or non-judicial functionaries. There exists no special procedure solely for cassation.

§3. EXTRAORDINARY APPEALS

156. The only extraordinary appeals of which I am aware are in the criminal law field in which the prerogative of mercy may be exercised by the Cabinet at the federal level. Many civil statutes provide for appeals to the cabinet, but these are not extraordinary and usually are in the area of non-judicial activity such as land zoning.

Part V. Incidents

Chapter 1. Interlocutory Motions

157. Earlier, I considered applications, which are a procedure for originating a proceeding that is different from an action procedure. They use a type of motion procedure. Here I deal with interlocutory motion procedure, generally.

Motions, either before a proceeding is started, or after, are termed ‘interlocutory motions’, or sometimes, ‘interlocutory applications’.¹ They are used to obtain some interim advantage in the proceeding such as a provisional remedy, striking out a document or part of a document filed by the other party, obtaining leave to take some step in the proceeding where leave is required, and for many other purposes. Time for taking a further step in the proceeding stops running when a motion is brought, and sometimes one is brought or ‘made’ for that purpose alone. If a party is prepared to foot the cost it may ‘motion the other side to death’ by bringing a succession of motions in a proceeding. Ultimately, the other side may seek an order barring further ones without leave. In short, the procedure is capable of misuse.

1. See D. Peppiatt, R. Linton, *Practice on Motions and References* (Butterworths, Toronto and Vancouver, 1988); J. Rochon, J. Terry, E. Gray, *Interlocutory Proceedings* (Butterworths, Toronto and Vancouver, 1996); M. Hendriks, *Court Motions Handbook* (Carswell, Toronto, 2nd edn. 1996).

158. The normal procedure followed on motions is for the moving party to prepare, serve, and file a notice of motion.¹ It will include the relief sought, the grounds, but not argument, where returnable,² and will list the evidence to be relied upon. A motion record is required, and, for some of the more involved motions such as those dealing with issue of law, or summary judgment, some form of factum of law is required from both the moving and the responding party.

1. Ont., Man., PEI, NB, NS, R. 37; Fed., R. 358–371; BC, R. 44; Alta., R. 384; Nfld., R. 29; Que., CCP ss. 159–171; Sask. RR. 317–344, 441–450, and elsewhere.
2. This can be a problem in a physically large jurisdiction with the parties coming from different regions. Some places require the motion to be brought in the place where the responding party's solicitor practises to minimize misuse. Should the respondent to the motion be outside the jurisdiction of the court, they will have to be summoned into it.

159. Depending upon the type of motion, it will be heard by a judge or a lesser judicial official.¹ Generally, motions that involve issues of law, liberty of the subject, default judgments, or those which concern parties with disabilities are heard by judges,

either in court or, where available, in chambers. Local practice for the holding of motions court is quite idiosyncratic and general statements are misleading. Practice directions are common.

1. For example, a master, local judge (NS), prothonotary.

160. There are three types of ways to deal with motions. Some, which are ‘*ex parte*’ do not, of course, require service and are returnable quickly. Others called ‘basket motions’ are on consent of the parties and no hearing is needed. They are left for the court official to sign, with a draft order. Contested motions are either heard in court or chambers, usually the latter, and rules provide for video conferences, telephone conferences and other electronic ways to get the parties together, as well as argument in writing. Some places have a fifteen-minute rule, that if one party fails to show up for that time, the other can go ahead. All result in a decision followed by an order. The range of possible costs orders is vast: The hearer may assess them, they may be left to the trial judge, they may go to the successful party in any event of the result at trial or only if that party wins overall. There is a tendency to have them assessed at the hearing according to set guidelines.

161. Evidence on interlocutory motions is normally by affidavit.¹ Depositions such as those taken before commissioners, discovery transcripts, documents produced on discovery are used as well. Oral evidence is less common. Cross examination on affidavits is normally allowed before the hearing, although, because it is subject to abuse, is controlled in various ways. On most interlocutory motions, deponents to affidavits are allowed to make statements based on information and belief (hearsay and opinion evidence) which they could not make in court if testifying as witnesses. Rules do make exceptions to this, however. Affidavits are sworn before a range of persons. Most lawyers are also ‘commissioners for oaths’. Notaries Public exist, as do notaries, in Quebec. Judges, judicial officials, justices of the peace are all qualified to act.² It is improper for a lawyer to swear an affidavit as deponent and then appear, using the affidavit as evidence. Confusion of role is obvious.

1. Ont., Man., PEI, R. 4, 39; Fed., R. 80; BC, R. 51; Alta., R. 298–314.1; NB, R. 4.05; Nfld., R. 48; NS, R. 38.
2. See, e.g., Notaries Public Act, RSN 1990, c. N-5; Notaries and Commissioners Act, RSNS 1989, c. 312; Commissioners for Taking Affidavits Act, RSO 1990, c. C. 17; Affidavits Act, RSPEI 1988, c. A-7; Notaries Public Act, RSS 1978, c. N-8.

Chapter 2. Provisional Remedies

162. There are a great many interim procedures available, some of which enable the parties to know that if they succeed at trial, there will be assets available to satisfy the judgment. Some of these are in the area of law known as bankruptcy, fraudulent preferences, tracing of assets, which are beyond the scope of this piece. Earlier, I dealt with two which are often used as pre-action remedies.¹ All of the provisional remedies are often authorized by statutory provisions such as Judicature Acts, and specialized legislation such as Land Titles Acts. All are sought using the motion procedure described above.

1. The attachment of assets (*Mareva* order), and obtaining evidence in the possession of the opposite party (*Anton Piller* order). *Supra*, Part 4, at p. 1.

163. The remedy of an injunction, mandatory or prohibitory, is found in all jurisdictions and is derived from the chancery side.¹ If obtained ‘*ex parte*’, their duration is time limited. Labour injunctions are often covered by express rules. Because the granting of an injunction will have a severe effect on the responding party, they are not easy to obtain and the moving party must undertake to indemnify the other side if it loses at trial. The *American Cyanamid*² test seems to be universal. The issues are the threatened harm, adequacy of damages, balance of convenience, and the effect of the injunction on both parties.

1. Ont., PEI, R. 40; BC, R. 45; NS, R. 43; Que., CCP, ss. 751–761; Nfld., R. 22; NB, R. 40; Fed., RR. 372–374; Alta., RR. 392–393; Sask. Part XXXII.
2. *American Cyanamid Co. v. Ethicon Ltd.*, [1975] 2 WLR 316. See *R.J.R. MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311.

164. Another common interim remedy is the appointment by the court of a receiver to manage some aspect of the business or property under dispute until trial. Careful directions are provided and indemnity required.¹ Normally the provisions of relevant corporation legislation will also provide for a similar remedy.²

1. Ont., PEI, Man., R. 41; BC, R. 47; NS, R. 46; Nfld., R. 25; Fed., R. 375–376. And see Sir R. Walton (ed.), *Kerr on the Law of Practice as to Receivers and Administrators* (Sweet and Maxwell, London, 17th edn., 1989).
2. Such as the Canada Business Corporations Act, RSC 1985, c. C-44.

165. Certificates of pending litigation (*lis pendens*) are available in proceedings in which title or an interest in real property (land), are in issue. Some rules require that the remedy be sought in the pleadings.¹ The land or interest in it must be unique, damages must not be adequate, the party obtaining the order must move the proceeding toward trial swiftly and post security. Once obtained by a party, they are lodged on title to prevent others from obtaining the asset. Once the proceeding is finished, they are discharged or vacated.

1. Ont., Man., PEI, NB, R. 42.

166. Most jurisdictions have specific rules covering attachment of assets, recovery of property (detinue, trover), preservation of property that is the subject of the proceeding, sale of it if a wasting asset, as well as pre-judgment garnishment of wages, accounts, etc.¹

1. See, e.g., Ont., PEI, Man., RR. 44, 45; Fed., RR. 377–379; Alta., RR. 427–435, 467, 470–481.1; BC, R. 46; NS, RR. 43, 48; Nfld., R. 22, 27.

