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## MULTI-JURISDICTIONAL GUIDE 2012/13

# DISPUTE RESOLUTION

## VOLUME 1

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# Canada

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## MAIN DISPUTE RESOLUTION METHODS

**1. What are the main dispute resolution methods used in your jurisdiction to settle large commercial disputes?**

Canada is a confederation of ten provinces and three territories, each with a separate and independent judicial system. While the province of Québec operates under a Civil Code, the legal system in every other province and territory is based on the British common law tradition. The court rules and the administration of justice, including alternative dispute resolution (ADR) procedures, are under provincial or territorial control. The procedural rules can differ significantly but the judicial process in each jurisdiction ends with a provincial or territorial court of appeal.

The final arbiter of all litigation is the Supreme Court of Canada, a federal institution, which decides appeals from decisions of the provincial and territorial courts of appeal, and from the Federal Court of Appeal. Therefore, the remedies available across Canada are similar.

### Recent trends in dispute resolution

**Decreased procedural entitlements in civil disputes**. Since 2010, three provinces (Ontario, Alberta and British Columbia) have implemented significant changes to their rules of civil procedure intended to promote the resolution of civil disputes in a less expensive, time-consuming and complex manner (*see Question 35*). A fourth province, Québec, has proposed a complete overhaul of its rules of civil procedure. Such reforms:

- Narrow the scope of documentary discovery.
- Reduce the permitted time for conducting oral discoveries.
- Expressly adopt the principle of proportionality in discovery.
- Introduce increased oversight of litigation plans by the court.

**Mandatory ADR.** Most jurisdictions now require certain ADR procedures (such as mandatory settlement conferences) as a part of the judicial process. For example, in Ontario, some actions are subject to mandatory mediation within 180 days after the filing of the first defence. Recent reforms have extended this trend. Alberta's new rules require parties to engage in a dispute resolution process before they can obtain a trial date from the court. Proposed reforms in Québec would require parties to consider ADR before resorting to the court system. In addition, some provincial law societies now require lawyers to consider the use of ADR in every dispute and to inform their clients, if appropriate, of available ADR options.

**Continued deference to arbitration clauses.** Courts continue to defer to the parties' contractual choices with respect to arbitration, except in narrow circumstances (for example, when expressly overridden by consumer protection legislation, see *Seidel v Telus Communications Inc., 2011 SCC 15*).

## COURT LITIGATION

### *Limitation periods*

**2. What limitation periods apply to bringing a claim and what triggers a limitation period?**

Each province and territory within Canada has its own limitation periods for different categories of claims. Several of the common law provinces, including Ontario, have adopted a basic limitation period of two years for claims in contract and tort, subject to discoverability. Ultimate limitation periods vary widely across jurisdictions, ranging up to 30 years (and certain claims are not subject to any ultimate limitation period).

In Québec, specific enactments establish various limitation periods (known as prescriptions), but generally claims for infringements of personal rights must be brought within three years.

Given the variance between Canadian jurisdictions, and the complex nature of limitations statutes, local counsel should be consulted.

### *Court structure*

**3. What is the structure of the court where large commercial disputes are usually brought? Are certain types of dispute allocated to particular divisions of this court?**

#### Superior courts

The superior courts of each province or territory hear small and large commercial disputes. However, the relevant provincial superior court can decline to hear a matter if it has no "real and substantial connection" to the forum chosen by the claimant.

The provincial and territorial superior courts are the:

- Court of Queen's Bench of Alberta.
- Supreme Court of British Columbia.
- Court of Queen's Bench for Manitoba.
- Court of Queen's Bench of New Brunswick.
- Supreme Court of Newfoundland and Labrador, Trial Division.

- Supreme Court of the Northwest Territories.
- Supreme Court of Nova Scotia.
- Nunavut Court of Justice.
- Superior Court of Justice (Ontario).
- Supreme Court of Prince Edward Island, Trial Division.
- Superior Court of Québec.
- Court of Queen's Bench for Saskatchewan.
- Supreme Court of Yukon.

The superior courts of each province and territory also include a court of appeal to which appeals of first instance judgments are made (*see Question 20*).

Claims relating to the right to commence a claim for damages against the federal government can be brought in any provincial superior court.

### Federal courts

Headquartered in Ottawa, the trial division of the Federal Court and the Federal Court of Appeal are statutory courts, each with limited jurisdiction. The federal government appoints judges from the provincial bars. Both courts sit on a regular basis in the major urban centres.

The trial division has concurrent first instance jurisdiction with the provincial and territorial superior courts to hear all claims by and against the federal government, and matters between private parties involving navigation, shipping and admiralty. It also has first instance jurisdiction to hear:

- Cases between private parties involving conflicting applications for:
  - patents;
  - copyright;
  - trade marks; or
  - industrial designs.
- All cases in which it is sought to:
  - challenge any patent of invention; or
  - alter the register of copyrights, trade marks or industrial designs.

The Federal Court of Appeal hears appeals from the Federal Court and has original jurisdiction in judicial reviews of federal administrative tribunals.

### Tax Court of Canada

The Tax Court of Canada is a federal court to which companies and individuals can appeal government tax decisions. Most appeals made to the Tax Court relate to income tax, sales tax or employment insurance. The Federal Court of Appeal has exclusive jurisdiction over appeals from the Tax Court.

### Toronto's Commercial List

Commercial disputes are put on the Commercial List and dealt with expeditiously by judges experienced in these types of disputes. The Commercial List was established more than 20 years ago by a Practice Direction under the Rules of Civil Procedure of Ontario. The matters eligible for the Commercial List include proceedings relating to:

- The Canada Business Corporations Act (CBCA) and the Ontario Business Corporations Act (OBCA).
- The Securities Act, including takeover and issuer bids.
- Insolvency matters, including winding-up and applications under the Companies' Creditors Arrangement Act (CCAA) (the Canadian equivalent to Chapter 11 in the US) and matters relating to the Bankruptcy and Insolvency Act (BIA).
- Any other commercial matters that a judge presiding over the Commercial List directs to be listed. In making this determination the judge will consider the matter's complexity in terms of procedure, subject matter and number of parties and whether it is commercial in nature (see *Maple Valley Acres Limited v CIBC, [1992] O.J. No. 2610*).

### Montreal's Commercial Division

The Commercial Division of the Superior Court of Québec is Montreal's version of the Commercial List.

