

CROSS BORDER LITIGATION MANUAL

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PREFACE

This Handbook is a product of the collaborative efforts of members of the Canada-United States Committee of the American College of Trial Lawyer and their colleagues. It is intended for use as a general guide for Canadian and American counsel faced with the prospect of litigation outside their own jurisdiction in the United States or Canada.

Of necessity and by design the Handbook is not intended as a comprehensive review of substantive or procedural law. Rather, it is a primer—a tool to provide an overview of salient points and differences between jurisdictions. It should alert counsel to potential issues in litigation; it should assist counsel in providing preliminary advice to clients and in formulating questions for or understanding answers provided by foreign counsel retained to prosecute or defend the litigation in the foreign jurisdiction.

The primary value of this Handbook may well be in its brevity. In relation to each of the fourteen topics covered, it should answer the questions: “What should I know about litigating in this jurisdiction?”; “What are key differences between litigating in my own jurisdiction and litigating in this other jurisdiction?”; “What questions should I ask?” The American College of Trial Lawyers hopes you will find the Handbook to be a useful tool in answering these questions.

Reference may also be had to the following College publications: CODE OF PRETRIAL CONDUCT, CODE OF TRIAL CONDUCT, CANADIAN CODE OF PRE-TRIAL CONDUCT, and CANADIAN CODE OF PRETRIAL CONDUCT, CANADIAN CODE OF TRIAL CONDUCT, ETHICS PROBLEM MANUAL (Canadian and United States versions).

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CROSS BORDER LITIGATION MANUAL

Chapter 1

A Comparative Overview

The powers of government in Canada and the United States are divided between the “federal” (central) government and the states or provinces. While Canada is a parliamentary democracy and the United States a representative democracy, both countries have a long tradition of respect for human rights and the rule of law; both have a judicial system which is independent and separate from the elected legislatures.¹ The common features are apparent, but the differences between our two legal systems are less-well-understood. In this brief overview, we describe some of those differences as an introduction to the practical issues of cross-border litigation and practice.

CANADA

1. Law and the Constitution

By the early nineteenth century, the British colonies in North America had evolved into the Provinces of Upper Canada (now Ontario), Lower Canada (now Québec), New Brunswick, Nova Scotia and Prince Edward Island. In 1867, the provinces were joined in a federation with a central parliament and provincial legislatures. The *British North America Act* of 1867 (now known as the *Constitution Act, 1867*) was Canada’s first constitution. In 1931, the last vestiges of Imperial power were eliminated when the British Parliament enacted the Statute of Westminster, and Canada became a fully self-governing nation.

Canada has ten provinces and three northern territories.² The law of all Canadian provinces, except Québec, is based on English common law. In Québec, the civil law is as set out in the Civil Code of Québec and the Code of Civil Procedure, which establish the fundamental principles of liability and responsibility in tort, contract, commercial law, inheritance, real property, and domestic relations.

The *Constitution Act, 1867* divides legislative power between the provinces and the federal government. The federal Parliament has wide legislative powers including a general power to pass laws relating to “peace, order and good government.” Federal power also includes authority to enact laws that are not within provincial competence, including: foreign affairs and defence; banking, money and coinage; intellectual property; criminal law and criminal procedure; trade and commerce; sea coast and inland fisheries; radio communications; railways, shipping and aeronautics; Indians

1 As a parliamentary democracy, Canada’s government (the Prime Minister and the other Ministers who constitute the Cabinet) is formed from the elected members of the legislative body. In the United States, members of Congress are directly elected by citizens of the states they represent. The President is elected by electors (the Electoral College) who in turn are directly elected by citizens of the states they represent. The President appoints his cabinet subject to the advice and consent of the Senate.

2 British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and the Yukon Territory, the Northwest Territories and Nunavut.

and Indian lands. The provinces may enact laws in respect of subject matters within their respective jurisdictions, including: all matters of a local nature within the province; property and civil rights; the administration of justice; businesses and trades; wills and estates; insurance; “local works and undertakings.”

Before 1982, when *Canadian Charter of Rights and Freedoms* was adopted, Canada did not have a constitutionally-protected bill of rights. The *Charter* contains many of the rights found in the United States Constitution, including freedom of association, freedom of speech, freedom of religion, freedom of liberty and security of the person, and freedom from discrimination. It also provides special criminal law rights, including search and seizure, fair trial, non-incrimination. These rights apply to federal, provincial, and territorial laws or institutions. The fundamental interpretive provision in the *Charter* guarantees the rights and freedoms set out in it, subject only to such reasonable limits prescribed by law as can be demonstrably identified in a free and democratic society.³

The Supreme Court has held that the onus of showing a "reasonable limit" on a fundamental right is on the government. The Constitution also guarantees the "existing aboriginal and treaty rights of the aboriginal peoples of Canada," including the Indian, Inuit and Métis peoples. It protects the right to use French and English in communicating with governmental institutions.

The power to enact laws with respect to the administration of justice in Canada is divided between the Federal Parliament and the provincial or territorial legislatures. The power to enact laws on criminal law and criminal procedure belongs to the Federal Parliament. However, while the provinces and territories cannot declare conduct a crime, they can legislate penalties for the breach of the civil law (such as penalties in the highway traffic statutes and securities regulation statutes). The administration of justice, including the establishment of courts and rules of civil procedure, is the responsibility of the provincial or territorial legislatures.

2. Courts and Judges

Judges in Canada are appointed by the federal Cabinet, except for the judges of provincial and territorial courts of limited jurisdiction. There are no elected judges in Canada. At the apex of the judicial system is the Supreme Court of Canada, comprising nine appointed judges with guaranteed seats for three judges from Québec and three from Ontario. The Supreme Court of Canada hears criminal and civil appeals, usually by leave, from the provincial and territorial courts of appeal and from the Federal Court of Appeal. The federal government may refer constitutional and other questions to the Supreme Court of Canada for an advisory opinion (the so-called “reference” power).

Each province and territory has a superior court of general jurisdiction with authority over criminal and civil matters. In addition, each province and territory has a provincial court with limited jurisdiction in criminal proceedings (except for certain serious offences), family law and certain civil (small claims) matters.

3 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982*, (U.K.), 1982, c.11.

Canada also has a system of federal courts including the Federal Court (trial), the Federal Court of Appeal, and the Tax Court. These federal courts have jurisdiction to hear intellectual property cases, suits against the federal government and agencies, review decisions by federal agencies and tribunals, admiralty matters, immigration cases, and federal taxation disputes.

All Canadian courts apply federal statutory law (including the Criminal Code), provincial or territorial statute law, and the common law as may be appropriate. The Canadian court system is depicted schematically in Appendix A.

3. The Legal Profession

The practice of law in Canada is regulated in each province and territory by law societies (the “Barreau” in Québec) established by statute. In general, the law societies have boards of directors composed primarily of lawyers (who are elected), with some lay members (who are appointed) providing public input. Each law society issues its own rules and policies and regulates the conduct of the legal profession. In addition, national standards have been established in the Code of Ethics issued by the Canadian Bar Association. Ultimately, the courts determine the law relating to professional standards, such as in claims for malpractice against lawyers.

After being graduated from law school and a period of apprenticeship (which usually involves “articling” with a practicing lawyer or law firm), a lawyer is admitted to practice by a provincial or territorial law society, which grants the right to practice in the province or territory. Persons admitted to practice in any province or territory may also practice in the Supreme Court of Canada, in the federal courts, and before federal tribunals.

By virtue of the “right of mobility of labour,” which is constitutionally guaranteed by Section 6 of the *Charter*, a Canadian lawyer may practice anywhere in Canada on a case-by-case basis with little formality. However, if a lawyer wishes to practice on a regular basis in another province or territory, admission to the other provincial or territorial bar is required after passing qualifying examinations.⁴

UNITED STATES

1. Law and the Constitution

The United States is a federation consisting of 50 states and 9 territories. Each state is considered to possess certain powers of a sovereign, although the Federal Constitution (ratified by the States in 1789) is the supreme law in the United States; neither Congress nor any state can pass laws that violate its provisions. Similarly, no judge (federal or state) can issue a ruling that violates the Constitution. The Constitution provides that any power not vested in the federal government is reserved to the various states. Consequently, not only does the federal Congress enact statutes and regulations which apply nationally, but each state has its own constitution and legislature which pass statutes and regulations applicable within the territorial borders of the individual state.

4 See Chapter 3

Due to the federal and state systems operating side by side – often intersecting and colliding, depending on the nature of the rights and activities involved – the United States legal system proceeds on two tracks. The first is the federal system under the aegis of the federal courts, which enforce and interpret federal law as set forth in the Constitution, federal statutes, and regulations promulgated by the federal government. The second consists of courts in the fifty states, which enforce and interpret the constitutions, statutes, and regulations of the various states. The federal district courts, the primary trial court in the federal system, are courts of limited jurisdiction, the bounds of their authority circumscribed by the Constitution and federal statute. State trial courts (which have different names in different states) are courts of general jurisdiction, able to hear most legal disputes except those federal issues over which Congress has given the federal courts exclusive jurisdiction (*e.g.*, bankruptcy, see Chap. 14).

Every citizen is a federal citizen as well as a citizen of a state. Given this duality of citizenship under the federal-state system, Article III, § 2 of the United States Constitution, as codified by 28 United States Code § 1332, permits federal courts to hear cases between citizens of different states where the matter in controversy exceeds \$75,000. This “diversity jurisdiction” grew out of a fear that a state court might be biased in favor of its own citizens in such cases. As the country’s trade and commerce became national and international in scope and its citizens moved freely and frequently from state to state, diversity jurisdiction has been restricted by requiring “strict diversity” among the parties⁵ and by increasing the amount that must be in controversy. Even so, there is no requirement that the federal courts be used for cases between citizens of different states. A non-citizen of a state can bring suit in a state court against a citizen of that state, and under the Constitution, each state must give “full faith and credit” to the judgments of the state courts of a sister state.

2. Courts and Judges

Federal judges (District Courts, Courts of Appeals and the Supreme Court) are appointed by the President and confirmed by the Senate. Once confirmed and sworn into office, federal judges have life tenure and only may be removed by impeachment. An exception to this procedure is United States bankruptcy judges (often referred to as non-Article III judges) who are appointed for 14 year terms by the United States Court of Appeals for the circuit in which they serve. Similarly, Magistrate Judges are appointed by the Judges in each District Court for a term of eight years to handle case administration and minor criminal matters.

Each state has its own method of selecting judges. Many states elect their judges at the trial court, appellate and supreme court level. Other states follow the federal model.

The federal courts consist of District (trial) Courts, 13 Courts of Appeals, and the Supreme Court.⁶ Additionally, the Bankruptcy Courts act as trial courts in bankruptcy matters and sit in the same geographic location as the District Courts. There are also administrative courts, which by statute or regulation deal with specialized areas of law, but appeals from these administrative law

5 However, the Class Action Fairness Act of 2005, Pub. L. No. 109-2, §§ 4-5, 119 Stat. 4, 9-13 (codified in scattered sections of 28 U.S.C.), operates to greatly expand federal court diversity jurisdiction in cases where “mass torts or mass claims” have an impact on citizens of multiple states. See Chapter 13.

6 This system and certain procedures applicable to it are set out in 28 U.S.C. §§ 1-23 (2006).

tribunals ultimately are heard either by the District Courts or the Courts of Appeals. The Courts of Appeals are organized into "circuits" which (with one exception) cover geographic regions; they hear appeals from the District Courts in their geographic area. The one exception is the Federal Circuit, which has jurisdiction over appeals from decisions in intellectual property matters, such as patent litigation, regardless of the location of the District Court from which appeal is taken. The Supreme Court hears appeals from the 13 Circuit Courts of Appeals and, on matters of federal constitutional law, from the highest court of each state.

The system of state courts is quite diverse, and virtually no two states have identical judiciaries. In general, however, the states all have a "hierarchally organized system"⁷ consisting of trial courts (with general jurisdiction) along with special courts. In some form or fashion each state has:

- a supreme court (or court of last resort);
- courts of intermediate appellate jurisdiction;
- courts of general trial jurisdiction; and
- courts of limited jurisdiction.

The courts of general trial jurisdiction, usually organized by counties within a state, have original jurisdiction over major civil suits and serious crimes. That is where most of the nation's jury trials occur. A state's inferior courts of limited jurisdiction such as municipal courts, magistrate courts, justices of the peace courts, and traffic courts, handle minor civil and criminal cases. Additionally, some states may have specialized tribunals with limited jurisdiction, such as divorce court, probate court, family court, and small claims court.

Both the United States federal and state court systems are depicted schematically in Appendices B and C, respectively.

3. The Legal Profession

In order to practice law in the United States, a lawyer must be licensed in one of the 50 states or the District of Columbia (after passing a bar examination) and admitted to practice before its courts. Generally speaking, the requirements for admission to the bar of a state are controlled by the highest court of that state. Admission to practice before the federal courts is limited to members of a state bar who petition for admission to the bar of a particular federal court. If a lawyer wants to practice in a state other than where the lawyer is licensed (except on a *pro hac vice* basis; see Chapter 3), then that lawyer must become licensed in that additional state either by taking the prerequisite exam or through reciprocity procedures, if available between the two states.

The American Bar Association is the national bar organization with, at present, more than 400,000 members. Membership is voluntary (the United States has over one million lawyers), and

7 See Infoplease, <http://www.infoplease.com/ce6/history/AO857620> (last visited Jan. 8, 2009).

its actions by and large are advisory only. Each state has a bar association, as do most major cities or large, urban counties. Most state bars are voluntary, but some have an integrated bar in which all attorneys licensed in the state must be a member and are subject to the bar's rules and regulations (promulgated and supervised by that state's supreme court). As with admission to the bar, generally speaking, matters such as disciplinary action, continuing legal education and regulation of lawyer conduct, are controlled by the highest court of the state in conjunction with the state bar association.

ADDITIONAL READING

1. *Canada-United States Law Journal* (Canada-United States Law Institute, 1978-).

Canada

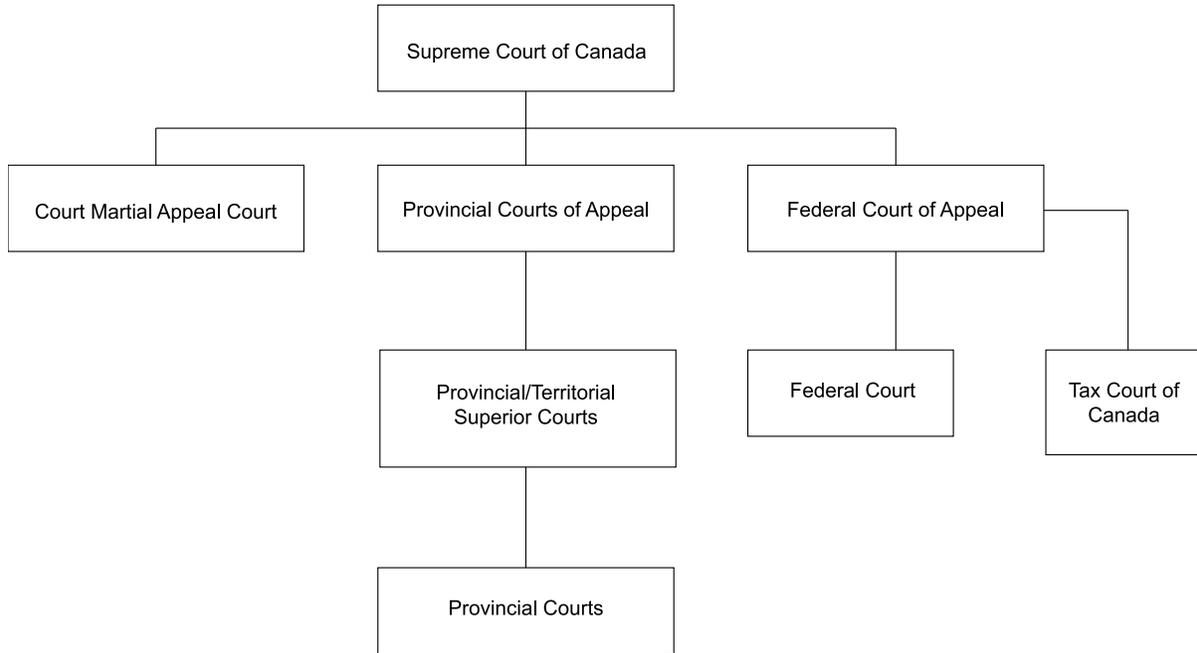
1. Gerald L. Gall, *The Canadian Legal System*, 5th ed. (Scarborough, Ont. Carswell, 2004).

U.S.

1. William Burnham, *Introduction to the Law and Legal System of the United States*, 4th ed. (Thomson West, 2006).

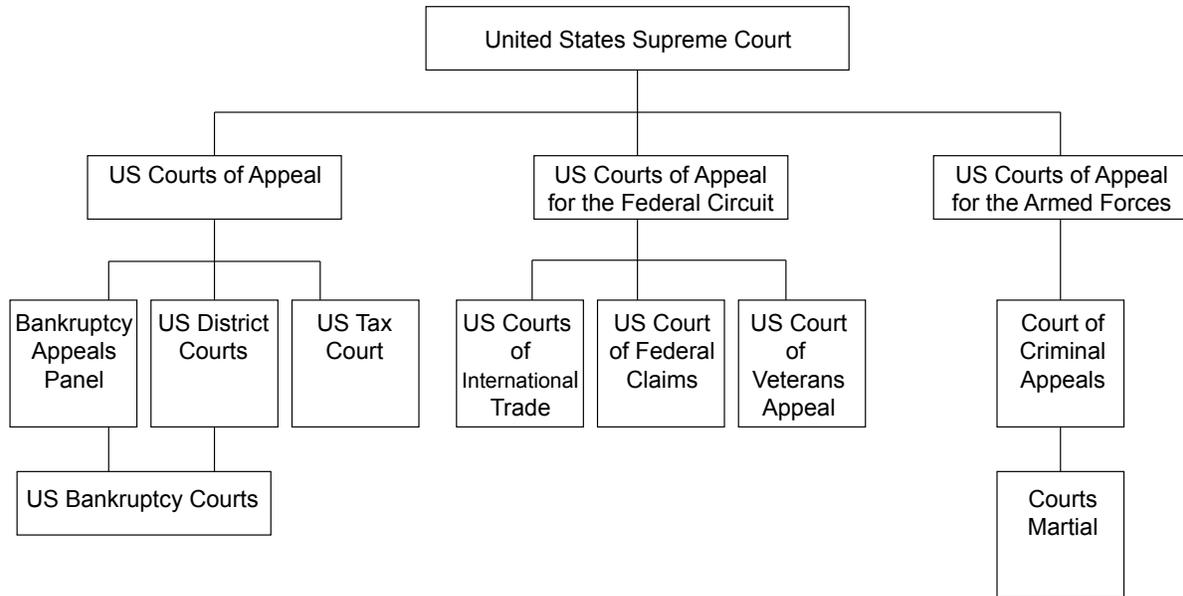
Appendix A

The Canadian Court System



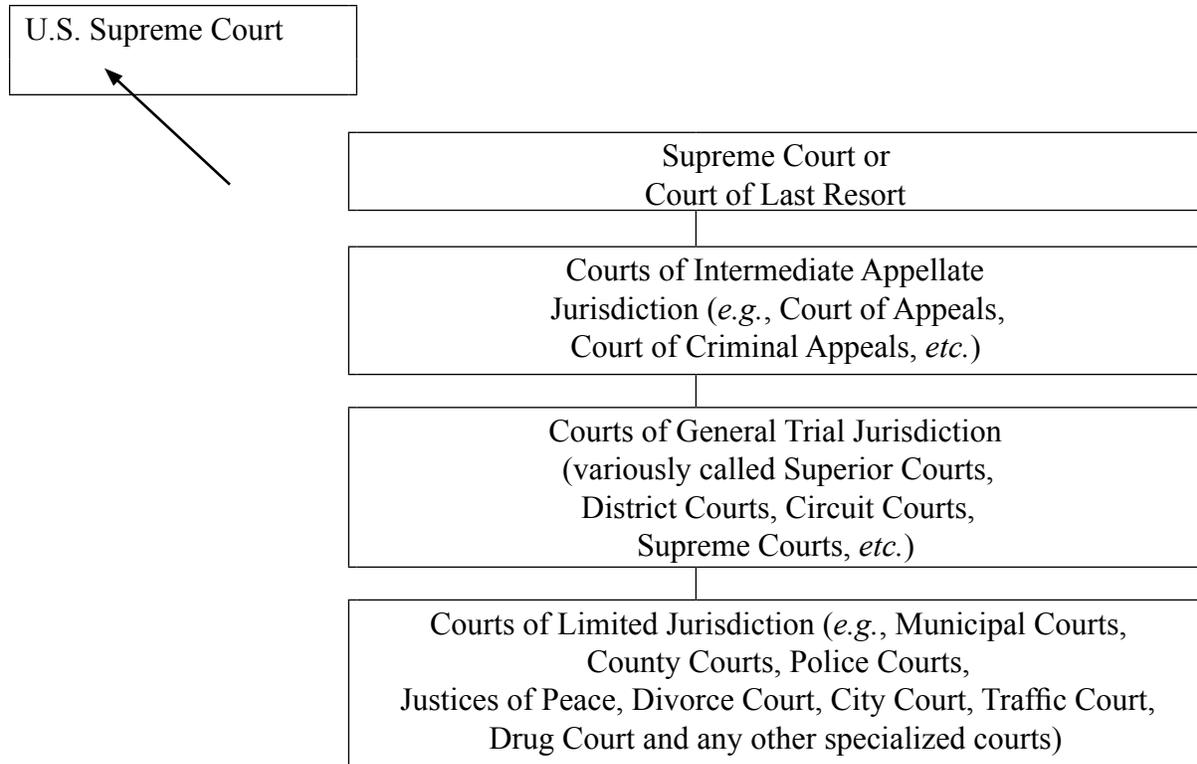
Appendix B

The United States Federal Court System



Appendix C

State Court Systems in the U.S.



Chapter 2

Jurisdictional Issues

Jurisdictional questions arise less frequently in Canada than in the United States. Although the Canadian federal courts have jurisdiction throughout Canada, they are very specialized courts which do not overlap with the provincial and territorial courts of general jurisdiction. Thus, most litigation, including tort, contract and other personal claims, comes before the provincial and territorial courts, not the federal courts.

In the United States, federal courts are courts of limited jurisdiction; their power is limited to adjudicating federal questions; diversity cases; suits between states or when the United States is a party; admiralty and maritime cases; federal criminal prosecutions. Thus, federal courts are empowered to hear only those cases constitutionally described as within the judicial power of the United States and granted by a jurisdictional act of Congress. In contrast, the state courts are described as courts of general jurisdiction. This dichotomy has resulted in a general presumption that a federal court lacks jurisdiction until proper grounds have been established, and it also has produced a requirement that proper grounds for exercising federal jurisdiction be included in the court pleadings. Parties cannot stipulate to federal jurisdiction that does not otherwise exist, and they cannot waive "lack of subject matter jurisdiction." One cannot be estopped from challenging a federal court's jurisdiction.

The growth of the United States into a more mobile, national economy--particularly since the early twentieth century--has greatly increased the number of federal court lawsuits, as well as expanded the influence of federal courts on every aspect of the personal and business lives of the citizens. As a part of this "nationalization," other bases of federal jurisdiction, above and beyond Article III of the Constitution, have developed. Under "ancillary" or "pendent" jurisdiction doctrines, federal courts have assumed jurisdiction over issues that are ancillary or pendent to the issues in an action that is otherwise properly before the court, even though the ancillary or pendent issues are, by themselves, not subject to federal jurisdiction. Additionally, a doctrine of "rights which arise under federal law" has resulted in federal court jurisdiction of matters not specifically enumerated in Article III, Section 2 of the Constitution.

Unlike Canada, jurisdictional issues in the United States are complicated by the existence of separate federal and state court systems, each of which may have original jurisdiction over certain matters and both of which, on occasion, have concurrent jurisdiction over the same matter.⁸ Although the federal Constitution and federal laws override state laws when there is a conflict, it does not follow that state courts are subordinate to federal courts. Indeed, the majority of cases in the United States are handled in state courts. Federal courts, on the other hand, have a more limited jurisdiction. And while most federal questions are exclusively within federal court jurisdiction, the Congress, on occasion, may provide that jurisdiction over a federal cause of action can be exercised concurrently by state courts.⁹

8 *See, e.g.*, 15 U.S.C. § 77v (2006) (providing that federal courts have concurrent jurisdiction with state courts for claims brought under the Securities Act of 1933); *see also* *Felder v. Casey*, 487 U.S. 131, 139 (U.S. 1988) (stating that state courts have concurrent jurisdiction over claims brought pursuant to 42 U.S.C. § 1983); *Tafflin v. Levitt*, 493 U.S. 455, 467 (1990) (holding that state courts have concurrent jurisdiction over civil RICO claims).

9 *See id.*

Canadian counsel or parties contemplating litigation in state or federal courts in the United States should analyze carefully the nature of the action, the location and citizenship of the parties. One also should consider traditional notions of due process and consult the underlying jurisdictional statute to determine whether federal jurisdiction is exclusive or concurrent.

CANADA

1. Personal Jurisdiction

The authority of the provincial and territorial courts is limited by boundary lines of those jurisdictions, and courts are obliged to give "full faith and credit" to judgments of courts in a sister province or territory.¹⁰ Jurisdictional issues can arise if there is a question whether the dispute has a sufficient connection with the province or territory.¹¹

The test for asserting jurisdiction over a litigant in Canada is whether there is a real and substantial connection between the forum and the non-resident party. If a meaningful connection exists, then the civil rights of the non-resident are not infringed by entry of a judgment against that person. The courts have adopted a nuanced, rather than a technical, approach to personal jurisdiction based upon the facts of each case. The Ontario Court of Appeal¹² had identified eight factors that should be considered in applying "the real and substantial connection" test. Those factors were:

- the connection between the forum and the plaintiff's claim;
- the connection between the forum and the defendant;
- unfairness to the defendant in assuming jurisdiction;
- unfairness to the plaintiff in not assuming jurisdiction;
- the involvement of other parties to the suit;
- the court's willingness to recognize and enforce an extraprovincial judgment rendered on the same jurisdictional basis;
- whether the case is interprovincial or international in nature; and
- comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere, including the standards in international conventions.

Recently, however, the Ontario Court of Appeal convened a five-member panel to revisit the above factors following criticisms that the test was unduly complex and lacked predictability. This

10 *Morguard Inv. Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (Can.).

11 *See Hunt v. T&N plc*, [1993] 4 S.C.R. 289 (Can.) (noting that jurisdiction can only be asserted against an out-of-province defendant where there is a "real and substantial connection" with province).

12 *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (Ont. C.A.); *Bonzari v. Iran* (2004), 71 O.R. (3d) 675 (Ont. C.A.).

exercise resulted in a unanimous decision¹³ which brings clarification to the application of the “real and substantial connection” test.

The first change is the institution of a presumption of connection which is established with reference to the factors used to determine whether a defendant may be served outside the province without leave pursuant to Ontario *Rules of Civil Procedure*¹⁴. Where jurisdiction is presumed, the burden of proving absence of a real and substantial connection rests on the defendant, otherwise it rests on the plaintiff. Secondly, the Court clarified that the first two of the above factors, concerning connections with the plaintiff’s claim and with the defendant, are the two factors which comprise the core of the analysis. As for the other six factors, they are not to be treated as independent factors but as analytical tools to assist in assessing the significance of the connections.

Similarly, jurisdiction of Québec courts is determined according to Article 3148 of the Québec Civil Code, which reads:

3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where

- (1) the defendant has his domicile or his residence in Québec;
- (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;
- (3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;
- (4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;
- (5) the defendant submits to its jurisdiction.

However, a Québec court has no jurisdiction when the parties, by agreement, have chosen to submit all existing or future disputes between themselves "relating to a specified legal relationship" to a court of somewhere else or to an arbitrator; this limitation can be waived by a defendant who voluntarily submits to the jurisdiction of the Québec court.

A defendant who is sued in the courts of a province or territory other than one’s residence may choose to dispute the jurisdiction of that court or submit to it. Traditionally, a defendant would submit to jurisdiction by appearing to defend the merits of the claim, except in Québec, where appearances are always made under a reservation of all rights, including challenges to jurisdiction. Also, the courts would enforce prior agreements of the parties to submit to their jurisdiction.¹⁵

13 *Van Breda v. Village Resorts Ltd.*, 2010 ONCA 84 (Ont. C.A.).

14 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, s. 17.02. The most common of the factors which give rise to the presumption of connection are: (i) the existence of governing law provisions designating the law of Ontario; and, (ii) a tort committed in the Province.

15 J.C. Castel & Janet Walker, *Canadian Conflict of Laws*, looseleaf (Markham, Ont.: Butterworths, 2005) ¶ 11.2.

In order to bring domestic law of the common law provinces or territories in line with the decisions of the Supreme Court,¹⁶ the Uniform Law Conference of Canada—a consultative body comprising representatives from each of the provinces—proposed the *Uniform Court Jurisdiction and Proceedings Transfer Act*.¹⁷ To date, the Act has been enacted in British Columbia, Saskatchewan, Nova Scotia and the Yukon Territory.¹⁸ The Ontario Court of Appeal recently stated that “[i]n refining the *Muscutt* test, we can look to *CJPTA* as a worthy attempt to restate and update the Canadian law of jurisdiction.”¹⁹ Section 3 of the Act gives the provincial or territorial court jurisdiction when the person unilaterally submits to the court's jurisdiction or when there is an agreement between the parties.

2. The Doctrine of *Forum Non Conveniens*

The doctrine of *forum non conveniens* permits a court to decline jurisdiction even if there is a “real and substantial connection” with the particular Canadian forum. In such a case, the overriding consideration is the existence of another forum that is more convenient and appropriate for resolving the dispute and securing the ends of justice. Some of the factors relevant to the “real and substantial connection” test may also be relevant in determining whether a Canadian jurisdiction is the most convenient forum for the action. For example, (i) whether there are particular advantages or disadvantages in pursuing the litigation in Canada, (ii) the availability of the parties and of witnesses, and (iii) as has been noted in recent United States class action cases, the increased burden on the courts in assuming jurisdiction over claims that arose elsewhere. Overall, the courts are showing greater sensitivity to commercial realities and the practicalities of litigation in determining whether to proceed with an action against a “foreign” defendant.

Part 3 of the *Uniform Jurisdiction and Proceedings Transfer Act* provides for the transfer of a case to another jurisdiction, providing that the transferee forum has territorial and subject matter jurisdiction over the proceeding. It is important to note that a proceeding remains “alive” when transferred to a different forum, which avoids the waste, duplication and delay of the previous system in which the plaintiff had to recommence the action in the appropriate forum.²⁰

In Québec, these principles of law are codified in article 3148 of the Civil Code of Québec. That Code provision gives courts jurisdiction in actions when the parties have, by agreement, submitted to it all existing or future disputes between themselves arising out of a specified legal relationship or when the defendant submits to its jurisdiction.

3. Sovereign Immunity

The international principles of sovereign immunity were codified in Canada in 1982 by the *State Immunity Act*.²¹ This immunity does not extend to the “commercial activities” of a foreign

16 See *id.*

17 UNIFORM COURT JURISDICTION AND PROCEEDINGS TRANSFER ACT (Uniform Law Conference of Canada), available at http://www.ulcc.ca/en/us/Uniform_Court_Jurisdiction_+_Proceedings_Transfer_Act_En.pdf (last visited Jan. 8, 2009).

18 S.B.C. 2003, ch.28; S.S. 1997, ch. C-41.1; S.N.S. 2003, ch.2; S.Y. 2000, ch.7.

19 *Van Breda v. Village Resorts Ltd.*, 2010 ONCA 84 at para. 69 (Ont. C.A.).

20 *Canadian Conflict of Laws*, *supra* note 15 ¶13.8.b.

21 R.S.C. 1985, c. S-18.

state, nor to claims that relate to death, personal injury, or damage to property that occurs in Canada. A foreign state may waive immunity under Section 4 of the Act by explicit written agreement, by initiating the proceeding, or by knowingly intervening in court in any way other than to claim immunity.

UNITED STATES

1. Personal Jurisdiction

State courts, which normally are courts with general jurisdiction, have power to resolve disputes with some connection to that state, whether it is the citizenship of the parties or the location of an event or occurrence causing the controversy that provides that connection. As is the case with any court, the jurisdictional power of state courts depends on the existence of three basic elements:

jurisdiction over the person (*in personam*);

jurisdiction over the subject matter;

authority to render the relief sought.

Even when a court has jurisdiction, additional statutes or rules regarding venue (or location) of a suit may control which court may hear the action.²²

Most states have enacted "long-arm statutes" that give courts jurisdiction over persons who are not citizens of the state or do not reside there. These statutes provide that any person or corporation, regardless whether a citizen or resident, who personally or through an agent does any of the acts enumerated (such as commission of a tortious act or transacting business) in the state, is subject to the court's jurisdiction. If those statutory requirements are met, then state court jurisdiction generally would extend to Canadian citizens or corporations.

In order for a state court to exercise personal jurisdiction over a defendant, there must exist "minimum contacts" among defendant, the forum and the claim. This is similar for the most part to the "real and substantial connection" test applied by Canadian courts to non-residents. The long-arm statutes of various states set forth the type of conduct by a nonresident that will create jurisdiction, but the United States Supreme Court has placed limits on the jurisdictional reach of state courts, both as to nonresidents of the forum state and foreign citizens. While recognizing the increasingly interstate and international nature of the United States economy and the blurring of state lines as meaningful economic or residential boundaries, the Court has ruled that the due process clause "does not contemplate that a state may make a binding judgment *in personam* against an individual or corporate defendant with no contacts, ties or relations."²³ This doctrine has evolved to a requirement of "minimum contacts" between the forum state and defendant such that maintenance of a suit does

22 Venue is usually treated as a separate issue from jurisdiction and is the subject of specific statutes. Venue is usually dependent on the residence of the parties (often the defendant) or where the events giving rise to the action occurred. Venue can be waived by a defendant.