167. A remedy is available to a stakeholder who has no personal interest beyond costs, in personal property it holds. Called ‘interpleader’ it allows the person to apply to the court to determine to whom the property belongs. Often a specific rule covers bailiffs or sheriffs who have seized property.¹

1. Ont., PEI, Man., NB, R. 43; Fed., R. 108; Alta., R. 442–453; BC, R. 48; Sask. RR. 411–427.

168. In matrimonial cases, whether tried in the superior courts or elsewhere, the issue of interim support and custody is often dealt with by way of motion. In fact it sometimes occurs that it is not possible to obtain a date for full argument of the motion for a time, and an ‘interim-interim’ order is issued, which is difficult to displace later.

Chapter 3. Admissions

169. During the course of preparation of an action for trial, the parties may make certain admissions of fact. In a statement of defence, for example the defendant may admit enough facts that part of the case may not need to go to trial. An admission of liability but denial of causation of all of the claimed damages may occur. In such a case the plaintiff may move for partial judgment immediately to recover some damages that are not disputed. The same occurs during discovery. One of the parties may admit enough on oral discovery for the other side to obtain partial judgment.

Rules of most jurisdictions provide another method to force admissions from the other side.¹ They allow a party to serve a ‘request to admit’. This goes beyond facts and can include a request to admit the authenticity of a document. The other side is required to answer specifically and silence or an inadequate answer will be taken as an admission. The procedure forces the party to decide what is in issue and what is not, by imposing costs penalties at trial for not admitting something that was not important and forcing the other side to prove it. Alberta goes farther and allows a party to serve a request to admit the correctness of an opinion. This would, if successful, shorten a trial considerably, or obviate the need for it.²

Although admissions that have been made can be withdrawn on consent or with leave of the court, it is not easy to succeed in such a request. The other side and the judge will ask, if it is wrong, why did you admit it, if it is correct, why should you be allowed to withdraw it?

Admissions, whether as a result of a request to admit or made voluntarily, can be used to obtain partial judgment not only in the immediate proceeding but elsewhere.³

1. Alta., R. 230; Ont., NB, Man., PEI, R. 51; NS, R. 21; BC, R. 31; Fed., R. 255; Nfld., R. 33; Sask. R. 241; Que., CCP, ss. 457–461 allow a party defendant to partially or completely acquiesce in a demand, i.e., admit part of the case or all of it.

2. Alta., R. 230.1.

3. In *Steer v. Merklinger* (1995), 25 OR (3d) 812, an admission to the execution of a promissory note which the party made on an oral discovery was used as the basis for a motion for summary judgment in another proceeding against the maker. Should that occur now, a judge would, in all probability, allow the party seeking to use it to by-pass the implied undertaking rule.

Chapter 4. Offers to Settle, Payment Into Court

170. With the rise of interest in alternative dispute resolution, many jurisdictions are formally requiring some attempt to settle proceedings without a trial. Mediation is the most commonly required procedure.¹ In addition, the rules of professional conduct governing the legal professions, often make the attempt to reach a settlement of disputed claims a requirement for lawyers. In fact, it has always been the situation that good counsel, aware of the costs, both monetary and psychological, of litigation, attempt to resolve disputes without a trial. Various concepts exist to encourage this.

1. *Infra*, Part VIII.

171. In contract law there is a doctrine of ‘tender before action’ which can be pleaded as a defence and has an effect on costs allowed a successful plaintiff.¹

Offers to settle all or part of a claim, by both sides, have always been allowed and their making subject to an evidentiary privilege sometimes called a ‘without prejudice’ privilege. Until the court decides on liability, it cannot be told of such offers, whether made before or during a trial. Such offers are subject to the law of contract, and can be time limited.

Rules of court for a long time have allowed a defendant to pay money into court in full or partial satisfaction of a claim where a monetary remedy is sought, inform the plaintiff, and,² if the offer is not accepted, argue for reduced costs if the plaintiff is less successful than the amount of the offer, or increased costs to it if the plaintiff is ‘shut out’. Again, these procedures are cloaked in a privilege.

1. See Quebec, CCP, ss. 187–191 (Tender and Deposit); NS, R. 41; Alta., R. 166.

2. The rules governing payment into court of money are part of more general rules covering the handling of funds in court. All jurisdictions have an official called an ‘Accountant’ or a like term, who looks after the moneys in court. See generally, Ont., R. 72; Nfld., R. 20; PEI, R. 72; Man., R. 73; BC, R. 58; Alta., RR. 175, 178 Sask. RR. 175–184f.

172. In the last twenty years, most jurisdictions have expanded on these procedures and concepts and now have formal rules allowing both sides to make offers to settle under the rules in any proceedings, actions, motions or applications.¹ Generally the offers do not have to be accompanied by payment into court, they must be made a certain time before the start of the trial and be open until the trial starts, they are protected by a privilege until liability and quantum of damages is decided, and costs penalties are imposed if the party does not accept them and goes on and does not ‘beat the best offer’. These range from a defendant having to pay the successful plaintiff’s costs on a higher scale from the time it learned of the plaintiff’s offer, to payment of double costs. If the defendant made the offer and in success, the plaintiff does not beat the defendant’s offer, it may be required to pay the defendant’s costs from the date of the notice on the regular scale of costs in some places or at twice that in others. For some reason, plaintiffs tend to get better treatment in these rules than do defendants. These are some of the ways that the costs system punishes litigants who insist on going to trial.

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1. *See*, generally Ont., PEI, Man., NB, R. 49; NS, R. 41A; BC, R. 37; Fed., RR. 419-422; Que., CCP, s. 460; Sask., R. 184C; Alta., RR. 166–174.

Chapter 5. Discontinuance

173. On consent of all parties, the proceeding may be stopped at any time before trial. In cases of parties with disabilities,¹ court approval may be required. In all cases in which a proceeding is ended, the court must be informed.

A plaintiff may discontinue all or part of the proceeding by serving and filing a notice (assuming service of the originating document). If the matter has been set down for trial the court may require that leave be obtained. The defendant's costs will have to be paid, and often the rules prohibit the plaintiff from starting a similar action until this has been done.

A defendant may serve a notice and withdraw all or part of the defence. The plaintiff is then allowed to proceed to a default judgment on that part of the action. Defendant will be required to pay the costs of the plaintiff.²

1. Infancy, mental incapacity.

2. See, e.g., Ont., Man., PEI, R. 23; BC, R. 36; Nfld., R. 19; NS, R. 40; Que., CCP, ss. 262–264; NB, R. 25; Fed., R. 165; Alta., RR. 153–154, 225; Sask. R. 198.

174. Where the originating document has been served, or an *appearance gratis* has been entered by the defendant, if the plaintiff takes no further steps, or takes some and then stops, leaving a time gap in the progress of the proceeding, the defendant may decide to seek to have the proceeding ended for want of prosecution.¹ Serving a notice of motion on the plaintiff usually has the effect of ‘waking the plaintiff up’ and, unless the plaintiff has been guilty of serious misconduct in the proceeding (contumelious action), or the defendant has been prejudiced in a material way by the delay, the plaintiff will be allowed to proceed. If the action is ended, the defendant is entitled to costs. As mentioned earlier, courts have built in procedures to trigger a ‘status review’ of the progress of a case in which nothing useful has been done for a period of time, and in case management, the scrutiny of the court is merciless and ongoing.

All jurisdictions with specific rules covering discontinuance or want of prosecution deal with the issue of ‘*res judicata*’ by allowing a further action since there has been no determination on the merits.²

1. Ont., Man., PEI, R. 24; Que., CCP, s. 265 (after one year since the ‘last useful procedure was filed’); NB, R. 26; Fed., R. 167.

2. A consent ending of the proceeding would cover this expressly.

Chapter 6. Language of Proceedings

175. Almost 25 per cent of the population in Canada lives in Quebec, with French being the language of choice for the majority. In all of the other jurisdictions, French is one of the minority languages although there is a significant minority French population in New Brunswick, Ontario, and Manitoba. Naturally, the issue of language is a touchy one, because it is so intimately bound up in culture. Stresses are most obvious when issues of education, the legislatures, the language of commerce, and the language of the courts are concerned.

In the Constitution Act, 1867,¹ although there were some language guarantees concerning education, only s. 133 guaranteed that either English or French ‘... may be used by any person or in any pleading or process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec’. The topic of language was not seen as a separate head of legislative jurisdiction and as a result, provision of bilingual services outside the federal level and in Quebec was left to the territorial or provincial legislatures.