The Commercial Division's jurisdiction is broader than that of the Commercial List and includes proceedings relating to the following federal and provincial statutes:

- Statutes of Canada:
  - BIA;
  - CCAA;
  - CBCA;
  - Winding-Up and Restructuring Act;
  - Bank Act;
  - Farm Debt Mediation Act;
  - Commercial Arbitration Act.
- Statutes of Québec:
  - Code of Civil Procedure:
    - Article 946.1 (homologation (that is, approval) of an arbitration award);
    - Article 949.1 (recognition and execution of an arbitration award rendered outside Québec).
  - Business Corporations Act;
  - Winding-Up Act;
  - Securities Act;
  - Act respecting the *Autorité des marchés* financiers (Financial Markets Authority).

The Commercial Division also hears cases that are considered by the judge to be commercial in nature.

### *Rights of audience*

**4. Which types of lawyers have rights of audience to conduct cases in courts where large commercial disputes are usually brought? What requirements must they meet? Can foreign lawyers conduct cases in these courts?**

#### Rights of audience/ requirements

Any lawyer licensed to practise law in a Canadian province or territory is granted audience rights in:

- His jurisdiction.
- Federal courts.
- The Supreme Court.

Additionally, the National Mobility Agreement (NMA) facilitates temporary and permanent mobility of lawyers between the nine common law provinces. The Territorial Mobility Agreement (TMA) facilitates permanent mobility to the three territories. Lawyers who meet the criteria under the NMA or TMA are generally permitted to practise law in an unrestricted manner in the new jurisdiction.

Québec has not implemented the NMA. However, the Québec Bar Association (*Barreau du Québec*) introduced a new membership category, Canadian Legal Advisor, to permit eligible lawyers from other Canadian provinces and territories to practise federal law, public international law, and the law of their home jurisdiction in Québec. The 2010 Quebec Mobility Agreement affords eligible Québec lawyers the same privilege in other provinces and territories.

#### Foreign lawyers

Generally, foreign lawyers cannot practise Canadian law in Canada without a licence. In some provinces, such as Ontario and Alberta, a foreign lawyer can obtain status as a "foreign legal consultant", enabling him or her to give legal advice in that province relating to the law of the foreign jurisdiction. However, this does not authorise foreign lawyers to represent clients before the local courts or tribunals. In Québec, a foreign lawyer may apply for either a temporary mobility permit to practice in the province for a specific case, or for a temporary practice permit. The latter must be renewed annually and is usually limited to certain areas of law, among other conditions.

## FEES AND FUNDING

**5. What legal fee structures can be used? Are fees fixed by law?**

Hourly billing is the predominant legal fee structure. Fees are not fixed by law. In Toronto, the top commercial litigators charge between Can$800 and Can$950 per hour (as at 1 March 2012, Can$1 was about EURO.7). In other commercial centres, such as Vancouver, Calgary and Montreal, the hourly rates can be slightly lower. However, the market is highly competitive and alternative arrangements are becoming increasingly common. These include:

- Contingency fees (that is, an agreement where the lawyer only receives a fee if the client wins).
- Fixed (task-based) fees.
- Discounted rates.

**6. How is litigation usually funded? Can third parties fund it? Is insurance available for litigation costs?**

#### Funding

Commercial litigation is generally funded by the parties, although in rare circumstances other parties bear the costs of litigation. A number of proceedings have been commenced in the name of failed corporations by entities who invested in the companies (whether through debt or equity transactions) at distressed levels. The investors typically fund this litigation. More recently, lenders have begun to offer loans at steep rates to claimants who would otherwise not be able to afford the litigation.

#### Insurance

There are many different types of insurance pools (for example, products liability, professional negligence, director and officer liability). However, most of these insurance regimes exclude coverage for intentional misconduct.

## COURT PROCEEDINGS

**7. Are court proceedings confidential or public? If public, are the proceedings or any information kept confidential in certain circumstances?**

Generally, all cases, whether civil or criminal, must be heard in open court. However, in certain exceptional cases, the court can hold a hearing in private if either:

- The presence of the public would make the administration of justice impracticable.
- There is a need to safeguard social values of extreme importance, such as the protection of the innocent.

Sealing orders to protect sensitive trade and other information are also available, and are quite commonly granted, although there is a recent trend toward making it more difficult to obtain a sealing order.

**8. Does the court impose any rules on the parties in relation to pre-action conduct? If yes, are there penalties for failing to comply?**

While the courts do not generally impose any rules in relation to pre-action conduct, changes have recently taken place in some provinces. In Ontario, certain actions are subject to mandatory mediation within 180 days after the filing of the first defence. While these mediations are treated as without prejudice settlement discussions, failure to attend can result in severe consequences, including pleadings being struck out or the action being dismissed.

In Alberta, parties must engage in a mandatory dispute resolution process before they can obtain a trial date from the court. This requirement, which can be waived by the court, can be satisfied through dispute resolution methods such as mediation or arbitration, or through a judicial dispute resolution process that allows a judge to facilitate a resolution for the parties.

Notwithstanding the general lack of court-imposed rules, as a self-governing profession, the provincial law societies' rules of professional conduct generally address the pre-trial conduct of lawyers. For example, the ethics rules of the Nova Scotia Barristers' Society require lawyers to:

- Encourage the client to compromise or settle whenever it is reasonably possible.
- Discourage the client from commencing useless legal proceedings.
- Consider the use of ADR for every dispute.

Failure to honour these obligations can result in a finding of professional misconduct. Therefore, a growing number of lawyers attempt pre-action facilitations or mediations and the early exchange of documents and other information.

**9. What are the main stages of typical court proceedings?**

### Starting proceedings

In the common law jurisdictions, depending on the relevant court rules, a claim can be started by issuing one of the following:

- A writ of summons.
- A statement of claim.
- A notice of action.
- A notice of application describing the claim.
- A similar initiating document describing the basis of the claim (for example, a notice of civil claim in British Columbia).

In Québec, a proceeding is commenced through an originating application.

### Notice to the defendant and defence

A defendant is generally given notice of the claim by being served personally. In Ontario, the claim must be served on the defendant within six months of being issued, and most other jurisdictions have similar limitations. In British Columbia, the claim must be served within one year.