23 *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945).

not offend "traditional notions of fair play and substantial justice."²⁴ These same principles apply with equal force to foreign defendants or citizens.²⁵

"Diversity of citizenship" jurisdiction is unique to the federal court system and has its origin in the founding of the republic.²⁶ Congress, pursuant to the constitutional mandate, codified federal district courts' diversity jurisdiction in the *Judiciary Act* of 1789.²⁷ The early concerns that state courts might be biased against parties from another state have largely disappeared in light of modern economic and business realities—corporations, individuals and their business transactions routinely cross state lines as well as international borders, particularly with Canada and Mexico. This has resulted in an increase in cases filed in federal court invoking diversity jurisdiction. This growing case load has led Congress to limit the use of diversity jurisdiction. For example, for diversity jurisdiction to apply, none of the plaintiffs in a case can be from the same state as any of the defendants (*i.e.*, complete diversity). Likewise, the minimum dollar amount involved has been raised multiple times and currently is \$75,000. A corporation is treated as a citizen of both the state of its incorporation and the state of its principal place of business. A partnership or limited liability company is considered a citizen of all the states in which any of its partners or members are citizens.

To prevent forum shopping, federal courts use the "legal certainty" test to determine whether the amount in controversy requirement is satisfied.²⁸ Prior to the passage of the 2005 *Class Action Fairness Act*, class actions required complete diversity between class representatives and all defendants. However, the 2005 Act drastically expands federal court diversity jurisdiction over mass tort or consumer class actions by creating diversity jurisdiction when only "minimum" diversity is present (*i.e.*, any plaintiff is a citizen of a different state from any defendant).²⁹

Even if a case is originally filed in state court, when the requirements of federal jurisdiction are met (diversity and amount in controversy, federal question, *etc.*), a defendant may remove the case to federal court. Significantly, "only the defendant" may seek removal. The time limit for removal is strictly interpreted,³⁰ and ordinarily removal must be sought within thirty days after "notice" of diverse citizenship that satisfies the statutory tests for diversity jurisdiction.

2. The Doctrine of Forum Non Conveniens

Forum non conveniens is an equitable doctrine that allows a court in the United States to decline jurisdiction over lawsuits that can more fairly be tried elsewhere or when the convenience of the parties and the ends of justice are better served by adjudicating the matter in another forum. It is almost axiomatic that motions under this doctrine will be considered when parties from another state or country seek relief in either state or federal courts or when the critical events occurred elsewhere

24 Milliken v. Meyer, 311 U.S. 457, 463 (1940).

25 An excellent analysis of the "minimum contact" limitation on state courts can be found in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980).

26 See U.S. CONST. art. III, § 2.

27 28 U.S.C. § 1332 (2006).

28 Courts will also analyze whether parties have been fraudulently added to defeat or advance diversity when not warranted.

29 The U.S. Congress' intent was to shift most mass tort and consumer class actions to federal court and provide increased scrutiny by federal judges of settlements and attorneys' fees. Under § 4 of the Act, joint claims of 100 or more persons are deemed federal class actions even if certification is not sought.

30 See 28 U.S.C. § 1441 (2006).

and the law of another state or country controls any aspect of the proceedings. Courts, in applying the doctrine, must weigh and balance fact-specific private and public interest factors, such as access to evidence, availability of compulsory process for witnesses, practical problems affecting ease or cost of trial, administrative difficulties or congestion of courts, and the interest of having local issues decided locally. If, on balance, these factors favor another forum, the court can decline jurisdiction.

Illustrative of the potential impact of *forum non conveniens* on Canadian parties is the Washington state case of *Dana Klaty v. Romina Dehhoda*,³¹ involving a car accident in the United States. Both the plaintiff and defendant were British Columbia citizens who resided in that province. The plaintiff claimed that the higher damages available in Washington state courts rendered the British Columbia forum totally inadequate. Declining jurisdiction, the Washington state court stated that so long as the plaintiff can litigate the essential subject matter of the case in the alternate forum, the fact that recovery might be smaller, even drastically smaller, does not make the forum “inadequate.”

3. Sovereign Immunity

The *Foreign Sovereign Immunities Act*³² generally provides foreign states and their instrumentalities with immunity from jurisdiction in all United States courts (both state and federal). However, this immunity has notable exceptions and does not exist, even as to state courts, when:

- a foreign state has waived its immunity;
- the action is based on a commercial activity carried on in the United States by the foreign state;
- the matter involves rights in property taken in violation of international law; or
- the action seeks to enforce an agreement made by a foreign state.³³

31 141 P.3d 67 (Wash. Ct. App. 2006).

32 28 U.S.C. § 1604 (2006).

33 *See id.* §§ 1605-1607.

ADDITIONAL READING

Canada

1. Linda S. Abrams & Kevin P. McGuinness, *Canadian Civil Procedure Law* (Markham, Ont.: LexisNexis, 2008).
2. Garry D. Watson & Michael McGowan, *Ontario Civil Practice*, 2009 ed. (Toronto: Carswell, 2008).

U.S.

1. 17A James Wm. Moore et al., *Moore's Federal Practice* §§ 120.10-.13 (Matthew Bender 3d ed. 2008).
2. 13-19A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (Thomson/West).

Chapter 3

Appearance in Courts by Foreign Lawyers

CANADA

The law societies in each province or territory regulate legal practice in Canada. A majority of the law societies have signed the *Inter-jurisdictional Practice Protocol*³⁴ and are required to follow Annex 1210.5, Section B of the *North American Free Trade Agreement* (“NAFTA”), which allows foreign legal consultants to practice law or advise on the law of the jurisdiction in which they are qualified to practice.³⁵ The definition of a foreign legal consultant utilized by the various Canadian governing bodies is consistent with this provision of NAFTA.³⁶ An appearance by a foreign lawyer before a Canadian court generally is not permitted unless the lawyer has received a special permit (analogous to pro hac vice admission in the United States) to appear in that court.

1. The Federal Courts

Any lawyer who has been called to practice in a province or territory may appear in the Supreme Court of Canada. For example, a United States lawyer who is a member of the bar of British Columbia may appear in the Supreme Court of Canada.

Under Sections 11(1) and (2) of the *Federal Courts Act*,³⁷ any lawyer who is a member of the bar of a province or territory may appear before a federal court. Therefore, in order to appear before the Federal Court, a United States lawyer must first be admitted to the bar of a province or territory. Although under Section 47 of the *Federal Court Rules*, judges retain a certain discretionary power with respect to the conduct of proceedings, it is highly unlikely that a judge would allow a United States lawyer who has not been called to the bar in Canada to appear before a federal court.

2. Provincial or Territorial Courts

There are slight differences in the rules and regulations that govern appearances in provincial and territorial courts. In some jurisdictions, the courts retain discretion to allow a foreign lawyer to appear in special circumstances.

(A) British Columbia

Section 17 of the *British Columbia Legal Professions Act*,³⁸ provides that a person with foreign legal qualifications who wishes to give legal advice in British Columbia must first obtain

34 A complete copy of the Inter-jurisdictional Practice Protocol is available at The Federation of Law Societies of Canada’s website at <http://www.flsc.ca/en/pdf/protocoleng.pdf> (last visited Jan. 8, 2009).

35 North American Free Trade Agreement, U.S.-Can.-Mex., Annex 1210.5, § B(1), Dec. 17, 1992, 32 I.L.M. 605 (1993).

36 Federation of Law Societies of Canada, Inter-jurisdictional Practice Protocol, Appendix 3, Law Society Rule 1, <http://www.flsc.ca/en/pdf/protocoleng.pdf> (last visited Jan. 8, 2009).

37 R.S.C. 1985, c. F-7.

38 S.B.C. 1998, c. 9, ss. 2-18 to 2-22.

a permit to act as a practitioner of foreign law from the Credentials Committee of the Law Society of British Columbia. However, even with that permit, a United States lawyer normally is not allowed to appear as counsel on behalf of a client before any court or administrative tribunal without being called to the bar in British Columbia.

Although the British Columbia Act governs the practice of law in the province, the courts continue to retain inherent jurisdiction over their own proceedings.³⁹ Thus, a court may permit a person other than a practicing lawyer to appear before it if it is in the interests of justice to do so, though this discretion is exercised "rarely and with caution."⁴⁰ The courts have shown a reluctance to interfere with the Law Society's authority to regulate the practice of law,⁴¹ and there is no precedent for a court's exercise of discretion to grant a right of audience to a foreign lawyer respecting the laws of British Columbia. In multi-jurisdictional bankruptcy matters, however, United States lawyers have occasionally been permitted to appear for limited purposes.

(B) Alberta, Saskatchewan and Manitoba

The conditions for United States lawyers to be granted a foreign legal consultant permit in Alberta,⁴² Saskatchewan⁴³ and Manitoba⁴⁴ are the same as in British Columbia, with the added restriction that a foreign counsel is prohibited from dealing in any way with funds held as trust money. Again, only a lawyer who has been called to the bar in a province or territory may appear as counsel in court.

(C) Ontario

In Ontario,⁴⁵ a United States lawyer must meet seven requirements before being granted a foreign legal consultant license, including: residency in Ontario, being authorized to practice law in the lawyer's home jurisdiction, and being of good character. Furthermore, the lawyer must not be subject to any limitations or restrictions imposed on the right to practice law in the lawyer's "home" jurisdiction. The lawyer must also have been engaged in the practice of law in the foreign jurisdiction for at least three years within the five-year period immediately preceding the application to be licensed as a foreign legal consultant.

Foreign legal consultants can advise on the law of the jurisdiction in which they are legally qualified to practice law.⁴⁶ The definition of foreign legal consultants specifically excludes appearing before a federal or provincial court. The Law Society of Upper Canada has never allowed

39 *Gitksan First Nation v. British Columbia (Minister of Forests)* (2004), 34 B.C.L.R. (4th) 173 ¶¶ 55-59 (B.C. S.C.).
40 *Vernrose Holdings Ltd. v. Pacific Press Ltd* (1978), 88 D.L.R. (3d) 523 at 529 (B.C. C.A.); *R v. Dick* (2002), 163 B.C.A.C. 62 ¶ 6 (B.C. C.A.).
41 *Law Society of British Columbia v. Hanlon* (2002), 11 A.C.W.S. (3d) 1034 ¶ 14 (B.C. S.C.); *Rainbow Technologies Inc. v. Smeltz*, [1993] 8 W.W.R. 657 ¶ 17 (Man. Q.B.).
42 THE RULES OF THE LAW SOCIETY OF ALBERTA, 74-80 (2008), available at <http://www.lawsocietyalberta.com/-files/ruleslsa.pdf>.
43 RULES OF LAW SOCIETY OF SASKATCHEWAN, 220 (2008), available at <http://www.lawsociety.sk.ca/newlook/-Publications/LSrules/LSRulesConsolidateFeb08.pdf>.
44 The Legal Profession Act, S.M. 2002, ch. 44, § 22; RULES OF THE LAW SOCIETY OF MANITOBA, 3-32 to 3-38 (2002), available at http://www.lawsociety.mb.ca/code_and_rules/rulepdfs/rules_full_100.pdf.
45 By-law 396 made pursuant to subsections 62(0.1) and (1) of the *Law Society Act*, R.S.O. 1990, c. L-8.
46 For an example of a foreign lawyer providing counsel services see *Stoneman v. Gladman* (2003), 174 O.A.C. 1 (Ont. Sup. Ct).

a foreign lawyer or a foreign legal consultant to appear before an Ontario court unless called to the bar in Canada.

(D) Québec

To appear before a provincial court in Québec, a United States lawyer requires a special authorization from the President of the Barreau du Québec. This authorization may permit a United States lawyer to appear before a Québec court for a client for a specific period.⁴⁷

The request for authorization to practice is made to the Director General of the Barreau du Québec and should indicate the name of the person or organization the lawyer will be representing. The request must be accompanied by a certificate of compliance, which attests that the attorney is legally authorized to act as a lawyer outside of Québec, is in good standing with the governing body of his or her home jurisdiction, and is covered by a liability insurance policy that is valid everywhere in the world. The Barreau du Québec will examine the particular circumstances of each case and may grant authorization to appear.⁴⁸ Approximately 100 such authorizations have been issued annually in the past few years.

(E) The Eastern Provinces

The foreign legal consultant provisions in New Brunswick,⁴⁹ Nova Scotia,⁵⁰ Prince Edward Island,⁵¹ and Newfoundland, and Labrador⁵² are the same as in Ontario. Thus, a United States lawyer is not authorized to represent a client before the courts in any of these provinces, even if the lawyer is authorized to practice foreign law in the province as a foreign legal consultant.

UNITED STATES

1. The Federal Courts

The United States Supreme Court is given the power to "prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts."⁵³ Exercising this authority, the Supreme Court, has given each federal district court the power to promulgate local rules of practice and procedure governing the practice of law in their individual jurisdictions.⁵⁴

47 *Professional Code*, R.S.Q. c. C-26, ss. 32-33.

48 The Barreau du Québec has issued one such authorization in 2004-2005, three in 2003-2004, and one in 2001-2002 in favour of U.S. lawyers. The process is now under review. Such authorizations are particularly appropriate in multi-jurisdictional bankruptcy or restructuring matters or in cases where the issue before the court is governed by American law which the U.S. lawyer is qualified to practice. However, the U.S. lawyer must retain a Québec lawyer as co-counsel.

49 *Law Society Act*, S.N.B. 1996, c. 89; THE LAW SOCIETY OF NEW BRUNSWICK, FOREIGN LEGAL CONSULTANTS RULES 3-4 (2005), available at <http://www.lawsociety-barreau.nb.ca/assets/documents/Foreign-Legal-Consultant-Rules-Jan-2005.pdf>.

50 SCOTIA BARRISTERS' SOCIETY REGULATIONS 6.1 (2008), available at <http://www.nsbs.org/documents/general/CURRENTREGS.pdf>

51 THE REGULATIONS OF THE LAW SOCIETY OF PRINCE EDWARD ISLAND 21.3 (2008), available at <http://www.lspei.pe.ca/pdf/regulations.pdf>.

52 THE RULES OF THE LAW SOCIETY OF NEWFOUNDLAND & LABRADOR 7.06 (2008), available at <http://www.lawsociety.nf.ca/rules.asp>.

53 28 U.S.C. § 2072 (2006).

54 See United States District Courts - Local Rules of Court, <http://www.uscourts.gov/rules/distr-localrules.html> (containing links to the local rules of each United States federal district court) (last visited Jan. 8, 2009).

Federal Rule of Civil Procedure 83 requires the district courts' local rules to conform with any uniform numbering system that may be "prescribed by the Judicial Conference." The purpose of this requirement is to avoid the confusion that could result were each federal district court to identify similar or identical rules using differing numbering schemes. Thus, the rules dealing with admission to practice normally can be found under a Local Rule 83.

The local rules of each federal district court contain provisions governing the ability of a non-local, out-of-state attorney to appear before the federal district court on a *pro hac vice* basis. *Pro hac vice* admission is designed to allow an attorney, who is not licensed in the federal district court and who does not reside in the jurisdiction of the court, to appear before a court for the limited purposes of an individual case. Once the case has ended, the attorney's *pro hac vice* admission expires.

Although the requirements for an attorney to obtain *pro hac vice* admission vary slightly from one federal district court to another, the standards generally are the same.⁵⁵ To obtain *pro hac vice* admission, an attorney must be a member of the bar of any United States court or of the highest state court of any state, territory or possession of the United States. The attorney must also file an application with the court providing, under penalty of perjury, the following information: the attorney's residence and office addresses; the courts by which the attorney has been admitted to practice and the date of admission; a statement that the attorney is in good standing, eligible to practice in the state courts, and is not currently suspended or disbarred in any other courts. In addition to these requirements, the attorney seeking *pro hac vice* admission must also designate as cocounsel an attorney who is admitted to the bar of the federal district court in question, and some court's may also require that "local counsel" maintain an office within the jurisdiction of the court.⁵⁶ Once admitted *pro hac vice*, the attorney must generally appear along with the local, designated counsel in all matters, unless the court authorizes differently.

It may be argued that the *pro hac vice* rules of the federal district courts do not preclude the admission of Canadian or international attorneys to the practice before federal courts. The district courts' power to admit attorneys *pro hac vice* is discretionary. In appropriate circumstances and when a Canadian lawyer can demonstrate being licensed in the highest court of the territory or province where he or she resides, having knowledge of the United States procedural rules, and being associated with local counsel, it is possible that a United States federal district court would grant *pro hac vice* admission to Canadian counsel.

In recent time, there has been at least one civil case and one criminal case in which Canadian lawyers were admitted *pro hac vice* in a United States District Court. In *re Livent, Inc. Securities Litigation*,⁵⁷ in granting the request for admission, the Magistrate Judge observed:

55 It is important to note that the majority of federal district courts allow *pro hac vice* admission of non-local attorneys. However, some courts look with disdain on *pro hac vice* admission and have expressed their preference that attorneys seeking to appear in their court obtain full admission to practice. *See, e.g.*, W.D. MICH. R. ("This Court disfavors *pro hac vice* admission and prefers that all lawyers appearing before it become full members of the bar of the Court. *Pro hac vice* admission may nevertheless be allowed on a temporary basis pending full admission, or in unusual circumstances."). Other jurisdictions are very liberal and allow non-local attorneys to appear before the court as long as they are a member in good standing of a United States District Court and the bar of the highest court of any state and they are associated with local attorneys who have been admitted before the court. *See, e.g.*, E.D.N.C. R. 83.1(e).

56 *See, e.g.*, C.D. CAL. R. 83-2.3.3.

57 Nos. 98-5686, 98-7161, 2004 WL 385048 (S.D.N.Y. Mar. 2, 2004).

“Our Court's *pro hac vice* rule ... omits any mention of an attorney of a foreign country. But admission *pro hac vice* is a sensible exercise of discretion on the particular facts of this litigation. Mr. Roebuck's ... declaration notes that he has been a member of the Ontario Bar since 1970 and that he is a fellow of the American College of Trial Lawyers. Mr. Kaslick's ... declaration notes that he has been a member of the Ontario Bar since 2000. Moreover, our local rules, like the Federal Rules, should ‘be construed and administered to secure the just, speedy and inexpensive determination of every action.’” (Emphasis added.)

In the *United States v. Black, et al.*,⁵⁸ which was a criminal case implicating a defendant's right to be represented by counsel of choice, a Canadian lawyer was admitted *pro hac vice*. Simply stated, Canadian lawyers seeking *pro hac vice* admission to a federal district court should give it the best shot and see what happens.

2. State Courts

State court rules allowing out-of-state attorneys to obtain *pro hac vice* admission generally mirror the local rules adopted by the federal district courts.⁵⁹ As a general matter, state court rules require an attorney seeking *pro hac vice* admission to be a member of the bar of another state, territory, or possession of the United States. Thus, Canadian lawyers who are not licensed to practice law in a state or territory of the United States may be precluded altogether from being admitted on a *pro hac vice* basis in a state court.⁶⁰

As with the federal district court local rules, it may be argued that the state court *pro hac vice* rules were designed with United States attorneys in mind and do not contemplate circumstances in which a Canadian or international attorney is seeking *pro hac vice* admission. But like their federal counterparts, state courts generally have the discretion to grant *pro hac vice* admission to a Canadian attorney who is not a member of a United States state or territory court. Arguably, if licensed in the highest court of the province or territory where the Canadian attorney resides, possessing reasonable knowledge of the applicable state court civil procedure, and having associated local counsel, then a Canadian attorney may be eligible for *pro hac vice* admission to the state court.

In the event that a Canadian lawyer is eligible to obtain and does obtain *pro hac vice* admission to a federal district court or state court, there are variations among the *pro hac vice* rules of which Canadian counsel should be aware. For example, some state and federal *pro hac vice* rules

58 No. 05-CR-00727 (N.D. Ill. Dec. 1, 2005) (granting motion to appear *pro hac vice*).

59 See, e.g., N.C. GEN. STAT. § 84-4.1(5) (2005) (mirroring the federal district rules and requiring an attorney seeking *pro hac vice* status in North Carolina to designate a member of the North Carolina bar to act as the “responsible” attorney); IDAHO BAR COMM’N R. 222 (2008) (mirroring federal district court rule regarding *pro hac vice* admission to Idaho state court), available at <http://www2.state.id.us/isb/PDF/IBCR.pdf>.

60 In contrast to the federal courts, there is no uniform rule in the state systems, such as Rule 83 of the federal courts, granting express discretion as to *pro hac vice* admission.

limit the number of times that an attorney can be admitted in that court *pro hac vice*.⁶¹ Additional variations may be determined by contacting the clerk of the federal district court or state court or by looking at the governing *pro hac vice* rules of the state or federal district court in which the Canadian lawyer is seeking admission.

ADDITIONAL READING

Canada

1. Federation of Law Societies of Canada, *Foreign Legal Consultants in Canada* (2000).

U.S.

1. 23 James Wm. Moore et al., *Moore's Federal Practice* § 506.02[1] (Matthew Bender 3d ed. 2008).
2. Roger J. Goebel, *Legal Practice Rights of Domestic and Foreign Lawyers in the United States*, 49 Int'l & Comp. L.Q. 413 (2000).

61 See, e.g., IDAHO BAR COMM'N R. 222(k) ("This rule does not quantify the number of limited admissions that may be granted to an individual, except for any lawyer applying by virtue of active membership in a jurisdiction that limits the number of limited admissions of Idaho lawyers. For those lawyers, there shall be a reciprocal limitation on the number of admissions."); R. FOR ADMISSION TO THE MONT. STATE BAR IV (2005) ("Except upon a showing of good cause, no attorney or firm may appear *pro hac vice* in more than two actions or proceedings in any state court or administrative agency in Montana.").

Chapter 4

Discovery Issues

CANADA

The discovery process in Canadian civil litigation has two principal components: document discovery and oral discovery, the latter most commonly referred to as "examinations for discovery." Practices and rules can vary significantly across the provinces and territories. The following only should be considered as a general overview applicable to many Canadian jurisdictions.

1. Document Discovery

All parties to civil litigation in Canada (except Québec) are generally required to produce without request any "document" or "record" that is relevant and material to the issues raised in the parties' pleadings. A document or record is the physical representation of any information, data, or other thing that is capable of being represented or reproduced visually or by sound. This includes all electronic mail, computer files, tape recordings, videos or other sources of stored data. Documents produced are to be used only for the particular action in which they are produced (the "deemed undertaking" rule). Parties to an action are required to exchange affidavits that list every relevant document that is or was in each party's possession, power, or control. In Québec, documents must be identified by the examining party, albeit in somewhat broad terms, and requested either prior to or during the course of discovery, which may be conducted, before or after the filing of a plea.

Privileged documents must be itemized in the affidavit of documents, but are not disclosed. When a dispute arises with respect to the validity of a party's claim of privilege, a motion can be made asking the court to resolve the dispute.

There are three principal categories of legal privilege: solicitor-client privilege, litigation privilege, and "without prejudice communications." Solicitor-client privilege protects communications (both oral and written) made in confidence between counsel and the client for the purpose of seeking or giving legal advice. Litigation privilege protects communications (both oral and written) made for the dominant purpose of preparing for litigation that is ongoing or is reasonably contemplated at the time the communication was made. Without prejudice communications include confidential communications with an adverse party for the purpose of settlement negotiations regarding the matters in dispute.

All relevant records within a party's control must be made available to an opposing party for inspection. In the normal course of litigation, this means providing the opposing parties with copies of all relevant documents either electronically or in paper form. While the precise definition of relevance may vary from province to province, Canadian courts uniformly have tended to adopt an expansive view of relevance and to require broad production.

The use of electronic discovery has grown tremendously in Canada over the past five years. E-discovery is the collection, preservation, exchange and production of information in electronic

form. In complex civil litigation, and in particular commercial litigation, electronic document exchange is becoming the norm. As in the United States, it is vital for all lawyers litigating in Canada to be familiar with basic e-discovery principles and the important differences between traditional discovery and e-discovery, which include:

- e-discovery results in a dramatic increase in the volume of records and information;
- electronic records are more difficult to destroy than paper documents;
- electronic data is susceptible to alteration, corruption and spoliation;
- electronic data contains hidden information (metadata).

Lawyers and judges throughout Canada have attempted to adjust to the rapid development of e-discovery. In 2003, the Ontario Discovery Task Force released a report, which contained thirteen principles to guide the e-discovery process.⁶² More recently, the trial courts in British Columbia⁶³ and Alberta⁶⁴ released guidelines for the use of technology and electronic evidence in civil actions. In February 2007, a draft form of the Sedona Canada Principles—Addressing Electronic Document Production,⁶⁵ was released. This draft document contains twelve principles, which are similar to the United States counterpart.⁶⁶ Due to the rapid developments in this area of the law, it is prudent for counsel to be aware of the specific e-discovery rules and principles applicable in the jurisdiction where they are litigating.

2. Examinations for Discovery

Following document discovery, the parties generally are entitled to examine only one representative of an opposing party through the “examination for discovery” process. Other than with respect to the number of deponents, this process is similar to, although more limited than, the United States deposition process. During examinations for discovery, the lawyer for one side of the dispute asks relevant questions of a representative for the other side of the dispute. The relevance of a question asked at examinations for discovery is based solely on the parties’ pleadings and, as with documents, Canadian courts take a broad view of relevance. Deponents are required to give their knowledge, information and belief in response to questions asked. Parties are also required to disclose the existence of applicable insurance if asked on discovery, and although this is not yet the case in Québec, courts are evidencing an increasing openness to grant requests to this effect. The precise rules concerning examinations for discovery vary across the provinces and territories, and reference should be made to the rules of the jurisdiction.⁶⁷

62 TASK FORCE ON THE DISCOVERY PROCESS IN ONTARIO, GUIDELINES FOR THE DISCOVERY OF ELECTRONIC DOCUMENTS IN ONTARIO 8-17 (2003), http://www.oba.org/en/pdf_newsletter/E-DiscoveryGuidelines.pdf.

63 These guidelines are available at the Courts for British Columbia’s website at <http://www.courts.gov.bc.ca>.

64 COURT OF QUEEN’S BENCH OF ALBERTA CIVIL PRACTICE NOTE NO. 14, GUIDELINES FOR THE USE OF TECHNOLOGY IN ANY CIVIL LITIGATION MATTER (2007), <http://www.albertacourts.ab.ca/qb/practicenotes/civil/-pn14technology.pdf>.

65 The Sedona Conference Working Group 7, The Sedona Canada Principles: Addressing Electronic Document Production (Public Comment Draft) (2007), http://www.thesedonaconference.org/content/miscFiles/-2_07WG7pubcomment.pdf.

66 The Sedona Conference, The Sedona Principles Addressing Electronic Document Production (2d ed. 2007), http://http://www.thesedonaconference.org/dltForm?did=TSC_PRINCP_2nd_ed_607.pdf

67 These rules can be found at the Canadian Legal Information Institute’s website at <http://www.canlii.org>.

The purposes of examination for discovery include:

- gaining an understanding of the each party's case, including the strength of their evidence;
- narrowing the issues of the litigation;
- facilitating resolution of the dispute;
- obtaining information or admissions from the opposing party which can be used to obtain judgment or be used at trial.

Unlike the United States, the rules of civil procedure in many Canadian provinces or territories provide for automatic rights of discovery from only one representative of an opposing party. In Québec, the rule is to allow more than one such examination, if necessary. Any party may initiate this discovery process by serving the person to be examined with notice to attend at a specified time and place for examination, although, this initial step usually is avoided through agreement by counsel.

Canadian rules of civil procedure do not provide for an automatic right of examining a non-party for discovery or for obtaining production of documents from a non-party. Non-party discovery, whether documentary or oral, requires an order of the court. It generally is necessary to show that a non-party's evidence is sufficiently relevant to a material issue in the action and that it would be unfair to require a party to proceed to trial without it. Similarly, examining more than one representative of a party requires leave of the court, which can be difficult to obtain.

A person who resides within the province or territory, but at a distance from the place where the action is commenced, can be compelled to attend examinations for discovery by court order or subpoena. Attendance or "conduct money," including an amount for travel to the location where the examination is to be held, may be part of the requirements for such an examination.

Generally, examination of expert witnesses prior to trial is not provided in Canada. However, parties can be required to disclose facts or opinions of experts as part of the examination process, and expert reports are exchanged prior to trial.

Examinations for discovery are typically conducted at the office of an official examiner, at a court reporting service office, or at a lawyer's office. A party is examined in the judicial county or district where the party resides, unless counsel agree to the contrary.

All parties to a lawsuit, or their representative, are entitled to be present during an examination for discovery, although frequently, parties not being examined do not avail themselves of this right. While no judge is present, all evidence given during the examination is under oath. In addition, a court reporter is present during the examination for the purposes of creating a transcript of the witness' evidence and recording undertakings, objections, and refusals. Examinations for discovery can be videotaped, on the consent of counsel or with leave of the court, but this seldom occurs. There are no time limits set for depositions.

It is permissible for counsel to ask leading questions and cross-examine a witness at examinations for discovery. Counsel for a witness may choose to re-examine his or her own client in order to correct an answer or to clarify an apparent admission or inconsistency. Alternatively, the witness subsequently may provide the correction or clarification in writing.

As part of the discovery process, the party being examined can give an "undertaking" ("commitment") to provide answers to questions or copies of records following the examination. This is important, given that only one representative of each party can be examined. A party can be asked to obtain and disclose the knowledge, information, and belief of anyone within that party's reasonable control, much like the deposition of a "person most knowledgeable" in the United States. Parties may object and refuse to answer questions or give undertakings unless the court orders otherwise on a subsequent motion, and objections to answering particular questions are made with brief reasons for the objection on the record.

Unlike in the United States courts, the general practice in most Canadian jurisdictions is for the objected-to question not to be answered, whether under protest or otherwise. Disputes are generally resolved on motion to the court prior to trial. For both undertakings and questions objected to and then ordered to be answered, the examining party can compel re-attendance although the general practice is for counsel first to answer in writing—a re-attendance is often required when the answer gives rise to follow up questions. A party who refuses to attend an examination for discovery or improperly refuses to answer a question ordered to be answered, may have his or her action dismissed or the defense stricken by the court. A party who refuses to answer a question may be precluded from introducing such evidence at trial.

Counsel may interrupt an examination for the purpose of objecting to an improper question or to ensure the witness understands the question. However, counsel must not interfere with an examination so as to signal to the witness and suppress or alter evidence. In other words, counsel may not "run interference" for clients during discovery. Further, counsel should treat an examination for discovery as being similar to cross-examination at trial. Though consultation with counsel may be permissible when examinations are protracted, counsel ordinarily should not discuss a witness' evidence with a witness during breaks. Generally, if counsel intends to speak to the client during examinations for discovery, this intention should be disclosed to opposing counsel in advance. In the proper case, the court will give directions to opposing counsel restricting his or her role in the discovery to its proper ambit. In an extreme case, the court may order a new examination.

Evidence from examinations for discovery can be used in two ways. First, portions of the transcript may be "read-in" as evidence at trial by the party who conducted the examination. A "read-in" must contain the witness' complete answer to a question. For example, if an issue was also addressed at another point of the examination, that testimony also must be "read-in." Therefore, counsel must be familiar with the contents of the examination for discovery of all parties. Second, the witness' answer in discovery may be used to impeach that person's testimony at trial with a prior inconsistent statement. In Québec, the relevant extracts are simply filed in the Court record before the trial.

3. Written Interrogatories and Requests to Admit

While most examinations for discovery are conducted orally, as an alternative, the rules of civil procedure also provide for examinations by way of written interrogatories. Use of examination by written interrogatories generally precludes taking an oral deposition of the same witness. Nevertheless, this is a cost-effective means of discovery, particularly when witness credibility plays a minor role in the lawsuit. Parties can also serve broad-ranging Requests to Admit any fact or the authenticity of any document at issue in litigation. The opposing party is obliged to answer by way of denial or else be deemed to have admitted such facts or the authenticity of such documents.

4. Other Discovery

The rules for discovery in most provinces provide for physical inspection of property when appropriate. The rules also provide for medical and psychological examinations in appropriate cases. This is generally done through agreement of counsel or, if necessary, by court order.

The rules of civil procedure in each province or territory provide for the pretrial taking of evidence of a witness in special circumstances. This is not a discovery device, but rather the actual taking of evidence in lieu of calling the witness at trial. Such an examination is sometimes referred to as a *de bene esse* (in anticipation of future need) examination and requires leave of the court or consent of the parties. This procedure is generally reserved for witnesses who will likely be unable to testify at trial by reason of death, infirmity, or sickness. It can also be used to obtain the testimony of a witness outside the province who cannot be compelled to attend the trial by subpoena. While this is a common process in the United States, it is rarely used in Canada.

An examination *de bene esse* is conducted as if the witness is giving evidence at trial. The witness is sworn and provides oral evidence through examination-in-chief, cross-examination and re-examination. A court reporter (but not a judge) is present during the examination for the purposes of creating a transcript of the witness' evidence. The examination may be videotaped, and since it is likely that the examination will be used at trial in lieu of calling the witness, videotaping is highly desirable.

5. Ongoing Disclosure Obligations

The obligation to disclose is a continuing one, and parties can be obliged to disclose on a timely basis further information and documents that may become available prior to trial. Sanctions for failure to disclose include possible exclusion at trial. The court can also deal with improper non-disclosure by way of costs awards.