When Manitoba joined the country in 1870, the Manitoba Act² guaranteed English-French in the courts in terms similar to s. 133. However, in 1890 the Manitoba legislature passed the Official Language Act and purported to allow English only in the pleadings and process in the Manitoba courts. After several attempts in the courts to challenge this, it was done successfully in the Supreme Court of Canada in 1979,³ leaving the Manitoba Act paramount.

Canada passed its own Official Languages Act which was upheld in *Jones v. Attorney General of New Brunswick* in 1975.⁴ At the same time New Brunswick had passed its own legislation providing, *inter alia*, for the use of both languages in the courts there. This was upheld in the same decision.

In 1977, Quebec ignored s. 133 and, among other things, in its Charter of the French Language,⁵ purported to make French the only usable language in courts there. This was struck down by the SCC in 1979.⁶

When the Charter was passed in 1982, sections similar to s. 133 (with Quebec excepted) guaranteed both languages in courts and elsewhere in institutions of government at the federal level and in New Brunswick.⁷

The result of all this is that a civil litigant at the Federal Court of Canada and in the SCC can be sure of a hearing in either official language. This is also guaranteed in New Brunswick. In Quebec, although s. 133 is still in force this same guarantee is not present. In Manitoba, the Manitoba Act prevails and the legislature is, in principle, required to provide judicial services in both languages. In other provinces and territories, it is left to the particular legislature, without any constitutional guarantees. Ontario⁸ allows any litigant to ask for a bilingual civil proceeding, not a French language one. It promises a bilingual judge anywhere, but a bilingual jury in only a few regions of the province.

In all jurisdictions, interpreters are required by the rules of court, to interpret to the language of the trial (usually into English, or, in Quebec, French). The parties pay the cost of this. Criminal proceedings, being under federal jurisdiction as far as

procedure is concerned, are covered in the Criminal Code of Canada, where the availability of trials in both languages is wider.⁹

1. British North America Act, 1867 (UK), now the Constitution Act, 1867.
2. S. 23, RSC 1985, App. II, No. 8. Now part of the ‘Constitution of Canada’ Constitution Act, 1982, s. 52(2).
3. *Attorney General of Manitoba v. Forest*, [1979] 2 SCR 1032.
4. [1975] 2 SCR 182.
5. SQ 1977, c. 5.
6. *Attorney General of Québec v. Blaikie*, [1979] 2 SCR 1016 (only the requirement of French in the legislature was in direct issue).
7. Constitution Act, 1982, ss. 16–22. Allowing the use of the language in the court does not guarantee that the judge will understand that language. See *Société des Acadiens v. Association of Parents*, [1986] 1 SCR 564.
8. Courts of Justice Act, RSO 1990, C. 43, ss. 125 & 126.
9. Generally, see P. Hogg, *Constitutional Law of Canada* (Carswell, Toronto, 2004). ch. 53.

Chapter 7. Security for Costs

176. All jurisdictions have provisions for allowing a defendant or respondent to move for an order requiring a plaintiff or applicant in certain situations to post a bond as security for costs in case the action fails. The situations in which this is done normally are those in which the plaintiff is from outside the jurisdiction, or has another proceeding underway against the same defendant for the same relief, or has not paid to the defendant another costs order, or is a corporation or nominal plaintiff and there is good reason to believe that the plaintiff has insufficient assets in the jurisdiction to pay a costs order, or the proceeding is frivolous or vexatious. Naturally, the moving party must prove the allegations and provide a draft bill of costs covering its estimate of what the ultimate costs might be.¹

The most common ground under which the order is sought is that of the corporation or nominal plaintiff. Because the obtaining of such an order against an impecunious plaintiff may end the proceedings, courts balance that possibility against the interests of the defendant in not facing un-met expenses. Generally, the existence of reciprocal enforcement of judgment legislation in the plaintiff's jurisdiction does not prevent such an order from being made. Where the order is made and the proceeding fails, the defendant can look to the bond for payment of costs *inter parties*, subject to the terms of the agreement.

1. See, generally, M. Orkin, *The Law of Costs* (Canada Law Book Inc., Toronto, looseleaf service), ch. 5, and Ont., PEI, Man., R. 56; Fed., RR. 415–418; NS, R. 42; Nfld., R. 21; Sask. R. 547.

Part V, Ch. 7, Security for Costs

Part VI. Legal Aid and Legal Costs

Chapter 1. Legal Aid

177. In this volume I have focused on litigation in the superior courts in Canada as a model of procedure in all the courts, including those at a lower level. Since, except for Quebec, on the whole the only lower level civil courts are small claims courts, in those jurisdictions in which the superior court does not deal with these claims, and courts dealing with family-related issues such as divorce, maintenance, support, custody, etc., again where they are not dealt with in separate divisions of the superior courts, the superior court model gives a good idea of civil litigation in Canada. The model does not, however, consider who is using the various courts in Canada. The average citizen does not see the inside of a superior court courtroom except if involved in a matrimonial dispute, summoned to appear for jury duty, or as a defendant in a case. It is normally only the government or a corporate litigant who can afford to use the civil dispute resolution services of the superior courts as plaintiff, without some assistance by way of class action rules, legal aid, contingent fees, or specially funded court access programmes such as in the Charter area.

The legal aid schemes in Canada fund access to, or protect citizens, more often in tribunals other than the superior courts. The major subject areas covered by these schemes are criminal law, family litigation, and to a diminishing degree, refugee and immigration law. Much of the money spent goes to provide counsel in federal or provincial administrative tribunals or specialized provincial courts. Little goes to help fund the high costs of being involved in a superior court civil trial.¹

1. As of 1996, civil legal aid in NB, PEI and effectively in NS was limited to domestic (family) matters. On paper the plan in Alta., is wider in coverage but rarely covers superior court civil, non-family matters. Man. covers all areas of civil law, in PEI the legislation to set up a legal aid scheme was not proclaimed and services are provided through the AG Dept. In Ont., the plan rarely covers non-matrimonial civil matters, except in class proceedings. In Quebec, coverage was cut back extensively in 1996. See *A Blueprint for Publicly Funded Legal Services* (Report of the Ontario Legal Aid Review, Toronto, 1997), ch. 15; *A New Legal Aid Plan for Ontario: Background Papers* (Osgoode Hall Law School, Toronto, 1997), and a special edition of the UBC Law Review, Vol. 33, 'Legal Aid 2000'.

178. Structurally, the legal aid systems in Canada are quite similar. They are set up by legislation, either the legislation providing for the qualification and governance of the legal profession, or in separate statutes.¹ There will be a governing Board, either a part of the law society or a separate entity, on which members of the public

and government usually sit alongside the lawyers. The jurisdiction will be broken into regions, each with its own office. Service will be provided either by staff lawyers on salary, or by private lawyers on a tariff or certificate basis,² or by a combination of the two. Staff lawyers will work out of offices or clinics, some of which are situated in faculties of law in various universities and utilize law students as well as staff lawyers. There are some specialized clinics dealing with immigration, poverty law, tenants, disabled, etc. Applicants for legal aid help apply and are required to pass a means test. Sometimes they will qualify even if their income is higher but will be asked to sign a pay back agreement. In civil litigation they will be required to reimburse the plan if they succeed and collect some money.

1. Legal Profession Act, RSA 2000, c. L-8; Legal Profession Act, SBC 1998, c. 9; Legal Services Society Act, RSBC 1996, c. 256; Law Society Act, RSM 1987, c. Legal Aid Services Society of Manitoba Act, RSM 1987, c. L. 105; Law Society Act, RSNB 1973, c. 80 of Law Society Act, SNB 1996, c. 89; Legal Aid Act, RSNB, c. L-2; Law Society Act, SN 1999, c. L-9.1; Legal Profession Act, RSNWT 1988, c. L-2; Legal Services Act, RSNWT, c. L-4 (Nunavut also); Legal Aid Act, RSNS 1989, c. 252; Law Society Act, RSO 1990, c. L-8; Legal Aid Services Act, SO 1998, c. 26; Legal Profession Act, RSPEI 1988, c. L-6.1; Legal Aid Act, RSQ 1977, c. A-14; CCP, C. 25; An Act Respecting the Barreau du Québec, c. B-1; Legal Aid Amendment Act, SS 1989–1990, c. 42; Legal Profession Act, SS 1990–91, c. L-10.1; Legal Profession Act, RSY 2002, c. 134; Legal Services Society Act, c. 135.
2. The administrators of the plan will authorize services usually to a maximum or for a set tariff amount, and the litigant is then free to take the certificate to any lawyer qualified by the plan to provide the service. The private bar seeks to keep the better work away from the staff lawyers and in its own hands.

