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1. Would your jurisdiction be described as a common law or civil code jurisdiction?

All Canadian provinces are common law jurisdictions with the exception of the province of Quebec. In Canada, French civil law is only applied to property and civil rights in Quebec, in accordance with the *Civil Code of Quebec* (C.c.Q).

Examples will be provided from Ontario, British Columbia and Quebec, three of the provinces in which litigation is most frequently brought.

Provincial governments have broad powers to make laws with respect to "property and civil rights," which includes contract law, labour relations, occupational health and safety, consumer protection, real estate transactions, land use, municipal law (municipalities derive their powers from Provincial statutes), securities law and regulation of professionals.

The Federal Government, on the other hand, makes laws with respect to matters that include immigration, trade, taxation and intellectual property.

2. What method of adjudication is used (adversarial, inquisitorial, other or hybrid)?

The adversarial method of adjudication is used.

3. What are the qualifications of the adjudicator (judge – elected, appointed; jury; other)?

Judges are appointed by the Commissioner for Federal Judicial Affairs Canada, who administers the appointment process on behalf of Canada's Federal Minister of Justice. The statutory qualifications for appointment are set out in the *Judges Act*, the *Federal Courts Act* and *Tax Court of Canada Act*. Eligible applicants must have 10 years at the bar of a province or territory, or a combination of 10 years at the bar and in the subsequent exercise of powers and duties of a judicial nature on a full-time basis in a position held pursuant to a law of Canada or of a province or territory. Appointments to a Provincial Superior Court are made only from among members of the bar of that province, as required by the *Constitution Act, 1867*. Independent judicial advisory committees are responsible for assessing the qualifications for appointment of

the lawyers who apply. A recommendation for appointment is made to the Federal Cabinet by the Federal Minister of Justice with respect to the appointment of *puisne* judges, and by the Prime Minister with respect to the appointment of Chief Justices and Associate Chief Justices.

Each province has its own legislation for juries. In Ontario, the *Juries Act* sets out the process to select juries. Names of potential jurors are taken from the most recent enumeration (voters) lists that the province's Ministry of the Attorney General obtains from the Municipal Property Assessment Corporation. A juror can be anyone who (1) resides in Ontario; (2) is a Canadian Citizen; and (3) has attained at least eighteen years of age in the year prior to the year of jury selection. Among those who meet these criteria, some individuals are disqualified from serving as jurors on the basis of their profession or previous experience. Individuals who do not qualify to serve as juror include: most legal practitioners, every practicing medical practitioner, every person engaged in law enforcement, individuals involved with the action in question, individuals convicted of an offence that may be prosecuted by indictment, and individuals with a serious mental or physical disability.

In B.C., the *Jury Act* sets out the requirements for the selection of jurors in B.C. jury trials. The requirements for jurors in B.C. are similar to the requirements in Ontario, however doctors are not disqualified from jury duty in B.C.

In Quebec, to qualify as a juror pursuant to the Jurors Act, a person must (1) be a Canadian citizen; (2) be at least 18 years of age; and (3) be entered on the list of electors. Those who meet the criteria may be nonetheless disqualified if they are politicians, judges, coroners and officers of the court, including practising lawyers or notaries. Finally, peace officers, firemen, persons afflicted with a mental illness or deficiency, persons who do not speak French or English fluently (under certain circumstances), and persons charged with or convicted of a criminal act are also disqualified from being jurors.

4. Are there any procedures available for specialized courts (i.e. commercial court, employment, environmental)?

In Canada, each province's Superior Courts have inherent jurisdiction over matters, except where legislation explicitly states otherwise. With respect to procedure, matters in Superior Courts of Ontario are generally litigated in accordance with Ontario's *Rules of Civil Procedure*. Family Law matters, however, are litigated in accordance with Ontario's *Family Law Rules*, which entail special provisions for mandatory case management and to ensure the welfare of children. The same is true in B.C.: matters in B.C. Supreme Court are litigated in accordance with the Supreme Court Civil Rules, whereas family law matters are litigated in accordance with the Supreme Court Family Rules. In Quebec, litigation must be carried out according to the Code of Civil Procedure, which also contains special provisions for matters pertaining to persons and property, family law, and matters involving legal persons.

With respect to specialized courts, the Superior Court of Justice in Ontario maintains a "Commercial List" with jurisdiction over a range of commercial issues such as bankruptcy, creditors' rights, shareholder disputes, and company re-arrangements. In the Toronto Region, there is also an "Estates List" that hears certain proceedings involving issues of estate, trust and capacity law.

In Quebec, the Superior Court has specific chambers for family law, commercial law, class actions and criminal law.

Specialized Federal Courts (with both trial and appellate branches) have jurisdiction over specific areas including tax, intellectual property and admiralty.

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For smaller monetary claims such as $25,000 and under, there is generally a small claims court governed by separate Rules. In Quebec, claims of $15, 000 and under are litigated in Small-Claims Court in accordance to specific provisions in the Code of Civil Procedure.