UNITED STATES

In the United States, the litigants conduct the bulk of discovery themselves with minimal judicial oversight. Discovery practice is governed by the Federal Rules of Civil Procedure in the federal courts and comparable court rules for state courts. In many ways, state court discovery tends to follow the federal practice; however, there can be significant differences. Thus, it behooves

lawyers practicing in state courts to investigate the relevant state and local rules regarding discovery in order to determine the applicable rules and timelines.⁶⁸

Federal Rule of Civil Procedure 26 delineates general procedures, controls the permissible scope of inquiry, allows for protective orders, and imposes an affirmative duty to supplement discovery responses in certain situations. However, before any discovery may be conducted, the parties first must hold a discovery meeting to develop an agreed discovery plan.⁶⁹ After that meeting, discovery ordinarily can be conducted in any manner or sequence that the parties desire.⁷⁰

Discovery of any matter that is "relevant" to the claim or defense of any party in the pending action is permissible. For discovery purposes, "relevant information" need not be admissible at trial "if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."⁷¹

Privileged matters may not be discovered, although information withheld on privilege grounds must be identified in a privilege log of some form.⁷² The principal privilege protects attorney-client communications. Limited protection is granted to trial preparation and work product materials; discovery of those materials depends upon whether the information is otherwise discoverable, and the party seeking the information can show a substantial need for it or an inability to obtain the substantial equivalent of the information by other means. Even so, a court will not require disclosure of the "mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation."⁷³

The right to discover information is not absolute. A party may object to discovery on various grounds, *e.g.*, ambiguity, overbreadth, or burdensomeness.⁷⁴ In response, the party seeking discovery may seek a court order to compel production. A party seeking to have the use of a certain discovery method limited should affirmatively pursue a protective order. Protective orders are typically granted to shield a party from annoyance, embarrassment, oppression, and undue burden or expense.⁷⁵ The Federal Rules provide the default guidelines for discovery, but in certain situations, however, parties may stipulate in writing to modify discovery procedures and limitations, so long as the stipulations do not interfere with the hearing date, trial date, or discovery deadline.⁷⁶

Following the discovery meeting between counsel, the court normally will conduct a discovery status conference that culminates in a "scheduling order." This order will control the timing of certain events such as disclosure of expert witnesses and deposition of experts. In the absence of a scheduling order, the Rules provide for automatic disclosure. Under the automatic disclosure provisions of the Federal Rules, parties must disclose certain information without prompting from the adverse party. Automatic disclosures primarily encompass the materials that

68 Because a 50 state survey is beyond the scope of this summary and because discovery under the Federal Rules of Civil Procedure is generally illustrative of U.S. discovery practice, this discussion will be limited to discovery under the Federal Rules.

69 FED. R. CIV. P. 26(f).

70 FED. R. CIV. P. 26(d).

71 FED. R. CIV. P. 26(b)(1).

72 FED. R. CIV. P. 26(b)(5).

73 FED. R. CIV. P. 26(b)(3).

74 FED. R. CIV. P. 26(b)(2).

75 FED. R. CIV. P. 26(c).

76 FED. R. CIV. P. 29

parties might use in arguing their respective cases.⁷⁷ Automatic disclosures occur at discrete stages during litigation, and there are four categories of information must be disclosed contemporaneously within 14 days of the discovery meeting required by Rule 26(f): the names and known contact information of all individuals who might possess discoverable information;⁷⁸ copies or descriptions of all documentation that might be used in support of the parties' claims or defenses;⁷⁹ computations of damages claimed; all applicable insurance policies. Later, parties must disclose expert witnesses who may testify, and 30 days before trial, the names of witnesses, documents, exhibits and other materials must be disclosed.⁸⁰

1. Document Discovery

Parties can compel an opponent to produce documents or other physical items for inspection and duplication.⁸¹ Essentially any document can be discovered, unless it is privileged or prepared in anticipation of litigation or production would be unreasonably burdensome.⁸² Production requests identify the desired material and the time and location for the production.⁸³ Responses to requests may include objections to the entire requests or portions thereof. Unlike interrogatories, there is no limit on the number of requests for production that a party may submit.

The most important development in "document discovery" has been in the increased focus on electronically-stored information. While originally thought of as a way to discover "email," electronic discovery now includes all manner of data that is stored in a computer, such as spreadsheets, databases, the electronic version of "hard copy" documents, and the metadata that accompanies electronic records. The Federal Rules now require that the parties develop a plan for production of this information, and parties are under an affirmative obligation to preserve data once a lawsuit is filed or they otherwise are put on notice of a probable claim. Much of the discovery process and attendant litigation now focuses on electronic data, and "e-discovery" is a topic of paramount importance in virtually every lawsuit in the United States.

A request for electronically stored information may specify the form in which it should be produced, although responses may object to the specified form.⁸⁴ If a request for electronically stored information fails to specify the form, the responding party must produce the information in a form in which it is ordinarily maintained or in a form that is "reasonably usable." A party need not produce the same electronically stored information in more than one form.

2. Depositions

Depositions may be either written or oral, although written depositions are rarely used. Oral depositions may be taken in the presence of an officer authorized to administer oaths under federal

77 FED. R. CIV. P. 26(a).

78 FED. R. CIV. P. 26(a)(1)(E).

79 FED. R. CIV. P. 26(a)(1)(B).

80 FED. R. CIV. P. 26(a)(3).

81 FED. R. CIV. P. 34(a).

82 FED. R. CIV. P. 34(a).

83 FED. R. CIV. P. 34(b).

84 FED. R. CIV. P. 34(b).

or state law, before someone appointed by the court, or before a person designated by the parties.⁸⁵ Ordinarily a certified court reporter takes the testimony verbatim. Oral depositions may also be recorded by video, but the party taking the deposition typically bears the cost of the chosen recording method.⁸⁶ Transcripts of depositions are available to any party upon request but typically must be paid for by the requesting party.

Under the Federal Rules, leave of court or stipulation of the parties is required if more than 10 depositions are to be taken by a party or if a deposition is to last longer than one day of seven hours.⁸⁷ State court practice will vary, but rigid limits on the number of depositions or the length of a deposition generally have not been written into the applicable rules, and standards of "reasonableness" govern. Parties seeking to take a deposition must serve notice on all parties, detailing the time and place at which the deposition will occur. Corporations and associations may be deposed; in such instances, the organization may be asked to present the person or persons who possess knowledge regarding the matter in question in response to specification of the information sought by the party seeking the deposition.⁸⁸

Depositions generally proceed without court involvement. Examination and cross-examination of deponents operate in a manner similar to that at trial, except that rulings on objections are reserved until a deponent's testimony is offered into evidence.⁸⁹ Objections to the form of the question and other objections, the grounds for which might be obviated or removed if presented at the time, are waived if not made during the deposition.⁹⁰ Objections must be nonsuggestive and nonargumentative. Deponents must respond to questions to which objections are interposed, unless counsel specifically advises the deponent not to respond. Deponents may be instructed not to answer a particular question only "to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under Rule 30(d)(4)."⁹¹ In certain instances, depositions may be conducted prior to the actual commencement of an action or pending appeal.⁹²

3. Written Interrogatories and Request to Admit

Written interrogatories can be used to obtain information from parties; non-party interrogatories are not permitted.⁹³ Each party may serve up to 25 interrogatories (inclusive of subparts) on any other party,⁹⁴ although this number can be increased by the court for good cause. The responding party must verify the accuracy of the responses.⁹⁵

The duty to respond to interrogatories is framed by the responding party's own knowledge and the knowledge that can reasonably be obtained through investigation. Thus, the Federal Rules

85 FED. R. CIV. P. 28(a).

86 FED. R. CIV. P. 30(b).

87 FED. R. CIV. P. 30.

88 FED. R. CIV. P. 30(b)(6). These depositions are known by the shorthand label of "30(b)(6) Depositions" or depositions of the person most knowledgeable ("PMK").

89 FED. R. CIV. P. 30(c).

90 FED. R. CIV. P. 32(d).

91 FED. R. CIV. P. 30(d)(1).

92 FED. R. CIV. P. 27.

93 FED. R. CIV. P. 33(a).

94 FED. R. CIV. P. 33(a). The number may be increased by stipulation or upon leave of court.

95 FED. R. CIV. P. 33(b)(2).

mandate consultation with others who might possess such relevant knowledge. Interrogatories may also inquire about a party's contentions. If the responding party deems a question inappropriate, the party may object rather than answer. The inquiring party then has the option of seeking a court order to require an answer.⁹⁶ A failure to object to a particular question results in a waiver unless good cause can be shown.⁹⁷

When interrogatories seek information contained in business records and the inquiring party could search the documents as easily as the responding party, the responding party may simply specify the records from which the requested information may be derived and allow the inquiring party a reasonable opportunity to examine them.⁹⁸ Parties may respond to an interrogatory by referencing specific electronically stored information in the same manner as any other business document since the rule explicitly includes electronically stored information in its definition of business records.⁹⁹

Parties can serve requests on another party to admit the truth of particular facts, the applicability of law to facts, or the genuineness of evidence that might be used in trial.¹⁰⁰ The permissible scope of an admission request is very broad, covering any nonprivileged matter that was not prepared in anticipation of litigation. Responsive admissions to such requests are conclusive evidence for purposes of the pending case, unless permitted by the court to be withdrawn.¹⁰¹ Responses may admit, deny (with specificity), or indicate why no response can be provided for each request. Objections may be raised where a request cannot be clearly understood or when a request implicates privileged material. If a responding party fails to respond within the prescribed time limits, the requests are automatically deemed admitted.¹⁰²

4. Other Discovery

Requests for physical and mental examinations of a party require a court order (unless otherwise agreed to by the parties), and are governed by more stringent standards.¹⁰³ The individual's physical or mental condition must be in controversy, and the movant bears the burden of establishing good cause in order to compel an examination, which entails a genuine balancing of the need for particular information against the privacy and safety of the individual.¹⁰⁴ A party may also enter land or property in the possession or control of the opposing party for purposes of inspection, measurement and photographs.¹⁰⁵

5. Ongoing Disclosure Obligations

A party has a duty to supplement automatic disclosures and answers to interrogatories, document production and responses to requests for admission if the party learns that the disclosure

96 FED. R. CIV. P. 33(b)(5).

97 FED. R. CIV. P. 33(b)(4).

98 FED. R. CIV. P. 33(d).

99 FED. R. CIV. P. 33(d).

100 FED. R. CIV. P. 36(a).

101 FED. R. CIV. P. 36(b).

102 FED. R. CIV. P. 36(a).

103 FED. R. CIV. P. 35.

104 FED. R. CIV. P. 35(a).

105 FED. R. CIV. P. 34(a)(2).

or response is in some material respect incomplete or incorrect, and if the additional or corrective information has not otherwise been made known in discovery.¹⁰⁶ Failure to supplement can lead to exclusion of witnesses or materials and sanctions.

The Federal Rules provide for sanctions for discovery violations.¹⁰⁷ Sanctions may be triggered when a party makes a motion to compel discovery that has been sought but refused, including a failure to make automatic disclosures, a failure to respond to discovery requests served, or a failure to provide proper or complete discovery responses. If an order is entered to compel discovery and a deponent or party fails to comply, that person may be subject to sanctions.¹⁰⁸ The court may order any sanctions that are "just" under the circumstances, including deeming the facts sought established; refusing to permit the introduction of evidence; striking pleadings or portions of them; staying further proceedings; dismissing the action; holding the party in contempt; imposing monetary sanctions.¹⁰⁹ Sanctions may not be imposed "on a party for failing to provide electronically stored information lost as a result of the routine, good faith operation of an electronic information system."¹¹⁰

ADDITIONAL READING

Canada

1. Todd L. Archibald & James C. Morton, *Discovery: Principles in Practice* (Toronto: CCH Canadian, 2004).
2. Stuart Ross, *Conducting an Examination for Discovery* (Toronto: Carswell, 1995).
3. Robert B. White, *The Art of Discovery* (Aurora, Ont.: Canada Law Book, 1990).

U.S.

1. Steven Baicker-McKee et al., *Federal Civil Rules Handbook* (2006).
2. Thomas A. Coyne, *Federal Rules of Civil Procedure* (2d ed. 2005).

106 FED. R. CIV. P. 26(e).

107 FED. R. CIV. P. 37.

108 FED. R. CIV. P. 37(b).

109 FED. R. CIV. P. 37(b)(2).

110 FED. R. CIV. P. 37(f).

Chapter 5

Motions

CANADA

1. Motion Practice

The nature and extent of motion practice in Canada is determined by the court in which the action was commenced. Canada does not have the equivalent of the Federal Rules of Civil Procedure that exist in the United States. As a result, while certain features of motion practice are common across jurisdictions, local motion practice can vary among provinces or territories, and sometimes even among judicial centers within a province or territory. While the Federal Court has its own procedures, it is a statutory court with jurisdiction limited to such claims as those against the federal government, intellectual property disputes, immigration, and admiralty. Since corporate and commercial litigation takes place in the superior courts of each respective province or territory, not the Federal Court, the following discussion focuses on motion practice in provincial or territorial trial courts.

Depending on the relief sought, a motion may be heard by a judge or a judicial officer known as a master.¹¹¹ A judge of a trial court has jurisdiction to hear any motion in a proceeding commenced in that court while a master's jurisdiction is restricted by statute; masters are able to hear most procedural motions except motions for interlocutory injunctions, judicial reviews or appeals. As a general rule of thumb, procedural matters are heard by a master, and substantive matters are heard by a judge.

A motion (sometimes referred to as "a chambers application") is commenced by notice of motion and supported by affidavit evidence. When counsel brings a motion on behalf of a corporation, the affidavit may be sworn by an officer, director, or employee of the corporation who has personal knowledge of the facts. With a few exceptions, counsel will have the opportunity to cross-examine the declarant of any affidavit served by a party who is adverse in interest on the motion. Generally, the entire transcript from the "cross-examination on affidavit" is filed with the court prior to the hearing on the motion. In Québec, the transcript of a cross-examination need not be filed in its entirety; the examining party may produce extracts at its discretion, subject to the right of the opposing party to file such other extracts as are necessary to complete those filed by the examining party. A memorandum of argument in support of, or in opposition to, a motion is generally required, although this may depend on the complexity of the matter at issue.

Oral advocacy often plays a significant role in motion practice. Counsel, as opposed to the court, generally determine the time allotted for the hearing of a particular motion. The time permitted for arguing a motion can often be significant—a fact that may come as a surprise to United States counsel who are accustomed to relying on their written submissions with brief oral argument.

111 In Québec, the "master" is known as a Clerk or Special Clerk.

In the major judicial centers, motions usually are heard every day of the week; in smaller centers, motions may be heard one day a week or less frequently. Depending on the volume of matters to be dealt with, the court may not always have the opportunity to review all the motion material before the hearing. Accordingly, counsel must be fully prepared to advocate orally. Counsel must be familiar with all facts of their case, guide the court through each aspect of their argument, and respond to opposing arguments.

Motions "in chambers" can be heard in an open courtroom, but are sometimes dealt with in the judge's or the master's offices ("private chambers"). In private chambers, counsel are usually invited to sit when they make submissions. However, most motions are dealt with in open court and counsel stand when addressing the court. Oral testimony of witnesses is rarely heard on motions.

While it is common for judges and masters to dispose of a motion at the hearing, it is sometimes necessary to reserve judgment. To expedite matters, typically counsel (on both sides of a motion) may prepare a draft form of order, which reflects the desired disposition of the motion. When a decision is reserved, the judge or master will often announce the decision to each counsel through the court clerk's office. Thereafter, the successful counsel drafts the formal order for approval by opposing counsel. If opposing counsel does not approve the order, an appointment can be made with the master or judge to settle the order.

Generally, the successful party on a motion will be entitled to receive costs from the opposing party, although the court has broad discretion in awarding costs. Payment of costs may be ordered forthwith, which frequently occurs, or deferred until the final determination of the lawsuit. Since costs awards can be significant, their potential must be considered in bringing or opposing a motion. The amount of costs available will vary among the provinces or territories, but as a general rule, costs will be awarded on a partial indemnity basis, which usually results in an award of less than 50% of the actual costs incurred. Substantial indemnity costs, also referred to as solicitor-client costs, are rarely awarded on a motion, and are generally restricted to instances of conduct meriting judicial disapproval. In the event of divided success on the motion, costs are subject to the court's discretion. Nonetheless, it is important for counsel to seek a determination on costs on the motion at the hearing. (See Chapter 12)

In Québec, judicial costs are normally awarded according to a Tariff (schedule of fees), which does not come close to compensating actual solicitor-client costs (*e.g.*, costs on most motions are \$50!). However, the Court does have the power (exercised sparingly in practice) to grant additional solicitor-client costs, if it is demonstrated that the losing party acted in an abusive or dilatory manner. The Court also has discretion to grant additional costs, if the complexity and length of the trial warrant same.

2. Pre-Trial Motions

Motions to Dismiss – There is no standard procedure in Canadian provinces for a motion to dismiss at the outset of litigation. Absent special local rules, there are only two motions that might customarily be made at the outset of a lawsuit: a motion asserting a lack of jurisdiction over the defendant or a lack of jurisdiction over the subject matter of the litigation. A jurisdictional challenge will normally arise when the defendant resides in another province or territory and arguably

has no connection with the jurisdiction where the action is brought. It also may arise when the subject matter of the litigation arguably has no connection with the jurisdiction where the action is brought.¹¹² Because there is limited jurisdiction in the Federal Court of Canada, a successful jurisdictional challenge based on lack of *in personam* jurisdiction will not result in the matter being transferred to another federal trial court, and the plaintiff will be left to initiate proceedings before the superior court in the defendant's home province or territory. In recent times, particularly in light of interprovincial and international commerce, Canadian courts tend to take an expansive view of their jurisdiction.

In Québec, an intention to contest lack of jurisdiction over the defendant must be disclosed in writing to the plaintiff before the original "return date" or by such other date as the parties may agree in writing. The filing of an Appearance by the defendant does not consent to the jurisdiction of the court.

Motions for Particulars, to Strike Pleadings, or Stay Actions – When a party is served with a pleading or notice that does not clearly describe the nature of the claim or defense, that party may bring a motion for particulars. It may not be necessary to file an affidavit in support of this application if the vagueness of the pleadings makes it obvious that particulars are required. The court will grant the application if it finds that the particulars are necessary for the moving party to respond to the pleading or notice.

The court has broad power to strike pleadings. The court will only grant such applications if it is "plain and obvious" that the action or defense, as pleaded, cannot succeed. This is a high standard and, as a result, motions to strike are generally unsuccessful. Before bringing such a motion, it is important to consider the applicable period of limitation. If the court strikes a pleading prior to the expiration of the applicable limitation period (typically two years subject to discoverability), the opposing party can simply amend the pleading and commence a new action.

The most common grounds for striking out pleadings include a nonexistent party; an unauthorized action or defense; an action forbidden by statute; no cause of action or ground of defense; abuse of process; *res judicata*; scandalous or embarrassing pleadings.

If the pleading is struck in its entirety, the lawsuit will end unless the court grants leave to amend or to substitute other pleadings. In many cases, because of the serious consequences to a party if its pleadings are struck, the court may order alternative remedies, such as striking only portions of the pleading; ordering the pleading amended within a specific period of time; ordering particulars; ordering security for costs; ordering the action stayed, either indefinitely, or until a certain time (e.g., until the conclusion of another lawsuit, the posting of security or some other act).

Other examples of common pretrial motions include motions to amend pleadings, to extend the time to file documents and to adjourn trial or other hearings. Many issues relating to the scheduling of matters and other administrative issues can be dealt with through an informal case conference with a judge rather than through a formal motion process.

112 See Chapter 2.

Discovery Motions – Motions relating to discovery issues are very common throughout Canada. The most common motions seek orders compelling an affidavit of records or documents;¹¹³ compelling attendance at examinations for discovery; compelling production of records within a party's possession, custody, or control; compelling production of records in the possession of a nonparty; compelling responses to discovery; compelling answers to undertakings given during examinations for discovery. If a party fails to comply with an order to compel, the court may impose sanctions, including awarding costs, striking pleadings or finding the nonresponding party in contempt of court (which may result in a fine or, in extreme cases, imprisonment).

Motions for Summary Judgment – Motions for summary judgment are commonly brought when the allegations raised by an opposing party are clearly unfounded or admissions are made early in the course of the litigation. Either a plaintiff or a defendant can apply for summary judgment. An affidavit in support of a summary judgment motion generally must be made on the basis of personal knowledge. This can sometimes present problems when the applicant is a corporation. Accordingly, it may be necessary to use several affidavits in support of the motion to ensure the supporting materials do not offend the hearsay rule. In Québec, an affidavit is not rendered invalid just because it contains hearsay evidence, although direct evidence will be required at the hearing to supplement any such evidence.

Generally, summary judgment will be granted only when it is plain and obvious that the action or the defense cannot succeed based on the pleadings and the available evidence (whether obtained during the discovery process or otherwise). To justify deciding the matter without a trial, the claim (or the defense) must lack any reasonable prospect of success. Summary judgment will not be granted if opposing affidavits disclose conflicting relevant facts. Moreover, the judge or master presiding over the summary judgment motion is not permitted to assess the quality and weight of the evidence; that is a function reserved for a trial judge.

The onus is on the moving party to satisfy the court that there is no genuine issue for trial. This is a high burden. To oppose the motion successfully, the responding party need only establish a triable issue based on some contentious factual evidence or point of law. Canadian courts generally have taken a relatively restrictive approach to summary adjudication, and as a result, a motion for summary judgment should only be brought in the clearest case.

Despite the heavy onus on the moving party, the responding party must not treat its burden too lightly. The courts have made clear that responding parties must “put their best foot forward” in responding to summary judgment motions. Put another way, the responding party must come forward with evidence demonstrating issues of fact or risk the motion being granted.

In ruling on a motion for summary judgment, the court is not limited to determining whether the action or the defense should be adjudicated in its entirety. If the court is satisfied that the only genuine issue for trial involves the quantum of damages, it may direct the action to proceed only on that issue.

113 There is no procedure to compel an affidavit of records or documents in Québec.

Québec law does not allow for summary judgment motions. Nevertheless, it is possible to request dismissal of an action if there is no cause of action (assuming all of the facts alleged to be true). Dismissal also is possible if an examination on discovery of the plaintiff demonstrates that the claim is frivolous.

3. Trial and Post-Trial Motions

Motions during a civil trial are normally scheduled with the trial judge and dealt with on an *ad hoc* basis. Although rarely used, a motion for a nonsuit is a more formal trial motion. A nonsuit motion is brought by the defendant at the close of the plaintiff's case and prior to presenting any evidence. The rules with respect to nonsuit motions at trial, based on the plaintiff's failure to call sufficient evidence to justify the granting of judgment, vary among the provinces or territories.

Following a final determination of the lawsuit, the court is without further jurisdiction. In other words, no motion for reconsideration or relief from the judgment, other than to correct clerical errors or omissions, can be brought. However, the presiding judge in some provinces is permitted to hear motions to enforce or assist in enforcing judgments.

UNITED STATES

1. Motion Practice

Initially, attorneys must recognize that each state has its own rules regarding motions. The purpose of a motion is to ask a court to issue an order that, procedurally or substantively, determines or narrows the issues for trial, resolves discovery disputes, or dismisses a case in its entirety. Although applicable only in federal courts, the Federal Rules of Civil Procedure address the procedures for the filing, service, form, and content of all motions;¹¹⁴ each local federal district court also has its own motion rules that may contain refinements or variations from these general provisions. Most federal (and state) courts now require or permit electronic filing pursuant to local rules. When dealing with state motion practice, there can be variations between districts, circuits, or counties within the state. Because the majority of state courts' rules are patterned, in one way or another, after the Federal Rules, this chapter focuses its discussion on those rules. Note, however, that some states (*e.g.*, California and Oregon), deviate significantly from the federal rules and each state's rules, as well as any local rules that are specific to a county, division, district, or to a specialized court (*e.g.*, tax, land use) should be consulted.

As a practical matter, most motions are made before trial and are designed to attack jurisdiction, challenge the adequacy of the pleadings, or facilitate discovery prior to trial. The number and type of pretrial motions are limited only by counsel's imagination, and, this chapter only discusses those most commonly encountered. Canadian counsel will be well-advised to review the motion rules of any United States court with great care since motion practice in the United States is far more extensive than in Canada.

114 See FED. R. CIV. P. 5-7.

2. Pre-Trial Motions

Motions to Dismiss – Chronologically, the first pretrial motion is usually a “Rule 12 Motion” which is a motion to dismiss. Federal Rule of Civil Procedure 12 sets forth a number of legal defenses or objections which, if upheld, will dispose of the lawsuit in its entirety. The most common attack on the complaint is the assertion that the plaintiff has failed to state a claim upon which any relief can be granted. While a Rule 12 Motion is not required, if it is filed, the motion must include all defenses or objections covered by the Rule. While any defense may be raised in the answer, Rule 12 states that the following defenses also may be raised by a motion to dismiss: lack of jurisdiction over the subject matter; lack of jurisdiction over a person; improper venue; insufficiency of process; insufficiency of service of process; failure to state a claim upon which relief can be granted; failure to join a necessary party.

While the defendant may preserve defenses either by an answer or by a motion to dismiss, the following defenses are waived if not made in the defendant’s initial motion or asserted in an answer: lack of personal jurisdiction; improper venue; insufficiency of process; insufficiency of service of process. Care must be taken by any defendant, therefore, in filing of an answer or motion so to preserve all possible available defenses.

Motions to dismiss must be made before filing an answer and, under the Rule, a 12(b) motion extends the time for filing an answer. Finally, it is critical for counsel to know that when a motion for “failure to state a claim” is made, the court must construe all factual allegations in the complaint in a light most favorable to the plaintiff in determining whether the plaintiff can prove any set of facts to support a claim for relief.

Motions for Judgment on the Pleadings, Motions to Make More Definite and Certain and Motions to Strike – A motion for a more definite statement asserts that the complaint is so vague or ambiguous that the defendant cannot answer the allegations. Courts generally view motions for a more definite statement with disfavor, and such motions rarely are granted. A motion to strike under Rule 12(f) is intended to eliminate from the complaint any “insufficient defense or any redundant, immaterial, impertinent or scandalous matter.” This motion, too, is regarded with disfavor and is rare.

A motion for judgment on the pleadings is made after the answer is filed. It is similar to a motion to dismiss for failure to state a claim on which relief can be granted, and it too challenges the legal sufficiency of the complaint. Again, as with motions for failure to state a claim, the court will assume the truthfulness of the facts alleged and will construe all reasonable inferences in favor of the party whose pleading is being challenged.

Discovery Motions – Federal Rule 37(a) permits motions to compel discovery or disclosure. This motion is usually made when a response to an appropriate discovery request (deposition question, interrogatory, document request, etc.) is not provided, is incomplete, or is evasive. No time limit is set for motions to compel, but clearly they must be made within a reasonable time after an opponent’s failure to provide discoverable material. Local rules in the federal courts govern the timing of filing and notice to opposing parties; these rules usually require pre-motion conferences with opposing counsel. Also, pretrial orders approved by the court after conference with counsel may determine the timing of

such motions. If a party fails to comply with a motion to compel, Rule 37 authorizes court sanctions ranging from evidence exclusion, issue preclusion, dismissal, award of expenses, fees and contempt.

Rule 26 is the other basis most commonly utilized for motions during discovery stages of a lawsuit. Rule 26(e) enables parties to move for protective orders “to protect a party or person from annoyance, embarrassment, oppression, undue burden or expense.” Rule 26(c) provides numerous ways in which protection from discovery may be ordered by the court. These range from “no discovery” and “discovery under certain conditions” to “methods,” “limitation of scope of discovery” and “non-disclosure of trade secrets and confidential information.” Protection under the rules is extensive and a court has substantial discretion to impose appropriate limits on discovery.

Motions for Summary Judgment – Motions for summary judgment¹¹⁵ are a useful pretrial tool for terminating actions when "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Summary judgment may be sought by any party as to the opposing party's claims or defenses. Partial summary judgment can be sought as to a specific claim or defense.

Prior to the mid-1980s, few summary judgment motions were granted in cases of any complexity; when granted, most were inevitably appealed and often overturned. Therefore, motions for summary judgment were rarely used in complex cases. However, a trilogy of United States Supreme Court decisions in 1986 sparked a significant increase in the federal courts' use of summary judgment to decide issues, claims, and cases that previously would have proceeded to trial.¹¹⁶ And the 2007 Supreme Court decision in *Bell Atlantic v. Twombly*, albeit in a Rule 12 Motion to Dismiss context, suggests that the United States Supreme Court remains intent on maintaining a higher threshold for plaintiffs to obtain a trial in the most complex cases.¹¹⁷ Consequently, motions for summary judgment will continue to be favorably received by federal courts to dispose of issues, claims, or entire cases when no issue of material fact is presented or the plaintiff's theory of the case is fatally flawed.

If a motion for summary judgment is made during the discovery stage of a lawsuit, the opposing party often seeks "further discovery" before responding; allowance for such discovery is made in Rule 56(f). The burden on the moving party is substantial: the movant must show that there is "no genuine issue of material fact" as to the issue addressed. If the motion involves an issue on which the movant has the burden of proof at trial in order to grant the motion, the court must hold that "no reasonable trier of fact" could find other than for the moving party. Should the motion, however, address issues on which the non-moving party has the burden of proof at trial, the movant need only disprove a critical element of the opposing party's claim or defense by showing that insufficient evidence exists for the respondent to meet that burden. Rule 56 specifies that the non-movant "may not rest upon the mere allegations or denials of ... the pleadings" but must "set forth specific facts showing that there is a genuine issue for trial." Even when denied, motions for summary judgment can be effective in narrowing the issues to be tried or pinpointing strengths or weaknesses of a case for settlement purposes.

115 FED. R. CIV. P. 56.

116 *Matshushita Elec. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242(1986); *Celotex v. Catrett*, 477 U.S. 317(1986).

117 550 U.S. 554 (2007).

Trial and Post-Trial Numerous motions are available to the parties during and after trial. The court can consider any motion to assure a fair and impartial trial, the hearing of proper evidence under the rules, and to prevent a miscarriage of justice. However, there are three substantive rules on which most post-trial motions are based:

Motion for Judgment as a Matter of Law – Federal Rule 50 provides for “judgment as a matter of law” regardless of the jury’s potential findings. It has replaced the terms “directed verdict” and “judgment notwithstanding the verdict” used in prior rules. This motion essentially challenges the sufficiency of an opponent’s evidence and must be brought before the case is submitted to the jury. The construction of facts favorable to the non-movant standard in summary judgment motions is equally applicable to motions under Rule 50. If (but only if) a motion for judgment has been made before a case is submitted to the jury, then the motion can be renewed after the jury returns an adverse verdict, at which time one would be permitted to argue that the verdict is unsupported by the evidence.

Motion for New Trial – A motion for a new trial will be granted if the court finds the jury has reached an erroneous result on a verdict that would be a miscarriage of justice. Standards applied by a court under Federal Rule 59 differ significantly from motion for judgment as a matter of law. The court has broad discretion to grant a new trial, it is free to weigh all the evidence and need not view that evidence in a light most favorable to the party obtaining the verdict. Rule 59 motions must be made within 10 days of the entry of judgment.

Motion for Relief From Judgment – A trial court may give relief from a final judgment under Federal Rule 60 for mistake, inadvertence, surprise or excusable neglect; newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial; fraud, misrepresentation or other misconduct of an adverse party. Motions under Rule 60 must be made within a reasonable time after judgment, normally within one year.

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1. 56 Am. Jur. 2d *Motions, Rules, and Orders* §§ 1-2, 6-42 (2000 & Supp. 2008).
2. 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* §§ 1190-96 (3d ed. 2004 & Supp. 2008).

Chapter 6

Use of Evidence Obtained in Foreign Proceedings

The usual way of introducing evidence is by having a witness give live testimony at trial, but when a witness may be unavailable for trial, it may be necessary to proceed with an out-of-court examination of the witness. Whether that evidence will be admissible is a critical issue. Canada and the United States are not signatories to any international agreements specifically authorizing the use of sworn testimony in each other's systems. Nonetheless, both countries have procedures by which testimony and evidence can be obtained for use in cases pending in the other country's tribunals.

CANADA

1. Admissibility

Generally, the rules allow for out-of-court testimony to be used at trial if it is ordered by the court or if all parties consent. Of course, prior statements may be used at trial to impeach the credibility of a witness.

Ontario Rule 36.04¹¹⁸ establishes that out-of-court testimony is admissible, provided the witness is not a party to the Ontario proceedings (unless the court orders otherwise). The opposite is true with regard to parties in the Ontario proceedings; their out-of-court testimony will not be admissible unless the court grants permission. In considering whether to grant such permission, the court will consider the witness' availability, whether the witness ought to give evidence at trial, and "any other relevant consideration." Thus, in reality, there are few restrictions when evidence to be submitted is given by a witness who is not a party to the proceedings. When the witness is a party, the court must authorize the filing of such evidence, but retains a broad discretion to do so.

Despite minor differences, a test similar to the Ontario rule is applied by courts in most, if not all, provinces or territories. The *Federal Court Rules* establish a similar procedure. Pursuant to Rule 271, the criteria considered relevant in granting a court order include the expected absence of the witness, the age or infirmity of the witness, distance, and expense.

Québec also has distinct statutory provisions relating to testimonial evidence. In the case of testimony taken out-of-court pursuant to Article 404 of the Code of Civil Procedure,¹¹⁹ no specific restrictions will be applied. With regard to prior sworn statement evidence, Article 2870 of the Civil Code of Québec¹²⁰ establishes that such testimony may be admitted into evidence if authorized by the court. Four main conditions must be met:

- the deponent must be a person who would have been considered able to testify at trial;

118 *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, s. 36.

119 R.S.Q. c. C-25.

120 S.Q. 1991, c. 64.

- the testimony must be limited to facts (as opposed to opinions), and its scope must be restricted to that which the witness would have been entitled to testify at trial;
- the court must decide that the testimony is necessary;
- the court must deem the testimony reliable.

It is important to bear in mind that regardless of the manner in which testimony is obtained, such testimony will be considered inadmissible if it is subject to privilege, such as solicitor-client privilege or privilege against self-incrimination. Under Section 5(2) of the *Canada Evidence Act*, a witness in a civil proceeding, while compelled to answer, is assured that “the answer so given shall not be used or admissible in evidence against him in any criminal trial or other criminal proceeding against him thereafter taking place,” subject to certain exceptions.