179. Funding for the plans comes from federal and provincial tax money, other grants, interest from solicitors' trust funds, or other sources such as student fees, but the reality is that the pool of available money is shrinking both because of shrinking funds and government cut-backs.

The impact of the Charter and the requirement to provide counsel has as yet been small.¹ Add to this the fact that, except for actions that challenge decisions of 'government', it has little coverage of civil litigation in the superior courts, its impact on regular citizen-citizen litigation has been small. Where it does apply, there have been government funded programmes to help pay for litigation counsel, such as LEAF,² or the Court Challenges Programme.

Some rules of court acknowledge that a judge may have to assign counsel to a litigant and it occurs occasionally.³

Lawyers' rules of ethics often impose a '*pro bono*' requirement on lawyers but it is unlikely that they would require free superior court representation.

Other ways of helping citizens access the legal system include public education plans, often associated with legal aid plans, support for named groups such as 'aboriginals', legal insurance schemes offered by law firms or unions,⁴ and more use of contingent fee arrangements. As seen, court rules to simplify actions of lower monetary value, are common.

All jurisdictions engage in ongoing civil justice reviews and changes in legislation and rules of court to try to improve access.⁵

1. *Supra*, 'Fundamental Guarantees'.

2. Women's Legal Education and Action Fund, a national agency. The Court Challenges Programme is a federally funded one which supports Charter challenges.
3. E.g., Fed. Rules.
4. The Canadian Auto Workers' plan is the largest. There is currently some growth in the area of legal insurance.
5. *See* Systems of Civil Justice Task Force Report (Canadian Bar Association, Toronto, 1996); Rethinking Civil Justice: Research Papers for the Civil Justice Review (Ontario Law Reform Commission, Toronto, 1996).

Chapter 2. Legal Costs

180. Costs of litigation are composed of two different components, lawyers' fees and disbursements. The latter are divided into sums charged by the court or by court-related services such as bailiffs or sheriffs, and sums charged by persons hired by litigants to provide a private service to them in the pre-trial or trial stage, such as experts, interpreters, private process servers, etc.¹

As far as the costs of court charges is concerned, these disbursements are usually recoverable from the losing side to the proceeding. Sums paid to private persons may not be recoverable, if they are unreasonable or if they were not reasonably necessary for the proceeding. All disbursements must be specifically documented and justified before they can be collected. Fees charged by lawyers to their own clients, in litigation or not, are covered under the legislation governing the legal profession or as part of the rules of court,² and are collectable from the clients by way of action or a process known as taxing or assessment (assessment between solicitor and client). This process is separate from, although in litigation proceedings, related to, the matter of sorting out between parties to a proceeding who pays costs to whom. The costs inter-parties are normally governed by the rules of court of the particular jurisdiction, and, unless on consent, are included in the final order of the court or referred for assessment between the parties (party-party assessment).

1. The amounts that are charged by court officials and how much is allowed to be charged for other out of court services are often included in regulations because they change regularly. These may be a part of the rules of court or regulations under specific legislation. *See* Sask. Court Officials Act, SS 1984-85-86, c. C-43.1; Costs and Fees Act, RSNS 1989, c. 104; Administration of Justice Act, RSO 1990, c. A.6; and Tariffs under rules of court of all jurisdictions.
2. E.g., Solicitors' Act, RSO 1990, c. S. 15; NS, R. 63.16 ff.; Nfld., R. 55.15; PEI, R. 57; Sask. RR. 549–568.

181. In a typical proceeding in which the plaintiff wins, the court will be asked to require the unsuccessful party to bear some of the costs of the successful one. This is based on an English 'indemnity principle' to the effect that if you lose, you are at fault for not realizing you had a bad case and must indemnify the other side for its trouble. The winning side will draw up a bill of costs, present it to the other side which may dispute it and require an assessment. It will include court fees and costs paid to outside agencies, if normally required in such proceedings. It will also include fees that counsel for the plaintiff expects the losing side to pay. Despite the indemnity principle, the amount of actual indemnity of the party is estimated at around 40 to 50 per cent. There will be items spent for which the rules do not allow recovery, particularly in the pre-action stages. Allowable counsel fees are often lower than what the plaintiff's counsel will charge the plaintiff. Counsel for the plaintiff will submit his or her account to his or her client. As between the parties, the bill of costs is payable. As between the plaintiff and his or her client, he or she is entitled to be paid his or her higher account as between a solicitor and his or her client, whether the defendant pays, as between parties, or not. Any difference between the accounts is made up by the plaintiff, normally out of the money collected on the judgment.

182. In terms of party-party bills of costs, the overriding principle is ‘judicial discretion’.¹ At the end of the case the parties will speak to costs to obtain a favourable costs order. Costs of interlocutory proceedings, if not already dealt with, will be included. The judge may fix the costs and they will become part of the order of the court, or they may be sent to be assessed.² In that case, following a hearing, a certificate is issued by the assessment officer, and, subject to objection, they become payable.³ Factors relevant to how high the fees can be, what disbursements are allowable, what work is chargeable and what is not, are included often in the relevant rules of court. They are many and varied and include degree of success, value of the service, amount of recovery, time, complexity, expectations of the parties, offers to settle rejected, refusals to admit, unnecessary steps, misconduct at the trial or along the way, use of junior counsel, students at law or paralegals, special factors such as unique legal situations that needed to be resolved, novel issues, constitutional principles. Sometimes, particularly in applications involving the government, no costs will be ordered.

1. E.g., Ont., CJA, RSO 1990, c. C. 43, s. 131, R. 57; Fed., R. 400–414; NS, R. 63; Man., PEI, R. 57; Nfld., R. 55; BC, R. 57; NB, R. 59, Que., CCP, ss. 477–481; Alta., RR. 600–613; Sask. RR. 542–583.
2. R.D. Malen, ‘Assessment vs. Fixing Costs: Emerging Principles’, 24 *The Advocates Quarterly* 230 (2001).
3. Assessments between parties and between solicitors and their own clients are held before judges or, more commonly, court officials such as masters, clerks, registrars, prothonotaries. See, e.g., Ont, PEI, Man., R. 58; Alta, Part 47; Sask. RR. 549–568.

183. In terms of what the courts allow between the parties, sometimes fees are assessed on a scale higher than the 40 to 50 per cent indemnity scale (party-party scale). In cases of wrongdoing of a party or where there is a fund from which the costs may come,¹ they will be payable on a higher scale, sometimes misleadingly called a solicitor-client scale.

Some jurisdictions use a grid system for party-party costs, based on the value of the action and other factors.² The major components of party-party costs are counsel fees. More experienced counsel are allowed to receive more per hour. Since most cases settle, often at the court house door, a counsel fee for preparation, often amounting to two days trial fee, is allowed.

1. In an application involving a trust or an estate, where the beneficiaries are disputing the interpretation of the document, they are not at fault and so should be more fully indemnified. Often, however, disputes about costs eat up the *corpus* of the trust or estate, leaving little to be divided.
2. In NB, proposed in Ontario, 2001, under the Federal Rules, for example.

184. As between the lawyer and his own client, close to full out of pocket costs and fees are allowed. Normally, these will have been discussed extensively before and during the action, and no misunderstandings will have occurred. In all jurisdictions except Ontario, and there in class proceedings only, contingent fees are allowed. Sometimes the contingent fee arrangement between counsel and the litigant must be pre-approved by the court or at least filed there.¹ If the retainer is disputed, normally assessment is not available and the lawyer must bring an action against her former client for payment. Assessments as between solicitors and clients are more formal

than as between parties, and it is common to have other lawyers giving evidence about the value of the services rendered.