The defendant must deliver the statement of defence within a prescribed period of time (unless he wishes to challenge the court's jurisdiction or bring other procedural applications). The period of time varies by province, and by the jurisdiction in which the defendant is served. For example, under Ontario's rules a defendant served:

- In Ontario has 20 days to deliver a statement of defence.
- Elsewhere in Canada or in the US has 40 days.
- Anywhere else has 60 days.

In practice, extensions of the time limits are freely granted where prejudice would not result.

A defendant may also file a counterclaim, cross-claim or third party claim to join all necessary issues and parties. There are a number of procedural and substantive rules (including time limits) governing all pleadings and defendants should consult the applicable provincial rules of court for details. In addition, a defendant wishing to challenge the claim on jurisdictional grounds must usually do so by an application before the delivery of a defence or any other step that could be construed as accepting the jurisdiction of the court.

If the defendant fails to deliver a statement of defence in time, the claimant can obtain default judgment. However, default judgments can usually be set aside on terms prescribed by the court.

### Subsequent stages

After the pleadings stage, the parties:

- Agree to a written discovery plan.
- Exchange documents.
- Conduct examinations for discovery (and other non-party examinations if necessary, for example through letters rogatory).
- Engage in interlocutory applications (if required).
- Conduct some form of mediation (the requirements vary by province) (*see Questions 1, 8 and 31*).
- Attend a pre-trial judicial conference.
- Failing settlement, proceed to trial.

## INTERIM REMEDIES

**10. What actions can a party bring for a case to be dismissed before a full trial? On what grounds must such a claim be brought? What is the applicable procedure?**

An application can be brought for judgment in favour of the defendant on an application based only on the allegations contained in the claim, if the court is satisfied that the claim fails to set out a reasonable cause of action. However, these applications are rarely successful, since the threshold test (that it is plain and obvious that the claim will fail at trial) is very high. Even if the court is inclined to grant judgment, it will typically give the unsuccessful party time to amend its claim.

In addition, the rules of court in all provinces and territories other than Québec allow for a form of summary judgment, under which a claim may be expeditiously disposed of without a full trial. Under Ontario's recently amended rule, the court may grant summary judgment if it considers that there is no genuine issue requiring a trial with respect to a claim or defence. The determination is based on a consideration of affidavit evidence, examination transcripts and, in some cases, oral testimony. This new rule permits the judge to weigh evidence, evaluate credibility and draw inferences from the evidence.

The Ontario Court of Appeal's recent decision in *Combined Air Mechanical Services Inc. v. Flesch, 2011 ONCA 764*, attempts to clarify how the new rule will be interpreted. In the Court's view, a summary judgment motion is only appropriate where either:

- The parties agree to use summary judgment.
- The claim or defence is without merit.
- The motion judge can "fully appreciate" all of the evidence needed to dispose of the case without a trial.

**11. Can a defendant apply for an order for the claimant to provide security for its costs? If yes, on what grounds?**

Provincial and territorial civil procedure rules typically permit the defendant to apply to the court for an order for security for costs, if any of the prescribed criteria are met. For example, in Ontario the criteria are:

- The claimant is ordinarily resident outside Ontario.
- The claimant has another proceeding for the same relief pending in Ontario or elsewhere.
- The defendant has an order against the claimant for costs in the same or another proceeding that remains unpaid in whole or in part.
- The claimant is a corporation or a nominal claimant, and there is good reason to believe that the claimant has insufficient assets in Ontario to pay the defendant's costs.
- There is good reason to believe that the action is frivolous and vexatious, and that the claimant has insufficient assets in Ontario to pay the defendant's costs.
- A statute entitles the defendant to security for costs.

**12. What are the rules concerning interim injunctions granted before a full trial?**

### Availability and grounds

There are two types of injunctions available before trial (or before the determination of the issues on their merits):

- **Interim injunction.** This is generally only granted for a very brief period until an application for an interlocutory injunction is made.
- **Interlocutory injunction.** This is intended to preserve the status quo or to enjoin certain conduct until the court determines the parties' rights.

The test for any injunction in Canada is essentially the same. As prescribed by the Supreme Court in *RJR-MacDonald Inc. v Canada (Attorney General), [1994] 1 S.C.R. 311*, the court must be satisfied that:

- There is a serious question to be tried.
- The applicant will suffer irreparable harm if the injunction is not granted.
- The balance of convenience favours granting the injunction.

Generally, the party seeking the injunction must give an undertaking to pay any damages suffered by the other party if that party ultimately succeeds in having the injunction set aside.

### Prior notice/same-day

An interim injunction can be obtained without prior notice to the other party and can be granted on the same day if the matter is urgent.

### Mandatory injunctions

Mandatory interim injunctions are available but less common as the imposition of an obligation to act positively shifts the balance of convenience against granting the injunction (*RJR-MacDonald*) (*see above, Availability and grounds*). Generally, Canadian courts are also more reluctant to grant any injunctive orders that will require judicial supervision.

**13. What are the rules relating to interim attachment orders to preserve assets pending judgment or a final order (or equivalent)?**

### Availability and grounds

There are a variety of interim attachment orders available, including specific pre-judgment attachment orders (also referred to as pre-judgment garnishment). These are available in Alberta, British Columbia, Manitoba, Newfoundland and Labrador, the Northwest Territories, Nunavut, Prince Edward Island, Saskatchewan and the Yukon. Generally, this order permits the attachment of all sources of income from a debtor to a creditor to the extent necessary to satisfy the amount of the creditor's claim. A creditor can make an application to the court for an attachment order where legal proceedings have commenced or are imminent. In Saskatchewan, The Enforcement of Money Judgments Act, which will come into force on proclamation (a fixed date is presently unknown), removes pre-judgment garnishment from the interim attachment orders available in that province.

Before granting a pre-judgment attachment order, the court must be satisfied that there are reasonable grounds to believe that the debtor is dealing with his, her or its exigible (able to be charged) property in a manner that is likely to seriously hinder the creditor's enforcement of a judgment.

The following remedies, although not express attachment orders, are also available to preserve or gain access to assets under a defendant's control:

- **Mareva injunction.** This is the well-known interim freezing injunction which restrains the defendant from disposing of or dealing with specific assets pending the determination of a legal action.
- **Anton Piller order.** This permits a claimant to enter the defendant's premises to preserve relevant materials or to obtain evidence which might otherwise be destroyed. It is sometimes colloquially referred to as a civil search warrant.
- **Possession order.** This allows for the interim possession of identified goods taken or retained in breach of a proven prima facie right to possession.
- **Certificate of pending litigation.** This is registered on title to land where the claimant appears to have a reasonable case and an interest in land is claimed.