The right to protection against self-incrimination in criminal proceedings is set out in Section 13 of the *Charter of Rights*, which establishes the principle that a witness who provides testimony in a civil proceeding cannot have such testimony used to incriminate him or her in subsequent criminal proceedings (except in cases of perjury or the giving of contradictory evidence). This protection is automatic and need not be invoked by the witness at the time a person testifies. What the Canadian rule does not do, however, is permit the witness to refuse to answer questions. The *Charter* provision is essentially a slight modification of the rule already in place under the *Canada Evidence Act*.¹²¹ The scope of this protection is limited, since it applies only to the use of compelled testimony in criminal proceedings. The difference between the Canadian approach and the United States exclusionary rule can be very significant in cross-border jurisdiction proceedings, and this must be carefully considered by counsel.

Canadian courts have refused to admit sworn statements obtained in the United States if the acceptance of such evidence would breach applicable state or federal law in the jurisdiction where the testimony was given. The specific boundaries of this prohibition are unclear. This practice, however, is in keeping with the objective of promoting international comity between courts.

2. Obtaining Evidence in Canada for Use in the United States

Canada, unlike the United States, is not a party to any multilateral treaty on obtaining evidence, such as the 1970 Hague Convention on the taking of evidence abroad in civil or commercial matters. However, Canadian federal, provincial or territorial authorities generally will assist United States litigants and tribunals in obtaining evidence in the form of testimony, statements or the production of documents for use in the United States proceedings. Nor are there statutes or rules in Canada that bar or restrict foreign tribunals or litigants taking evidence from a willing person in private civil matters, which routinely occurs without prior consultation or permission from

121 R.S.C. 1985, c. C-5, s. 5(1).

Canadian authorities. Such depositions may be taken before a privately arranged court reporter or before the nearest United States consul.¹²²

If, the testimony is in connection with a federal or state government investigation in the United States, then the consent of the Canadian government must be obtained even if the Canadian witness is willing (or volunteers) to be deposed or give a statement. In such cases, the Department of Foreign Affairs and International Trade Canada requires that it be informed who is testifying; the date, time, and place of the deposition; the name of counsel for the witness. The Department also requires assurances that the witness is willing to be examined; the testimony is "entirely" voluntary; the witness' consent carries no liability or obligation, other than giving testimony, apart from perjury or making false statements.

When a witness is unwilling to testify or when production of documents is must be compelled, litigants in the United States must obtain the required evidence by letters rogatory to the appropriate Canadian court. Canadian federal, provincial, and territorial governments have provisions that facilitate assistance to foreign courts seeking such testimony. Under Sections 46 and 47 of the *Canada Evidence Act*, courts in Canada may respond to such requests and order an examination or compel production of documents as if a domestic subpoena had been issued. Similar provisions exist in provincial legislation. For instance, in Québec, under Sections 9 and 13 of the *Special Procedure Act*,¹²³ a party wishing to obtain evidence in the Province of Québec for use in a foreign court may petition the superior court to obtain an order compelling a party to provide oral or written evidence. The petition must be accompanied by letters of request issued by the foreign court. The order must be served upon the party to be examined, but the motion itself may be presented *ex parte*. Section 60 of the Ontario *Evidence Act*¹²⁴ is substantially similar. Local Canadian counsel will be necessary since a petition seeking the Canadian court's assistance will have to be filed along with the letters rogatory.

Canadian courts have established criteria for honoring letters rogatory from American courts. They are:

- the letters constitute a formal request from a court in the United States to a Canadian tribunal;
- the discovery does not violate the laws of civil procedure of the Canadian court, particularly as they concern third parties;
- the United States court has the power under its enabling statutes and rules to direct the taking of evidence abroad;
- the United States court is a court of law or equity (not an administrative tribunal);

122 See Application of Malev Hungarian Airlines, 964 F.2d 97 (2d Cir. 1992); Application of Asla Medical, S.A., 981 F.2d 1 (1st Cir. 1992); *In re* Request for Assistance from Ministry of Legal Affairs of Trinidad and Tobago, 848 F.2d 1151 (11th Cir. (Fla.), 1988). *But cf.* Malev, 964 F.2d at 105 (Feinberg, J., dissenting) (challenging the majority's decision on the grounds that it may permit a foreign litigant discovery that it could not seek in its home country tribunal and which an American litigant, in a U.S. proceeding on the same issues, could not obtain). The 1st and 11th Circuits have denied foreign litigant discovery in such circumstances.

123 R.S.Q. c. P-27.

124 R.S.O. c. E-23.

- the witnesses from whom the United States court desires testimony reside within the Canadian court's jurisdiction;
- the order sought is needed in the interest of justice;
- the United States court will use the evidence at trial and not for the purpose of pre-trial discovery;
- compliance with the order will not place the witness in the position of having to commit any offense;
- the documents in support of such application are under the seal of the issuing court or judge;
- the witness is not required to undergo a broader form of inquiry than he or she would if the litigation were conducted locally; and
- the evidence cannot be secured except by the intervention of the Canadian courts.

There are limits on the production of evidence for use in foreign proceedings. For example, the Québec *Business Concerns Records Act*¹²⁵ and the Ontario *Business Records Protection Act*¹²⁶ protect potentially sensitive commercial information and will prevent the production of business records for use in litigation outside of Canada. On several occasions, Canadian courts have held that such legislation may be successfully invoked as a means of defending against orders issued pursuant to letters of request from foreign courts.

UNITED STATES

1. Admissibility

Federal and state rules of evidence generally will determine whether testimony or documents obtained in Canada (and duly sworn under oath) will be admissible in a United States court. While many evidence rules could possibly affect ultimate admissibility of evidence regardless of its source, the most likely to affect Canadian testimony are the following Federal Rules of Evidence: 601 (competency); 603 (oath or affirmation); 801 (hearsay exception for sworn testimony); 804 (permitting prior statement under oath when the witness is unavailable); 803 (the residual exception to the hearsay rule permitting admission of testimony or documents with "guarantees of trustworthiness" and "if it is the most probative evidence on an issue"); 903 (admission of foreign public records and certified foreign records of regularly conducted activity without authentication). Compliance with requirements or conditions imposed by those rules ordinarily will result in the evidence being admitted. Generally, most state rules of evidence are similar to the Federal Rules.

125 R.S.Q. c. D-12.

126 R.S.O. 1990, c. B-19.

2. Obtaining Evidence in the United States for Use in Canada

To obtain evidence from witnesses situated outside the court's jurisdiction, a Canadian court may issue letters of request or letters rogatory directed to the judicial authorities of the jurisdiction in which the witness is situated. For example, Rule 36.03 in Ontario, provides that in the event a court authorizes the examination of a witness who is outside of Ontario, it may also issue a commission and letters of request for the taking of such evidence. This is done in accordance with Rule 34.07, which sets out the formalities. Most other provinces or territories have similar provisions.

In Québec, the taking of evidence outside of the province or territory is done by what is called a "rogatory commission." Pursuant to Article 426 of the Code of Civil Procedure, Québec courts are empowered to appoint a commissioner to take evidence outside of the jurisdiction. The evidence obtained will be considered as evidence at trial and must be placed in the court record.

Federal Court Rule 272 grants the court the power to issue a commission, letters rogatory, or letters of request when an order is made for the examination of a witness outside of Canada. This rule states that an examination outside Canada must be taken "in a manner that is binding on the witness in that jurisdiction."

Federal courts in the United States are directed to give "assistance to foreign and international tribunals and litigants before such tribunals" pursuant to 28 United States Code section 1782. Further, under Section 1782(a), a federal district court may order testimony, not only pursuant to letters rogatory from a foreign tribunal, but "upon the application of any interested person." Literal application of the "any interested person" phrase has been utilized by some courts to permit discovery in the United States even if there has been no request for such discovery made in the foreign tribunal.¹²⁷

The applicable federal statutes encompass both civil and criminal matters, and they extend to quasi-judicial commissions.¹²⁸ Indeed, this statutory mandate is without regard to reciprocity or comity principles which usually apply when courts of one country assist foreign tribunals. Sections 1781(a) and (b), further expand the scope of Section 1782 and authorize the United States Department of State "directly or through suitable channels" to receive, transmit and return after execution letters rogatory issued or requests made by a foreign tribunal.¹²⁹ While perhaps superfluous in light of Section 1782, an additional statute—28 United States Code section 1696(a)—authorizes federal district courts to order "service of any document issued in a foreign proceeding," upon "any person residing or found within its district." Procedurally, of course, Canadian counsel will have to retain United States counsel to file appropriate motions for issuance of a subpoena or notice of deposition requiring the witness to testify. Further, United States counsel will need to facilitate service of letters rogatory and make sure the testimony is obtained in a timely manner.¹³⁰

127 Indeed, as discussed later in this section, the U.S. State Department, under several sections of Title 28, has a mandate to cooperate and facilitate in the service and execution of letters rogatory issued in both Canada and the U.S.

128 *AMD v. Intel*, 292 F.3d 664 (9th Cir. 2002).

129 The State Department is authorized to do the same, in Canada or any other foreign country, for U.S. courts and tribunals.

130 28 U.S.C. §1781(a)-(b) (2006).

Given the broad mandate of Section 1782, Canadian tribunals (or counsel) may opt to obtain American testimony through the federal courts in the United States. Nevertheless, foreign courts (and counsel) may also utilize state courts to obtain testimony. Many state courts extend full assistance in taking deposition of witnesses within their jurisdiction for use in foreign tribunals.¹³¹ Nineteen states have adopted the *Uniform Foreign Deposition Act* (or a similar statute). Under that Act, foreign counsel need only sign and file a notice of deposition and issue a subpoena under the Act in order to compel attendance. The procedures necessary in other states vary: some authorize the judge or clerk of the court to issue a subpoena upon filing of a notice, while others require the filing of a “miscellaneous” action by separate, local counsel. Canadian counsel will need to check the state court procedure requirements before determining which courts’ assistance (state or federal) should be sought.

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1. Lawrence W. Newman & Michael Burrows, *The Practice of International Litigation* III-49 to -58, III-75 to -82 (Juris Net, LLC 2d ed. 2008).
2. Jack B. Weinstein & Margaret A. Berger, *Weinstein’s Federal Evidence* (Joseph M. McLaughlin, ed., Matthew Bender 2d ed. 2008).

131 See 8 ARTHUR BEST, WIGMORE ON EVIDENCE § 2195(d) n.1 (4th ed. 2008); UNIFORM FOREIGN DEPOSITION ACT (2007), available at http://www.law.upenn.edu/bll/archives/ulc/idda/2007act_final.pdf. Each of the 50 states and the District of Columbia has enacted either a statute or a procedure for taking deposition for use in a foreign (or other) state. Procedures vary greatly and local counsel should check with the local state or federal clerk as to what is required.

Chapter 7

Court Customs and Special Issues

CANADA

Each Canadian province or territory has its own court system, the structure of which is similar in principle to that of the United Kingdom. As such, many of the customs and traditions that guide courtroom conduct in Canada have their origin in the rules of the United Kingdom. While court customs and etiquette can vary among jurisdictions, the following is a brief summary of some general principles that may assist United States counsel when attending a proceeding in a Canadian court.

1. Customs and Decorum

Court Attire – Generally, counsel appearing in superior trial courts wear black court gowns with white tabs at any hearing where *viva voce* evidence is heard. The same dress is worn during hearings at courts of appeal. Canadian lawyers and judges do not wear wigs in court. For trial level motions and applications, some provinces or territories require counsel to be gowned (*e.g.*, Ontario) while other provinces or territories do not (*e.g.*, Alberta). For private chambers or master’s formal chambers, counsel do not need to be gowned, however, business attire is mandatory. While the concept of “business attire” is open to interpretation, the one constant is that men must wear a tie and jacket and women must wear conservative attire when making submissions to the court.

Addressing the Court – Upon the judge’s (or master’s) entry and exit into court, it is customary for all persons in the courtroom to stand. The judge (or master) typically will bow slightly towards the gallery. It is appropriate for counsel to bow slightly in return. Similarly, it is proper for counsel to bow to the presiding judge or master upon entering or existing court while it is in session.

The manner in which the court wishes to be addressed in Canada varies among jurisdictions, and even among jurists. Members of the Supreme Court of Canada currently prefer to be addressed as “Justice (male surname)” or “Madam Justice (female surname)” as opposed to “My Lord,” “My Lady” or “Votre Seigneurie.” The courts in Ontario and Québec have also adopted this practice. In Ontario, it is acceptable to refer to a judge as “Your Honour.” In other provinces or territories, such as Alberta and British Columbia, counsel continue to the practice of referring to justices of the superior trial court or the court of appeal as “My Lord” or “My Lady.” Masters are referred to as “Master” or, for male masters, “Sir.” Regardless how one refers to the court, etiquette requires that counsel stand when addressing the court.

Etiquette While Advocating – Rules of courtroom etiquette require that counsel treat witnesses and fellow counsel with civility and respect. While arguing a motion, the court will not accept arguing between counsel. All submissions must be directed to the court. Similarly, it is considered inappropriate for counsel to interrupt opposing counsel during their argument or while he or she is examining a witness. If interruption is absolutely necessary, counsel should rise to their feet, signaling to the court and to opposing counsel that an objection is being raised. The court will then hear the objection and give its ruling.

Trial Practice – When examining a witness, counsel generally remain standing behind a lectern or podium. Exhibits and other material are passed to the witness through the court clerk. If counsel find it necessary to approach a witness, they generally first seek permission of the presiding judge.

Counsel introduce trial evidence through their own witnesses via examination-in-chief, also referred to as direct examination. While counsel, with the court's permission, are permitted to lead witnesses through non-contentious portions of evidence (*e.g.*, *curriculum vitae* of an expert witness), it is considered improper for counsel to lead witnesses through material or disputed evidence. Following examination-in-chief, opposing counsel for each adverse party has a right to cross-examine the witness. Following cross-examination, a “redirect” examination may occur. During redirect counsel may ask direct questions; the scope of questioning, however, is generally restricted to only those new matters which arose during cross-examination.

Media access – While an important principle of the Canadian justice system is “open access” to the public, Canadian courts generally do not permit the filming of court proceedings. This is under review in some jurisdictions. Media can attend court proceedings and report on them, but cannot broadcast audio or video recordings. Media also are prohibited from publishing photographs taken inside the courtroom. While there are trials in Canada that garner nationwide media attention, the coverage of these trials is vastly different than their American equivalents. And yet a notable exception is the fact all hearings at the Supreme Court of Canada are filmed and many are broadcast on television.

2. Language Issues

English and French are the official languages of Canada. As such, litigants in Canada often have statutory and, in some instances, constitutional rights to plead or draft proceedings in either language. In addition, there are constitutional and statutory rights for courts to issue any process or pleading in either official language. The Constitution, in various sections, provides these rights for litigants appearing in the courts of Québec, Manitoba and New Brunswick, as well as the Supreme Court of Canada or the federal courts. These courts also have the right to produce communications in either language, although, a litigant before any of these courts does not have a constitutional right to receive documentation in the language of his or her choice; the court can use either English or French.

In Québec, the *Charter of the French Language* provides that French is the language of the courts of Québec, subject to the various constitutional guarantees for the use of English. The effect is to make French the default language of courts in Québec. For the remaining jurisdictions in Canada, English is generally the default language, although French-speaking litigants have a right to a bilingual proceeding. This includes a right to be heard by a judge who speaks both English and French. Parties also have the right to request an interpretation or a translation of anything given orally at certain hearings or of documents in some circumstances.

3. Simplification of Civil Procedure and Case Management

Due to the increasing complexity of civil trials, courts across Canada have experienced a growing backlog of cases. In response to this trend, several jurisdictions have taken steps to streamline and simplify the litigation process in an effort to achieve greater judicial economy.

While each jurisdiction differs to a degree, there are some common elements. Generally, these simplified or streamlined procedures are reserved for lawsuits involving relatively small monetary claims (typically less than \$75,000). The procedures are also characterized by strict time limits for moving an action forward; the absence of, or a restricted number of out-of-court examinations; the availability of a summary trial, in which only document and affidavit evidence is used. While parties generally may "opt out" of these procedures, doing so may sometimes be difficult if opposing counsel does not consent.

Another initiative, which some jurisdictions have adopted in an effort to shorten and simplify the litigation process, is case management. This mechanism is designed to reduce unnecessary cost and delay in civil litigation, facilitate early and fair settlements, and bring proceedings expeditiously to a just determination. Under case management, the parties negotiate a timetable for their litigation in accordance with certain prescribed limits. When a party fails to comply with time requirements, a case conference may be convened at which a court-sanctioned timetable may be created, the parties ordered to comply with the timetable or pay costs. Québec is unique in this respect, as the parties to every proceeding must agree to a timetable shortly after the action is commenced.

It should be noted that in many, if not most, Canadian jurisdictions, judges do not have their own individual docket, so practices may be different from those United States courts in which a judge is assigned to a case at the time of filing. Several Canadian provinces and territories have taken steps to improve efficiency in commercial matters by encouraging judicial specialization. In Toronto, for example, a formal "Commercial List" court hears most commercial matters in Ontario; the court comprises judges with extensive knowledge and experience in commercial matters. Other jurisdictions throughout Canada have similar specialized commercial courts to facilitate an expedited disposition of commercial disputes.

4. Alternative Dispute Resolution

The use of alternative dispute resolution mechanisms has increased tremendously in Canada, principally arbitration and mediation. Arbitration is commonly used in commercial disputes either as a result of a contractual term or the parties' *ad hoc* invocation of arbitration. In Canada, there are a number of arbitration organizations of experienced civil litigators and retired judges who are available to arbitrate commercial and corporate disputes (at an hourly rate). By and large, the result of arbitration is binding on all parties.

The use of mediation to resolve civil lawsuits has grown exponentially in recent years in Canada. Unlike an arbitrator, a mediator is not a decision-maker and has no authority to impose an outcome on the parties. Mediation aims to produce a voluntary, consensual settlement outcome. The mediator must be agreed to by all parties and costs typically are shared. Generally, lists of court-approved mediators can be obtained from the local court registrar. Recently, some jurisdictions in Canada have experimented with mandatory mediation for civil disputes. In other jurisdictions, the court has the discretion to order mediation upon review of the pleadings, if there appears to be a reasonable expectation of settlement through mediation. As the development of mediation in civil disputes is constantly evolving, it is prudent for counsel to review the local practice at the commencement of a lawsuit.

Some jurisdictions have developed hybrid forms of alternative dispute resolution. For example, Alberta has had success with its judicial dispute resolution program, in which the parties request a judge of the court to hear their dispute. The parties can choose to have a binding or a non-binding process. This process can be used to resolve entire actions, deal with interlocutory issues or resolve issues on appeal. It typically occurs in a boardroom with only the judge, the parties and counsel present. In all instances, the presiding judge will provide parties with his or her opinion on the merits of each argument.

UNITED STATES

In the United States there are federal and state court systems, each with their own customs and practices. As in Canada, however, many of the customs and practices are influenced by practice in the United Kingdom and are very similar to practices in Canada.

1. Customs and Decorum

Court Attire – Generally, in all courts in the United States, counsel are expected to wear business attire, generally meaning coat and tie for men, and conservative suits for women. The only known exception to this is the Solicitor General of the United States who wears a morning suit when arguing to the United States Supreme Court. Gowns and wigs are not worn by counsel in the United States.

Addressing the Court – Upon the judge’s entry into or exit from the courtroom, all persons are expected to rise. Similarly, when a jury enters or exits the courtroom, it is customary for all, including the judge, to rise.

Judges and magistrates of courts inferior to the Supreme Court of the United States (or the highest appellate court of a state) are addressed as “Your Honor.” In the Supreme Court of the United States, the Chief Justice is addressed as “Mister Chief Justice” and the associate justices are addressed as “Justice (last name).” Federal Court of Appeals Judges are called “Judge,” however, while judges on some intermediate state appellate courts also may be called “Justices.” A similar practice is followed in the highest appellate court of most, if not all, states. Typically, at the beginning of addressing a court, counsel starts by saying “May it please the court.” In the United States Supreme Court, the appropriate opening salutation is: “Mr. Chief Justice and may it please the court.”

Etiquette While Advocating – Both as a matter of etiquette and as a matter of professionalism, counsel are to treat witnesses, opposing counsel and the court with civility and respect. It is not appropriate for counsel to interrupt opposing counsel or to address opposing counsel directly. During examination of witnesses counsel can, and is expected to, make objections, which always are addressed to the court. Typically, courts do not want counsel to argue the objection or even to indicate (except in the briefest of manner, e.g., “relevancy”) the reason for the objection unless invited by the court to do so. This is particularly true if a jury is present. If the jury is present and the court wants to hear arguments on the objection, it will invite counsel to “sidebar” to argue outside the hearing of the jury.

Trial Practice – The conduct of trials in courtrooms throughout the United States, both state and federal, is fairly uniform. Having said that, every trial lawyer knows that each courtroom is different depending upon the trial judge who is sitting on the bench.

Many courts will require counsel to remain at a podium while examining a witness. Regardless whether a particular court requires counsel to remain at the podium or permits counsel to walk around the courtroom during examination, it is never proper to approach a witness or the judge without first requesting permission to do so. Generally, exhibits are handed to witnesses by a clerk of the court.

Counsel examine their own witnesses “on direct,” which is to say except for uncontested background questions, questions must be direct rather than leading. By contrast, opposing counsel is free to use leading questions when cross examining. Counsel may also call a “hostile” witness “as if on cross.” And a witness first called on direct may later be declared “hostile,” at which point the examination may proceed by the use of leading questions.

Media Access – Access to the courts is guaranteed by the United States Constitution. Except in very exceptional circumstances (e.g., incompetency hearings in probate court), the news media is free to report on proceedings in court. Television coverage is not permitted in federal courts, and the proceedings of the United States Supreme Court, although not televised, are available to the public as audio recordings.¹³² Television coverage is permitted in many state courts.

2. Language Issues

There is only one official language in the United States, English, and all court proceedings are conducted in English. In the event a party or a witness cannot speak English, the courts must provide an interpreter.

3. Simplification of Civil Procedure and Case Management

The use of case management, modeled after federal practice, is widespread in the United States. Generally speaking, case management requires early intervention of the court to arrive at a time table for significant events in the case and to explore settlement possibilities. In the federal system, judges and magistrate judges tend to be very involved in case management. The degree of involvement in the multitude of state courts is so variable that no generalization can be made.

4. Mediation and Alternative Dispute Resolution

There has been a dramatic increase in the use of alternative dispute resolution in the United States. The most common forms of ADR are the same as in Canada, namely, arbitration and mediation. Mediation is the most widely used form of ADR in the United States. Its growing popularity has led some to conclude that on any statistical basis, trial is the "alternative" and less-used means of resolving disputes. Indeed, many courts in the United States are requiring parties to participate in mediation.

132 Arguments can be accessed at <www.oyez.org>

Mediation practice varies widely from state to state, and even among federal courts in different states. Canadian counsel involved in litigation in the United States should be aware that in virtually every forum, mediation in some form is increasingly used to resolve matters in the civil court system. Mediation in some states is voluntary and mandatory in others. In the voluntary states, however, both state and federal judges (in such states) universally encourage, but do not require, parties to consider mediation.¹³³ Moreover, both state and federal judges at the initial scheduling conference on a case will usually inquire about the use of various alternative dispute resolution procedures. Parties can retain the services of a professional mediator or, in many instances, use the free services of a court-appointed mediator.¹³⁴

Other variations of ADR such as non-binding "minitrials" or "summary jury" trials are used. In some states both the state and federal courts mandate some form of ADR as a means to achieve an "early settlement or disposition" in order to "narrow issues," "avoid discovery" and "reduce the cost and duration of litigation."¹³⁵

The growth of mediation and ADR has produced a plethora of mediation and ADR firms consisting of retired judges, senior lawyers limiting their practice to mediation, and lawyers who have been certified under the rules of those states that have established procedural rules and standards of conduct in the mediation of cases. Canadian counsel handling litigation in United States state or federal courts must be aware that mediation or some form of Alternative Dispute Resolution will be considered in almost every case.

133 For example, in the federal court in Massachusetts, a local rule requires judges to "encourage the resolution of disputes by settlement or other alternative dispute programs." D. MASS. R. 16.4(a), *available at* <http://www.mad.uscourts.gov/general/pdf/combined01.pdf> (last visited Jan. 8, 2009).

134 See 28 U.S.C. §§ 631, 636.

135 See, *e.g.*, Vt. R. Civ. P. 16.3.

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Chapter 8

Expert Evidence

In modern civil litigation, the use of expert testimony has become commonplace. An expert witness is broadly defined as one who is qualified by knowledge, skill, experience, training or education to provide a scientific, technical, or other specialized opinion about the factual evidence. Expert witnesses are an invaluable aide to litigators in identifying the strengths and weaknesses of their case and, of equal importance, preparing a case that is readily understandable for the trial judge.

CANADA

1. Expert Reports

Counsel often retain experts for consultation purposes prior to examinations for discovery. This assists counsel in identifying missing documents, formulating questions for discovery and evaluating a witness's response at discovery. However, inevitably the role of experts becomes more pronounced during the final months prior to trial. Undoubtedly, one of the most important contributions an expert can make to a case is the expert report.

While the particular rules of procedure will vary among Canadian jurisdictions, generally when a party intends to call an expert witness at trial, counsel must serve the other parties with an expert statement. Typically, this must be done 90 to 120 days prior to the commencement of trial. The expert statement, commonly referred to as an expert report, must set out the expert's name and qualifications, the proposed area of qualification, and the substance of the opinion. This includes not only the opinion but the factual information or assumptions on which the opinion is based. The factual information must be specific enough to support the expert's conclusion. By contrast the factual information must be general enough to accommodate the unpredictable nature of trial evidence.

While a discovery deposition of an expert witness generally is not permitted in Canada, an expert's conclusions sometimes can be obtained through the "examination for discovery" of the party calling the expert. As in the United States, the opinions of an expert or consultant, who is not designated as a trial witness, normally do not need to be disclosed.

Following the delivery of initial expert reports, if counsel intends on calling an expert in rebuttal to an opposing expert's statement, a report generally must be served 60 days prior to trial. Reply statements to expert reports, if necessary, are typically exchanged 30 days prior to trial. If the timelines are not met or no expert reports are filed, counsel may be precluded from calling an expert witness to testify without leave of the trial judge. The admissibility and probative value of expert reports is left largely to the discretion of the trial judge.

In limited circumstances, and on proper notice to the opposing side, counsel may file expert reports in lieu of having the expert appear to testify. Typically, this is done when the expert witness is a treating physician or caregiver and is merely giving evidence regarding contemporaneous observations and opinions at a given time. Opposing counsel may object to the expert's non-

attendance at trial and request a cross-examination of the witness. If the court later finds that the witness' presence was unnecessary, costs generally will be awarded against the cross-examining party.

2. Qualifying an Expert Witness

In the Canadian legal system, there is no equivalent to *Daubert* hearings, in which the court heavily scrutinizes the proposed expert's evidence prior to his or her testimony. However, before a witness can give expert testimony at trial in Canada, the expert must first be qualified by the court. The qualification procedure, in what amounts to a *voir dire*, is notably distinct from the process of a *Daubert* hearing and is relatively straightforward.

The late Honorable Justice John Sopinka of the Supreme Court of Canada aptly summarized the method for qualifying an expert witness as follows:

Counsel should provide a copy of the expert's *curriculum vitae* to the court. The expert should be led through the highlights of his or her credentials including academic training, work experience, books or articles written in the area, and, where applicable, previous proceedings in which the witness has been accepted as an expert. At the conclusion of the process, counsel should ask the judge for a ruling that the witness is qualified to give expert opinion within the field of his or her expertise.¹³⁶

Opposing counsel may object to the witness's qualification and has the right to cross-examine the witness on his or her credentials, and the relevance of the witness's training and experience. This cross-examination on qualification occurs prior to the witness providing any expert evidence. In addition, counsel may seek to narrow the area on which the witness will be permitted to testify. When it is clear that a witness is qualified, as a strategic move to avoid undue attention to an impressive *curriculum vitae*, opposing counsel may indicate to the court that he or she will not be challenging the expert's qualifications. However, a witness cannot be qualified on the consent of the parties; this is the exclusive role of the trial judge.

3. Expert Evidence at Trial

The decision of the Supreme Court of Canada in *R. v. Mohan*¹³⁷ provides the structure for the admissibility of expert evidence in Canada. The following are the four necessary criteria:

Relevance – The threshold for relevance is whether the evidence touches on the facts at issue in the litigation. Although relevance is a threshold requirement for the admission of expert evidence, as with all other evidence, expert evidence that is *prima facie* relevant will be subjected to the court's analysis of the impact of the evidence on the trial as a whole. As part of this analysis, expert evidence will not be admitted if the probative value of the evidence is outweighed by its prejudicial effect, requires an excessive amount of time, or is misleading because its effect is out of proportion to its reliability.

136 John Sopinka, Donald B. Houston & Melanie Sopinka, *The Trial of an Action*, 2nd ed. (Markham, Ont.: Butterworths, 1998).
137 [1994] 2 S.C.R. 9 (Can.).

Necessity in Assisting the Trier of Fact – In order for expert evidence to be admissible it must assist the trier of fact. In this respect, expert evidence will only be admissible if it provides information that is likely to be outside the experience and knowledge of a judge or jury. It is not sufficient that expert evidence be “helpful” to the trier of fact. As in the United States, the courts are divided as to when an expert may opine on the ultimate issue.

Absence of any Exclusionary Rule – Expert opinion evidence will not be admissible, even if it is relevant and helpful, if that evidence is made inadmissible by virtue of another exclusionary rule. Evidence that is not admissible directly cannot be made admissible indirectly. For example, an expert witness cannot be used to introduce impermissible character evidence. One exception involves the admissibility of hearsay evidence since it is well-established that an expert’s opinion is admissible even if it is based on hearsay evidence.

A Properly Qualified Expert – To be qualified, the expert must show knowledge beyond the knowledge of a lay person. Counsel should be aware of the restrictions on the number of expert witnesses. Under the Canada Evidence Act, a party cannot call more than five expert witnesses to testify at trial without leave of the court. In some jurisdictions (e.g., Ontario), the limit has been reduced to three expert witnesses, but this limit is rarely imposed.

4. Scope of Litigation Privilege

As courts become more concerned with the scope of disclosure in litigation, the extent to which the files of retained experts are protected from disclosure on the basis of litigation privilege is diminishing. Generally, opposing counsel are entitled to access the foundation of the expert's opinion.¹³⁸ This approach requires disclosure of all foundational material for the expert's report, regardless whether the final findings, opinions or conclusions expressly reflect that information. As a result, draft expert reports or transcribed telephone conversations between experts and counsel may be subject to disclosure when that expert testifies at trial. The disclosure of such material may be required in advance of trial so as not to interrupt the trial. Canadian judges have held that an expert, once called to the witness stand, is offering assistance to the court. The expert's testimony is meant to assist judge or the jury as the trier of fact, not to bolster the theory of the case presented by one side of the litigation. As such, the opposing party should be given access to the foundation of such opinions in order to test them adequately. Such disclosure is perceived to deter counsel from inappropriately influencing an expert. However, the practice in Canada is not uniform. For example, Québec courts have declined to compel the disclosure of draft reports.

UNITED STATES

There are significant variations in the manner in which different jurisdictions in the United States treat expert evidence. This section confines itself to the rules followed in the federal courts after which many of the states’ rules are modeled.

138 See also Chapter 4.

1. Expert Reports

Unless otherwise stipulated or directed by the court's scheduling order, expert witness disclosures, including the identity of experts who will testify and reports concerning the experts' qualifications and testimony, must be made at least 90 days before trial. The written report must be prepared and signed by the expert and must contain:

A complete statement and the basis and reasons for all opinions to be expressed; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.¹³⁹

In complex litigation, however, the disclosure of expert testimony will usually be modified by the court to meet the needs of the particular case. In addition, the timing of expert witness disclosures may be affected by a scheduling order in the case. In such a case, the provisions of the scheduling order control.

Parties must also supplement the expert disclosures as required by Rule 26(e). Failure to supplement the expert disclosures when required can lead to the exclusion of the expert's testimony.

Under Federal Rule of Civil Procedure 26(b)(4)(A), "a party may depose any person who has been identified as an expert whose opinions may be presented at trial." If, however, a report is required from the expert witness, the deposition cannot be conducted until after the report is provided.¹⁴⁰ Absent a demonstration of good cause, a party may not discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial.¹⁴¹ Moreover, unless "manifest injustice" would result, the party seeking discovery must pay the expert a reasonable fee for time spent in responding to discovery and, with respect to discovery obtained from a non-testifying expert¹⁴², the party seeking discovery must pay the other party a fair portion of the fees and expenses reasonably incurred in obtaining facts and opinions from the expert.

2. Qualifying an Expert Witness

Federal Rule of Evidence 702 provides that expert testimony is admissible if it will "assist the trier of fact to understand the evidence or to determine a fact in issue." In short, does the expert testimony help the jury understand the facts and resolve the issues? This helpful standard depends, of course, on the legal and factual issues in the case.

139 FED. R. CIV. P. 26(a)(2)(B).

140 FED. R. CIV. P. 26(a)(2)(B).

141 FED. R. CIV. P. 26(b)(4)(B).

142 *Id.*

Rule 702 provides that an expert is anyone "qualified as an expert by knowledge, skill, experience, training, or education." An expert must have greater knowledge than a lay person to make his testimony "useful" to the jury. Once the expert is shown to have some expertise, the issue then is one of credibility, which is for the jury to decide.

3. Expert Evidence at Trial

The admissibility of expert opinion testimony in federal courts is governed by the Supreme Court's decision in *Daubert v. Merrell Dow Pharmaceuticals*.¹⁴³ The key inquiry under *Daubert* is whether the offered expert testimony is relevant and reliable. The trial judge must determine initially if the expert will "testify to scientific knowledge that will assist the trier of fact to understand or determine a fact in issue."¹⁴⁴ That determination requires the trial judge to assess "whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts in issue."¹⁴⁵ Factors bearing on this inquiry include:

- whether the theory or technique can be and has been tested;
- whether it has been subjected to peer review and publication;
- the known or potential rate of error;
- whether the theory or technique has been generally accepted by the scientific community.