1. In NS, R. 63.18; Nfld., R. 55; NB, R. 59, for example. Because there is no federal law society, counsel in the federal courts are governed, as between themselves and their clients, by the relevant provincial or territorial law societies.

185. Generally, a successful party is not deprived of costs, if sought, although the practice varies. In some jurisdictions, specific rules of court allow the court to require counsel to pay costs personally or deprive them of costs against their own clients in part, for wrongdoing in the proceeding.¹ Where counsel was representing the Crown,² or was in-house for a corporate party, counsel fees as between parties are allowed. Even though the lawyer is receiving a salary anyway.

1. Ont., Man., R. 57.07, PEI, R. 57.06. Normally the lawyer is given a hearing into the matter before such an order is made.
2. See, Federal Court Act, RSC 1985, c. F-7, s. 47, for example.

186. Where the plaintiff succeeds against one or more defendants, but not all, if the claims were closely related and it was reasonable for the plaintiff to have joined the defendants who succeeded in escaping liability, the court may make the losing defendant pay the costs of the winning defendant, even though the plaintiff would normally be responsible for them. Called a ‘Sanderson’ or ‘Bullock’ order, depending on the method of payment ordered, this type of order puts considerable pressure on co-defendants particularly where there has been a ‘Mary Carter’ agreement between the plaintiff and one of the defendants.

Proceedings with multiple parties, counter-claims, cross-claims between defendants, and third-party claims, result in some complicated costs orders. Sometimes these are set off against each other.¹ Costs in appeals are dealt with in same rules of court that govern trials or in separate appeal rules.

Because the costs of losing are so high, and full recovery of costs even in success is unlikely, costs drive much of the litigation in Canada. Much of the rest is driven by the merits or by unreasonable factors.

1. The best source of information about costs in Ontario and at the federal level is M. Orkin, *The Law of Costs* (Canada Law Book Inc., Toronto, looseleaf service).

Part VII. Evidence

Chapter 1. Purposes of the Law of Evidence

187. The rules governing the admission of evidence in proceedings in Canada are a combination of common law, constitutional principles, and statutes.¹ It is often the case that the rules set out below in summary, are changed somewhat in the case of lower courts or tribunals, where they may be relaxed and not so strict.² Generally, even in the superior courts,³ they are being relaxed as well.

The search for truth in a trial is only one goal. It is recognized as impossible to achieve because of the limits on perception, memory, the strictures of the principles of party preparation and presentation, time limits, and other factors that affect reliability such as self interest.

Another goal is efficiency. The concept of relevance limits what the parties are able to advance as evidence, and many rules allow the proof of facts by documents or copies of these, rather than by direct oral testimony.

A further goal or purpose of the rules of evidence is fairness to all parties. Although of more importance in a criminal trial in which the balance between the state and the defendant is in issue, there are rules of privilege, that allow persons to resist the introduction of evidence where a higher interest is involved. In addition, rules do not allow general evidence of bad character.

Finally, there are often interests beyond those of the parties that need to be protected. Public interest immunity, or certain other privileges seek, to do that. Attempts to settle are protected, in part so that all persons will do so.

As will be seen, the trial judge, faced with balancing many interests, has a delicate job to do as part of his or her legal role.

1. Canada Evidence Act, RSC 1985, c. C-5; Alberta Evidence Act, RSA 2000, c. A-18; Evidence Act, RSBC 1996, c. 124; RSNB 1973, c. E-11; RSNWT 1988, c. E-8 (Nunavut also); RSNS 1989, c. 154; RSO 1990, c. E.23; RSPEI 1988, c. E-11; RSY 2002, c. 78; Manitoba Evidence Act, RSM 1987, c. E150; Saskatchewan Evidence Act, RSS 1978, c. S-16; The Evidence Act, RSN 1990, c. E-16; Quebec: Book of Evidence of the Civil Code of Quebec, SQ 1987, c. 18.
2. The statutes setting up administrative tribunals will often state that evidence that is 'credible and trustworthy' may be acted upon. *See* Statutory Powers Procedure Act, RSO 1990, c. S. 22, Labour Relations Act, SO 1995, c. 1; Administrative Justice Act, SQ 1996, c. 54; Administrative Procedures Act, SA 2000, c. A-3; and small claims court legislation.
3. In courts and tribunals under federal jurisdiction, the Canada Evidence Act governs. This covers most of the criminal prosecutions, where the Charter is of great significance as well. In provinces and territories, the relevant Act applies. Because evidence is characterized as procedural rather

than substantive, the problems of proof of the law in other jurisdictions occur less often. Proof of non-jurisdictional substantive law is considered in the same way as proof of a fact, requiring the calling of evidence in a trial.

Chapter 2. Relevance and Admissibility of Evidence

188. There is a distinction between materiality and relevance.¹ The broad issues, often defined in legal terms, are delineated in the pleadings. Thus, the parties will know that the plaintiff is alleging negligent driving on a particular date, for example. Evidence about that event will be material. A number of facts will be required to be established to prove the case. These will have been put into issue by the pleadings and may include identification of the driver as the defendant or as someone for whom the defendant is responsible at law, ownership of the vehicle, manner of driving, etc. These facts will be proved, or not, by relevant evidence. Logic will determine whether a piece of offered evidence will tend to prove the existence of the fact. The evidence may be direct, such as eye-witness evidence that the defendant was seen driving the car when it hit the plaintiff. It may be circumstantial, such as evidence that the defendant was seen driving the vehicle two minutes earlier in the same area. Rules of evidence will determine whether evidence that is offered to prove a fact, which evidence is material in the broad sense, and relevant to the existence of the fact, can be used. The concept of admissibility will be in issue. Canadian evidence law generally admits such evidence, if properly offered, unless there is a rule prohibiting its use, called an exclusionary rule. These rules, many of which have come to the statutes from the common law, protect many different interests and further many different and often conflicting goals.

1. See, J. Sopinka, S. Lederman, A. Bryant, *The Law of Evidence in Canada* (Butterworths, Toronto and Vancouver, 2nd edn., 1999); R. Delisle, *Evidence: Principles and Problems* (Carswell, Toronto, 6th edn., 2001); and D. Paciocco, L. Stuesser, *The Law of Evidence* (Irwin Law, Toronto, 2002).

189. One, for example, the prohibition against hearsay, is partly designed to ensure that reliable evidence is used. What a person said to another is best proved by the evidence of the person who said it. Of possibly less reliability is evidence of someone who overheard it or to whom the speaker told about the conversation.¹ However, if the content of the conversation was an admission against the interests of the speaker, it was likely to be true, since people do not normally admit to things against their interests, and would be allowed in. This rule, over the years, became subject to so many exceptions that it became somewhat meaningless, and courts now take a broader, more pragmatic approach to such evidence.

1. When testifying, the witness will be saying what they heard, and the rule should better be called a 'say-hear' rule.

190. Opinion evidence is another difficult category. Whether a fact in issue existed at the relevant time is normally determined by the finder of fact, a jury if one is used, or a judge alone. Of course, that finding is itself little more than the opinion of the fact-finder. Some facts, however, are so open and notorious that all citizens are aware of them. These are ones about which no evidence is required and judicial notice can be taken of them.¹ Generally, if the fact in issue is one outside the normal experience of the trier of fact, evidence of a properly-qualified expert witness will be allowed.

Thus, it is common to see such evidence in trials involving medical opinions, engineering standards, or in the many cases that raise issues of professional competence. The trier of fact is allowed to, but need not, rely on the opinion of the experts, which often differ.²

1. The existence of the second world war ‘Holocaust’, was in issue in *R. v. Zundel* (1987), 56 CR (3d) 1 (Ont. C.A.). R.J. Delisle, *Judicial Notice of the Holocaust* (1987), 56 CR (3d) 93.
2. Sopinka, *supra* No. 4, at ch. 12.

191. Character evidence of the propensity of a person to have acted in a particular way, is difficult as well. It tends to be evidence not about the fact in issue, but about the person of the party, and looks like evidence to enhance his credibility,¹ or blacken his character. Considerations of fairness and of relevance are always raised.

1. Common law discouraged the calling of evidence solely to show a person was more likely to be believed, calling such evidence ‘oath helping’.