To obtain a Mareva injunction a claimant must:

- Make full and frank disclosure of all material matters in his knowledge.
- Give particulars of his claim against the defendant, stating the grounds and the amount of his claim.

- Provide some grounds for believing that the defendant has assets.
- Provide some grounds for believing that there is a risk of the assets being dissipated or removed from the jurisdiction of the court.
- Give an undertaking as to damages.

In relation to the other interim orders (*see above*), a claimant must also both:

- Show that there is a risk of dissipation of the assets.
- Meet similar criteria, including relating to the protection of any privileged information.

To obtain a certificate of pending litigation, the claimant must demonstrate that the litigation involves a claim which, if substantiated, would adversely affect the defendant's interest in the property. This could relate to a direct ownership claim or, for example, an agreement by the defendant to sell an interest in the land to a third party.

### Prior notice/same-day

Attachment orders are frequently sought without notice, for fear that relevant evidence could be destroyed or assets put beyond the courts' reach. However, a without notice order is only granted where the claimant has demonstrated that it is necessary in the interests of justice to proceed in the absence of the responding party. In without notice proceedings, disclosure obligations are stringent and if the applicant withholds any, even marginal, material information, the order will be set aside. The courts presume that the opposing party should be notified.

### Main proceedings

If the main proceedings are in a foreign jurisdiction, the claimant can apply to a Canadian court for an injunction over the defendant's Canadian assets, to support those foreign proceedings.

### Preferential right or lien

Attachment does not create a preferential right or lien.

### Damages as a result

The claimant is liable if it is later proved that the order should not have been granted. An undertaking to that effect is a usual requirement to obtain the initial order. The claimant may also be liable for substantial costs if the attachment order is set aside.

### Security

On an application for any interim injunction or mandatory order the claimant must, unless the court orders otherwise, undertake to comply with any order concerning damages that the court makes if it decides that both the:

- Granting of the order has wrongfully caused damage to the responding party.
- Claimant ought to compensate the respondent.

In certain cases, for example relating to a foreign claimant, the undertaking may be required to be supported by security.

**14. Are any other interim remedies commonly available and obtained?**

### Anti-suit injunction

Where proceedings have been commenced in a foreign court (or, in rare cases, before they have been commenced), the defendant may apply to a Canadian court to restrain the claimant (in the foreign court, defendant in the Canadian court) from continuing the lawsuit.

The Supreme Court has developed a test to determine the circumstances in which a Canadian court should order this remedy (*Amchem Products Incorporated v British Columbia (Workers' Compensation Board), [1993] 1 S.C.R. 897*). Generally, an anti-suit injunction should be heard in Canada only after the applicant has first exhausted all means available in the foreign proceeding to have it terminated. The general test is that an anti-suit injunction will not be granted in Canada if the foreign court assumed jurisdiction over the defendant on a basis consistent with Canadian *forum non conveniens* principles. However, the injunction will be issued if the:

- Assumption of jurisdiction was inconsistent with those principles.
- Defendant would suffer an injustice outweighing the harm to the claimant in being deprived of the right to litigate in the foreign jurisdiction.

### Norwich order

This is an order for pre-action discovery of a third party to further a potential claim (for example fraud or internet libel), where the claimant is unable to determine who may be liable unless the third party (such as a financial institution or internet service provider) discloses the necessary information.

The applicant must satisfy all of the following criteria (*GEA Group AG v Ventra Group Co., 2009 ONCA 619*):

- The applicant has provided evidence sufficient to raise a valid, bona fide or reasonable claim.
- The applicant has established a relationship with the third party from whom the information is sought that establishes that the third party is somehow involved in the acts complained of.
- The third party is the only practicable source of the information available.
- The third party can be indemnified for costs to which the third party may be exposed because of the disclosure.
- The interests of justice favour obtaining the disclosure.

## FINAL REMEDIES

**15. What remedies are available at the full trial stage? Are damages just compensatory or can they also be punitive?**

The courts generally have jurisdiction to order any remedy that is just, whether it is based on the common law, equity or statute.

The following remedies are typically available:

- Damages. These can include the following types of damages:
  - compensatory;
  - aggravated;
  - exemplary;
  - punitive.
- Specific performance.
- Declaration (a formal statement by the court on the rights of interested parties or the construction of a document).
- Rectification (an equitable remedy which corrects a contract in accordance with the parties' prior agreement).
- Permanent injunctions.
- Foreclosure (an order preventing a mortgagor from redeeming the equity of redemption).
- The imposition of a constructive trust (to the effect that the defendant holds an asset in trust for the claimant).

## EVIDENCE

### *Disclosure*

**16. What documents must the parties disclose to the other parties and/or the court? Are there any detailed rules governing this procedure?**

Generally, any document in a party's possession, control or power that is relevant to any matter in issue in the case must be disclosed during the discovery process. Recent developments in disclosure include:

- **British Columbia.** As of 2010, the scope of disclosure in British Columbia has been narrowed to all documents in a party's possession or control that could be used by any party to prove or disprove a material fact, as well as all other documents to which a party intends to refer at trial. Under the continuing disclosure obligation, newly acquired information and documents must be disclosed immediately. Failure to produce a relevant document can attract serious penalties, such as the claim or defence being struck out.
- **Manitoba.** As of April 2012, Manitoba will implement a new rule for expedited actions for claims not exceeding Can$100,000. The rule will narrow the scope of disclosure in expedited actions in a manner similar to the British Columbia reforms and introduce proportionality as a guiding principle in the disclosure process. The proportionality principle directs the court, in determining whether a party must produce a document, to consider the proportional relationship between the time, expense and prejudice associated with the request and the complexity, importance and amount in issue in the proceedings.
- **Nova Scotia.** In 2009, Nova Scotia instituted the first Canadian civil procedure rule specifically directed at disclosure of electronic information; this rule was based on the Sedona Canada Principles Addressing Electronic Discovery (Sedona Canada Principles) (*www.thesedonaconference.org*).
- **Ontario.** As of 2010, parties in Ontario must agree to a written discovery plan setting out various items such as the intended scope of documentary and oral discovery, and dates for the delivery of documents. Parties must consult the Sedona Canada Principles and should consider whether the scope of requested production is proportional to the issues being litigated.
- **Alberta.** Beginning in 2010, parties in Alberta who are involved in complex cases must set out a litigation plan that establishes, among other things, a protocol for the organisation and production of documents.