Under *Daubert*, the judge (not the scientific community), controls admissibility. Since the judge is the gatekeeper, "*Daubert* hearings" are required to make a threshold assessment whenever a party seeks to introduce expert testimony based on scientific tests and methods. If the expert's testimony is based on scientific tests and methods, the full *Daubert* analysis will apply. If the expert's testimony is only based on training, observation, and experience (as distinguished from scientific tests and methods), the judge still must determine if the testimony is reliable and, in making this determination, may consider one or more of the *Daubert* factors.

In 2000, Federal Rules of Evidence 701 and 702 were amended to provide that expert witnesses cannot avoid the trial court's "gate keeping" scrutiny by testifying as a lay witness under Rule 701. Rule 702 was amended to make it clear that an expert may testify if "(1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." This wording incorporates the holdings of *Daubert* and *Kumho Tire*.¹⁴⁶

Evidence Rule 703 provides that if the facts or data upon which the expert bases an opinion are "of a type reasonably relied upon by experts in the particular field ... the facts or data need not be

143 509 U.S. 579 (1993).

144 *Id.* at 580 (citing FED. R. EVID. 702).

145 *Id.*

146 *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).

admissible in evidence." This means that the expert can base opinion testimony on facts and data not in evidence, such as hearsay, so long as the facts and data are the type such experts reasonably use in their field.

Evidence Rule 705 provides that an expert can testify "without first testifying to the underlying facts or data, unless the court requires otherwise." However, the cross-examiner can require the expert to "disclose the underlying facts or data" on which the expert's testimony is based. Thus, on direct examination, the expert can testify to opinions without first stating the bases for the opinions.

Rule 702 permits the expert to testify "in the form of an opinion or otherwise." For example, the expert can testify to an "opinion" or, as is required in some jurisdictions, an "opinion to a reasonable degree of scientific certainty." The expert can testify, if appropriate, to a "conclusion." The expert may still testify to a hypothetical question. On the other hand, the expert's testimony cannot be conjecture or speculation.

Evidence Rule 704 provides that expert testimony "otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact" (except for mental states in criminal cases). However, Rule 702 also requires that expert testimony "assist the trier of fact to understand the evidence or to determine a fact in issue." Putting the two rules together creates the proper rule: an expert may testify to "ultimate issues" if the testimony is "helpful" to the trier of fact.

For many years the state court standard for admissibility of expert testimony based on scientific tests and methods was the "*Frye* test."¹⁴⁷ Under the *Frye* test before expert testimony based on scientific tests or principles is admissible, those tests or principles "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." The relevant scientific community principally determines admissibility, not the judge. Some state courts continue to follow *Frye*, while other state courts now follow *Daubert*. Even though there are published rules of procedures governing the utilization of experts in both the state and federal courts, those rules may vary in significant ways. Furthermore, local practice may vary the application of the published rules. Practitioners from outside the jurisdiction will be well-advised to retain local counsel to assist them with regard to these peculiarities of local practice.

4. Scope of Litigation Privilege

An expert's report is required to provide "a complete statement of all opinions to be expressed and the basis and reasons therefore" and "the data or other information considered by the witness in forming the opinion." The "Work Product Doctrine," as embodied in Rule of Civil Procedure 26(b) (3), states that its provisions are subject to the rules governing discovery from expert witnesses. A possible unintended consequence of permitting depositions of testifying experts and requiring submission of the expert report prior to the deposition is that there will be no work product protection at those depositions, even for the mental impression and legal theories of counsel.

147 *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Some courts have ruled that any material given by an attorney to an expert is discoverable, even if it includes the attorney's mental impressions, since such material is "considered" by the expert in formulating his or her opinion. These courts favor this "bright-line" approach because it allows parties to know in advance what material will be discoverable and is less burdensome on the court, which would no longer be required to make determinations as to contested documents. Other courts, however, have rejected this reasoning and held that the Work Product Doctrine applies at the deposition of a testifying expert.

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Chapter 9

Jury Trials

CANADA

Compared to the United States, where civil juries are constitutionally enshrined, civil jury trials are relatively rare in Canada, particularly in commercial litigation. In jurisdictions such as Ontario and British Columbia, at most, 20% of eligible trials are heard by civil jury. In other jurisdictions the incidence is far lower. Despite their rarity, civil jury trials are available in every Canadian province and territory except Québec, and except where matters fall within the federal courts' jurisdiction.¹⁴⁸

Jurisdictions that permit civil jury trials typically have legislation that prescribes the type of actions that may be heard by a jury. Counsel should make reference to the applicable legislation when determining the availability of a civil jury trial. While the process and likelihood of obtaining a civil jury trial vary among jurisdictions, there are some commonalities.¹⁴⁹

1. Right to a Civil Jury Trial

In most Canadian jurisdictions,¹⁵⁰ parties to a civil action in the superior trial court have a *prima facie* right, with some exceptions, to have their action tried by a jury. However, a jury trial is not available in all cases, such as those seeking an injunction, sale of real property, foreclosure, specific performance, declaratory relief, or other equitable remedies. In addition, many jurisdictions do not permit civil jury trials when the amount of money in dispute falls below a prescribed limit (ranging from \$1,000 to \$75,000). Some jurisdictions (*e.g.*, Alberta) also expressly restrict the availability of civil jury trials to actions founded in tort or contract.¹⁵¹

Most jurisdictions require that a jury notice or application for a jury trial be served prior to the trial date being scheduled. One exception to this general rule is Ontario, where a jury notice must be served prior to the close of pleadings—a time when the parties may have a limited ability to assess the appropriateness of a jury trial. On the opposite end of the spectrum are the territories (Northwest Territories, Yukon and Nunavut), where an application for a jury trial can be brought as late as two weeks prior to the commencement of trial. In Quebec, there is no right to civil jury trial.

The substantive right to a civil jury trial is one that is not to be taken away lightly. A party opposing a jury trial has the burden to show some cogent reason why the action should be tried by judge alone. In deciding whether a civil jury trial is appropriate, judges will typically look to the following factors:

148 *Federal Courts Act*, R.S.C. 1985, c. F-7, s. 49.

149 See Appendix A.

150 Alberta, British Columbia, Ontario, Nova Scotia, Prince Edward Island, Northwest Territories, Yukon and Nunavut. There is an absolute right to a civil jury trial for tort cases in Saskatchewan. There is no *prima facie* right to a civil jury trial in Manitoba, New Brunswick or Newfoundland and Labrador. In these latter jurisdictions, civil jury trials are virtually non-existent.

151 See Appendix A.

- the complexity of the factual and legal issues in dispute;
- whether the number of anticipated exhibits will cause a jury to spend an undue amount of time studying the evidence;
- whether the length of the trial will make a jury trial inconvenient (it is rare for courts to allow civil jury trials that are scheduled to be longer than three weeks);
- whether the jury could be reasonably expected to follow the evidence and apply the judge's charges properly.

Based on these factors, if a party will be unfairly prejudiced by a jury trial, the court has the power to order a trial by judge alone. It should be noted that a judge cannot discharge a jury solely on the ground that the legal issues of the case are too complex. It is the duty of the trial judge to instruct the jury with respect to the legal principles no matter how complex they may be.

Once a civil jury trial has commenced, it is still possible for the trial judge to conclude that the matter should be tried by judge alone. The particular process for raising the issue, including whether a motion is required, varies among jurisdictions. As an alternative, counsel should consider that most Canadian jurisdictions allow a civil trial to be split so that some matters are decided by a judge alone and some by a jury.

Decisions regarding civil jury applications largely fall within the discretion of the presiding judge and appellate courts. Even so, a decision to permit a jury trial does not foreclose a trial judge later striking a jury trial.

2. Jury Selection

In Canada, the jury selection process is much more restricted than in the United States. Counsel are limited in their ability to gain information about prospective jurors. Typically, the only information counsel receives is obtained by observing jurors during their appearance in court at the time of jury selection. In most jurisdictions, the roster of jurors (“the jury return”) will only list the prospective juror's name, address, and occupation or employer.

On the day of jury selection, the presiding judge typically will make some introductory remarks to the prospective jurors. Following this, the clerk of the court will call each prospective juror's name and ask that the person step forward. *There is no voir dire*. Counsel for each party will then say either “challenge” or “content” to indicate their preference. It is the usual practice for counsel for the plaintiff to express a view first. There are two kinds of challenges that may be exercised against prospective jurors: peremptory and cause. Peremptory challenges are allowed by virtue of legislation and can be exercised for any reason. Cause challenges are extremely rare and only granted when there is a basis upon which a juror ought to be disqualified, most commonly for an inability to remain impartial in the particular case. The number of cause challenges is unlimited. The number of peremptory challenges will vary among jurisdictions. If neither counsel exercises a challenge, then that person is sworn in as a juror.

UNITED STATES

Civil jury trials are much more common in the United States than in Canada, principally because they are constitutionally guaranteed. That said, there are important rules concerning jury trials in the United States and practical issues of which the cross-border practitioner should be aware.

1. The Right to Jury Trial

In the federal courts, the right to jury trial is guaranteed by the Seventh Amendment to the United States Constitution. In the civil setting, this constitutional right is rigorously protected, but as with all constitutional rights, it can be waived. Accordingly, the best practice is to include a demand for a trial by jury in the complaint at the time it is filed. In this way, the right to a jury trial is preserved and will not be forfeited unless and until it is expressly waived.¹⁵²

In the state court system, the Seventh Amendment does not apply in a civil context and, therefore, the trial practitioner is well advised to examine the local law and procedural rules governing the right to jury trial. Certain state statutory schemes in the United States have been constructed by the state legislators with the apparent intent that no jury trial be provided.¹⁵³ Accordingly, a careful review of state statutes is prudent. When in doubt, the best practice is to insert a demand for jury trial in the complaint so as to preserve the position.¹⁵⁴

The right to a jury trial may also be restricted by the structure of the court system in any given state. Courts of equity or chancery courts still are prevalent within the United States, and if the relief sought is predominately or exclusively equitable in nature, there is no right to jury trial. Accordingly, the trial practitioner should examine the relief requested to determine whether an action sounds in law or equity for the purpose of determining whether a right to jury trial will attach to the proceeding.

2. Jury Selection

In the United States, the *voir dire* of the jury has essentially been taken over by the trial judge in the federal courts. While the trial practitioner is permitted to suggest questions in advance of jury selection, in most instances, the court has a standard set of questions and will include the questions of counsel only after a hearing and the acceptance of those questions as being pertinent to the proceedings. This practice is followed in many state courts as well, although many state courts permit wide ranging *voir dire* by trial counsel. For example, in California, counsel in a civil trial has a statutory right to conduct a “reasonable” *voir dire*. As with most matters of state trial procedure, the practitioner is well advised to retain local counsel familiar with the practice in the particular jurisdiction.

152 See Federal Rule of Civil Procedure 38 and 39 for the rules governing the right to jury trial.

153 For example, in New Jersey, the legislature passed a “law against discrimination” which the state Supreme Court found did not provide for the right to jury trial. It took a further amendment by the state legislature to ensure that individuals did have that right. Given the nature of the relief being provided by that statute, one would have assumed that a jury trial was implied, but the Supreme Court did not agree.

154 See Appendix B: List of Border States and Their Jury Demand Requirements.

Challenges for cause in both the state and federal systems are unlimited, although subject to a ruling by the court. With regard to peremptory challenges, in most instances, each party is permitted three peremptory challenges. In litigation with multiple parties, the court may reduce the number of peremptory challenges in order to expedite the jury selection process, particularly when the interests of multiple parties are aligned.

In civil actions, the standard size of the jury is six jurors in federal court; jury size in state court may be as large as 12 jurors, depending on state law. Depending upon the length of the trial, the court often will empanel additional jurors as “alternate jurors” to account for the loss of certain jurors due to illness, or otherwise, during the course of the proceedings. As a result, in most federal jury trials, the panel consists of eight or nine jurors.¹⁵⁵ Some courts follow the practice of not identifying jurors as “alternates” so that counsel cannot know which of the jurors will be permitted to deliberate and render a verdict. In those situations, at the end of the presentation of the evidence, the court will reduce the number of jurors by way of a lottery.

In the federal courts, the jury verdict must be unanimous, unless the parties agree to a simple or a super majority. In most states, a super majority of jurors is required for a verdict for either side.¹⁵⁶ Any number fewer than the super majority will result in a mistrial. In the federal system, unanimity favors the defense, and for that reason, it is rare for there to be a stipulation permitting a jury verdict by a super majority.

155 *See Appendix C: List of Border States and Number of Jurors Seated.*

156 *See Appendix D: List of Border States and Verdict Required.*

ADDITIONAL READING

Canada

1. Geoffrey D.E. Adair, *On Trial: Advocacy, Skills, Law and Practice*, 2nd ed. (Markham, Ont.: LexisNexis Butterworths, 2004).
2. John Sopinka, Donald B. Houston & Melanie Sopinka, *The Trial of an Action*, 2nd ed. (Markham, Ont.: Butterworths, 1998).
3. Steven Lubet, Sheila Block & Cynthia Tape, *Modern Trial Advocacy, Canada*, 2nd ed. (Notre Dame: National Institute for Trial Advocacy, 2000).

U.S.

1. Robert S. Hunter, *Federal Trial Handbook. Civil* (Thomson/West, 2003-.)
2. Weyman I. Lundquist and Alyson Pytte, eds., *Litigation Manual. Jury Trials* (American Bar Association, 2008.)
3. Thomas A. Mauet, *Trial Techniques*, 7th ed. (Aspen Publishers, 2007.)
4. McCutchen, Doyle, Brown & Enersen et al., *Federal Litigation Guide* (M. Bender, 1985-.)
5. James W McElhaney, *McElhaney's Trial Notebook*, 4th ed. (American Bar Association, 2005.)

Appendix A

Availability of Civil Jury Trials

Province or Territory	Availability of Jury Trial	Number of jurors	Specific Right to jury	Examples where jury trials are prohibited or when considered inappropriate
British Columbia	Yes	8, but not less than 6 jurors may return a verdict (if a unanimous verdict cannot be reached after three hours, a verdict may be returned by 75 % of the jurors.	<ul style="list-style-type: none"> - Defamation - False imprisonment - Malicious prosecution 	<ul style="list-style-type: none"> - Action Against Crown - Equitable claims - Administration of the estate of a deceased person - Dissolution of a partnership or the taking of partnership or other accounts, - Redemption or foreclosure of a mortgage - Sale and distribution of the proceeds of property subject to any lien or charge - Execution of trusts - Rectification, setting aside or cancellation of a deed or other written instrument - Specific performance of a contract - Partition or sale of real estate - Custody or guardianship of an infant or the care of an infant's estate - Family law proceedings - Expedited action
Manitoba	Yes	6, but 5 may return a verdict and the parties may agree to a trial of 5 jurors	<ul style="list-style-type: none"> - Defamation - Malicious arrest - Malicious prosecution or false imprisonment 	<ul style="list-style-type: none"> - Equitable claims

Availability of Civil Jury Trials (continued)

Province or Territory	Availability of Jury Trial	Number of jurors	Specific Right to jury	Examples where jury trials are prohibited or when considered inappropriate
New Brunswick	Yes	7, but 5 may return a verdict	<ul style="list-style-type: none"> - Libel - Slander - Breach of promise for marriage - Malicious arrest - Malicious prosecution - False imprisonment 	- Equitable claims
Newfoundland and Labrador	Yes	6, but 5 may return a verdict	<ul style="list-style-type: none"> - Defamation - Malicious prosecution - False imprisonment - Seduction - Breach of promise of marriage 	- Equitable claims
Nova Scotia	Yes	7, but 5 may return a verdict after deliberating for at least 4 hours..	<ul style="list-style-type: none"> - Libel - Slander - Criminal conversation - Seduction - Malicious arrest - Malicious prosecution - False imprisonment 	- Action against the Crown

Availability of Civil Jury Trials (continued)

Province or Territory	Availability of Jury Trial	Number of jurors	Specific Right to jury	Examples where jury trials are prohibited or when considered inappropriate
Ontario	Yes	6, but 5 may return a verdict.	-Not prescribed by statute	<ul style="list-style-type: none"> - Action Against Crown - Proceeding in the Family Court - Injunction or mandatory order - Partition or sale of real property - Relief under Part I, II or III of the <i>Family Law Act</i> or under the <i>Children's Law Reform Act</i> - Dissolution of a partnership or taking of partnership or other accounts - Foreclosure or redemption of a mortgage - Sale and distribution of the proceeds of property subject to any lien or charge - Execution of a trust - Rectification, setting aside or cancellation of a deed or other written instrument - Specific performance of a contract - Declaratory relief - Other equitable relief - Relief against a municipality

Availability of Civil Jury Trials (continued)

Province or Territory	Availability of Jury Trial	Number of jurors	Specific Right to jury	Examples where jury trials are prohibited or when considered inappropriate
Prince Edward Island	Yes	7, but 5 may return verdict if after three hours of deliberation unable to agree	-Not prescribed by statute	<ul style="list-style-type: none"> - Injunction or mandatory order - Partition or sale of property - Relief in relation to matters over which the Family section has jurisdiction - Dissolution of partnership or taking of partnership or other accounts - Foreclosure or redemption of a mortgage - Sale and distribution of the proceeds of property subject to any lien or charge - Execution of a trust - Ratification, setting aside or cancellation of a deed or other written instrument - Specific performance of a contract - Declaratory relief - Other equitable relief - Relief against a municipality - Actions in which the Small Claims Section has jurisdiction - Action Against Crown - Election petition

Availability of Civil Jury Trials (continued)

Province or Territory	Availability of Jury Trial	Number of jurors	Specific Right to jury	Examples where jury trials are prohibited or when considered inappropriate
Québec	No jury in civil matters	N.A.	N.A.	N.A.
Saskatchewan	Yes	6, but 5 may return a verdict	<ul style="list-style-type: none"> - Libel - Slander - Malicious arrest - Malicious prosecution - False imprisonment - Action where claim exceeds \$10,000 	<ul style="list-style-type: none"> - Divorce - Matrimonial property - Action for equitable relief even if value is more than \$10,000

Appendix B

List of Border States and Their Jury Demand Requirements

States	Jury Demand
Maine	Demand made prior to scheduling order
New Hampshire	No later than 10 days after service of last pleading*
Vermont	No later than 10 days after service of last pleading
New York	Within 15 days after service of last pleading
Pennsylvania	20 days after service of last pleading
Ohio	14 days after service of last pleading
Michigan	28 days after filing of the answer or a timely reply
Wisconsin	Oral on record or written before scheduling conference or pre-trial (whichever comes first)
Minnesota	No waiver by not filing jury demand
North Dakota	No more than 10 days after service of last pleading
Montana	No later than 10 days after service of last pleading
Idaho	No less than 14 days after last pleading served
Washington	At or prior to time case is called to be set for trial

*In general, a “pleading” refers to: a complaint, cross-claim, counterclaim, third-party complaint, answer, or reply to an answer direct at the issue for which a jury is demanded.

Appendix C

List of Border States and Number of Jurors Seated

States	Jurors
Maine	8 or 9
New Hampshire	Not fewer than 6 and not more than 12
Vermont	12 or less if stipulated by parties
New York	6
Pennsylvania	6 or less
Ohio	12 or less
Michigan	6 to 12 or less if stipulated by the parties
Wisconsin	6 or up to 12 if requested by the parties
Minnesota	6 to 12
North Dakota	6 unless 9 specifically requested
Montana	6 to 12
Idaho	Minimum 6 or less than 12
Washington	Must specify between 12 or 6, if not requested, 6 is selected

Appendix D

List of Border States and Verdict Required

States	Verdict
Maine	Two-thirds or as stipulated by parties. No verdict with fewer than seven jurors
New Hampshire	Unanimous unless stipulated by parties. No verdict taken for jury of less than six
Vermont	Unanimous
New York	Five-sixths for verdict
Pennsylvania	Majority as stipulated or verdict when five out of six jurors agree
Ohio	Three-fourths for verdict
Michigan	Unanimous verdict unless stipulated; five-sixths for jury of 6
Wisconsin	Five-sixths verdict
Minnesota	Unanimous verdict
North Dakota	Majority verdict
Montana	Two-thirds for verdict
Idaho	Three-fourths for verdict
Washington	May stipulate to a stated majority to be taken as a verdict when less than twelve

Chapter 10

Damages and Other Relief

CANADA

1. Damages

Monetary damages in Canada can be broadly classified as compensatory and noncompensatory. Compensatory damages seek to compensate the injured party for the loss suffered as a result of an actionable wrong. In contrast, noncompensatory damages include those damages that are not measured by the plaintiff's loss, such as punitive damages and restitutionary awards.

(A) Compensatory Damages

Compensatory damages attempt to remedy harm to economic interests, harm to property interests, personal injury, wrongful death, and harm to intangible interests. The purpose is to award a sum of money that will put the plaintiff in the position as though the wrong had not occurred. In the context of contract damages, the court normally aims to place the injured party in the same position he or she would have been in if the contract had been performed. Similarly, the normal measure of recovery in tort law is to make the plaintiff whole by returning him or her to the position that person would have been in had the tort not been committed.

Canadian courts also refer to compensatory damages as "special" and "general." Special damages consist of any calculable, pretrial monetary losses and must be specifically pleaded in some provinces or territories. General damages include all future pecuniary and non-pecuniary losses; they are often proved through the use of expert opinion evidence. Special and general damages for personal injury claims are assessed by the court separately for pecuniary loss occurring before the trial, non-pecuniary loss, loss of earning capacity or the cost of future care.

Non-pecuniary damages are awarded for intangible losses, such as pain and suffering, loss of amenities, loss of enjoyment of life, and loss of expectation of life. In a trilogy of cases decided by the Supreme Court of Canada in 1978, the Court adopted a cap of \$100,000 for nonpecuniary damages per claimant, to be applied in all but exceptional cases. Adjusting for inflation, the current ceiling for non-pecuniary damages is just over \$300,000. This cap has consistently been applied by courts across Canada and used as a scale to assess awards in less catastrophic cases. It is very rarely exceeded in cases of personal injury.¹⁵⁷

Overall, general damage awards tend to be lower in Canada than in the United States, perhaps because there is a ceiling on non-pecuniary damages for personal injury and the infrequency of jury trials. Civil jury trials are rare outside of personal injury cases and insurance litigation. In some cases, Canadian courts may also award aggravated damages. Although often confused with punitive damages, aggravated damages are compensatory in nature and are available to a plaintiff as

¹⁵⁷ Courts have refused to extend the same limitation for non-pecuniary damages to claims for defamation and cases of negligence causing economic loss. See *Young v. Bella*, [2006] 1 S.C.R. 108 (Can.).

an additional award based on the recognition of the defendant's "exaggerated" misconduct, which has aggravated the plaintiff's loss. Aggravated damages "describe an award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behaviour." The plaintiff must establish grave misconduct and that an additional intangible loss has been suffered in order to support an award of aggravated damages. While any plaintiff may be awarded punitive damages, only a natural person may be awarded aggravated damages, since only a natural person can suffer an emotional injury.¹⁵⁸

Until recently there has been confusion in Canada regarding what may be properly classified as aggravated damages, particularly in actions for breach of contract. In *Fidler v. Sun Life Assurance Co. of Canada*,¹⁵⁹ the Supreme Court of Canada clarified that an award of damages for mental distress caused by a breach of contract does not constitute an award of aggravated damages, and its availability does not turn on the presence of an independent actionable wrong. Following the general rule governing damages for breach of contract set out in *Hadley v. Baxendale*,¹⁶⁰ mental distress caused by a breach of contract will be compensable if it is a loss that would have been within the reasonable contemplation of the parties at the time of contract formation. In *Honda v. Keys*,¹⁶¹ the Supreme Court of Canada further clarified that the same principle of reasonable expectation governs all awards of damages for breach of an employment contract in an action for wrongful dismissal. There was "no reason to retain the distinction between 'true aggravated damages' resulting from a separate cause of action and moral damages resulting from conduct in the manner of termination." Damages awarded for the manner of dismissal must be awarded under the *Hadley* principle and must reflect the actual damage suffered by the plaintiff.

In most Canadian provinces it is considered appropriate for a judge to give the jury guidance on the appropriate range of damages. Section 118 of Ontario's *Courts of Justice Act*¹⁶² provides that in an action for damages for personal injury, the court may give guidance to the jury on the amount of damages to be awarded, and the parties may make submissions to the jury on the amount of damages. Under Ontario's legislation the judge is permitted but not required to give the jury guidance on the appropriate range of damages. The Law Reform Commission of Ontario argued for the implementation of this provision by arguing that the advantages of jury independence had to be weighed against the need for fairness, consistency, and rationality in damage awards.¹⁶³

The Supreme Court of Canada has given guidance on the issue in a number of cases. In *Crosby v. O'Reilly*,¹⁶⁴ the Court unanimously decided that in a fatal accident case, the jury ought to be given careful guidance on what is a proper conventional figure. In *ter Neuzen v. Korn*,¹⁶⁵ the majority of the Court held that if a trial judge was of the view that, based on the evidence, the damages may be assessed in the range of, or exceeding the upper limit (set by the *Andrews* trilogy), the jury should be instructed on the limit. However if the trial judge is of the view that the evidence

158 *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104 (Ont. C.A.); see also *Thomas Management Ltd v. Alberta (Minister of Environmental Protection)* (2006), 397 A.R. 339 (Alta. C.A.).

159 *Fidler v. Sun Life Assurance Co. of Canada*, [2006] 2 S.C.R. 3 (Can.)

160 *Hadley v. Baxendale* (1854), 156 E.R. 145.

161 *Honda v. Keys*, [2008] 2 S.C.R. 362 (Can.)

162 R.S.O 1990, c. C-43, s. 118.

163 Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death* (1987), at 109

164 [1975] 2 S.C.R. 381 (Can.).

165 [1995] 3 S.C.R. 674 at 725 (Can.).

would not support a range approaching the upper limits, it should not be discussed with the jury. In Saskatchewan, the following approach has been adopted: First the judge should receive submissions from counsel as to the appropriate range of damages. Counsel are not permitted to make submissions regarding damages directly to the jury, as that is the function of the trial judge, and the submissions will assist the trial judge in formulating an appropriate range of damages. Second, if counsel agree on the appropriate range, and the trial judge is of the view that it will be helpful, he/she shall instruct the jury on the appropriate range of damages. Third, if counsel do not agree, and the judge is of the view that it would be helpful, he/she shall instruct the jury as to the range of damages he feels is appropriate having regard to the evidence and the submissions of counsel. Fourth, when the trial judge does instruct the jury on the appropriate range of damages, he/she should explain that he is merely giving guidance and not a strict upper or lower limit. It is the jury's function, not the trial judge's function to decide the proper measure of damages.¹⁶⁶

The approach adopted in Saskatchewan has been described by Cooper-Stephenson as the most sensible.¹⁶⁷ The benefits of the approach are that the judge may give the jury guidance when he/she feels it would be helpful, but is not required to do so, and determining the appropriate quantum of damages remains the jury's responsibility.

In British Columbia, the Saskatchewan procedure was briefly adopted by the Court of Appeal in *Foreman v. Foster*.¹⁶⁸ However, Justice Thackray, speaking for the majority of the same court in the 2002 case of *Brisson v. Brisson*,¹⁶⁹ declined to follow *Foreman* after an extensive review of the available authorities. Therefore, the position in British Columbia is not currently clear.

Appellate courts in Canada are loathe to interfere with jury awards. The fundamental commitment to maintaining jury awards is likely based in part on respect for the jury system, in part on the fact that there is a cap on non-pecuniary damages for pain and suffering and in part on the appellate courts' reluctance to send a matter back for a new trial (though, of course, the appellate court can substitute its own view of the proper damages). The basic principle governing appellate intervention in jury awards is that a jury award will not be interfered with unless it is so plainly unreasonable and unjust as to satisfy the court that no jury reviewing the evidence as a whole and acting judicially could have arrived at that conclusion. Although it is impossible to quantify what is "plainly unreasonable and unjust," it has been suggested that the damages must be too high or too low by 50 percent to meet this threshold. The same "plainly unreasonable and unjust" standard applies to both a jury's assessment of damages and to its apportionment of liability. The only *caveat* to this is that if the trial judge did not properly instruct the jury on the issue of damages under attack, then the appellate court may substitute its own assessment of damages.¹⁷⁰

166 *Junek v. Ede*, [1991] 1 W.W.R. 60 (Sask. C.A.); *Reiger v. Burgess*, [1988] 4 W.W.R. 577 at 634-35 (Sask. C.A.); *Quintal v. Datta*, [1988] 6 W.W.R. 481 (Sask. C.A.)

167 Ken Cooper-Stephenson, *Personal Injury Damages in Canada*, 2nd ed. (Scarborough, Ont.: Carswell, 1996) at 524.
168 (2001), 196 D.L.R. (4th) 11 (B.C. C.A.).

169 (2002), 213 D.L.R. (4th) 428 (B.C. C.A.)

170 *McIntyre v. Grigg* (2006), 83 O.R. (3d) 161 (Ont. C.A.) for the standard generally; *Rizzi v. Mavros* (2008), 236 O.A.C. 4 (Ont. C.A.) for the "caveat."

(B) Non-Compensatory Damages

Punitive Damages — Punitive damages are distinct from compensatory damages and are awarded when the circumstances warrant punishment. Punitive damages are designed to address the purposes of retribution, deterrence, and denunciation. To warrant punitive damages, the impugned conduct of the defendant must be a marked departure from the ordinary standards of decency, so as to offend the court's sensibilities.¹⁷¹ Conduct attracting punitive damages is often described by courts as malicious, oppressive, or high-handed. In Québec, the specific instances allowing punitive damages are provided by statute. Violation of fundamental rights, as well as rights of consumers and tenants, are the main sources of punitive damages in Québec.

There is no judicially fixed ceiling on punitive damages in Canada, although million dollar punitive damage awards are rare in Canada. A punitive damage award must be proportional to the blameworthiness of the defendant; the degree of the plaintiff's vulnerability; the harm directed specifically at the plaintiff; the need for deterrence (taking into account other penalties); the advantage wrongfully gained from the misconduct.¹⁷²

Punitive damage awards in Canada tend to be granted less frequently and in smaller amounts than in the United States. One reason for the difference is the greater use of jury trials in the United States in tort cases. Another possible reason is that, in Canada, the evidence used to support a punitive damage award must involve behaviour directed towards and harmful to the plaintiff; it does not include behaviour towards third parties.¹⁷³

An award of punitive damages for breach of contract requires proof of an independent "actionable wrong," in addition to the failure of performance. For example, a breach of the distinct and separate contractual duty to deal with a party in good faith would constitute a separate actionable wrong which would be in addition to the breach of contractual duty to perform.

Restitution – The term "restitution" refers both to a specific remedy and a body of substantive law for civil liability. As a remedy, restitution is available to strip a wrongdoer of improper gains based on the principle of unjust enrichment.¹⁷⁴ Unjust enrichment occurs when there has been enrichment of one party, a corresponding deprivation of the other, and there is no legitimate reason for that result.

Although restitutionary remedies typically do provide compensation for losses suffered by a plaintiff, they are not strictly compensatory. The remedy is measured by the benefit wrongfully obtained by the defendant rather than by what the plaintiff lost.¹⁷⁵ Restitutionary remedies come in a number of different forms, such as an order for the defendant to pay a sum of money, a constructive trust for ownership of specific property, or an accounting of funds unjustly acquired by the defendant.

171 *Whiten v. Pilot Insurance Co.*, [2002] 1 S.C.R. 595 (Can.).

172 *Id.*

173 Jamie Cassels, *Remedies: The Law of Damages* (Toronto: Irwin Law, 2000) at 260-61.

174 *Id.* at 229.

175 *Id.*

Nominal Damages – As in the United States, Canadian courts may award a small sum of money as nominal damages. The purpose of nominal damages is to serve as a minor deterrent to the defendant and as a declaration of the plaintiff’s rights. Nominal damages may be awarded when a plaintiff is able to establish a complete cause of action, but has not suffered a substantial loss, or is unable to prove the amount of loss. If the cause of action, such as negligence, requires proof of harm, then nominal damages cannot be awarded whenever the plaintiff has failed to prove actual harm. Significantly, in Canada, an award of nominal damages may justify an award of costs, which, as noted elsewhere, can be significant.¹⁷⁶

2. Injunctive Relief

Canadian courts may grant injunctions to prevent injuries to property, restrain infringement of rights that are capable of enforcement at law or in equity, and preserve assets or rights pending final judgment. As with the American legal system, injunctions may compel or restrain a course of conduct and may be employed on a permanent or temporary basis.

An interlocutory injunction restrains the defendant until the final disposition of the action or until further order. When considering an application for interlocutory injunction, courts apply the following three factors:

- a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried (or in some instances, a prima facie case);
- it must be determined whether the applicant would suffer irreparable harm if the interlocutory injunction were refused;
- an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of an injunction pending a decision on the merits (the balance of convenience).¹⁷⁷

Although it does not have a precise meaning, “irreparable harm” has been found to be that which cannot be quantified in monetary terms or be cured. For example, irreparable harm would occur when one party will suffer permanent market loss or irrevocable damage to its business reputation.¹⁷⁸

Interlocutory injunctions can vary widely in nature. For example in the corporate context, interlocutory injunctions may be sought to compel a corporation's compliance with the applicable business corporations statute, the corporate by-laws or a unanimous shareholder agreement; to prevent a breach of duty in termination of employment; to prevent the breach of an ongoing obligation. *Mareva* and *Anton Piller* orders are specific types of interlocutory court orders that are usually made *ex parte*. A *Mareva* injunction allows a court to freeze eligible assets within its jurisdiction if there is a genuine risk of assets disappearing, either inside or outside the jurisdiction. It may be obtained before the originating process is issued or at any stage of a proceeding. An *Anton*

176 See Chapter 12.

177 Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora, Ont.: Canada Law Book, 1992) ¶ 2.280.