192. Admissibility is also governed by the privileges mentioned earlier. Even though relevant, certain evidence offered may not be admitted if to do so would weaken some relationship that the law wishes to protect. Thus, the solicitor-client privilege is protected, to some extent. Communications between spouses, or between professionals such as doctors and patients, the interests of the government in protecting internal government information in the public interest, the interests of the media in protecting sources, and many others, are often the subject of dispute.¹ Usually, if recognition of the privilege will prevent the court from having enough evidence to decide if the fact existed, it will not be allowed to stand in the way. In criminal prosecutions, the privilege against self incrimination, the ‘right to silence’, and rules about improperly obtained evidence derived from the Charter and the common law are of more significance than they are in civil trials.

There are other general exclusionary rules such as those against the introduction of similar fact evidence, or prior consistent statements.

1. Most courts in Canada use the Wigmore test of whether a privilege should be protected in a particular case. It balances the interests of the parties to the communication against the public interest. Wigmore was the author of a massive and influential text in the US. 8 Wigmore, *Evidence* (McNaughton revision, 1961).

193. The weight to be given to evidence that is admitted, is generally a matter for the trier of fact. Once the evidence is capable, as a matter of law, of sustaining the inference that the fact existed, whether it should do so is a matter of weight. As seen earlier, appellate courts give the trial courts considerable deference on matters of the weight of the evidence.

Chapter 3. Burdens of Proof

194. It is not until the end of the case in court that the issue of the final or legal burden of proof arises. It is when the jury is charged, or the trial judge sitting alone must find facts that the extent to which the evidence is strong becomes crucial. Essentially, the side that made the allegation of fact must prove it on the balance of probabilities. The party may have the assistance of inferences, presumptions, reverse onus clauses, etc., but the weight of the evidence must be adequate. How adequate is another issue. On the balance of probabilities is no more than more likely than not. Normally, trial judges who try to further define such terms get into trouble with courts of appeal.

Long before the end of the case, however, the parties and the judge will be assessing the weight of the evidence on the crucial factual issues. It may be that the side with the burden of proof, normally the plaintiff as far as allegations necessary to found liability are concerned, will realize that it is in a position in which it must call more evidence or risk failing to convince the court at the end. At the same time, the defendant may realize that if evidence that has been led is not challenged by other evidence, it will lose on a particular factual issue at the end. This difficult position is sometimes described as the risk of non-persuasion, in the case of the plaintiff, or the evidentiary burden, in other cases. It is nothing more than a realization that more evidence on the issue is required in the trial to be sure that the legal burden, when applied at the end, will or will not be satisfied.

195. The motion for a non-suit, mentioned earlier, at the end of the plaintiff's evidence, tests the issue of whether there is any evidence on all the factual issues that the plaintiff must prove, that requires an answer. It is not the application of the final legal burden at all, just a screen to save the defendant trouble, if it succeeds.

196. Another phrase that is sometimes used is that of a '*prima facie*' case. Used more in criminal trials than in civil, it probably means little more than if the case is decided on the existing evidence, the fact will be established, and is misleading at best.

197. Some facts if proved, lead almost automatically to conclusions about the existence of other facts. The reaching of the conclusion of the existence of the other facts, is sometimes called an inference, sometimes a presumption. In either case the conclusion can be rebutted by other evidence. Thus, there is a civil presumption that if absent and not heard from for seven years by those that would normally hear, you are dead. It is, of course, rebuttable by the bringing of evidence that you are alive. It is a common sense conclusion used in order for the families of the missing person to settle the estate and get on with their lives.¹

Sometimes the law of evidence makes the reaching of a conclusion from certain facts absolute unless the other side introduces evidence to the contrary. A true reverse onus clause does this. By statute, the legislature may state that proof of a fact is, in the absence of evidence to the contrary, proof of another fact. Being found in the

driver's seat of a motor vehicle after it has been in an accident may be stated to prove that you were the driver at the relevant time. Unlike a presumption or inference, however, such a clause requires the other side to provide evidence to the civil standard or at the end of the case the fact will be taken to have been legally determined. A true reverse onus clause actually reverses the legal burden once the fact from which the fact in issue (who was driving), is proved (who was in the driver's seat).

1. Sopinka, *supra* para. 188, no. 1, at ch. 4.

Chapter 4. Types of Evidence

198. Trials in Canada are continuous and the method of evidence preferred is oral testimony of witnesses, sworn or affirmed to tell the truth.¹ They are called by the parties, or on rare occasions by the judge, are examined in chief by their counsel, cross-examined by the counsel for the other party, and if necessary reexamined by their own counsel. Other types of sworn testimony that are used are transcripts from oral discovery, from cross-examination on affidavits used in interlocutory proceedings, and of depositions taken in the jurisdiction or elsewhere, also called evidence on commission or '*de bene esse*'. In addition, transcripts of evidence given at other proceedings is sometimes used, often to challenge the credibility of a witness giving oral testimony. If allowed by statute, unsworn evidence of children may be received.

1. At common law, not all persons were 'compellable', meaning that they were required to come and give evidence if summoned, in a civil trial. Spouses were not only not compellable, they were considered to be not competent to do so. In civil cases this has been abolished. Protected persons such as foreign heads of state are probably not compellable. Persons who are not capable of understanding the importance of the proceedings and of telling the truth are not considered competent to testify.

199. A category called 'real evidence' exists. It includes documents, videos, tapes, motion pictures, photographs, in-court demonstrations and experiments (rarely allowed), and the physical appearance of witnesses or their demeanor, where some factual issue raises it.¹ In some cases it also includes the report of an assessor appointed by the court during the trial. Of these forms of real evidence, documents, defined widely, are the most common form, and much of the relevant evidence acts are taken up with provisions dealing with the introduction of documents, copies, business records, government papers, etc. All those produced at the document discovery are required normally to be brought to the trial. Usually, real evidence must be introduced through a witness who identifies it and can be examined about its authenticity.

1. This will include evidence from a 'view' if the purpose of such a proceeding is more than to help to understand evidence given in court, a debatable proposition.

Chapter 5. The Future

200. In recent years, the courts of Canada have begun to move away from the rigid rules of evidence that allowed litigators to predict what evidence would be admitted or not, to a more flexible approach that in principle, is designed to ensure more ‘justice’. Starting in the criminal sphere, with the use of the Charter, relaxation of the rules is occurring. Hearsay rules are less strict, and out of court statements of persons more likely to be admitted if they are ‘necessary and reliable’. The rules of privilege are being relaxed.¹ Because of the cost of bringing people from far away to a trial, more use of commission evidence is common. With the relaxation of the formal rules and a move to a case by case ‘principled’ approach, more of the trial time will be spent dealing with admissibility issues than in the past. This can be seen already in criminal cases in which an extensive ‘*voir dire*’ is held before a serious trial. It may also lead to increased length of trials, and less appellate success, since the rules are more case specific.²

It is also the case that the use of computers in business and all aspects of life leads to difficult issues of proof or of authenticity, such as of paperless transactions, or electronic signatures.

1. See *R. v. McLure*, [2001] 1 SCR 445.

2. Sopinka, *supra*, para. 188, no. 1, at p. 7.

Part VIII. Alternative Dispute Resolution

Chapter 1. General

201. The resolution of disputes generally is well beyond the scope of any volume.¹ Here I deal with disputes that have reached the stage where litigation is contemplated or pending, and look at how the judicial system in Canada helps the parties to resolve them without a trial.