### *Privileged documents*

**17. Are any documents privileged? If privilege is not recognised, are there any other rules allowing a party not to disclose a document?**

#### Privileged documents

Privilege is recognised as a substantive rule, rather than simply an evidentiary or procedural rule. In civil litigation, the primary classes of privilege are:

- Lawyer-client privilege (also known as legal advice privilege), which extends to confidential communications between a lawyer and his client for the purpose of giving or receiving legal advice.
- Litigation privilege, which extends to confidential documents created for the dominant purpose of actual or contemplated litigation.

These classes of privilege extend to in-house lawyers, provided the confidential documents are for the purpose of litigation or legal advice rather than for business.

Other categories of privilege include:

- Confidential communications within certain special relationships, such as between a doctor and patient. These communications may in rare circumstances be afforded a "case-by-case" privilege if the prescribed legal test is met.
- Communications in furtherance of settlement. Privilege may attach to such communications but will be lost if, for example, the existence or interpretation of a settlement agreement is subsequently in issue.

The client can elect to waive privilege in relation to a particular document, but this may allow the opposite party to inspect any other document that is related to the document over which privilege has been waived.

#### Other non-disclosure situations

Privilege is generally the only ground on which disclosure of relevant documents can be refused. In some provinces disclosure may be resisted on the basis that the request is abusive or disproportionate, however such arguments will prevail only in extreme cases (in relation to proportionately, *see Question 16*).

Where disclosure is ordered, courts are prepared to order remedies in appropriate circumstances to protect against the harm that may result from the disclosure of confidential and other protected information (*see Question 7*).

### *Examination of witnesses*

**18. Do witnesses of fact give oral evidence or do they just submit written evidence? Is there a right to cross-examine witnesses of fact?**

#### Oral evidence

Witnesses of fact generally give oral evidence at trial and are subject to direct examination, cross-examination and re-examination. In some proceedings, fact witnesses are permitted to give evidence by way of witness statement, subject to a limited right of cross-examination.

#### Right to cross-examine

See above, *Oral evidence*.

### *Third party experts*

**19. What are the rules in relation to third party experts?**

#### Appointment procedure

Either party can retain an expert or, uncommonly, the court can appoint an expert to assist it in its determination of complex issues. In British Columbia, experts can be jointly appointed by two or more parties. In some regulatory proceedings and in the Federal Court, "hot-tubbing" is now employed, whereby opposing experts testify together on one panel and are then cross-examined. It is believed that this procedure helps narrow the issues and permits the adjudicator to better understand where the experts differ, and why.

#### Role of experts

Whether appointed by a party or the court, an expert's role is to assist the court in reaching its determination. An expert must not lose objectivity or become partisan or the court is likely to disregard his or her opinion. This common law rule was recently codified in Ontario.

#### Right of reply

The report of an expert witness who will give evidence at trial must generally be delivered according to a timetable prescribed by the local rules of court (or as agreed by the parties). This must be followed by a responding expert's report and any necessary supplementary reports. If time limits are not met, the expert can testify only with leave of the trial judge.

In Alberta, as of 2010, experts can be examined on their reports by adverse parties during the discovery process, either on agreement or by court order. The evidence of the expert is treated as if it was the evidence of an employee of the party intending to rely on it, and must be adopted by the party.

#### Fees

The retaining party pays the expert's fees. These may be recoverable by a successful party as part of a costs award (*see Question 22*). If the court has appointed the expert, their fees may be recoverable from any number of parties, depending on the circumstances. For example, the debtor generally pays a court-appointed monitor in restructuring proceedings under the CCAA, subject to the court's discretion. If an inspector is appointed under the CBCA, OBCA or other similar legislation, the fees are paid by the company or entity whose oppressive conduct resulted in the appointment order.

## APPEALS

**20. What are the rules concerning appeals of first instance judgments in large commercial disputes?**

#### Which courts

Appeals of first instance judgments (but not necessarily interim decisions) are made to the provincial court of appeal. Generally, final decisions can be appealed as of right, while interim decisions usually require leave to appeal. Appeals from provincial appellate courts are taken, with leave, to the Supreme Court of Canada. For leave to be granted in the latter case, the appeal must involve an issue of national importance.

#### Grounds for appeal

In *Housen v Nikolaisen, 2002 SCC 33*, the Supreme Court set the following standards for appellate review:

- Questions of law will be reversed if they are incorrect.
- Questions of fact can only be reversed if the trial judge made a palpable and overriding error.
- For mixed questions of fact and law (that is, applying a legal standard to a set of facts), the standard of correctness applies where the trial judge's error can be attributed to the application of an incorrect legal standard, a failure to consider a required element of a legal test, or similar error in principle. However, if the issue on appeal involves the trial judge's interpretation of the evidence as a whole, it should not be reversed unless there was a palpable and overriding error.

#### Time limit

The time limit for bringing an appeal varies by province and by type of appeal, and therefore local counsel should always be consulted. For example, in Ontario the time limits for the service of a notice of appeal or motion for leave to appeal are as follows:

- For an appeal from an interlocutory order, within seven days after the making of the order appealed.
- For an appeal requiring leave, within 15 days.
- For an appeal as of right, within 30 days.
- For an appeal from the court of appeal to the Supreme Court of Canada requiring leave, within 60 days.
- For an appeal from the court of appeal to the Supreme Court of Canada in which leave is not required or has been granted, within 30 days.

## CLASS ACTIONS

**21. Are there any mechanisms available for collective redress or class actions?**

Class action litigation is common, particularly in British Columbia, Ontario, Saskatchewan and Québec (following a series of Supreme Court decisions in 2001 establishing a framework for class action litigation in all Canadian jurisdictions). Nine of Canada's ten provinces have class proceedings legislation (the sole exception being Prince Edward Island, where class action litigation can be commenced based on the Supreme Court decisions). In particular,

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in relation to actions based on alleged breaches of securities laws, all provinces now have legislation intended to protect purchasers of securities in the event of material misrepresentation, both for primary market and secondary market transactions.