178 *id.* at ¶ 2.400-2.410.

Piller order is a civil search warrant, often obtained in conjunction with a *Mareva* injunction. It allows the plaintiff to access the defendant's premises to inspect materials or documents and to copy or remove them pending the trial. An *Anton Piller* order is only granted when the normal processes available will be rendered useless without an immediate and effective measure. It is available before or after the commencement of proceedings.¹⁷⁹

In Québec, provisional interlocutory (*i.e.*, interim) injunctions can, in theory, be obtained without notice. In practice, however, judges almost always require that the opposing party be notified (at least several hours before) before the presentation of the application in order to give an opportunity to contest the application.

3. Specific Performance

Specific performance of a contract may be ordered whenever damages for a failure to perform under the agreement are incapable of providing a complete remedy to the plaintiff. A party seeking specific performance must establish a concluded and existing contract.¹⁸⁰ Usually, specific performance is granted for an agreement for the purchase and sale of land. In the past, Canadian courts tended to treat all land as unique and order specific performance unless there was a reason to deny equitable relief. More recently, however, the Supreme Court of Canada has ruled that specific performance should not be granted in the absence of evidence that the property is unique to the extent that its substitute is not readily available.¹⁸¹

In Québec, specific performance is the general rule in contractual matters. The court has discretion to refuse specific performance in cases that do not "admit of it." For example, specific performance might be denied for a contract *intuit personae*, such as an employment agreement, painting a personal portrait, etc..

4. Declaratory Relief

Canadian courts may grant declaratory relief—a judicial statement that a party is the owner of a certain right or piece of property, that conduct is inappropriate or unlawful, that certain activity infringes the rights of another party. Declarations are commonly sought in intellectual property and other property disputes.

UNITED STATES

1. Damages

Damages in the United States¹⁸² generally fall into two broad categories: compensatory and punitive. The two are not mutually exclusive; in certain instances, an injured party can receive

179 *id* at ¶ 2.750-2.1140.

180 *The Canadian Encyclopedic Digest*, CD ROM: May, 2009, Release 2 (Scarborough, Ont.: Carswell), Specific Performance § 18.

181 *Semelhago v Paramadevan*, [1996] 2 S.C.R. 415 (Can.).

182 The law governing these issues can and does vary, sometimes significantly, between the federal and state systems and among the various states. This summary is intended to provide an overview of generally applicable principles.

both. Punitive damages, however, are rarely awarded in the absence of compensatory damages. To recover damages, a plaintiff must demonstrate the existence of a legitimate and recognizable cause of action for some legal wrong suffered at the hands of the defendant and damage resulting from that wrong. Occasionally, these hurdles are simplified by the presence of a statute that explicitly sets forth particular grounds for damage relief. When a statute governs, one may be entitled to damages simply by demonstrating that the defendant violated the statute.

(A) Compensatory

Compensatory damages are intended as satisfaction for some loss sustained,¹⁸³ be it rooted in personal injury, property damage or the invasion of a right granted by law. Such damages are intended to make the injured party "whole" or return the injured party to the position that that person was in prior to the injury. Thus, the purpose of compensatory damage remedies is to restore, not to enrich, an injured plaintiff. Generally, the plaintiff has the burden of proving compensatory damages by a preponderance of the evidence.

Compensatory damages include all losses recoverable as a matter of right that are not punitive. Compensatory damages for personal injury can encompass bodily pain and suffering; disfigurement; disabilities; loss of health; character damage; and in a majority of jurisdictions, mental stress and anguish. A plaintiff may also recover for medical expenses, lost profits, lost wages, lost fringe benefits, and loss of earning capacity. Mental and emotional damages include a plaintiff's loss of enjoyment of life.

Compensatory damages are often referred to as either "general" or "special." General damages include those that naturally and necessarily result from the wrongful act, inclusive of those that follow as a conclusion of law. Special damages arise from the special circumstances of the case and naturally, but not necessarily, result from the wrongdoing.

(B) Noncompensatory Damages

Punitive Damages – Designed to set an example, punitive damages¹⁸⁴ are aimed at deterrence and punishment, not at compensation. Punitive damages awards are not normally available in contract cases, unless there is a fiduciary or other special relationship between the injured party and the defendant. The foundational element for punitive damages is the invasion of some legally-protected interest. Mere physical injury, however, is not sufficient; generally there must be some aggravating condition for which the state of mind of the wrongdoer is critical. Typically, only cases in which the defendant evinces a ruthless disregard for others, outrageous conduct, an evil motive, reckless indifference, or a similar motivation will trigger punitive damages. Dependent upon the circumstances of the case, a direct showing of the defendant's state of mind might not be required if malice can be implied from the facts.

Punitive damages enhance but do not replace compensatory damages. In this way, the plaintiff can be said to receive a windfall, and as a result, great judicial restraint is generally

183 Reference is often made to "actual" damages, which are indistinguishable from compensatory damages.

184 The related, but not necessarily identical, concept of "exemplary" damages is used in some jurisdictions.

exercised in their application. These damages are not boundless, yet there is no fixed limit on the amount recoverable. They can be limited by statute, but they can also be limited by the discretion of the fact-finder. The fact-finder may evaluate factors such as the reprehensibility of the conduct, wealth of the defendant, defendant's profitability as a result of the conduct, litigation costs, the aggregate of all civil and criminal sanctions lodged against the defendant and ratio between the harm caused by the defendant's misconduct and the losses suffered by the plaintiff. In many states, clear and convincing proof of malice, fraud, or oppression is necessary to justify punitive damages. The decision to punish a tortfeasor by punitive damages is an exercise of state power. As a result, in addition to statutory and discretionary limitations, punitive damages implicate procedural and substantive limitations under the due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution. While there is no bright line test, generally a punitive damage award that is greater than a single digit multiple of compensatory damages will not withstand Constitutional scrutiny. In accordance with due process considerations, the jury must receive some guidance as to the purpose and applicability of punitive damages. Courts must also provide an opportunity for post-trial review of any punitive awards. If the punitive damages award is considered excessive, the court can order a remittitur or a new trial.

Not every state recognizes punitive damages. In jurisdictions that do not recognize them, the compensatory damages may reflect aggravating circumstances and, in effect, act as punitive damages when the wrongful conduct is particularly egregious. Those states that do recognize punitive damages vary widely in their application. For example, in order for punitive damages to apply, some jurisdictions statutorily require a specific finding that both the public interest will be served by punishing the wrongdoer and that it will act as a deterrent to others. There is also a difference among jurisdictions as to whether punitive damages can be awarded in the absence of compensatory damages. Another jurisdictional split relates to the sufficiency of nominal damages to support a punitive damages claim.

Certain jurisdictions seem to require the plaintiff to demonstrate that the egregious behavior of the defendant be indicative of a greater pattern of misconduct directed toward the general public. Due to the nature of punitive damages as a deterrent, some jurisdictions have held that they are inapplicable when the tortfeasor dies. Other jurisdictions, however, maintain actions for punitive damages against the estate in order to act as a broader deterrent to the public at large.

Restitution – In certain areas of the law, especially in intellectual property or unfair competition, a claimant may seek a remedy in the form of restitution, forcing the defendant to give up profits made by virtue of a civil wrong. Restitution damages are not calculated in reference to any loss on behalf of the plaintiff *per se*. Rather, these damages are based on making the defendant disgorge the profit gained from the wrongful conduct.

Nominal – In lieu of compensatory damages, a court may choose to award the plaintiff nominal damages when an invasion of a legal right results in no actual loss or when an actual loss is present but the plaintiff cannot prove the amount of the loss. Nominal damages cannot be recovered when damages constitute a specific element of the cause of action and the plaintiff fails to prove such damages.

2. Injunctive Relief

Injunctions attempt to prevent harm before it occurs—an equitable remedy that operates when damages do not sufficiently address wrongful conduct. An injunction is an extraordinary remedy and generally is disallowed when a remedy at law (typically money damages) exists that can furnish the injured party with full relief.

Injunctions either compel ("mandatory") or restrain ("prohibitory") a particular course of conduct and can apply either on a permanent or temporary basis. In certain circumstances, the court may order a temporary restraining order or a preliminary injunction to stay or compel a particular course of action until the court has the opportunity to make a decision on the merits. In order to obtain a temporary or preliminary injunction, the moving party usually must establish at least a substantial likelihood of success on the merits and irreparable injury in the absence of the injunction. Other factors considered include a balancing of the harms and the impact on the public interest in the event the relief is granted or denied.

3. Specific Performance

Specific performance requires the party to perform a certain act. Although specific performance can apply to almost any lawsuit seeking to compel behavior, it is most commonly applied to pre-existing transactions, such as contract disputes and real estate transactions.¹⁸⁵ There are certain situations, however, in which specific performance orders will not be applied: when it would cause severe hardship to the defendant; when the contract in dispute is unconscionable; when the claimant has misbehaved in some way; when performance is impossible; when performance consists of a personal service; when the contract is too vague.

4. Declaratory Relief

Declaratory judgments determine or clarify the rights, obligations, or duties of the parties. These judgments may only be sought in cases of actual controversy. Thus, individual standing, ripeness and mootness considerations apply. Unlike injunctive and specific performance remedies, declaratory judgments are not ordinarily conditioned upon the inadequacy of remedial alternatives. Regardless, courts may properly exercise their discretion in denying declaratory relief when they are convinced that it would be less effective than another remedy. Courts may also refuse a declaratory judgment when it would not adequately address the uncertainty in question. Declaratory judgments bind the parties in the same way as any other final judgment. In some instances, however, a declaration of rights, duties or responsibilities will not adequately or completely resolve a dispute. In such situations, further relief may be granted to the extent that it is necessary and proper. In other words, declaratory relief does not preclude access to other appropriate remedies.

185 Judgments for specific performance are especially prevalent in transactions relating to the sale or lease of land.

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2. Jamie Cassels and Elizabeth Adjin-Tettey, *Remedies: the law of damages*, 2nd ed. (Toronto: Irwin Law, 2008)
3. Law Society of Upper Canada, Continuing Education, *Special lectures 2005: The modern law of damages* (Toronto: Irwin Law, 2006)
4. *Young v. Bella*, [2006] 1 S.C.R. 108 (Can.).
5. *Whiten v. Pilot Insurance Co.* [1996] 1 S.C.R. 595 (Can.)
6. Jamie Cassels and Elizabeth Adjin-Tettey, *Remedies: the law of damages*, 2nd ed. (Toronto: Irwin Law, 2008)
7. Robert J. Sharpe, *Injunctions and Specific Performance*, looseleaf (Aurora, Ont.: Canada Law Book, 1992).
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1. Dan B. Dobbs, *Law of Remedies*, 2d ed. (West Publishing Co., 1993).
2. Robert L. Dunn, *Recovery of Damages for Lost Profits*, 6th ed. (Lawpress Corporation, 2005).
3. Linda L. Schlueter, *Punitive Damages*, 5th ed. (Matthew Bender, 2005).
4. 22 Am. Jur. 2d Damages §§ 1-833 (2003).
5. 42 Am. Jur. 2d Injunctions §§ 1-360 (2000).
6. 46 Am. Jur. 2d Judgments §§ 322-359 (1994).
7. 71 Am. Jur. 2d Specific Performance §§ 1-245 (2001).

Chapter 11

Enforcement of Foreign Judgments

CANADA

Canada and the United States are each other's largest trading partner. The growth in cross border commerce can be expected to continue given the *North American Free Trade Agreement*. Notwithstanding this international cooperation, there is no treaty between Canada and the United States that provides a simple and rapid method of enforcing civil judgments in commercial matters. By contrast, such conventions have been in force between the European Economic Community states since 1967 and between Canada and the United Kingdom since 1984.

In Canada there are statutes of provinces and territories that do provide for the interprovincial or territorial enforcement of judgments by registration.¹⁸⁶ Some provinces or territories have legislation providing for the registration of United States judgments or Canadian judgments when there is reciprocal legislation in both jurisdictions. Otherwise, all that is available is the traditional method of suing in Canada on a judgment obtained in the United States.

Canadian courts have begun to relax the common law rules restricting the enforcement of foreign judgments and awards. The modern rule laid down by the Supreme Court of Canada is that a civil judgment obtained in a foreign court will be recognized and enforced in Canada, provided that the foreign court has properly exercised jurisdiction. A finding of proper jurisdiction requires that the judgment be issued by a court with a "real and substantial connection" either with the subject matter of the action or with the defendant. An acknowledgement of the foreign court's jurisdiction will be subject to the defenses of public policy, fraud, and "lack of natural justice."¹⁸⁷

The rule recognizing the enforcement of foreign judgments is subject to an important qualification. The rule applies only to final money judgments, not to equitable orders such as injunctions and orders of contempt. In other words, a foreign judgment given by a court of competent jurisdiction is enforceable by a Canadian court provided it is final and conclusive and for a definite sum of money.¹⁸⁸

Canada is party to certain international conventions providing for the enforcement of foreign awards. Thus, Canada, as the United States, has ratified both the 1958 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* (the New York Convention)¹⁸⁹ and the *Convention on the Civil Aspects of International Child Abduction* (the Hague Convention).¹⁹⁰ Canada signed the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*

186 See UNIFORM ENFORCEMENT OF CANADIAN JUDGMENT ACT (Uniform Law Conference of Canada), available at <http://www.ulcc.ca/en/us/index.cfm?sec=1&sub=1e1> (last visited Jan. 8, 2009).

187 *Beals v. Saldanha*, [2003] 3 S.C.R. 416 (Can.) (recognizing and enforcing a default judgment of a Florida court against a resident of Ontario).

188 *Pro Swing Inc. v. Elta Golf Inc.*, [2006] 2 S.C.R. 612 (Can.) (refusing to enforce in Ontario a consent decree and contempt order for trademark infringement issued by the Northern District of Ohio Eastern Division).

189 United Nations Foreign Arbitral Awards Convention Act, R.S.C. 1985, ch. 16 (2d Supp.).

190 Convention on the Civil Aspects of International Child Abduction. http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=24

establishing the International Centre for the Settlement of Investment Disputes (ICSID) in 2006 but, has not ratified it.¹⁹¹

Treaty implementation in Canada is unique in that it can come under either federal or provincial legislative authority. Both the New York Convention and the Hague Convention involve provincial legislative intervention. All provinces and territories have implemented both conventions, with the exception of Ontario in the case of the New York Convention. The details of the rules governing the recognition and enforcement of foreign judgments in Canada are conveniently collected in *Castel and Walker, Canadian Conflict of Laws*, 6th ed.¹⁹²

UNITED STATES

There is no reciprocal agreement between the United States and any other foreign nation on recognition and enforcement of judgments. This includes judgments by courts in Canada. Full faith and credit, which is accorded to sister-state judgments in the United States, is applicable to judgments of foreign nations. In the absence of a federal statute, treaty, or other basis for federal jurisdiction, the enforcement of foreign judgments becomes a matter of state law.¹⁹³ Therefore, much of the jurisprudence addressing the enforcement of foreign judgments is derived from state case law and from federal court decisions applying state law. In recognition and enforcement of foreign judgments, state courts generally apply the same rules and principles that they apply to the judgments of sister states.

Notwithstanding the absence of a treaty or federal statutes, the 1895 Supreme Court cases of *Hilton v. Guyot*¹⁹⁴ and *Ritchie v. McMullen*¹⁹⁵ set forth the bases for enforcement of foreign judgments in federal courts. In *Hilton*, the Supreme Court declined to enforce the judgment of a French court on the grounds that if the facts were reversed, the French court would not enforce the judgment of a United States court. In its companion case, *Ritchie*, however, the Court enforced the judgment of a Canadian court stating that the judgment of a United States court under similar facts would be enforced in Canada. Thus, a reciprocity requirement was established. Since *Hilton* and *Ritchie*, the Supreme Court has not addressed the issue of reciprocity in the enforcement of a foreign judgment. Inherent in both cases, however, is the comity that the courts of the United States owe to foreign courts if due process standards of jurisdiction, notice of appearance, and lack of fraud can be shown. Once demonstrated, enforcement may be available so long as a judgment of a United States court, under like circumstances, would be conclusive on the merits in the foreign forum.

In the absence of statutory law or case precedent, some courts turn to well-established legal authorities such as RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, Ch. 8, in seeking guidance. The RESTATEMENT (THIRD) sets out basic principles for non-recognition of foreign judgments. A court in the United States may not recognize and enforce the judgment of a foreign nation if:

191 A Bill to implement ICSID was passed by the House of Commons on January 30, 2008 and the Act received Royal Assent on March 13, 2008, but at this writing it has yet to be proclaimed into force and formal ratification has yet to occur.

192 J.G. Castel & Janet Walker, *Canadian Conflict of Laws*, looseleaf (Markham, Ont.: Butterworths, 2005).

193 *Erie v. Tompkins*, 304 U.S. 64 (1938).

194 159 U.S. 113 (1895).

195 159 U.S. 235 (1895).

- (a) the judgment was rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law;
- (b) the court that rendered the judgment did not have jurisdiction over the defendant in accordance with the law of the rendering state.¹⁹⁶

The RESTATEMENT (THIRD) also includes the lack of subject-matter jurisdiction, judgments obtained by fraud, a defendant’s lack of notice, judgments against public policy, and conflicting judgments as bases for denying recognition and enforcement of foreign judgments.¹⁹⁷

The value of codifying standards for recognition of judgments has led legislators and legal scholars to develop rules for enforcement of foreign judgments. The *Uniform Foreign Money Judgments Recognition Act* which was promulgated by the National Conference of Commissioners on Uniform State Laws in 1962, has been adopted by 32 states and the Virgin Islands.¹⁹⁸ Prior to that model act, the Uniform Law commissioners had promulgated the *Uniform Enforcement of Foreign Judgments Act* in 1948 (amended in 1962). Despite the similarities in titles, these acts are quite different from one another. On the one hand, the more recent of these acts provides for enforcement of the judgments of foreign nations in the United States state courts, while the older act only provides enforcement of the sister-state judgments under the full faith and credit clause of the United States Constitution. In 2005, when the commissioners revised the model act in an effort to decrease the confusion between the two promulgations, they revised the title to “*Uniform Foreign-Country Money Judgment Recognition Act*.”¹⁹⁹

The ongoing efforts of codification are seen internationally as well. In 1970, the United States signed the United Nations *Convention of the Recognition and Enforcement of Foreign Arbitral Awards*. Under that Convention, all signatory nations must enforce foreign arbitral awards.²⁰⁰ The majority of signatory countries, including the United States, limit the treaty to commercial arbitral judgments and require reciprocity.²⁰¹

In the area of domestic relations judgments, the recognition of foreign judgments generally involves American citizens residing in foreign countries.²⁰² A small minority of states recognize a foreign divorce if both parties submit to the foreign jurisdiction and at least one party personally appears before the foreign court.²⁰³ Support judgments, on the other hand, traditionally are not enforced because they are not final judgments.²⁰⁴

With growing concern over international child abduction by foreign-national parents, the United States ratified the *Hague Convention on the Civil Aspects of International Child Abduction* in

196 RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW §§ 482(1)(a), (b) (1987).

197 *Id.* § 482(2).

198 Website of National Conference of Commissioners on Uniform State Laws: http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-ufcmjra.asp

199 UNIFORM FOREIGN-COUNTRY MONEY JUDGMENTS RECOGNITION ACT OF 2005 (The Nat’l Conference of Comm’rs on Unif. State Laws Feb. 2006).

200 Lynn Wardle, *Interstate and International Conflicts of Law* (1999) [unpublished, archived at Brigham Young University] at 13.

201 *Id.*

202 *Id.*

203 *Id.*

204 *Id.*

1988. There are two main purposes of this Convention: first, to provide quick return of a wrongfully abducted child and second, to ensure enforcement of the custody laws of other countries.²⁰⁵ The Hague convention is reciprocal and only applies between countries that have ratified it. The federal legislation, the *International Child Abduction Remedies Act*, provides for federal jurisdiction in an action under the Hague Convention.²⁰⁶

Even though there has been a trend towards codification of the rules governing the enforcement of foreign judgments, state common law continues to be the primary means for enforcing foreign judgments. Therefore, whether a foreign judgment is enforced in the United States would depend on the state law under which the enforcement is sought.

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1. 18 James Wm. Moore et al., *Moore’s Federal Practice*, §§ 130.50-.52 (Matthew Bender 3d ed. 2008).
2. 3 Ved P. Nanda & David K. Pansius, *Litigation of International Disputes in U.S. Courts* §§ 20:1-:21 (Thomson Reuters/West 2d ed., 2008).
3. Wanda Ellen Wakefield, Annotation, *Judgment of Court of Foreign Country as Entitled to Enforcement or Extraterritorial Effect in State Court*, 13 A.L.R. 4th 1109 (1982).

205 *Id.*

206 42 U.S.C. §§ 11601-11610(2006).

Chapter 12

Costa and Contingency Fees

CANADA

1. General Principles Regarding Costs

In civil litigation matters in Canada it is customary, but not mandatory, for the winning side to receive an award of costs against the losing side. Costs include both counsel's fees and disbursements, including experts' fees. Although an award of costs is within the discretion of the presiding judge, who may decline to award costs, the rule in most Canadian jurisdictions is that costs "follow the event" (*i.e.*, they are awarded to the successful party), unless the court orders otherwise. This is sometimes referred to as the "English Rule."

While disbursements are normally recovered on a dollar-for-dollar basis, provided they are reasonable, an award of costs is not normally intended to provide a complete indemnity for legal fees. Fees are normally dealt with in such a way that the award of costs will include less than the full fees paid by the winning party. The degree of indemnity depends on the category of costs awarded by the court.

In some jurisdictions, but not all, the hearing judge, particularly in interlocutory matters, may fix the amount of costs at the time of giving judgment, with costs payable at that time (*i.e.*, forthwith). Otherwise, the costs award is determined by the registrar or other court official if the parties cannot agree. Defendants may apply to the court for an order that the plaintiff post security for costs.

2. Categories of Costs Awards

Canadian jurisdictions use different nomenclature to describe the categories of recoverable costs, but the following terms are most commonly used:

Party and Party Costs – Also referred to as "Partial Indemnity Costs," Party and Party Costs are the default mechanism for awarding costs. The fees component of the costs award is determined according to a tariff or other scale, which will vary across jurisdictions, but is usually designed to ensure that, in a standard lawsuit, something in the range of one-third to one-half of the fees paid are recoverable.

Solicitor and Client Costs – In some jurisdictions, the term Solicitor and Client Costs (also referred to as "Substantial Indemnity Costs"), has been preserved to enable the trial judge to award a class of costs that more closely approximates a full indemnity of fees as well as disbursements. Solicitor and Client Costs are awarded rarely and usually express some degree of denunciation by the presiding judge of the conduct of the losing litigant. An award of Solicitor and Client Costs is generally in the range of two-thirds to three-quarters of the fees paid. In some jurisdictions, an award of Solicitor and Client Costs may result where a party makes a written offer of settlement that was rejected. For example, if the offer is not accepted and the offering party achieves a better outcome

at trial, the unsuccessful party must pay Solicitor and Client Costs accrued from the date of the offer to the date of judgment. In other jurisdictions, the term Solicitor and Client Costs is no longer used. “Special Costs” is a roughly equivalent term that permits a higher level of recovery of costs.

Premiums – In some jurisdictions, plaintiff counsel has succeeded in recovering a premium from the unsuccessful defendants. Premiums are generally reserved for cases in which counsel achieve an extraordinary outcome or there was a considerable risk that counsel for the plaintiff would not recover their fees. The propriety of making such an award recently has been called into question.

3. Assessment of Costs

When the court awards party and party costs, the fees component is determined by reference to a tariff, or other scale, which awards a specific dollar amount or units that translate into dollars for specific tasks in the litigation process. Often the local rules will provide for different scales of costs within the ambit of party and party costs, so that the units allocated may be increased for a case of unusual difficulty or complexity. The determination of the appropriate scale, and in some cases the amount, is also made by the trial judge. In some jurisdictions, the presiding judge will fix costs without resort to an assessment process.

When the court awards Solicitor and Client or Special Costs, the fees component is determined not as much by reference to a tariff, but to the reasonable fees actually charged by counsel for the winning party. The standard usually applied to assess these fees is that they must have been proper and reasonably necessary to conduct the proceeding to which the fees relate.

The factors normally considered by the court in assessing reasonableness of the fees for all cost awards include the following:

- the complexity of the proceeding and the difficulty or novelty of the issues involved;
- the skill, specialized knowledge and responsibility required of counsel;
- the amount of money in dispute;
- the time reasonably expended in conducting the proceeding;
- the conduct of any party that tended to shorten or unnecessarily lengthen the proceeding;
- the importance of the proceeding to the party whose bill is being assessed and the result obtained;
- the benefit to the party whose bill is being assessed of the services rendered by the solicitor.

More recently, courts have also focused on what the losing party could reasonably have expected to pay if unsuccessful.

4. **Interlocutory Costs**

Costs on interlocutory proceedings or motions are also awarded, although they are within the court's discretion. In some jurisdictions, cost awards are payable forthwith; in other jurisdictions, costs are not normally assessed until the conclusion of the proceeding. A number of terms are used to describe different types of costs orders that may be made on interlocutory applications pending final determination of the case.

Costs in the Cause – The term “costs in the cause” means that costs of the interlocutory application will be awarded to the party who is awarded costs of the proceeding by the trial judge. If the trial judge does not award costs, there will be no award of costs of the motion.

Costs to <party> in the Cause – If the motions judge orders, for example, “costs to the plaintiff in the cause,” the plaintiff ultimately will recover the costs of that motion if the plaintiff is awarded costs of the proceeding, but not otherwise. The defendant will not recover costs of that motion (which presumably the plaintiff won), even if the defendant is awarded costs of the proceeding.

Costs to <party> in any Event of the Cause – If the motions judge orders costs of the motion to one of the parties “in any event of the cause,” that party will be entitled to its costs for that application regardless of the costs award made at the conclusion of the proceeding. This type of order may be made when the motions judge views that the application ought not to have been made or contested.

Costs to <party> Payable Forthwith – As noted, in some jurisdictions, costs payable forthwith are the rule. For other jurisdictions, interlocutory costs are not normally determined or paid until the conclusion of the litigation. In those other jurisdictions, if the motions judge is of the view (usually because of some conduct of the losing party), that there should be a punitive element to the costs award, costs may be ordered to be “payable forthwith.” In these circumstances, the winning party may proceed to assess and collect the costs of the motion although the proceeding is ongoing.

5. **Provision in the Formal Order**

Frequently there will be no mention of costs in the reasons for judgment, particularly in interlocutory matters. It is essential that the formal order contain the provision for costs because without a formal order, there will be no basis for insisting on payment of costs. If costs are not addressed by the court and counsel cannot agree on the appropriate order, application should be made to the presiding judge for a specific costs order before the formal order has been entered.

6. **Other Matters**

In most jurisdictions, different considerations apply in public interest litigation. Pro bono or other public interest litigants who are unsuccessful still may be absolved of responsibility for an opponent's costs, and such litigants may even be entitled to recover costs in some circumstances. For the purposes of paying or receiving costs, the Crown (the government) is generally treated as any other litigant except, for example, in interventions to protect the state's interest. In rare circumstances,

costs may also be awarded against a lawyer *personally* (without the ability to recover from the client), when that lawyer's conduct in the litigation has been particularly egregious.

7. Contingency Fees

At common law, contingency fee arrangements were prohibited, but such fees are now permitted by legislation and codes of professional conduct in the provinces and territories. While the details of what is permissible in contingency fee arrangements vary among the jurisdictions, generally contingency fee arrangements must be in writing and signed by the parties; must be fair and reasonable; may be subject to review for reasonableness upon request; will be void if they provide for payment in excess of a stated percentage (typically between 25% and 40%) without prior approval. Ordinarily, contingent fees are prohibited in certain kinds of cases, including child custody or access, matrimonial, criminal or quasi-criminal matters.²⁰⁷

UNITED STATES

1. General Principles Regarding Costs

In the United States, the prevailing party is ordinarily entitled to recover a judgment for costs other than attorney's fees. Federal Rule of Civil Procedure 54(d)(1) provides that "costs other than attorney's fees" should be allowed to the prevailing party unless otherwise directed by the court. Most state courts, by rule or statute, mirror the federal rule. The term "costs" is subject to statutory definition. Generally, reimbursable costs include:

- filing fees;
- fees for the service of process by a public officer or registered process server;
- fees for service by publication;
- notary fees for services required by law;
- reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records admitted into evidence at trial or in mandatory arbitration, including records, reports and legal files;

207 See, e.g., RULES OF LAW SOC'Y OF SASKATCHEWAN 1501; *Solicitors' Act*, R.S.O. 1990, c. S-15, s. 28.1; *Contingency Fee Agreements*, Reg. 195/04, s. 4; LAW SOC'Y OF NEW BRUNSWICK, CODE OF PROF'L CONDUCT, ch. 9, r. 10 (2004), available at http://www.lawsociety-barreau.nb.ca/assets/documents/Code_of_professional_conduct_March_2006.pdf; LAW SOC'Y OF ALBERTA, CODE OF PROF'L CONDUCT, ch. 13, r. 3 (2008), available at <http://www.lawsocietyalberta.com/files/Code.pdf>; LAW SOC'Y OF BRITISH COLUMBIA R. 8-2 (2008), available at http://www.lawsociety.bc.ca/publications_forms/rules/rules_toc.html; LAW SOC'Y OF UPPER CANADA, RULES OF PROF'L CONDUCT 2.08(2) (2008), available at http://www.lawsociety.bc.ca/publications_forms/rules/rules_toc.html; *An Act Barreau du Québec*, R.S.Q. c. B-1, s. 126(3); NOVA SCOTIA BARRISTER'S SOC'Y LEGAL ETHICS HANDBOOK ch. 12 (2008), available at http://www.nsbs.org/legalethics/Handbook_AmendedOct2008.pdf; PRINCE EDWARD ISLAND R OF CIV P. 57.08 (2008), available at <http://www.gov.pe.ca/courts/supreme/rules/index.php3>; NEWFOUNDLAND AND LABRADOR SUPREME COURT R. 55.16 (2004), available at <http://www.assembly.nl.ca/legislation/sr/regulations/Rc86rules.htm>; THE LAW SOC'Y OF NEWFOUNDLAND AND LABRADOR, CODE OF PROF'L CONDUCT 10 (1998), available at <http://www.lawsociety.nf.ca/code/code.asp>; *Law Society Act*, S.N.B. 1996, c.89, ss. 17(2)(dd), 82, 83(3).

- statutory attorney and witness fees;
- the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration to the extent that the court or arbitrator finds that such depositions were necessary to achieve the successful result.

Absent statutory authority or exercise of judicial discretion, attorney's fees, travel expenditures, and investigatory expenses do not qualify as reimbursable costs.

2. The "American Rule" on Attorney's Fees

The majority of states and federal courts follow the "American Rule," which requires each party to pay his or her own attorney's fees regardless which party prevails at trial.²⁰⁸ Numerous exceptions to the rule exist, and courts may award attorney's fees to a prevailing party when there is a contractual agreement between the parties allowing recovery of fees; there is a specific statutory authorization providing for attorney's fees; a court rule permits sanctions for misconduct in judicial proceedings; some recognized ground of equity exists.

3. Fee Shifting Statutes

A significant exception to the American Rule is statutory authorization awarding attorney's fees to prevailing parties in certain cases. Congress has enacted numerous such fee shifting statutes, but typically, these only authorize fee awards to the party bringing the action. Those that allow fees to defendants most often do so when the claim was brought in bad faith or constitutes harassment.

In determining what fees may be awarded, the statutory language, congressional intent, and pertinent case law should be consulted. Although the language may vary, a typical statute outlines the type of success a litigant must achieve to qualify, as well as the level of discretion given to the court to award fees. For a statute to confer power on the court to shift fees, the language must expressly say so.

The United States Supreme Court has ruled that to qualify as the prevailing party, plaintiffs must obtain some judicial relief on the merits of their claims.²⁰⁹ The *Buckhannon* case applies to all statutes that employ the "prevailing party" language, including any variation of the word "prevail" and those statutes with modifiers on the word "prevail." Absent a statutory provision, a "prevailing party" requirement will be read into the statute. However, if Congress provides explicit statutory language as to who prevails, the courts may follow that definition of "prevailing party."

A judicial order in favor of the plaintiff will almost always make that party eligible for attorney's fees under a fee shifting statute. Since it is the court that recognizes a plaintiff's rights

208 Alaska is an example of a state that has abandoned the American Rule, at least in part. Alaska Rule of Civil Procedure 82 governs awards of attorney's fees, and applies to most civil cases in the state, to all federal diversity cases and to other federal cases where state questions are raised. The Rule provides a formula for calculating the amount of attorney's fees to be awarded in most cases, but permits the court's discretion in varying the amount.

209 *Buckhannon Bd. & Care Home Inc. v. W. Va Dep't of Health and Human Res.*, 532 U.S. 598 (2001).

have been violated, there is no question about which party prevailed. Because *Buckhannon* requires “judicial relief on the merits” in order for a litigant to qualify for attorney’s fees, some methods of resolving disputes, such as consent decrees or settlements, do not necessarily qualify one as a prevailing party.

4. Court Rules that Allow Fee Shifting as a Sanctioning Device

In addition to statutes authorizing fee awards, the Federal Rules and most state court rules provide a court with the power to shift fees in order to sanction misconduct in judicial proceedings. The Federal Rules of Civil Procedure permit the award of reasonable attorney's fee as a sanction for non-compliance with discovery rules.²¹⁰ Those Rules also allow fees for voluntary dismissal²¹¹ and mandate that a party using affidavits in a summary judgment motion in bad faith or for the purpose of delay pay the costs and reasonable attorney's fees incurred by the other party.²¹² In addition, the Federal Rules provide that if an award after trial is less than a settlement offer, "the offeree must pay the cost incurred after the making of the offer."²¹³ The Supreme Court has found that absent Congressional expressions to the contrary, where the underlying statute defines "costs" to include attorney's fees, such fees are included as costs. And a federal court is authorized to impose a monetary sanction including payment of reasonable attorney's fees for certain abuses in pleadings and motions.²¹⁴

5. Equitable Exceptions to the American Rule

Bad Faith – The subjective bad faith test is a common law principle of fee shifting in both federal and state courts that is distinct from, and in addition to, a statutory basis for attorney’s fees. Under this doctrine, which requires a factual finding of intent, a court may exercise its inherent authority to sanction misconduct by awarding attorney’s fees. This sanction is normally only used in extreme circumstances and is usually due to the party’s, not counsel’s, behavior. However, courts have power to levy fines against counsel if circumstances warrant.