There are many different methods of assisted resolution of disputes including independent fact finding, early neutral evaluation, mediation, conciliation, arbitration, mini-trials, and combinations of these.² Most of them require another person to help the parties to negotiate to end the dispute. In recent years courts have, with the urging of others as well as on their own, begun to integrate some of these methods into the formal court rules and procedures. The most common one, which has been formalized for the longest time, is arbitration. Normally, this involves a neutral who is specialized in the area of the dispute, who hears the matter in a less formal manner than in court, and gives a decision which the parties agree in advance will bind them, subject to judicial review for serious error.³ Courts in Canada will enforce arbitration agreements, unless given a good reason not to do so, and will stay pending litigation at the request of a party until arbitration has concluded. All jurisdictions have Arbitration Acts, as well as International Commercial Arbitration Acts or rules of court⁴ covering them. They uniformly provide a procedure to arbitrate the matter, often giving the parties a fair amount of leeway to design their own procedures. Homologation of awards is allowed. Although generally not court annexed,⁵ arbitration is encouraged by the hands-off approach of judicial enforcement of arbitration agreements.⁶

1. As a technique to help resolve disputes, mediation or other forms of third-party assistance, have a long history in Canada. Most governments, large commercial institutions and universities have formal ADR structures, many of which require the parties to go through an attempt to resolve using a neutral third party. A good idea of the range of these is found in Boule, Kelly, *infra*, no. 2.
2. See R. McLaren, J. Sanderson, *Innovative Dispute Resolution* (Carswell, Toronto, looseleaf service); L. Boule, K. Kelly, *Mediation* (Butterworths, Toronto and Vancouver, 1998); J. Thibault, *Les Procédures de Règlement amiable des Litiges au Canada* (Wilson and LaFleur Ltd., Montreal, 1998); M. Silver, P. Barton, *Mediation and Negotiation* (Butterworths, Toronto and Vancouver, 2001); C. Menkel-Meadow, *Mediation, Theory, Policy and Practice* (Ashgate, Vermont, 2001); A.J. Pirie, *Alternative Dispute Resolution* (Irwin Law, Toronto, 2000).
3. Obviously, the range of methods for conducting arbitrations is wide. In the labour relations field, less formality is seen than in international commercial disputes. L.Y. Fortier, 'Delimiting the Spheres of Judicial and Arbitral Power', 80 *The Canadian Bar Review* 143 (2001).

4. Commercial Arbitration Act, RSBC 1996, c. 55; Foreign Arbitral Awards Act, c. 154; International Commercial Arbitration Act, c. 233; Commercial Arbitration Act, RSC 1985, c. 17; United Nations Foreign Arbitral Awards Convention Act, c. 16 (2d. Supp.); The Arbitration Act, SM 1997, c. 4; International Commercial Arbitration Act, SM 1986–1987, c. 32; Arbitration Act, SNB 1992, c. A-10.1; Arbitration Act, RSN 1990, c. A-14; International Commercial Arbitration Act, c. I-15; Arbitration Act, RSNWT 1988, c. A-5; International Commercial Arbitration Act, c. I-6 (Nunavut also); Arbitration Act, RSNS 1989, c. 19; Commercial Arbitration Act, SNS 1999, c. 5; International Commercial Arbitration Act, RSNS 1989, c. 234; Arbitration Act, RSO 1991, c. 17; International Commercial Arbitration Act, 1990, c. I-9; Arbitration Act, RSPEI 1988, c. A-16; International Commercial Arbitration Act, c. I-5; Quebec, CCP., ss. 382–394 (arbitration by court referral), ss. 940–951.1 (recognition of foreign arbitral awards); Arbitration Act, SS 1992, c. A-24.1; Enforcement of Foreign Arbitral Awards Act, SS 1996, c. E-9.12; International Commercial Arbitration Act, RSS 1988-89, c. I-10.2; Arbitration Act, 2000, c. 8; International Commercial Arbitration Act, RSY 2002, c. 123.
5. In Quebec, CCP, ss. 382–394 formally incorporates an arbitration procedure into the rules of court, as does s. 827.1 with family mediation.
6. See generally, J-G Castel, *Canadian Conflict of Laws* (Butterworths, Toronto and Vancouver, 5th edn., 2002), p. 15-1 (ch. 15). Sample agreements are provided by the Foundation for Dispute Resolution and the British Columbia International Commercial Arbitration Centre.

202. Building upon the success of arbitration in the commercial sector and in the labour sector, governments in Canada have embraced mediation as the preferred method of court-annexed dispute resolution. Mediation is nothing more than negotiation with professional help. In lower courts such as small claims courts, landlord-tenant tribunals, and in many other specialized areas, particularly in family law, compulsory or voluntary mediation is required or encouraged. In superior courts in many jurisdictions, it is now required in most family law cases and in many civil cases, although on a pilot project basis, largely.¹ Court appointed mediators or, more commonly, private mediators chosen from a court approved list are used. There is nothing to prevent the parties from engaging in consensual mediation, in fact many of the more complex commercial cases go that route. There has not been much development of judicial mediation, formally using sitting judges as mediators.² It is the case, however, that many judges are retiring early, or, in their retirement, joining ‘private courts’, in which flexibility of design and experience allow them to resolve disputes quickly, if not inexpensively.³

1. Ontario in R. 24.1 requires mediation of civil cases in Toronto (100 per cent as of 1 July 2001) and in Ottawa. BC, Sask., NS, Que., and other provinces either have or are moving toward similar requirements. In Ontario, as well, R. 75.1 provides for pilot mediation projects in Toronto and Ottawa in Estates, Trusts and Substitute Decisions.
2. There is much resistance from within the judiciary to such a suggestion. See, in the US, S. Burns, *Making Settlement Work, An Examination of the Work of Judicial Mediators* (Ashgate, Vermont, 2000).
3. In Ontario, Quebec, and BC, for example, private courts are flourishing, leading some to wonder if the judicial system can adapt and avoid becoming obsolete, particularly in commercial disputes.

203. In a few jurisdictions, particularly at the federal level, the parties are given, by the rules of court, some flexibility to design their own alternative dispute resolution mechanism.¹ The use of early neutral evaluation, or mini-trials, are mentioned. The first is simply a quick look by a judge at the case to give the parties an outsider's view of the merits. It is non-binding, and, unless the parties agree, the judge will not hear the trial. The second is a trial in which the facts are agreed to or are few in dispute.

If done within the rules of court, a judicial official other than the one that will hear the trial is involved, and an opinion given. A considerable amount of discussion accompanies the process, and, particularly in the commercial sector, resolution is likely.

The rise of court-annexed systems to avoid trials has been a bit behind the development of private services, although the court-annexed services are catching up, particularly where compulsory. As mentioned earlier, in pre-trials, many judges have always been eager to help the parties resolve matters before trial and have been very successful in doing so.

1. Fed., RR. 380–391; PEI, R. 75.

Part VIII, Ch. 1, General

Part IX. Seizure for Security and Enforcement of Judgments

Chapter 1. Seizure for Security

204. Earlier, when considering pre-action proceedings, I dealt with the obtaining of orders to seize assets of the defendant within the jurisdiction, called ‘*Mareva*’ orders. Pre-judgment attachment of assets in other jurisdictions is possible only in those jurisdictions which allow it without accompanying proceedings. In many European jurisdictions this is allowed.¹ Within the jurisdiction, other provisional remedies such as recovery of personal property, appointment of a receiver, certificates of pending litigation, judicial sales of property that is perishable, etc., are used to keep assets available for judgment creditors. Pre-judgment garnishment of debts owed to defendants is less common, although sometimes seen with secured assets.

1. For example, in France, Belgium, Germany, Italy, the Netherlands, Switzerland. Non-European jurisdictions include Japan and Korea. L. Newman, M. Burrows, *The Practice of International Litigation* (Transnational Juris Publications Inc., Irvington-on-Hudson, NY, 1992), p. 147.

Chapter 2. Enforcement of Judgments

§1. ENFORCEMENT OF DOMESTIC JUDGMENTS

205. By this title, I refer to enforcement within the jurisdiction in which the court order was made, i.e., where the trial was held. The topic is of considerable interest to parties, since without enforcement, the judgment is useless. There will, of course, be available any assets that have been obtained by provisional remedies.¹ In addition, money paid into court, such as that to accompany an offer to settle, will be available. The provisional appointment of a receiver may be continued, as equitable execution. It is unlikely to be allowed solely to seize an asset that could be obtained by execution.

Generally, the matter of enforcement of judgments is covered both by rules of court and by much legislation. Because of this, this part covers the topic on a survey basis,² and deals with *personam* judgments only. Judgments *in rem* are enforced in the first instance, on the ‘*res*’.