Ontario, Québec, Alberta, Manitoba, Nova Scotia, Saskatchewan and the Federal Court all follow an opt-out model. In British Columbia, Newfoundland and New Brunswick, class members resident in the province may elect to opt out, but members outside the province must specifically opt in to the action.

To commence class action litigation, a party must obtain court-approved certification. While the specific provisions may vary between jurisdictions, there are generally five criteria which must be satisfied to certify a class action:

- The pleadings must disclose a cause of action.
- There must be an identifiable class.
- The proposed representative must be appropriate.
- There must be common issues.
- A class action must be the preferable procedure.

Once a class action is certified, the litigation continues with a representative plaintiff acting on behalf of the entire class. While the rules of court apply, class action legislation gives the courts broad powers to avoid or modify the traditional procedures to better suit the nature of a class action.

Both Ontario and Québec have set up funds to assist with the financing of class actions. In Ontario, the Class Proceedings Fund provides financial support for claimants' disbursements and indemnifies the claimant against an adverse cost award, but does not pay ongoing solicitors' fees. In Québec, the fund can assist with legal fees as well as disbursements.

Private third-party funding arrangements have also been approved by the courts. However, agreements have been rejected where they place no cap on the potential amounts which the funding body could receive.

## COSTS

**22. Does the unsuccessful party have to pay the successful party's costs and how does the court usually calculate any costs award? What factors does the court consider when awarding costs?**

A successful litigant is usually entitled to receive his or her costs of the proceeding (including appeals) from the unsuccessful party on the basis of either:

- **Partial indemnity.** A successful party will still have to pay a significant part of its own legal fees.
- **Substantial indemnity.** Available in limited circumstances, this represents a higher scale of costs and goes much further towards providing full indemnity for litigation costs.

The calculation of costs varies by province. In some provinces, calculating the quantum of costs is simply a matter of applying a tariff system. In others, it is at the court's discretion. In British Columbia, the new rules (effective 2010) limit the costs that can be recovered on certain types of actions claiming Can$100,000 or less.

When a Canadian court awards costs on a discretionary basis, in addition to the results of the proceeding and any pre-trial offers to settle, some of the other factors it may consider include:

- The amount claimed and the amount recovered in the proceedings.
- The apportionment of liability.
- The complexity of the proceedings.
- The importance of the issues.
- The conduct of any party that tended to shorten or to lengthen unnecessarily the duration of the proceedings.
- A party's denial of, or refusal to admit, anything that the court considers should have been admitted.
- Whether any step in the proceeding was:
  - improper, vexatious or unnecessary; or
  - taken through negligence, mistake or excessive caution.

Pre-trial offers to settle play a role in costs awards in most provinces. These offers must not be disclosed to the court until after the disposition of the case on its merits. Typically, the defendant is liable to pay an increased costs award in respect of the claimant's legal costs incurred after the date of the offer, where both:

- The claimant's offer is not accepted.
- The claimant obtains a judgment that is at least as favourable as the offer.

Similarly, where a defendant's offer is not accepted and the claimant obtains a judgment that is not more favourable than the offer, the defendant is entitled to a costs award from the claimant in respect of costs incurred after the date of the offer.

**23. Is interest awarded on costs? If yes, how is it calculated?**

Generally, post-judgment interest on costs orders is awarded at a rate prescribed by regulation, calculated from the costs order's date. However, courts retain discretion to:

- Disallow post-judgment interest.
- Vary the rate of interest.
- Allow interest for a shorter period where it is considered just to do so.

## ENFORCEMENT OF A LOCAL JUDGMENT

**24. What are the procedures to enforce a local judgment in the local courts?**

A judgment can be enforced in a number of ways, the most common of which are:

- **Garnishment of a debtor's wages.** This ensures payment is made directly to the judgment creditor, subject to various exemptions.

- **A writ of seizure and sale filed with the sheriff (a court official).** This provides a notice to any potential purchaser of property owned by the debtor that a judgment creditor both has an interest in the property and is entitled to the proceeds of its sale in the amount of the judgment. This is subject to the rights of any secured creditors and other creditors who may also have an interest in the property.
- **An examination in aid of execution.** This can provide information about assets against which a judgment can be enforced.
- **The oppression remedy.** In some limited circumstances, the oppression remedy may be available to enforce an award against a company or individuals who have taken improper steps (for example, by stripping assets).

The judgments of the common law provinces and territories are enforceable in other common law provinces and territories under specific reciprocal enforcement of judgments legislation. If the requirements of that legislation are met, the out-of-province judgment may be registered and treated as if it were a judgment of that province.

Judgments from Québec are not automatically enforceable in other Canadian provinces and vice versa. In these circumstances, the judgment creditor must bring an application on the judgment to enforce it.

## CROSS-BORDER LITIGATION

**25. Do local courts respect the choice of governing law in a contract? If yes, are there any areas of law in your jurisdiction that apply to the contract despite the choice of law?**

Parties are free to agree on the applicable substantive law.

A court respects the governing law expressed by the parties in a contract, provided the choice of the selected law is:

- Bona fide (that is, the parties have chosen a legal system with which the transaction has a connection).
- Legal (that is, not prohibited by any legislation or illegal in itself. For example, Ontario provides that all family law arbitrations in Ontario must be conducted only in accordance with Canadian law).
- Not excluded by a public policy reason.

In limited circumstances, such as consumer protection and personal property security (the taking of security over chattels and other personal property), statutory provisions can apply irrespective of the parties' choice of law.

The procedural law of the chosen forum applies regardless of the choice of law in the contract.

**26. Do local courts respect the choice of jurisdiction in a contract? Do local courts claim jurisdiction over a dispute in some circumstances, despite the choice of jurisdiction?**

Canadian courts generally enforce forum selection clauses unless there is a strong cause for the agreement to be overridden. Canadian courts interpret "strong cause" strictly and its use is usually confined to issues relating to breaches of public policy (which the courts define narrowly).

If there is ambiguity as to whether the clause applies to a particular dispute, the Canadian court carefully analyses the nature of the claims and defences. The forum selection clause is inapplicable if the court determines that the claim is either:

- Not contractual by nature.
- Insufficiently connected with the underlying contract.