Common Fund – A litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole, not from the unsuccessful party. Shareholder suits, creditor actions and proceedings involving trusts or fiduciary relationships can apply the common fund doctrine in order to provide the means for compensating counsel. Because the common fund doctrine is an equity-based judicially-created exception, application of the doctrine is within the discretion of the trial judge.

6. Lawsuits Against a State

Several courts have ruled that an award of costs against a state and, in particular, an award of attorney's fees, violates the Eleventh Amendment of the Constitution. The Amendment applies

210 See FED. R. CIV. P. 30(g)(2), 37(a)(4), 37(b), 37(c), 37(d).

211 FED. R. CIV. P. 41(a)(2).

212 FED. R. CIV. P. 56(g).

213 FED. R. CIV. P. 68.

214 FED. R. CIV. P. 11.

whenever a judgment would be paid from public funds. However, Congress has the authority to enact legislation permitting damage recoveries against states when necessary to enforce the Fourteenth Amendment. Attorney fee awards sought under the Civil Rights Attorney's Fee Award Act of 1976 fall under this authorization. Also, other courts have awarded costs if the action is pursued by the state in bad faith or if the award will be satisfied out of a county, not state, treasury.

7. Lawsuits Against the United States

The United States cannot be liable for the payment of costs without its consent. Accordingly, express statutory authorization must be found before costs will be assessed against the federal government.²¹⁵ Some statutes exempt the United States from liability for attorney fees.

8. Attorney's Fees in Cases of Federal Diversity Jurisdiction

When it does not run contrary to a valid federal statute, state law denying or giving the right to attorney's fees that reflects the substantive policy of the state should be followed. Discretionary authority given to federal district courts under the Federal Rules must be exercised within the bounds of state law, unless an award or denial is not related to state substantive policy. However, it is possible for the federal district court to use its inherent power to assess attorney's fees as a sanction for defendant's bad faith, notwithstanding the forum state's lack of recognition of the exception. Federal courts will generally apply state law to supplemental state claims unless the federal and state claims are substantially related, in which case fees may be assessed according to the federal court's discretion.

9. Security for Costs and Attorney's Fees

There is no general federal statute or rule governing security for costs. Many federal district courts have promulgated their own rules, although in absence of a rule, the court has discretion whether to require security for costs or expenses. In diversity actions, federal courts typically follow state practice, though they are not compelled to do so. If suit is brought under a federal statute, the court may use its own rules or adopt state practice so long as it is not inconsistent with the federal statute. It is within the power of a state to require security for costs or expenses including attorney's fees. Many district and state courts allow security for costs upon a showing of good cause.

10. Contingency Fees

Contingent fee arrangements are generally proper in civil matters. "Although a lawyer generally should decline to accept employment on a contingent fee basis by one who is able to pay a fixed fee, it is not necessarily improper for a lawyer, where justified by the particular circumstances of the case, to enter into a contingent fee contract in a civil case ..."²¹⁶ Contingent fee arrangements are most commonly used in cases involving personal injuries and workers compensation.²¹⁷ A typical

215 28 U.S.C. § 2412 governs the imposition of costs against the federal government.

216 MODEL CODE OF PROF'L RESPONSIBILITY EC 2-20 (2005).

217 American Bar Association, Division for Public Education. Search "contingent attorneys fees" at <http://abanet.org>.

contingent legal fee is one-third of the plaintiff's recovery. Based on the contingent fee agreement, the percentage may be higher or lower, depending on the stage at which recovery is obtained. As long as the fee agreement is reasonable, it will be enforceable. A contingent fee agreement is not invalid solely on the ground that the attorney award is large. Ultimately, enforcement of the contingent fee agreement will be left to the court's discretion.

Typically, out-of-pocket and incidental expenses are not considered to be a part of contingent legal fees and are required to be paid by the client. Often, clients will be required to pay these fees up front. However, in some states, attorneys will advance the entire cost of the litigation and defer collection of all expenses until the end of the case.²¹⁸

Lawyers may only advance or guarantee expenses related to litigation so long as the client remains ultimately (or technically) liable for such expenses. While a loan by an attorney to a client to allow the client to carry on a suit is not contrary to public policy, an attorney's advancing of funds not directly related to the litigation is unethical because, in effect, the attorney is purchasing an interest in the litigation.

Most states have adopted some form of a lawyer's code of professional responsibility. The American Bar Association publishes the Model Rules of Professional Conduct which the majority of states have used as a model for their code of professional responsibility. The codes, together with statutes and court rules adopted in various states, regulate contingency fee agreements. Although the details of the regulations can vary from state to state, generally contingency fee agreements should be in writing and signed by the client; should be reasonable, considering all relevant circumstances; will be subject to scrutiny by the courts; may be subject to a limitation on the percentage of fees that may be charged. Contingent fee agreements are not permitted in divorce or criminal cases, engagements relating to lobbying services, matters relating to procuring the liberation or pardon of a convict, or circumstances that would obstruct or prevent the administration of justice.

The manner in which contingent legal fees can be distributed is a matter that is governed by the rules of court or the codes of professional responsibility. In general, if the contingent fee is to be divided among attorneys from different firms, the contingent fee agreement must satisfy three requirements: (1) the division must be in proportion to the services performed by each lawyer, (2) the joint representation must be indicated in the contingent fee contract and the client must be fully aware of the amount each attorney will receive, and (3) the total fee must be reasonable.²¹⁹

218 Herbert M. Kritzer, *The Wages of Risk: The Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 270 (1998).
219 For a general discussion of contingency fee agreements under American law, see 7 AM. JUR. 2D. *Attorneys at Law* §§ 211, 273-278 (2006).

ADDITIONAL READING

Canada

1. Mark Orkin, *The Law of Costs*, looseleaf (Aurora, Ont.: Canada Law Book, 1987).

U.S.

1. Robert L. Rossi, *Attorneys' Fees*, 3rd ed. (Thomson/West, 2002-2008).

Chapter 13

Class Action

Few issues are as complex and potentially demanding on court and counsel as class actions. United States District Judge Barbara Rothstein, Director of the Federal Judicial Center, recently remarked, "There is no such thing as a simple class action. Every one has hidden hazards that can surface without warning."²²⁰ Class actions, by their nature, aggregate claims and greatly increase possible economic liability. Thus, each and every legal and factual aspect of putative (or actual) class actions will usually be contested prior to (and even after) certification by the court.

CANADA

1. Background

Class actions have a relatively brief history in Canada. The first legislation allowing class actions was enacted in Québec in 1978, but it was not until 1993 that Ontario enacted similar legislation, followed by British Columbia in 1995. Most Canadian provinces and territories now have enacted class action legislation and the federal court has also recently enacted amendments to its Rules of Civil Procedure permitting class actions in matters of federal court jurisdiction. According to some commentators, this rise in class action legislation has been greatly influenced by the growth in the number of class action lawsuits in the United States.²²¹ Canadian case law is developing rapidly as courts tackle the issues arising from class action litigation, often for the first time.

Class actions are frequently commenced simultaneously in a number of provinces or territories by plaintiffs' counsel who cooperate in bringing such actions. Although class action legislation differs in some respects from jurisdiction to jurisdiction, most is substantially similar to the Ontario legislation.²²² According to the Supreme Court of Canada, there are three common goals of all class action legislation: judicial economy, access to justice, and behavior modification. For "cross-Canada" class actions, one province—often Ontario—is usually chosen as the "lead" jurisdiction.

2. Preliminary Issues

It is important to note that a judge sitting without a jury presides over Canadian class actions. Other than Québec, a class action is typically commenced by a statement of claim that sets out the allegations and seeks certification of the proceeding as a class action. The defendant may then bring preliminary procedural motions, including motions to strike the pleading and motions contesting jurisdiction. The latter are common in cross-border class actions and include motions based on

220 BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, FED. JUDICIARY CTR., *MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES* (2005), [http://www.fjc.gov/public/pdf.nsf/lookup/ClassGde.pdf/\\$File/ClassGde.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ClassGde.pdf/$File/ClassGde.pdf)

221 Genevieve Saumier, *USA–Canada Class Actions: Trading in Procedural Fairness*, 5 *GLOBAL JURIST ADVANCES* 2, (2005), available at <http://www.bepress.com/gj/advances/vol5/iss2/art1/>.

222 The exception is the Province of Québec, where the class proceedings legislation has some significant differences from the other provinces/territories.

jurisdiction *simpliciter*²²³ and *forum non conveniens*. The general trend in the context of continent-wide business is for Canadian courts to assume jurisdiction.

Under the doctrine of *forum non conveniens*, a Canadian court can stay a putative class action proceeding if there is clearly a more appropriate foreign jurisdiction in which the case should be tried. A number of factors go into this determination.²²⁴ However, absent concerns about injustice to individual parties, a court may rightly elevate the factors of comity, judicial efficiency, distribution of resources and the avoidance of inconsistent results when performing the *forum non conveniens* analysis. Therefore, when an action is equally suitable to be heard in multiple jurisdictions, Canadian courts will likely allow the proceeding which was commenced first to proceed while staying subsequent parallel actions.

3. Certification

Canadian legislation does not grant an absolute right to commence a class action. In order for a class action to continue, the purported class must be certified. The class representative must bring a motion before a judge and establish a minimum evidentiary basis for a certification order.

Class certification usually is contested by defendants, as this issue alone will often determine whether an action will be pursued, abandoned, or settled. The certification hearing proceeds on the basis of affidavit evidence and on transcripts of cross-examination on the affidavits. The parties will usually exchange "facta" containing written arguments, and the motion will be heard orally. Generally, oral arguments are not time-limited and can extend for several days. Certification is a procedural step; the court does not determine the merits of the case at the certification hearing. Rather, the question at the certification stage is whether the claims in the action can appropriately be prosecuted as a class proceeding.

In designing Canadian class action legislation, the drafters had regard to the United States experience with Federal Rule of Civil Procedure 23. The legislation has many similarities to Rule 23, but also some notable differences, particularly at the certification stage. For example, certification in Canada does not share the Rule 23 requirements of numerosity, typicality of the representative plaintiff, or predominance of the common issues. Despite this, Canadian courts often take guidance from American class action case law with respect to certification.

In almost all of the provinces with class action legislation, the focus for certification is on the form of the action. The party seeking certification must establish: a viable cause of action; an identifiable class; common issues; a class action is the preferable procedure; the representative plaintiff(s) is appropriate; class counsel is "adequate" and has a practical litigation plan for conducting the proceeding.

In addressing the requirement that the statement of claim disclose a cause of action, the test assumes the facts pleaded could be proved and then asks—is it plain and obvious that the pleading

223 Jurisdiction *simpliciter* motions involve a challenge to the Canadian court's entitlement to take jurisdiction as there is not a "real and substantial connection" with the forum. See Chapter 2.

224 For list of factors see *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (Ont. C.A.) ¶ 41 discussed *supra* in Chapter 2, section 2 and clarified in *Van Breda v. Village Resorts Ltd.*, 2010 ONCA 84 (Ont. C.A.).

still fails to disclose a cause of action? In other words, the requirement will be met when there is a possibility the putative class might succeed with the claims.

Most of the Canadian class proceedings statutes simply require an identifiable class of two or more people. While in practice it is unlikely that a class of only two members would be certified, the test remains less onerous than the numerosity requirement in the United States. The purpose of the class definition is to identify the individuals entitled to notice; entitled to relief; bound by the judgment. A class cannot be overly inclusive; there must be a rational connection between the class definition and the proposed common issues.

Common issues need not predominate over individual issues. Rather, most Canadian jurisdictions only require the presence of common issues. The "common issues" question is often one of the most contentious certification issues, with defendants attempting to demonstrate that what the plaintiffs allege as common issues really are individualized and will require a factual inquiry specific to each potential class member. The Supreme Court of Canada has held that in framing the common issues, the guiding question should be "whether allowing the suit to proceed as a representative one would avoid duplication of fact finding or legal analysis." Common issues do not need to be issues that are determinative of liability; they need only be issues of fact or law that will significantly advance the action. Generally, limitation defenses cannot be tried as a common issue.

The court conducts the class action "preferability" inquiry through the lens of the three principal advantages of a class proceeding; namely judicial economy, access to justice and behavior modification. "Preferable" is construed broadly and has two concepts at its core. First, would the class action be a fair, efficient and manageable method of advancing the claim, and second, whether the class action is preferable to other available means of resolving the claims. To answer these questions, the court will look at the common issues in context; the importance of the common issues must be taken into account in relation to the claims as a whole.

Canadian jurisdictions generally do not require that a representative plaintiff have an identical claim against every defendant. For example, the test in Ontario is whether the representative can fairly and adequately represent the interests of the class and does not have an interest in conflict with other class members. The test will generally be met when there is a representative plaintiff with a cause of action against each defendant. There must be common issues in the litigation, but the issues need not be identical as against each defendant. In British Columbia, the test is even more relaxed in this regard; certification has been allowed against multiple defendants when the representative plaintiff does not have any cause of action at all against some of the named defendants. Courts generally note that such issues may need to be dealt with through the subsequent certification of subclasses.

Another requirement is that the representative plaintiff must have competent counsel. In a recent Ontario decision, the representative plaintiff did not understand the primary evidence in support of the certification motion, did not know what constitutes a litigation plan, and, did not understand the financial arrangements between his Canadian counsel and United States counsel.²²⁵ Accordingly, the court had serious reservations whether the plaintiff had capacity to instruct counsel

225 *Poulin v. Ford Motor Co. of Canada* (2006), 35 C.P.C. (6th) 264 (Ont. Sup. Ct.).

properly on behalf of the putative class members. These reservations militated against concluding that the plaintiff could fairly and adequately represent the interests of the proposed class.

The capacity of the representative plaintiff to fund the litigation is another factor in determining whether the plaintiff can adequately represent the class. However, the representative plaintiff is not required to demonstrate that there are concrete and specific funding arrangements in place.

The party seeking certification is typically required to put forward a workable litigation plan for the proceeding. This litigation plan sets out a practical method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding.²²⁶ The litigation plan is a very important part of the certification process and consequently is often disputed between the parties.

If certification is successful, the judge hearing the motion will certify the proceeding as a class action and determine which issues are common to the class. If the matter is not settled at that point, the action will proceed to a trial of the common issues, followed by an assessment of damages. If liability is established, an assessment of damages can take place by way of trial, mini-trial or some other court-approved process.

Partly as a result of relatively less rigorous certification requirements, certain types of class actions, such as product liability or insurance actions involving several defendants, tend to be more easily certified in Canada than in the United States. Other common types of Canadian class actions involve mass torts, antitrust issues, and securities issues.

The certification process in Québec is somewhat different. The motion for “authorization” (the Québec equivalent of certification), takes place before a judge of the Class Actions Chamber of the Superior Court. The prospective plaintiff must file a statement of facts giving rise to the request for authorization, indicate the nature of the relief being sought, and describe the proposed class. While the Québec legislation does not refer to “common issues”, it does require the presence of identical, similar or related questions of law or fact. However, unlike the process in the rest of Canada, the allegations in the authorization motion do not need to be supported by affidavit evidence, and the statement of claim need not be issued until after the class is authorized. The defendant, meanwhile, generally is not permitted to file materials on authorization without leave of the court. Therefore, the defendant's only opportunity to oppose certification may be through oral argument at the hearing (if the defendant is granted leave to make submissions). In the past, these differences have tended to expedite the authorization stage in Québec and make it a jurisdiction with a relatively significant amount of class action activity. Recently, however, the courts in Québec appear to be taking a more restrictive approach.

4. Notice

If the court grants certification, notice of the lawsuit must be given to all class members. The court determines the method of providing notice. Typically, notice is given in the most cost-efficient manner, which could include mass mailing or advertisements in a newspaper or magazine. The

226 For a helpful guide for the requirements of a proper litigation plan see *Poulin* (2006), 35 C.P.C. (6th) 264.

wording of the notice must enable a class member to understand the implications of the notice on their legal rights, which include the right to opt out of the proceeding. Moreover, the notice must be published in a publication ordinarily used by class members. Upon receipt of notice any class member may opt out of the proceeding by contacting the class representative.

5. Discovery Issues

Prior to class certification, the Canadian rules do not allow for discovery, and the defendant is generally not required to file a statement of defense (a responsive pleading). However, when parallel actions (addressing similar subject matter and related parties) proceed in both Canada and the United States, plaintiffs may have access to evidence derived from the discovery process in the United States action.

Canadian courts have ruled that it would be inappropriate to prevent putative representative plaintiffs in Canada from applying to a United States court for the purpose of altering a protective order of confidentiality with respect to discovery evidence arising from a similar United States action. In this way, plaintiffs can potentially gain access to a wide range of evidence prior to certification and prior to expending the resources necessary, or gaining the right, to gather such evidence in the Canadian jurisdiction.

Conversely, courts have also complied with letters rogatory requesting cooperation in compelling the production of documents for the use in the United States class actions. Canadian courts will comply with such requests when the evidence sought is relevant, not otherwise obtainable, and identified with reasonable specificity.

6. Settlement Issues

Because a defendant faces such significant exposure to potential liability once a class action is certified, successful certification motions are often followed by settlement. However, even before the certification hearing, if parties wish to settle or discontinue a Canadian class action, they must obtain the court's approval. Under Ontario legislation, the court must examine whether the proposed settlement is "fair, reasonable and in the best interest of those affected by it" and enables judicial efficiency and economy. This determination will be based on a multitude of factors.²²⁷ The fact that a settlement is less than ideal for any particular class member is not a bar to approval for the class as a whole. The court's power to approve or reject settlements does not permit it to modify the terms of a negotiated settlement. In the normal course, once a court is satisfied that a settlement is the product of arm's length bargaining by experienced counsel, the settlement will be approved. To make the settlement binding on the class, the action must be certified, usually with the consent of the defense. Therefore, the court must also consider the criteria which apply in the normal course of a certification hearing.

In a recent case involving the settlement of an Illinois class action in which the defined class included Canadian members, the Ontario Court of Appeal expressed the view that such a settlement

227 For a list of factors see *Dabbs v. Sun Life Assurance Co. of Canada*, [1998] O.J. No. 1598 (QL) ¶ 13 (Ont. Ct. (Gen. Div.)) and *Parsons v. Canadian Red Cross Society* (1999) 103 O.T.C. 161 ¶ 71-72 (Ont. Sup. Ct.).

could be binding on the members and prevent an Ontario class action from proceeding on the same subject matter, provided that: there is a real and substantial connection linking the cause of action to the foreign jurisdiction; the rights of non-resident class members are adequately represented; and non-resident class members are accorded procedural fairness including adequate notice. In such circumstances, a plaintiff's failure to opt out of a United States class action would be regarded as a form of "passive attornment" to the United States jurisdiction. However, in the circumstances of that particular case, the notice provided in Canada regarding the settlement was held to be inadequate.²²⁸ In another case, the Ontario court approved a United States class action settlement agreement which involved Canadian class members. However, the approval was conditional on the Ontario court also retaining a supervisory role over the implementation of the settlement for the protection of Ontario class members.²²⁹

7. Multi-jurisdictional Issues and the National Class

Beyond the class action rules, Canada does not have a case consolidation mechanism similar to Federal Rule of Civil Procedure 42 or the Multidistrict Litigation Rules, which permit the aggregation of claims involving similar questions of fact and law. However, Canadian case law has developed the concept of the national class action, which, as the term suggests, allows the aggregation of class action claims that would otherwise be spread across multiple Canadian jurisdictions. In a national class action, the court of one province or territory takes jurisdiction over a class defined to include parties outside of that jurisdiction. If parallel actions are commenced in other provinces or territories, they may be stayed pending the outcome of the national class action. Historically, related actions typically were commenced in British Columbia, Québec and Ontario, with the Ontario class defined to include all Canadians other than those resident in British Columbia and Québec. With the recent enactment of class action legislation in the other provinces and territories, this practice may change.

The concept of the "national class" was developed in Ontario from the principles of private international law. However, some courts in other provinces have shown resistance to one province's broad assumption of jurisdiction. A Newfoundland court refused to stay a proceeding because the Manitoba action involving an intended national class on the same subject matter had not yet been certified.²³⁰ In a Québec ruling, the court refused to recognize an Ontario settlement of a national class because the notice given to Québec members of the class was inadequate.²³¹

The court's acceptance of "national" class actions may be changing. The Saskatchewan Court of Appeal recently overturned a motion judge's decision that denied a defendant's motion to stay a class action based on a similar "national" class action against it that had been commenced in Ontario.²³² The court stayed the Saskatchewan action, on the condition it could be re-activated if the Ontario class action was discontinued or if it was certified without the Saskatchewan plaintiffs. Further, the court noted that the plaintiffs acted in a vexatious manner by commencing multiple claims when there was no suggestion the claims served a legitimate interest. The law continues to develop on this topic

228 *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 (Ont. C.A.).

229 *Kelman v. Goodyear Tire and Rubber Co* (2005), O.T.C. 36 (Ont. Sup. Ct.).

230 *Pardy v. Bayer Inc.* (2003), 229 Nfld. & P.E.I.R. 242 (Nfld S.C. (T.D.)).

231 *Lépine c. Société Canadienne des Postes*, J.E. 2005-1631 (Qc. Sup. Ct.), *aff'd*, [2007] R.J.Q. 1920 (Qc. C.A.).

232 *Englund v. Pfizer Canada Inc.* (2007), 284 D.L.R. (4th) 94 (Sask. C.A.).

8. Securities Class Actions

In 2006, Ontario became the first Canadian jurisdiction to create statutory liability for secondary market disclosures and to permit class actions for such liability. Most other Canadian jurisdictions have enacted or are in the process of enacting similar statutory provisions as part of their local securities law. The Ontario legislation includes a test for leave to commence a class proceeding, which was intended to prevent "strike suits" that are commonly found in the United States. The court can grant leave to proceed as a class action only when the action is brought in good faith and there is a reasonable possibility that the action will be resolved at trial in favor of the plaintiff. The proper interpretation and application of this test has yet to be judicially considered.

9. Cooperation Between Courts and Counsel

As class actions continue to proliferate in Canada, both the Canadian class action bar and the bench are becoming increasingly aware of the need to cooperate with colleagues in other jurisdictions. The first group to take advantage of such cooperation was the plaintiff's bar, which has long-shared information in formal or informal working relationships across jurisdictional boundaries. The defense bar has also moved in the same direction, particularly in the case of parallel actions that deal with related corporate parties in different jurisdictions.

Courts also have commented on the importance of cooperation between jurisdictions. As Justice Farley of the Ontario Superior Court of Justice recently stated:

It would seem to me that the various class proceedings would benefit from cooperation and coordination--using the three Cs of the Commercial List (communication, cooperation and common sense). Otherwise, they will be faced with the practical problem of fighting amongst themselves as to a turf war and running the risk of being divided and thereof susceptible to being conquered.²³³

Further, the Canadian Judicial Council endorsed the recommendation of the Uniform Law Conference of Canada for the creation of a Class Proceedings Database to facilitate the exchange of information about multi-jurisdictional class proceedings. In 2007, the Canadian Bar Association started a two-year pilot project establishing such a database, namely the National Class Action Database. Courts in Alberta, British Columbia, Newfoundland, Ontario, Québec, Saskatchewan and Yukon, and the Federal Court, have issued practice notes or directions in support of that database. These rules essentially require plaintiffs' counsel to send electronically to the Canadian Bar Association, within ten days of filing, a copy of the originating process or notice of motion for certification, and any amendments to such proceedings. It is also worth noting that in Québec, where a mandatory province-wide registry was established as of January 1, 2009 (Art. 1052.2 of the *Code of Civil Procedure*), any registration in said registry will automatically be transferred to the National Class Action Database.

233 *Grace Canada Inc. (Re)* (2005), 17 C.B.R. (5th) 275 (Ont. Sup. Ct.).

UNITED STATES

1. Background

In contrast to Canada, class actions in the United States have a history that dates back to the mid-1800s. Additionally, the federal courts adopted rules permitting inter-district and multidistrict consolidation of cases with common claims. Indeed, federal courts aggregate many claims for settlement and common discovery purposes even though the cases are not capable of class action treatment.²³⁴ However, the exponential growth of class actions in the United States began in the mid-1960s with the expansion of Federal Rule of Civil Procedure 23. This greatly facilitated the aggregation of claims of passive class members and led to national and even international class actions in mass tort or consumer situations.

Inevitably, class actions have had cross-border economic and legal implications. Since the United States and Canada are each the largest trading partner of the other, class actions in the United States dealing with asbestos, automobiles, breast implants, tobacco and pharmaceuticals, among others, often affected and involved citizens and businesses in both countries. Over 20 years ago the United States Supreme Court ruled that "American courts could certify cross-border class actions" and, in effect, exercise jurisdiction over Canadian members of a United States class action.²³⁵ For the United States, this evolution was natural since its courts have vast experience with injuries on a large scale crossing state borders. As discussed above, Canadian courts, since the 1990s, have recognized cross-border class actions as well.²³⁶ Nevertheless, the differences between Canadian and United States class procedures are significant and may influence the forum chosen by counsel for cross-border class litigation.

2. Preliminary Issues

Federal Rule of Civil Procedure 23 controls class actions filed in federal courts, and over two-thirds of the states have enacted a similar rule.²³⁷ Further, the enactment of the 2005 *Class Action Fairness Act* dramatically expands federal diversity jurisdiction and creates federal jurisdiction over most mass tort or mass claim class actions.²³⁸ Congress' intent was to shift most mass tort and consumer class action to federal court and provide increased scrutiny by federal judges in order to assure fairness of settlements and reasonableness of attorney fees awards. Indeed, Section 4 of that Act specifies that joint claims of 100 or more persons are deemed a federal class action even if no certification is sought. It is likely, therefore, that most cross-border actions will be in a federal court. Counsel, however, should be aware that rules do vary when state class actions are involved or state law governs.

234 This aggregation is accomplished through Federal Rules of Civil Procedure 14, 19, 20, 42, and 28 U.S.C. § 1407.

235 *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985).

236 In *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 (Can.), Justice Sopinka, in allowing British Columbia citizens to pursue asbestos injury claims in the U.S., succinctly articulated the reasons for Canadian cross-border remedies and why cross-border class actions will continue: "With the increase of free trade and the rapid growth of multi-national corporations, it has become more difficult to identify one clearly appropriate forum [to remedy these injuries]. . . It is often difficult to pinpoint the place where the transaction giving rise to the action took place. . . [And] no single forum [may be] . . . the most convenient and appropriate for . . . trial." *Id.* at 911-12.

237 See Debra Lynn Bassett, *U.S. Class Actions Go Global: Transnational Class Actions and Personal Jurisdiction*, 72 *FORDHAM L. REV.* 41, 41 n.1 (2003).

238 Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.); see, Anna Andreena, *Class Action Fairness Act of 2005: The Eight-Year Saga Is Finally Over*, 59 *U. MIAMI L. REV.* 385 (2005).

3. Certification

A party seeking certification of a class action must first meet the four prerequisites of Rule 23(a): numerosity, commonality, typicality, and adequacy of representation. The first two, numerosity and commonality, generally have not been formidable obstacles. Numerosity means that "joinder is impracticable not impossible" and courts have certified a class as small as 14.²³⁹ Nor is the commonality threshold burdensome. It merely requires that there be one or more questions of law or fact common to the class; "a single common question" has been found sufficient.²⁴⁰ The other two prerequisites, typicality and adequacy of representation, are more often litigated by defendants as reasons for noncertification.²⁴¹ Nonetheless, the test for typicality is not overly rigorous "and generally is satisfied if the plaintiff's claims stem from the same events or course of conduct and . . . (are) based on the same legal theory that gives rise to the claims of other members."²⁴² "Adequacy of representation" is usually examined by the court and must meet two tests: the would-be class representative must not have interests that conflict with the class as a whole, and plaintiff's counsel must be qualified, experienced, and competent to conduct the litigation.²⁴³ Courts, in their analysis of both tests, are particularly mindful of the fiduciary role of both the class representative and counsel.

If the four prerequisites of Rule 23(a) are satisfied, the representative plaintiff must then satisfy the additional requirements of Rule 23(b),²⁴⁴ which enumerates the situations justifying class treatment. The putative class representative must fit within one of three categories.²⁴⁵

The first category addresses two separate circumstances, both justifying class certification: proceeding as a class action is appropriate when "varying adjudication in lawsuits with individual class members might establish incompatible (*i.e.*, conflicting) standards." It also is proper when adjudication with members in multiple lawsuits will necessarily or probably adversely affect other members of that class."²⁴⁶

The second category of Rule 23(b) arises "when the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby marking appropriate final injunctive or declaratory relief covering the class as a whole." Civil rights cases alleging class-based discrimination are "illustrative" of actions fitting within this category.²⁴⁷

The third category set forth in Rule 23 is a "catch-all provision". It permits class actions when they are "convenient and desirable," have a "predominance of common issues" and a "class

239 Gomez v. Illinois State Bd. of Educ., 117 F.R.D. 394, 398 (N.D. Ill. 1987); Grant v. Sullivan, 131 F.R.D. 439, 446 (M.D. Pa. 1990).

240 *In re Am. Med. Sup. Inc.*, 75 F.3d 1069, 1080 (6th Cir. 1996).

241 See Thomas E. Willging, et al., *Class Action and the Rule Making Process: An Empirical Analysis of Rule 23*, 71 N.Y.U. L. REV. 74, 115 (1996).

242 Louis W. Hensler, *Class Counsel, Self-Interest and Other People's Money*, 111 U. MEM. L. REV. 53, 58 (2004).

243 See *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 526 (2d Cir. 1968); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 549-58 (1949).

244 See FED. R. CIV. P. 23(b).

245 See FED. R. CIV. P. 23 advisory committee's note to 1966 amendment; Deborah M. Russell and Robert L. Hodges, *Emerging Issues in Non-injury Class Action Litigation Targeting Products Lines*, 39 TORT TRIAL & INS. PRAC. L.J. 137, 169 (2003).

246 See FED. R. CIV. P. 23(a)(1)(A), (B) & advisory committee's note to 1966 amendment; *Harrington v. City of Albuquerque*, 222 F.R.D. 509, 586 (D.N.M. 2004).

247 See Fed. R. Civ. P. 23(a)(2) & advisory committee's note to 1966 amendment; Russell & Hodges, *supra* note 246, at 142-43.

action is superior" to other dispute resolution methods.²⁴⁸ Given the fact-specific nature of demonstrating "predominance" and "superiority," as well as what is "convenient and desirable," this category produces most class certification litigation. For example, the court must find that issues common to all members will ultimately predominate over individual issues.²⁴⁹ Predominance is obviously "more demanding" than commonality and requires more than a "claim common to the class."²⁵⁰ Merely pleading a common claim such as "a fraud, warranty or warning cause of action" does not eliminate "varying individual reliance" issues which can defeat predominance.²⁵¹

The "superiority" test under Rule 23(a)(3) requires the court to consider four non-exclusive standards: the interests of members in controlling their own action; the extent and nature of the litigation already commenced; desirability of concentrating claims in a particular forum; difficulties likely to be encountered in managing the class action.²⁵² All four are extremely fact-determinative and provide defendants numerous challenges to certification.

The explosive growth of the U.S. economy and of national and international markets for goods and services, together with the "opt-out requirement" under 23(a)(3), have encouraged class counsel's use of Rule 23(a)(3) to attempt aggregating large numbers of "passive class members" with small claims. In such cases even a small percentage of the total claims translate into large fee awards even if each individual claim is practically *de minimus*.²⁵³

4. Notice

The Federal Rules outline procedures for certification, the nature of and type of notice to be given to the class and the court's duties regarding settlements.²⁵⁴ As to notice, Rule 23(c)(2) (B) requires notice to class members "who can be identified through reasonable effort." Notice is mandated when a class is certified or when parties propose to dismiss or settle an action. Rule 23(c) (2)(B) also specifies the substance of notice required.²⁵⁵

Rule 23(d) outlines the court's power to make "appropriate orders" in the conduct of the action. These include "discretionary supplementary notices" to the class as well as the named parties when management of the action or due process protections requires them.²⁵⁶ Plaintiffs initially bear the cost of identifying class members and giving notice. The costs are typically advanced by counsel with reimbursement contingent on a recovery. In most settlements however, notice costs will usually be allocated to the defendants as part of the agreement.²⁵⁷

248 See Advisory Committee Note to 1966 Amendment to Rule 17(a), 39 FRD 69, 102-03 (1966); Fed. R. Civ. P. 23(a)(3) & advisory committee's note to 1996 amendment.

249 FED. R. CIV. P. 23(b)(3); see, e.g., Spence v. Glock, 227 F.3d 308, 312 (5th Cir. 2000).

250 Newton v. Merrill Lynch, et al., 259 F.3d 154 (3d Cir. 2001).

251 See Castano v. Am. Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996) ("Plaintiff's conceded that addiction would have to be proved by each class member . . .").

252 FED. R. CIV. P. 23(a)(3).

253 See Hensler *supra* at note 243.

254 See FED. R. CIV. P. 23(c), (d), (e).

255 Specifically, the notice must state (1) the nature of action; (2) definition of the class certified; (3) the class claims, issues or defenses; (4) the right to appear through counsel; (5) the right to opt out by a specific date; and (6) the binding effect of any judgment on those who do not opt out.

256 See ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 3 (4th ed. 2002) (citing Miller, *Problems of Giving Notice in Class Actions*, 58 F.R.D. 313, 328 (1973)).