If the remedy sought in the proceeding was a specific one, and was granted, it will be enforced. Thus, an order for specific performance of a contract, or for the delivery of property, or for the tracing of assets, will be enforced. If the remedy was solely one for the payment of money, with interest and costs, it is enforced in the same way. Basically, the winning side, which I shall call the judgment creditor, obtains a writ from the court which it files with the sheriff, bailiff, or proper enforcement officer. Although different terms are used, the normal writs are those of seizure and sale or execution (real and personal property), possession (specific real property), delivery (specific personal property), partition and sale of property, plus garnishment proceedings on the debts owed to the judgment debtor, and appointment of receivers. In some places the orders are called attachment orders, on the property of the debtor, which should be distinguished from attachment of the person, akin to civil contempt. Sequestration orders put the property of the defaulter into the court. Judicially supervised sales of property and supervised winding up of businesses are used as well. If there was an appeal and stay of proceedings, execution follows the lifting of the stay, normally.

All jurisdictions have rules, normally in statutes, about what property can be seized and what is exempt. As indicated, earlier, there are exemptions on the basis of immunity, for example the property of a foreign state. There are also exemptions for some household goods, tools of trade, etc. In summary, the taking out of the proper writ, or the taking of the proper enforcement proceeding, is up to the judgment creditor. The court supervises the enforcement, making appropriate orders if asked.

It is common to find specific legislation and rules covering the enforcement of orders in the context of matrimonial disputes. Support orders, custody orders, maintenance orders, are dealt with, often with accompanying reciprocal enforcement legislation.

A common enforcement technique involves the examination on oath of the judgment debtor. They can be ordered to appear and answer questions about the existence and location of their assets. This process is often aided by the statutory provisions covering

fraudulent transactions, fraudulent preferences, absconding debtors, etc. In addition, bankruptcy or insolvency proceedings are often being taken concurrently.

If the judgment debtor is prepared to go to gaol and has no assets, the limits of the judicial process are reached. Most writs of execution last for six years and can be extended.

1. Both within and outside the jurisdiction, where allowed.
2. For example, in Alberta the legislation includes the Execution Creditor's Act RSA 1980, c. E-14, the Civil Enforcement Act, and Rules 340–365 of the Rules of Court. *See also* the Court Order Enforcement Act, RSBC 1996, c. 78; Executions Act, RSM 1987, c. E160, Judgments Act c. J10, Fraudulent Conveyances Act c. F160 Garnishment Act c. G20 Rules 60, 66 (Man.). All other jurisdictions have a similar plethora of statutes. Other rules of court covering enforcement of judgments are: BC, RR. 42, 42A, 43; PEI, R. 60; Que., CCP, ss. 543–649; 423–449; NS, R. 52–55; Ont., R. 60; Nfld., R., 50–52; NB, R. 61; Sask Part XXX.

§2. RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

206. Here, there is a distinction between enforcing, in Canada, judgments of other Canadian jurisdictions, and enforcement of non-Canadian judgments in Canada. In the latter class, there is a further distinction to be made between judgments of the UK jurisdictions, and those of other jurisdictions. There is also a distinction between judgments *in personam*, concerning status, and *in rem*. I deal here solely with money judgments.¹

1. *See generally*, J-G Castel, *Canadian Conflict of Laws* (Butterworths, Toronto and Vancouver, 5th edn., 2001), ch. 14; E. G. Upenieks & R. J. van Kessel, *Enforcing Judgment and Orders*, Toronto: Butterworths, 2002; T. Buckwold, *The Role of the Sheriff in a Redesigned Judgment Enforcement System*, 66 Sask. L. Rev. 219, 2003. The Supreme Court of Canada held in *Beals v. Saldanha*, [2003] 3 S.C.R. 416 that the 'real and substantial connection' test applies not only to inter-provincial judgments but also to recognition and enforcement of non-Canadian judgments. The test requires that a significant connection exists between the cause of action and the foreign court.

207. In Canada, a foreign money judgment from elsewhere in Canada or wherever, is considered as a debt and gives the judgment creditor a cause of action enforceable by a new action in a Canadian court. Until collection, the plaintiff also has the option of bringing an action based on the original cause of action, as well.

It is necessary that the foreign courts have had jurisdiction in a way recognized in Canada. This normally includes the factors considered above which, in summary, are residence or carrying on business, submission or agreement to submit. Jurisdiction is less likely to be recognized if domicile or ownership of property in the jurisdiction, without more, existed at the time the foreign action was commenced. It must also be final, appeals finished, not obtained by fraud, or contrary to domestic public policy, not obtained in a way procedurally unfair, for a definite sum, not for taxes or penalties. When it is the plaintiff using an action on the judgment to enforce it, normal originating process is issued and served, with the claim being a statement of the details of the judgment. Where the judgment is being used as a defence in a Canadian proceeding, it is a good defence if the defendant succeeded or if the plaintiff succeeded on the same cause of action and the judgment was satisfied. If the judgment was from another Canadian court, the principles of *Morguard*, discussed earlier,¹ will be applied,

and even default judgments will be recognized. If a non-Canadian judgment, it is still a bit unclear to what extent the principles apply.

1. *Supra*, Part II, Ch. 2.

208. Within Canada, some jurisdictions have enacted Uniform Enforcement of Canadian Judgments legislation, after 1991. Essentially, it treats judgments of other Canadian courts in the same way as domestic judgments, and allows their registration. The procedure used is the procedure of the Application, which involves an originating document, and affidavit evidence, for the most part. In those provinces which have enacted the legislation, the common law remedy remains, as do remedies under other legislation for the reciprocal enforcement of judgments.¹

1. Enforcement of Canadian Judgments Act, RSBC 1996, c. 115; Canadian Judgments Act, SNB 2000, c. C-0.1; Canadian Judgments (Enforcement) Act, RSPEI 1988, c. C.1.1; Enforcement of Canadian Judgments Act, SS 2002, c. E-9.1001.

209. Reciprocal enforcement legislation applies between Canadian jurisdictions that have adopted the legislation, and for recognition and enforcement of non-Canadian judgments in Canada.¹ Under the reciprocal enforcement legislation, registration is by way of Application, made within six years of the date of the final judgment. Affidavits and a certified copy of the order of the foreign court are used, and, once registered, domestic enforcement follows. Similar defences to those considered above are available.²

1. Subject, of course, to the *Morguard* principles and other legislation like the Uniform legislation, which tend to make it easier to enforce other Canadian judgments in Canada. See Reciprocal Enforcement of Judgments Act, RSA 2000, c. R-6; RSM 1987, c. J-20; RSNB 1973, c. R-3; RSN 1990, c. R-4; RSNWT, Nunavut, 1988, c. R-1; RSNS 1989, c. 388; RSO 1990, c. R. 5; RSPEI 1998, c. R.6; SS 1996, c. R-3.1; RSY 2002, c.189. See also Foreign Money Claims Act, RSBC 1996, c. 155; Enforcement of Judgments Convention Act, SO 1999, c. 12; SS 1998, c. E-9.13; Foreign Judgments Act, RSNB 1973, c. F-19.
2. See BC, R. 54; Sask., R. 349; Ont., PEI, R. 73; Que., CCP, ss. 795–799; Alta., R. 730–736; Fed., R. 326–344; Nfld., R.49.19; Man., R.65 (these include some rules covering UK judgments as well).

210. With judgments of the UK, separate legislation exists for the recognition and enforcement of judgments. It implements the convention of 1984. It was entered into to minimize the effect on Canadian assets in the UK, of the Brussels and Lugano Conventions, since the UK is a signatory to them and they tend to recognize jurisdiction on bases wider than in Canada, such as on domicile.¹ Procedurally, the rules of court allow for similar procedures to those used in the reciprocal legislation.²

There also exists a 1996 Convention with France, and specific federal legislation to deal with particular areas of law such as oil pollution, anti-trust, unfair competition, and others.

1. See, Castel, *supra* para. 206, no. 1, at p. 312.
2. Canada-United Kingdom Civil and Commercial Judgments Convention Act, RSC 1985, c. C-30; Canada-United Kingdom Judgments Enforcement Act, RSM 1987, c. J21; The Act Respecting the Convention Between Canada and the UK Providing for Reciprocal Recognition and Enforcement, SNB 1984, c. R-4.1; The Reciprocal Enforcement of Judgments (Canada-UK) Act, RSNWT,

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Nunavut, 1988, c. R-2; The Reciprocal Enforcement of Judgments Act, RSNS 1989, c. 388; RSO 1990 c. R.6; RSPEI 1988, c. R-6; RSS 1996, c. R-3.1; RSY 2002, c. 190.

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