For example, despite a forum selection clause in favour of the state of Texas, the Ontario Court of Appeal ruled that Ontario had jurisdiction over a claim based on breach of fiduciary duty and conspiracy because the claims were not arising "out of or in connection with" Texas (*Matrix Integrated Solutions Limited v Radiant Hospitality Systems Ltd., 2009 ONCA 593*).

**27. If a foreign party obtains permission from its local courts to serve proceedings on a party in your jurisdiction, what is the procedure to effect service in your jurisdiction? Is your jurisdiction party to any international agreements affecting this process?**

Canada is a party to the HCCH Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters 1965 (Hague Service Convention), which contains a procedure that can be used to effect service in Canadian jurisdictions. Where the proceedings are to be served under this convention, the party seeking service can submit a request to either the Federal Central Authority in Ottawa or the appropriate provincial or territorial Central Authority. The Central Authority transmits the request to competent authorities who serve the documents.

However, the Hague Service Convention process is cumbersome and more direct means of service are usually available. Each Canadian jurisdiction (provincial, territorial and federal) sets its own rules regarding the service of judicial documents. In the circumstances, the most practical way of serving foreign documents in Canada is to retain local counsel to ensure that local requirements are strictly complied with. In many cases, the following methods of service are available:

- Forwarding duplicate sets of the documents in English directly to the sheriff in whose jurisdiction service must be effected. If serving in Québec, the documents should be forwarded to the sheriff (*huissier*) and a French translation should be included.
- Retaining a licensed private process server.
- Sending the documents by International Registered Mail.

**28. What is the procedure to take evidence from a witness in your jurisdiction for use in proceedings in another jurisdiction? Is your jurisdiction party to an international convention on this issue?**

Canada is not a party to the HCCH Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970 (Hague Evidence Convention).

A foreign request to take evidence from a witness in Canada should take the form of a written request from the foreign court (letters rogatory). The Canada Evidence Act and the provincial evidence acts prescribe a procedure by which foreign requests for judicial assistance can be enforced (for example, see *section 46, Canada Evidence Act*).

The basis of the concept of international judicial assistance is the comity of nations (*Zingre v The Queen, [1981] 2 S.C.R. 392*). Before an order giving effect to such a foreign request will be made, the evidence must establish that the:

- Evidence sought is relevant.
- Evidence sought is necessary, either for the purposes of discovery or trial.
- Evidence is not otherwise attainable.
- Order sought is not contrary to public policy.
- Documents sought are identified with reasonable specificity.
- Order sought is not unduly burdensome, having in mind what the relevant witnesses would be required to do, and produce, were the action to be tried there.

Once a request has been enforced, although the procedural rules of the examination are governed by the foreign proceeding, the substantive legal requirements are those of Canada (for example, the laws of privilege).

### *Enforcement of a foreign judgment*

**29. What are the procedures to enforce a foreign judgment in the local courts?**

#### General principles

Enforcement of foreign judgments is a matter of provincial law, although the Supreme Court has provided general directions in this area (*see below*).

There is no uniform legislative scheme. In Saskatchewan (the only province which has adopted uniform foreign judgment enforcement legislation), registration of the foreign judgment in Saskatchewan courts is the simplest method to enable local enforcement, provided all the requirements of the legislative scheme are met.

Where there is no such legislation, such as in Ontario, enforcement is usually achieved by commencing an action on the foreign judgment. Canadian courts usually treat such proceedings as actions on a simple contract debt and it may be advisable to proceed by way of summary judgment. If the court finds in the judgment creditor's favour, the resulting judgment can be enforced as for any other judgment of that province.

To enforce the foreign judgment, the judgment creditor must satisfy the real and substantial connection test developed by the Supreme Court (*see Question 3, Superior courts*). The test imposes a low threshold, involving a fact-specific inquiry as to whether there was a real and substantial connection between the foreign jurisdiction and the persons, events and circumstances that led to the foreign judgment. If this test is met, and the judgment is final and conclusive, the court considers whether enforcement in Canada should be denied on the basis of any of the following defences:

- Fraud.
- Denial of natural justice.
- Public policy.

Generally speaking, as long as the judgment is not ineligible (such as, for example, maintenance orders), the judgment will be enforced if the statutory criteria are met. Registration of the judgment will be refused if, for example, the:

- Judgment has already been satisfied.
- Judgment was obtained by fraud.
- Judgment is not enforceable in the territory of origin.

Once registered, the judgment will be of the same force and effect as a judgment of that province.

#### Enforcement of UK judgments

All provinces except Québec permit the enforcement of a UK judgment under a summary application process.

The enforcement of US judgments is covered above (*see General principles*).

## ALTERNATIVE DISPUTE RESOLUTION

**30. What are the main alternative dispute resolution (ADR) methods used in your jurisdiction to settle large commercial disputes? Is ADR used more in certain industries? What proportion of large commercial disputes is settled through ADR?**

The most commonly used ADR procedures are:

- Negotiation.
- Mediation.
- Arbitration.

Negotiation and mediation are generally more informal, confidential processes, where the information exchanged is not compellable in litigation. Arbitration is generally more structured and follows either court-like rules or rules of a respected arbitration body, at the election of the parties.

ADR is often used in the real estate, labour and employment, investment, construction and energy sectors, but is increasingly popular among all kinds of businesses.

**31. Does ADR form part of court procedures or does it only apply if the parties agree? Can courts compel the use of ADR?**

Mandatory mediation is imposed in some court proceedings. In addition, it is common for parties to engage in pre-trial settlement conferences as part of the court process. In large commercial cases it is common to conduct mediations without the court's involvement.

In Alberta parties must engage in a mandatory dispute resolution process before they can obtain a trial date from the court (*see Question 8*).

**32. How is evidence given in ADR? Can documents produced or admissions made during (or for the purposes of) the ADR later be protected from disclosure by privilege? Is ADR confidential?**

In relation to arbitration proceedings, the parties generally agree in advance how evidence will be given. In the absence of agreement, the arbitral tribunal determines the procedures to be followed, including the rules of evidence (which may be similar to those of the courts).

Other forms of ADR usually do not involve giving evidence. If they do, in mediation for example, disclosure of any information acquired during the process is generally prohibited in unresolved disputes.

Arbitration and mediation are generally regarded as confidential. However, if the parties apply to court at any point during the process, the fact of the arbitration proceedings will become public. The nature of the proceedings may also become public depending on the nature of the application (*see Question 7*).