257 Milstein v. Huck, 600 F. Supp. 254, 256 (E.D.N.Y. 1984).

Rule 23(e) requires court approval of any settlement and notice to the class as to its terms and conditions. This allows class members to object to the settlement or opt out so they can pursue their own remedies. Court approval of a settlement is usually in two stages. The court first makes a preliminary fairness evaluation, and after notice to the class, the court holds a "final fairness hearing." Parties usually schedule a preliminary pretrial conference to ascertain the court's view as to whether the proposed settlement is "within the range of possible judicial approval."²⁵⁸

The 2005 *Class Action Fairness Act*, in addition to expanding federal court jurisdiction over large class actions, also gives courts greater control over "fee awards." In particular, the Act specifies court supervision of fees in so-called coupon settlements, in which class members receive vouchers to be used in purchasing new products or services. The Act provides that class counsel cannot base contingent fees on a settlement value that assumes a 100 percent coupon redemption rate.²⁵⁹

5. Canadian Cross-Border Class Actions in United States Courts

Cross-border class actions usually fall into three categories: There may be "copycat" actions in which parallel, but separate class suits, are filed in both countries. The case may be an international class action, in which a proposed class includes residents of both countries. Hybrid actions may also occur in which a group of Canadian claimants with little or no nexus to the United States nonetheless seek the benefits of its Rule 23 remedies. Copycat actions in Canada do not involve the jurisdictional or procedural law of the United States or vice-versa. The other two categories, however, face substantial legal barriers in the United States. Classes of exclusively foreign citizens (or which contain significant numbers of foreign citizens), are rejected when possible.²⁶⁰

While the United States Supreme Court in the 1985 *Shutts* case approved certification of a class that included residents of Canada and all fifty states, it also ruled that "minimal due process standards" be satisfied.²⁶¹ In that case, the Court found that the notice, opportunity to be heard, opportunity to opt-out, and adequate representation of the class assured due process as to non-resident, absent class members. Based on such "constructive consent" by the absent class members who failed to seek exclusion, the Court greatly facilitated the reach of class actions. Nonetheless, it did so because the non-resident plaintiffs could "only benefit" from inclusion and were not exposed to potential adverse judgments nor required to actively appear or hire counsel. Thus, it was found that the "local contacts" normally required with the forum were waived.²⁶²

Notwithstanding the *Shutts* case, the United States courts have held that any mandatory class, including citizens of other countries, raises serious personal jurisdiction issues. For example, in *Re School Asbestos Litigation*, the court found that alleged injunctive relief sought against Canadian class members actually imposed legal liability and rejected certification.²⁶³ Thus, trial counsel in an

258 See CONTE & NEWBERG, *supra* note 257, at § 11.25 .

259 *Id.*; Class Action Fairness Act of 2005, Pub. L. No. 109-2, §§ 4-5, 119 Stat. 4, 9-13 (codified in scattered sections of 28 U.S.C.).

260 *Id.* footnote 259; see also ATLA Convention Reference Materials (July, 2001); David A. Klein, *Class Action Litigation: Handling Cases Where the Wrong Crosses National Boundaries*.

261 Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985)

262 *Id.*

263 789 F.2d 996, 1003 (3rd Cir. 1986).

international class action should anticipate personal jurisdiction issues and even if an international class is certified by a United States court, the adequacy of the Rule 23 notice provision may be challenged. In *Parsons v. McDonalds Restaurants of Canada, Ltd.*, a Canadian court refused to enforce a United States settlement order and found no personal jurisdiction over Canadian members because of inadequate notice and representation. Thus, the defendants were deprived of the *res judicata* effect of their settlement in Canada.²⁶⁴

A *forum non conveniens* motion is likely when a class includes foreign claimants. As one author noted, the first line of defense to combat putative class actions by foreign claimants “is a motion to dismiss on *forum non conveniens* grounds.”²⁶⁵ The traditional grounds for such a motion usually can be found whenever foreign claimants appear, namely an alternative forum and availability of remedies in their own country. This is particularly true of mass torts. United States courts have made such motions easier by ruling that “a foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly even though they may not enjoy the same benefits . . . [as] in U.S. courts.”²⁶⁶ Even the absence of a class action procedure does not preclude such a finding.²⁶⁷ Finally, United States courts may dismiss, even if United States residents are class representatives or the courts may separate foreign claimants from local residents into a subclass and then dismiss.²⁶⁸

The breast implant cases in the United States, are instructive. Several of the class actions involved Canadian claimants who received their implants outside the United States from Canadian companies (or companies subject to Canadian jurisdiction). Since the Canadian plaintiffs sued outside their own country, the court rejected the usual presumption favoring plaintiffs' selection of a forum and dismissed on traditional *forum non conveniens* grounds. One of the major public interest factors considered was the burden such cases presented for United States courts.²⁶⁹

Any class action raising choice of law issues can present obstacles fatal to certification. If application of a foreign country's law is necessary to adjudicate class claims or a court might be required to determine “most significant relationship” tests under multiple countries' laws, a United States court may rule against “commonality” of issues or find a “lack of manageability.”²⁷⁰ Consequently, class certification may be denied in any case that requires a United States court to weigh another country's “contacts” with the claims, including where the injury occurred; relationship between the parties; domicile and nationality of the parties; what law might apply.

In *Bersch v. Drexel Firestone, Incorporated*, the court dismissed an action in which literally thousands of foreign claimants (predominantly Canadian), sought recovery under United States securities laws for fraudulent sales of Bersch's securities by a Canadian company in Canada.²⁷¹ Although decided in 1975, the court in that case sounded a theme which is frequently followed in

264 *Currie v. McDonald's Restaurants of Canada Ltd.* (2005), 74 O.R. (3d) 321 (Ont. C.A.). The Ontario court did not rule out jurisdiction by a U.S. court if “adequate notice” and “representation” were shown.

265 Charles F. Rysavy & Pranita A. Raghavan, *The (Often Insurmountable) Hurdles Facing Foreign Claimants Prosecuting Class Actions in American Courts*, TORT TRIAL & INS. PRAC. L.J. (2006).

266 *In re Air Crash Disaster Near New Orleans, La. on July 9, 1982*, 821 F.2d 1147, 1165 (5th Cir. (La.), 1987).

267 *See Aguindo v. Texaco*, 303 F.3d 470, 478 (2d Cir. 2002).

268 *Piper Aircraft*, 454 U.S. at 256; *Macedo v. Boeing Co.*, 693 F.2d 683, 684-86 (7th Cir. 1982).

269 887 F. Supp. 1469 (N.D. Ala. 1995).

270 *Spence v. Glock*, 227 F.3rd 308, 312 (5th Cir. 2000).

271 519 F.2d 974 (2d Cir. 1975).

considering foreign claimants in a United States class action: "[when,] as here, a court is confronted with transactions that on any view are predominantly foreign, it must seek to determine whether Congress would have wished the precious resources of United States Courts . . . to be devoted to them rather than leave the problem to foreign countries." Similarly, in two more recent cases, United States courts rejected class suits by Canadian plaintiffs when the wrongful conduct and damages occurred exclusively in Canada.²⁷² The court in *Paraschos* found the suit ". . . so overwhelmingly dominated by Canadian interests it should be dismissed in deference to Canadian law . . . [and] international comity."²⁷³

If a putative class action relates in any way to the policies or action of a foreign government or its agencies, the obstacles to certification usually are insurmountable. For example, if a claimant in a mass tort injury has received medical benefits from a government entity, rights of subrogation usually make the government a "necessary" or "indispensable" party.²⁷⁴ Such cases also raise potential "immunity" and "act of state" doctrine issues.²⁷⁵

6. Enforcement of Canadian Class Action Judgments in the United States

Foreign judgments have no independent legal force in the United States but are recognized on "comity" grounds.²⁷⁶ However, ever since the Supreme Court's ruling in *Hilton v. Guyot* in 1895, foreign judgments have been enforced if the foreign court had personal jurisdiction consistent with United States due process standards.²⁷⁷ Further, United States courts will recognize foreign judgments when the foreign court had proper jurisdiction.²⁷⁸ Under current Canadian class action legislation, a Canadian court's jurisdiction of a class, even of nonresident, absent members in other provinces, seems to meet United States standards for due process and proper jurisdiction. While there are no cases on point, since United States courts have found that fairness exists as to absent, non-resident claimants if an "opt-out" provision is provided, there is no reason for finding a Canadian court's jurisdiction under similar provisions inadequate.

7. Strategic Considerations

Class actions in Canada and the United States differ so dramatically that trial strategy and case decisions will frequently depend entirely on where a lawsuit is filed. Certification of a class in Canada, as noted, is easier since numerosity, typicality and predominance are not a condition of certification. As in the United States, members of the class are "bound by the court's determination" unless they opt-out. However, Canada's more restrictive approach to discovery, jury trials, civil damages, attorney's fees and treble (or punitive) damages, make its courts more favorable to defendants. As one Canadian firm noted, ". . . in many cases, Canadian plaintiffs will want to proceed

272 *Id.* at 985, *McNamara v. Bre-X Minerals, et al.*, 32 F. Supp. 2d 920 (E.D. Tex. 1999), *reconsideration denied*, 68 F. Supp. 2d 759 (E.D. Tex. 1999); *Paraschos v. YBM Magnex Int'l*, 130 F. Supp. 2d 642, 644-45 (E.D. Pa. 2000).

273 130 F. Supp at 642.

274 *See United States v. Aetna*, 338 U.S. 355, 382 (1949); *Krueger v. Cartwright*, 996 F.2d 928, 931-32 (7th Cir. 1993).

275 *See Fluent v. Salamanca Indian Lease Auth.*, 928 F.2d 542, 548 (2d Cir. 1991); *W.S. Kirkpatrick & Co. v. Env'tl Tectonics Corp.*, 493 U.S. 400, 409 (1990). Additional sovereignty questions such as state secrets, political question doctrine, Arms Regulations Acts under the International Traffic in Arms Regulations Act, and the Arms Export Control Act can be fatal to class treatment.

276 *In re Stephanie M.*, 867 P.2d 706, 716 (Cal. 1994).

277 159 U.S. 113, 163-64 (1895); see Chapter 11.

278 *Bank of Montreal v. Kough*, 430 F. Supp. 1243, 1246 (N.D. Cal. 1977).

in the U.S., due to the greater availability of punitive damages, . . . higher jury awards, broader discovery, and other factors such as pending multidistrict litigation or class action."²⁷⁹

In most situations defendants will try to use *forum non conveniens* and choice of law motions to move non-resident Canadian class members to a Canadian forum. Yet, the compensation and attorney fees advantage in United States actions will encourage plaintiffs' counsel in class actions to seek a United States forum. Significantly, the *Class Action Fairness Act* of 2005, while seeking to assure fairer outcomes for defendants, does little to make United States class actions less economically attractive to plaintiffs, perhaps the lone exception being for coupon settlements. However, by shifting most mass tort and national class actions to federal courts, whose dockets are already crowded, it may cause these courts to look more favorably on motions that send foreign classes to other jurisdictions.

ADDITIONAL READING

Canada

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2. McCarthy Tetrault (Firm), *Defending Class Actions in Canada*, 2nd ed (Toronto: CCH Canadian, 2007).

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1. Herbert Newberg & Alba Conte, *Newberg on Class Actions*, 4th ed. (Thomson/West, 2002).

279 D. Weston, *Class Actions: The Canadian Experience*. 11 DUKE J. COMP. & INT. L. 269, 274 (2000).

Chapter 14

Insolvency Issues

CANADA

While legislative power in Canada is divided between the federal and provincial governments, bankruptcy and insolvency are within federal jurisdiction. Canada's principal federal insolvency statutes are the *Bankruptcy and Insolvency Act*²⁸⁰ and the *Companies' Creditors Arrangement Act*.²⁸¹ Applications for the recognition of foreign insolvency proceedings by Canadian courts may be made under one of these two statutes.²⁸² Most recognition applications, applications for ancillary relief, or applications for protection in related main proceedings have been made in respect to Chapter 11 United States Bankruptcy Code cases.

1. Bankruptcy and Insolvency Act

The Bankruptcy and Insolvency Act is the most commonly used insolvency statute in Canada, and that statute contains regimes for the liquidation of insolvent debtors (somewhat akin to Chapter 7 proceedings in the United States) and proceedings designed to facilitate the restructuring of insolvent debtors (somewhat akin to U.S. Chapter 11 proceedings). The Act also provides for court-appointed receivership proceedings, international insolvency proceedings, and consumer debt restructuring. In addition, the Act contains provisions that affect the right of secured creditors to enforce their security. Although there are no separate bankruptcy courts in Canada, some courts have considerable experience in insolvency matters, and in some cities specialized branches of the superior court in the relevant province or territory have been established to deal with insolvency matters. The Act gives jurisdiction, at first instance, to the superior courts in each province and territory. Appeals, when permitted, are to the Courts of Appeal in each province and territory; further appeals are to the Supreme Court of Canada.

In general terms, bankruptcy proceedings are to be filed or issued in the locality of the debtor. Generally, venue is proper where the debtor has carried on business during the year immediately preceding bankruptcy; where the debtor has resided during that year; in cases when the debtor has not carried on business or has not resided in Canada; where the greater portion of the property of the debtor is situated. It is not necessary that a person reside or carry on business in Canada or that a corporation be established under Canadian law to take advantage of, or be subject to, the *Bankruptcy and Insolvency Act*, though any of those elements, plus insolvency, will suffice. As with the United States Bankruptcy Code, simply having property in Canada and meeting the insolvency tests are enough.

The Act's liquidation regime permits an insolvent person to make a voluntary assignment in bankruptcy. An assignment in bankruptcy is an administrative step that, once effected, vests the property of the bankrupt in a bankruptcy trustee and makes both the bankrupt's property and the

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

281 R.S.C. 1985, c. W-11.

282 There is also the seldom used Winding-up and Restructuring Act, R.S.C. 1985, ch. W-11, based on the old English Companies Act winding-up provisions and applied primarily to the liquidation of regulated financial institutions.

bankrupt subject to the bankruptcy process. Only an "insolvent person" may make an assignment in bankruptcy. An insolvent person is a person whose liabilities exceed the realizable value of his assets, a person who is unable to meet his obligations in the ordinary course, or a person who has ceased to meet his obligations in the ordinary course.

The liquidation regime under the Act permits a creditor to commence involuntary bankruptcy proceedings against a debtor. The application for involuntary proceedings must demonstrate that the debtor owes the applicant creditor at least \$1,000, and that the debtor committed an act of bankruptcy within the six months preceding the filing of the bankruptcy application. Acts of bankruptcy and include ceasing to meet liabilities generally as they fall due.

When a person becomes bankrupt, a stay of proceedings, which applies to all unsecured creditors, arises by operation of law. However, in liquidation cases, the statutory stay of proceedings does not apply to secured creditors.

The primary task of a trustee in bankruptcy is to accumulate the property of the bankrupt, convert it to cash, and distribute it in accordance with the detailed scheme of priorities set out in Section 136 of the Act. What is or is not property of the bankrupt can sometimes be disputed. For example, property held in trust by a bankrupt for others does not form property of the estate.

Trustees in bankruptcy have broad powers to examine persons under oath regarding the property or affairs of the bankrupt. This right to examine and to obtain documents and information is not limited to the bankrupt persons or persons related to (or affiliated with) the bankrupt. Rather it applies broadly. The *Bankruptcy and Insolvency Act* also provides rights of examination to creditors so they might examine persons with respect to the property or affairs of the bankrupt. A trustee in bankruptcy is entitled to examine persons without the need to obtain an order of the court, but if a creditor wishes to conduct examinations, a court order is required.

A trustee is provided broad power to deal with settlements (a form of fraudulent conveyance); unjust preferences; reviewable transactions (transactions with persons related to the bankrupt in which the consideration passing between the parties is conspicuously different); the improper payment of dividends. In addition, a trustee in bankruptcy is entitled to avail itself of creditor remedies under provincial or other laws, including fraudulent conveyance legislation, unjust preference legislation and the oppression remedy provisions of provincial and federal corporation statutes. When a trustee in bankruptcy refuses or neglects to institute proceedings at the request of a creditor, the aggrieved creditor may apply to the court for an order permitting him or her to initiate those proceedings in the creditors own name.

An insolvent person may take the administrative step of filing a notice of intention to make a proposal or may file a proposal for reorganization. When either step is taken, a statutory stay of proceedings automatically applies to all of the debtor's unsecured and secured creditors. The filing of a notice of intention to make a proposal is designed to afford a debtor an opportunity to formulate a plan that can be put to creditors.

One or more creditors may move the court for an order that the stay of proceedings not apply to any creditors or to the moving creditor. The moving creditor must show that equity is in its favor

or it otherwise is likely to be materially prejudiced by the continued operation of the statutory stay of proceedings.

A proposal for reorganization must be made to unsecured creditors; it may be made to secured creditors. Each class of creditors votes separately and there may be a number of secured creditor classes based on a “commonality of interest” test. Likewise, it is possible for there to be more than one unsecured creditor class. If the requisite majorities of creditors vote in favour of the proposal, then the trustee must, within a specified time, make an application to the court for the approval of the proposal at what is essentially a fairness hearing.

The *Bankruptcy and Insolvency Act* contains a power to appoint an interim receiver.²⁸³ A secured creditor may apply to the court for the appointment of an interim receiver over all of the property of an insolvent person. Interim receivers have often been appointed to take possession and control of operating or non-operating businesses for the purposes of seeking to achieve “going concern” sales or piecemeal liquidations. The receiver is an officer of the court and takes power and direction from the order of appointment and from subsequent orders made in the proceeding. More recently, this remedy has fallen somewhat out of favor in some cases because of potential exposure to labor and employment liabilities.

The Act provides that a stay of proceedings which operates against creditors in a foreign proceeding does not apply to creditors who reside or carry on business in Canada with respect to property in Canada, unless the stay is a result of proceedings taken in Canada. The *Bankruptcy and Insolvency Act* provides a mechanism for the coordination of foreign insolvency proceedings with Canadian proceedings. In addition, when there are no existing proceedings in Canada, the Act permits applications for the recognition of foreign proceedings and related relief, including the making of orders staying proceedings in Canada and for the appointment of an interim receiver over all or a part of the debtor’s property located in Canada.

2. Companies' Creditors Arrangement Act

The *Companies' Creditors Arrangement Act* is a more flexible restructuring regime than the somewhat similar regime available under the *Bankruptcy and Insolvency Act*, and because of that flexibility, it is usually the statute of choice for larger or more complex proceedings. Voluntary proceedings are common, but involuntary creditor initiated proceedings are also possible, though rare. It is applicable to insolvent corporations and is restricted to cases in which creditor claims are \$5 million or more. It also contains provisions permitting the recognition of foreign insolvency proceedings in Canada, and applications for recognition of foreign proceedings are more typically made under its Section 18.6, rather than under the international insolvency proceeding provisions of the *Bankruptcy and Insolvency Act*.

The *Companies' Creditors Arrangement Act* gives jurisdiction to the superior courts of the provinces and territories. Appeals are taken to the highest court of final resort for the province or territory in which the proceeding originated; further appeals are to the Supreme Court of Canada.

283 The Judicature Acts of most provinces/territories confirm that superior courts also have the power to appoint a receiver, or receiver and manager, and to grant other equitable relief where it is just and equitable to do so.

Venue is proper where the head office or principal place of business of the company is situated in Canada. If the company has no place of business in Canada, then the application may be made in any province or territory within which any assets of the company are situated.

The *Companies' Creditors Arrangement Act* permits a qualifying debtor company to seek court-ordered protection from some or all of its creditors or persons who have asserted claims against the company. When appropriate, the Act allows the debtor company to restructure its business and affairs and make new arrangements with its creditors and others. The first formal step in a restructuring process is to apply to the court for an order (commonly referred to as the "Initial Order"), preventing creditors from enforcing their normal contractual and other rights against the company and its property. That Order also may provide for other initial relief.

The Initial Order usually contains a stay preventing creditors from enforcing normal rights and remedies against the insolvent corporation. It will also appoint a "monitor" who is typically a licensed trustee in bankruptcy. The insolvent corporation remains in possession of its property and is able to carry on business under court supervision as it develops a restructuring plan. The restructuring plan may involve the rejection of onerous contracts, the disposition of non-core assets, and the presentation of a plan or proposal to some or all of the company's creditors. If the requisite majorities of various creditor classes approve a plan, then a court may approve or sanction a plan if it concludes that the plan is fair and reasonable. This order is usually called the "Sanction Order."

Under the *Companies' Creditors Arrangement Act*, the court has the power to coordinate proceedings with foreign proceedings. The court has a broad discretion to make orders to suit the circumstances of any particular case. The court also has the power to make recognition orders and grant ancillary relief in respect of foreign proceedings even when there are no ongoing proceedings in Canada. Those proceedings can include Chapter 11 proceedings in which the debtor is not insolvent, and also can include applications by non-debtor affiliates of Chapter 11 debtors. Recognition orders will often include provisions recognizing the foreign proceedings and staying proceedings against the applicant in Canada without leave of the court. The order may permit the applicant to remain in possession and carry on business, dispose of assets (subject to further court approval), or compel performance of obligations to the debtor by others. Other provisions may also be included as necessary. When a plan is confirmed in the United States in a Chapter 11 proceeding, it is usual for that order to be the subject of a later recognition application under the *Companies' Creditors Arrangement Act*.

UNITED STATES

In the United States, bankruptcy is governed by federal law (Title 11 of the U.S. Code). There are separate bankruptcy courts in each federal district. The bankruptcy court is a unit of the federal district court. All "core" bankruptcy matters are referred to the bankruptcy court, except in the rare case when the reference is withdrawn by the district court judge. "Non-core" proceedings may be heard and determined by the bankruptcy court with the consent of the parties. Appeals from decisions of the bankruptcy court are to the federal district court, then to the court of appeals, and finally to the United States Supreme Court. In a few of the federal circuits, appeals from the bankruptcy court may be made to specially constituted bankruptcy appellate panels instead of the district court.

In general terms, the proper venue for a bankruptcy filing is determined by the location of the domicile, residence, principal place of business, or principal assets of the debtor in the 180 days prior to the filing.

There are three primary forms of bankruptcy. In chapter 7, the debtor's non-exempt assets are liquidated and distributed to creditors. In chapter 11, the debtor (primarily business entities) proposes a plan of reorganization which, if approved, permits the debtor to emerge from bankruptcy with debts restructured and/or discharged. Chapter 13 is for individuals with a regular income and debt under a specified cap. Chapter 13 debtors seek approval of a plan which permits them to retain their assets while committing their disposable income to the payment of unsecured creditors over the life of the plan (typically over 36-60 months). Secured creditors retain the priority of their liens in all forms of bankruptcy. There are also two other infrequently used substantive forms of bankruptcy: chapter 9 reorganizations for municipalities and chapter 12 reorganizations for family farmers and fishermen.

A business that files a Chapter 11 proceeding will become a debtor-in-possession. Initially, no bankruptcy trustee will be appointed (and none will be appointed absent some evidence that the debtor-in-possession is wasting assets or engaged in some species of fraud). The debtor-in-possession is given an opportunity to prepare a plan of reorganization that must be approved by a majority of the creditors. If a plan is approved by the creditors and confirmed by the court, it binds both the debtor and the creditors to its terms of repayment. Under the plan, the debtor-in-possession can reduce debts by repaying a portion of its obligations and discharging others. It can also terminate burdensome contracts and leases, recover assets, and rescale operations to get back to profitability. Under this chapter, a business normally goes through a consolidation period and comes away with a reduced debt load and a reorganized business. Plans can call for repayment out of future profits, sales of some or all of its assets, or a merger or recapitalization. Generally, the plan of reorganization must provide for paying creditors at least as much as they would have been entitled to be paid in a Chapter 7 liquidation proceeding.

Upon the filing of a bankruptcy petition, and without notice to any parties, there goes into effect an automatic stay prohibiting the commencement or continuation of any action to recover a claim against the debtor. Creditors can obtain relief from the automatic stay to pursue an asset of the debtor if they can satisfy the court that the debtor has no equity in the asset and the asset is not necessary to the successful reorganization of the debtor.

In a bankruptcy proceeding commenced pursuant to the Code, a debtor or trustee has the ability to initiate an "Avoidance Action" so as to undo certain pre-petition transactions involving the debtor. Common Avoidance Actions include preferential transfers, which are payments for an antecedent debt made by an insolvent debtor to a third party within the ninety day period prior to the bankruptcy filing and fraudulent transfers—pre-petition transfers made by the debtor with the purpose of hindering, delaying or defrauding creditors.

The *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005* was enacted under Chapter 7 (liquidation) of the Bankruptcy Code.²⁸⁴ That legislation contains significant changes

284 Pub. L. No. 109-8, 119 Stat. 23 (codified as amended in scattered sections of 11 U.S.C.).

relating to transnational (*i.e.*, cross-border) bankruptcy cases. Specifically, that Act mandated that a new chapter (“Chapter 15”) be added to the Bankruptcy Code with the goal of “provid[ing] greater legal certainty for trade and investment as well as to provide for the fair and efficient administration of cross border insolvencies.”²⁸⁵

1. Chapter 15 Proceedings

Chapter 15 was written with the objectives of cooperation between courts of the United States, (and their trustees) and the courts and other competent authorities of foreign countries. The statute promotes greater legal certainty and an efficient administration of cross-border insolvencies. Chapter 15 applies when:

- (a) assistance in the United States is sought by a foreign court or representative in connection with a foreign proceeding;
- (b) help is needed in a foreign jurisdiction with respect to a case pending under the Code;
- (c) bankruptcy cases in the United States and a foreign proceeding are pending concurrently;
- (d) foreign creditors, among others, have an interest in requesting the commencement of, or participating in, a case under title 11 of the Code.²⁸⁶

The Bankruptcy Code also limits who may be a debtor in a Chapter 15 proceeding: the debtor cannot be a railroad, domestic insurance company, or a foreign bank, although a debtor may be a foreign insurance company. Chapter 15 also does not apply to an individual (and such individual's spouse) with unsecured debt of less than \$307,675, and secured debt of less than \$922,975, if such individuals are United States citizens or aliens legally permitted to reside in the United States. Finally, a proceeding under Chapter 15 may not be sustained when the debtor is an entity subject to a Securities Investors Protection Act²⁸⁷ proceeding, a stockbroker, or a commodity broker.

A Chapter 15 ancillary case is commenced through the filing of a Petition for Recognition of a foreign proceeding. An order will be entered recognizing a foreign proceeding only if:

- (a) such proceeding is a “foreign main proceeding” or a “foreign non-main proceeding”;
- (b) the foreign representative is a “person or body”;
- (c) the petition satisfies the requirements spelled out in Section 1515 of the legislation.

285 H.R. Rep. No. 109-31 (2005).
286 11 U.S.C. § 1501(b)(1)-(4).
287 15 U.S.C. §§ 78aaa-111.

Foreign main proceeding" is defined as "a foreign proceeding pending in the country where the debtor has the center of its main interests," which for the purposes of Chapter 15, is presumed to be the debtor's registered office or an individual's residence."²⁸⁸ This concept of a "center of main interests" equates with the concept of a "principal place of business" in United States parlance."²⁸⁹

The burden of proof for a potential Chapter 15 debtor is on the foreign representative, and the presumption that the debtor's registered office is also the center of the debtors' main interest is limited to situations in which there is no serious controversy.²⁹⁰ The presumption only applies "[i]n the absence of evidence to the contrary."²⁹¹ If a foreign proceeding is commenced in the country where the debtor's registered office is located and there is evidence that the center of main interests might be elsewhere, then the foreign representative retains the burden of proving that the center of main interest is in the same country as the registered office.²⁹²

The Bankruptcy Code does not state the type of evidence required to rebut the presumption that the "center of main interest" is the debtor's place of registration or incorporation. Various factors, singly or combined, could be relevant to such a determination: the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; or the jurisdiction whose law would apply to most disputes.²⁹³

Denial of a Petition for Recognition may have severe repercussions to a foreign representative. Following denial, the court is authorized to issue an order preventing the foreign representative from access to Courts in the United States.²⁹⁴ Correlatively, the failure to obtain recognition does not affect a foreign representatives' ability to sue in a United States court to recover a claim that is property of the estate.²⁹⁵

During the period between the filing of a Petition for Recognition and entry of an order ruling on such petition, Chapter 15 permits a bankruptcy court to grant interim or provisional relief to the foreign representative based on the exigent circumstances of the case. "[W]here relief is urgently needed to protect the assets of the debtor or the interests of the creditors," the court may enter an order which, *inter alia*, stays execution against the debtor's assets, and, subject to certain conditions, entrusts all or part of the debtor's assets located in the United States to the foreign representative. If and when the Petition for Recognition is granted, any interim relief granted by the court is terminated. In addition, and "[c]onsistent with the theme that the foreign main proceeding is dominant among

288 11 U.S.C. § 1516(c).

289 *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 129 (Bankr. S.D.N.Y. 2007) (citing *In re Tri-Continental Exchange Ltd.*, 349 B.R. 627, 635 (E.D. Cal. 2006)).

290 *In re Bear Stearns*, 374 B.R. at 127-28 (citing H.R. Rep. No. 31 (2005)).

291 11 U.S.C. § 1516(c).

292 *In re Tri-Continental Exchange*, 349 B.R. at 635.

293 *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y.2006) *aff'd*, 371 B.R. 10 (S.D.N.Y.2007) (noting that such factors should be applied with the goal of protecting "the reasonable interests of parties in interest" and "maximizing the value of the debtor's estate."); *In re Bear Stearns*, 374 B.R. at 128 (quoting *In re SPhinX*, 351 B.R. at 117-18).

294 11 U.S.C. § 1509(d).

295 11 U.S.C. § 1509(f).

foreign proceedings,²⁹⁶ a request for relief may be denied on the grounds that it would interfere with the foreign main proceeding.²⁹⁷ Chapter 15 further mandates that any interim relief sought may only be granted "if the interests of the creditors and other interested entities, including the debtor, are sufficiently protected."²⁹⁸

2. Automatic Relief Granted Upon Recognition

Chapter 15 clearly represents a significant increase in the rights afforded to a foreign representative. Upon entry of an order recognizing a foreign main proceeding, certain key sections of the Bankruptcy Code are deemed automatically available with respect to the debtor and the property of the debtor located within the United States.²⁹⁹

The automatic stay applies to foreign main proceedings, although all of the exceptions and limitations to an automatic stay also apply to a foreign main proceeding. In other words, the automatic stay may be lifted in such a proceeding for any of the reasons set forth in Section 362(d) of the Code. Further, the debtor has an obligation to provide "adequate protection" and one of the reasons that the automatic stay may be lifted is for lack of adequate protection of creditors. Moreover, just as the automatic stay is inapplicable to stay a party's contractual right to terminate, liquidate or accelerate termination values, payment amounts or other transfer obligations arising under or in connection with securities contracts, commodity contracts, forward contracts, repurchase agreements, swap agreements or master netting agreements,³⁰⁰ so too is the stay granted inapplicable to forestall a party's contractual rights to terminate or accelerate.³⁰¹

The automatic stay does not prevent a creditor from commencing an action in a foreign country if such is necessary to preserve a claim against the debtor.³⁰² Important to this exception, however, is that while it allows for the commencement of an action or proceeding, it does not provide for the prosecution of same. The automatic stay is not violated if, upon recognition, the foreign representative commences a full voluntary or involuntary bankruptcy case pursuant to the Code.³⁰³

The Bankruptcy Code applies to "a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States."³⁰⁴ Section 363 of the Code provides the means by which a debtor may use, sell or lease its property during the course of a liquidation or reorganization proceeding.³⁰⁵ Section 549 of the Code provides a debtor with the ability to avoid a debtor's transfer of property that occurred after the liquidation or reorganization case was

296 See 8 COLLIER ON BANKRUPTCY ¶ 1519.03 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2007).

297 11 U.S.C. § 1519(c).

298 11 U.S.C. § 1522(a).

299 11 U.S.C. § 1520(a) (2006). See also *Berwick v. New World Network Int'l, Ltd.*, No. 06-2641, 2007 U.S. Dist. LEXIS 22995, *4-5 (S.D.N.Y. March 28, 2007) (recognizing application of automatic stay provisions of Section 362 of the Code upon recognition of a foreign main proceeding).

300 See 11 U.S.C. § 561(a) (2006).

301 11 U.S.C. § 561(d).

302 11 U.S.C. § 1520(b).

303 11 U.S.C. § 1520(c).

304 11 U.S.C. § 1520(a)(2).

305 11 U.S.C. § 363 (2006).

commenced.³⁰⁶ Section 552 of the Code determines the post-petition effect of a pre-petition security interest on property acquired after the commencement of a case.³⁰⁷

A foreign representative may be permitted to operate the debtor's business during the pendency of the Chapter 15 proceeding. A bankruptcy court, where necessary, also has the authority to limit the foreign representative's ability to operate the debtor's business.³⁰⁸

3. Avoidance Actions

In a full bankruptcy proceeding commenced pursuant to the Code, a debtor or trustee has the ability to initiate "Avoidance Actions" so as to undo certain pre-petition transactions involving the debtor. Common Avoidance Actions include preferential transfers, which are payments for an antecedent debt made by an insolvent debtor to a third party within the ninety day period prior to the bankruptcy filing. Avoidance actions also include fraudulent transfers—pre-petition transfers made by the debtor with the purpose of hindering, delaying or defrauding creditors.

ADDITIONAL READING

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1. Frank Bennett, *Bennett on Bankruptcy*, 10th ed. (North York, Ont.: CCH Canadian, 2008).
2. L.W. Houlden, C.H. Morawetz & Janis Sarra, *Bankruptcy and Insolvency Law of Canada*, looseleaf (Toronto: Carswell, 2009).

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1. *Collier on Bankruptcy* (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008).
2. William L. Norton, Jr. & William L. Norton, III, *Norton Bankruptcy Law and Practice*, 3d (Thomson/West, 2008).

306 11 U.S.C. § 549 (2006).
307 11 U.S.C. § 552 (2006).
308 11 U.S.C. § 1520(a)(3).

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