**33. How are costs dealt with in ADR?**

Generally the parties agree in advance on the disposition of costs in ADR, failing which each side bears its own costs.

In the case of arbitration, in the absence of agreement, the arbitral tribunal must enforce the costs rules applicable to the arbitration (for example, the International Chamber of Commerce (ICC) and the International Centre for Dispute Resolution (ICDR) of the American Arbitration Association (AAA)).

**34. What are the main bodies that offer ADR services in your jurisdiction?**

There are a number of Canadian arbitration bodies that handle large commercial arbitrations. However, parties also commonly use the processes of international institutional arbitration bodies, such as the:

- ICC.
- ICDR.
- International Institute for Conflict Prevention and Resolution (CPR).
- London Court of International Arbitration (LCIA).

Many prominent Canadian lawyers are on the arbitration panels for these and other similar bodies. Within Canada, some of the better-known organisations are the:

- Canadian Commercial Arbitration Centre (Centre Canadien d'Arbitrage Commercial) (CCAC) (*llatreille@ccac-adr.org*).
- British Columbia International Commercial Arbitration Centre (BCICAC) (*cases@bcicac.com*).
- ADR Institute of Canada, Inc. (see *www.adrcanada.ca* for contact information of local affiliates).
- ADR Chambers (*adr@adrchambers.com*).
- Canadian Arbitration, Conciliation and Amicable Composition Centre Inc.

## PROPOSALS FOR REFORM

**35. Are there any proposals for dispute resolution reform? If yes, when are they likely to come into force?**

Three provinces (Ontario, Alberta and British Columbia) have recently undergone reforms of their civil justice systems, and a fourth, Québec, has proposed an overhaul of its rules of civil procedure.

### Ontario

In Ontario, the new rules came into force on 1 January 2010 with the primary objective of increasing access to justice. Moreover, the reforms also resulted in new rules that require the extent of pre-trial discovery to be proportional to the amount in issue and the complexity of the case.

Key elements of the reform included:

- A more achievable standard and reduced costs disincentive for summary judgment applications (*see Question 10*).
- The express adoption of the guiding principle of proportionality.
- Increased monetary jurisdiction for:
  - small claims (up to Can$25,000); and
  - simplified procedure actions (up to Can$100,000).
- Decreased scope of documentary production.
- Decreased length of oral discovery (the general rule is seven hours in total per party).

### Alberta

In Alberta, the new rules came into force on 1 November 2010, to address the perceptions that the court system was difficult to use, time consuming and cost prohibitive, and that the rules of court were out of date and not consistently applied or enforced.

Key elements of the reform included:

- Mandatory alternative dispute resolution before a trial date can be set (*see Question 8*).
- The establishment of two separate litigation management systems:
  - for simple cases, parties are required to complete the steps of litigation (including ADR) within a reasonable time considering the nature of the action;
  - for complex cases, parties must create a formal complex case litigation plan which contains a timeline and agreed-upon protocol for the organisation and production of records.
- Examination for discovery of adverse parties' experts in some circumstances.
- Service of all documents, other than commencement documents, can now be effected by electronic means.

### British Columbia

In British Columbia, the new rules came into force on 1 July 2010 with the objective of securing the just, speedy and inexpensive determination of proceedings on their merits, in ways that are

proportionate to the amount in dispute, the importance of the issues and the complexity of the proceedings.

Key elements of the reform included:

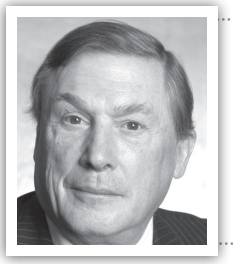
- Establishment of trial management conferences for all actions to be conducted, if practicable, by the judge who will preside at trial.
- Strict limits on recoverable costs in fast-track litigation cases (generally actions for Can$100,000 or less).
- The ability for a judge to order the use of a joint expert witness.
- Narrowed scope of documentary production.
- Decreased length of oral discovery (capped at seven hours per party).

### Québec

In September 2011 Québec's Minister of Justice released a draft bill which would enact a new Code of Civil Procedure to completely replace the existing code (public consultations are currently underway). The reforms are intended to achieve a more accessible, simpler, less costly and more user-friendly civil justice system. Key elements include:

- A requirement for parties to consider negotiation, mediation or arbitration before resorting to the court system.
- New limits on pre-trial examinations (five hours or two hours, depending on the claim).
- Significant changes to the rules relating to expert evidence, including a limit of one expert opinion per subject and the promotion of the use of common experts.
- The imposition of a "case protocol" and monetary sanctions for failure to comply with this protocol.
- The encouragement of technological solutions (for example, examinations at a distance).

## CONTRIBUTOR DETAILS



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**Recent transactions**

- *Canadian Wheat Board v Canada*. Retained to fight legislation to end the Board's monopoly in *Canadian Wheat Board and barley* (2011-2012).
- Counsel for Bayer AG in the successful defence of a Can$40 million claim by the vendor of a multi-billion dollar petrochemical business (2011).
- Livent Inc., Hollinger Inc. Retained by auditors regarding class action litigation and regulatory investigations in Canada and the U.S. (2011-2012).
- Member of arbitration tribunal constituted under ICDR rules in dispute between Swiss-based commodities broker and US-based aluminium smelter (2009).
- Chair of the ICC arbitration arising out of frauds at an Austrian bank subject to New York law, seated in New York City (2011).

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**Areas of practice.** Class actions; commercial; commercial arbitration; energy; professional liability; securities. 2012 Chambers Global ranked (Dispute Resolution: Arbitration; Dispute Resolution: Ontario).

**Recent transactions**

- *Coulson v Citigroup Global Markets Inc., 2012 ONCA 108*. Counsel to auditors in upholding an earlier dismissal of a proposed US$100 million securities class action against auditors and others.
- Arbitration counsel to mining company in proposed US$50 million ICC arbitration.
- Arbitration counsel to large real estate client involved in domestic Can$30 million arbitration with energy utility (2011-2012).
- *Mason v Augen Capital Corp., 2010 ONSC 5319.* Represented shareholders in dissident shareholder proxy contest.
- *Polar Star Mining Corporation v Willock, 2009 CanLII 11436.* Represented corporation in dissident shareholder action.

# ADR.

# We continue to reinvent the name.


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