5. Is arbitration an option and when? If so, what rules are typically used?

Arbitration is available where parties to a dispute have entered into an arbitration agreement, either in writing or otherwise. In Ontario, the *Arbitration Act, 1991*[1] applies to any arbitration involving a dispute between domestic parties, unless application of the act is excluded by law. The Ontario *International Commercial Arbitration Act*[2] applies to commercial disputes that involve a foreign party. Both Acts limit court intervention in arbitration proceedings. While the *International Commercial Arbitration Act* closely follows the UNCITRAL Model Law on International Commercial Arbitration and places strict limits on court intervention, the *Arbitration Act, 1991* is less strict and provides some scope for courts to intervene in the conduct of arbitrations.

Arbitrations are generally carried out according to the ADR Institute of Canada National Arbitration Rules. Parties are permitted to agree to vary or exclude these rules, except where the rules apply to matters such as application, arbitrator impartiality, powers to order payment and powers to fix costs. In Ontario, arbitrators are expected to assume Ontario law, and binding religion-based arbitrations are only valid when conducted exclusively in accordance with the law of Ontario or some other Canadian Jurisdiction.

In Quebec, arbitration is also available if parties have entered into an arbitration agreement.

6. Will the Courts enforce an arbitration agreement to preclude other forms of litigation?

Courts may enforce arbitration agreements governed by either the *International Commercial Arbitration Act* or the *Arbitration Act, 1991*. Courts will generally enforce arbitration agreements under either Act, subject to some narrow exceptions. In Quebec, an arbitration award cannot be put into forced execution until it has been homologated by the court. Once homologated, the award is executory as a judgment of the court.

According to Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration, to which Canada is a signatory, a court may also refuse to enforce an arbitration agreement where that agreement is found to be "null and void, inoperative or incapable of being performed."

7. For Court proceedings, is mediation mandatory, either before or after filing of a claim or complaint?

Generally speaking, Canadian Courts support alternative dispute mechanisms. For example, the Ontario *Rules of Civil Procedure* make pre-trial mediation mandatory for actions commenced in certain regions (currently Ottawa, Toronto and

[1] SO 1991, c 17.
[2] RSO 1990, c I 9.

Essex). On a party's motion, the court may grant an exemption from this requirement. When mediation does take place, parties are free to choose their own mediator. To encourage expedient resolution of disputes, mandatory mediation sessions must be held within 180 days of the filing of the first statement of defence. Apart from court mandated mediation, parties routinely take cases to voluntary mediation. Respected practitioners and retired judges frequently serve as mediators.

Mediation is not mandatory in the B.C. Supreme Court, however some Small Claims registries in B.C. have implemented a pilot program whereby claims are randomly selected to participate in mandatory mediation.

8. What is the process for pre-hearing fact discovery (if any)?

(a) Are there provisions for mandatory document disclosures?

Generally, each province mandates some form of documentary production. In Ontario, parties are required to disclose every document relevant to any matter in issue in an action that is or has been in the possession, control or power of a party, subject to privilege. "Document" is broadly defined to include sound recordings, videotapes and electronic files. Following the exchange of pleadings, parties are required to exchange affidavits of documents, which include: (1) documents in the possession of the party that the party has no objection to disclosing; (2) documents in the party's possession that the party objects to disclosing (i.e., privileged documents); and (3) documents no longer in the party's possession. Thereafter, disclosure remains a continuing obligation of all parties.

B.C.'s document production rules are similar to the Ontario rules. Parties in B.C. are required to disclose any document that could be used at trial to prove or disprove a material fact (Supreme Court Civil Rule 7-1).

In Quebec, a party who intends to use at trial an exhibit in his possession, whether the exhibit be real evidence or a document, must communicate it to any other party to the proceedings. An exhibit may include the whole or an abstract of testimony, an expert's report or any other document referred to in certain sections of the Code of Civil Procedure, such as a witness' written statement or deposition.

(b) Is there provision for oral examinations of the parties or others?

Typically, only the parties to a proceeding can be orally examined for discovery, except where the court permits otherwise. For example, in Ontario, non-parties may be examined when these individuals have unique access to some piece of information and where it would be unfair to proceed to trial without this information. In general, parties are entitled to select who is examined on behalf of those parties who are adverse in interest. The court retains discretion to vary this selection. Examined parties have a duty to inform themselves about the facts prior to examination. Where questions cannot be answered during examination, undertakings to make further inquiries and respond in writing are contemplated. Similar rules apply to Quebec.

In B.C., only parties to the proceeding can be examined for discovery. However, there is a rule permitting pre-trial examination of witnesses when a court so orders (Supreme Court Civil Rule 7-2 and 7-5).

(c) Are there limits on the length of oral examinations?

In some jurisdictions, limits are placed on oral discovery. In Ontario, each party has a total of seven hours to examine another party. This time limit can be extended by consent of the parties or with leave of the court. The same seven hour limit applies in B.C., and can only be extended by consent of the party being examined or by a court order (Supreme Court Civil Rule 7-2(2). In Quebec, there is no formal limit placed on oral discovery. Moreover, no examination on discovery is permitted if the amount claimed or the value of the property claimed is less than $25,000.

(d) Are witness statements or summaries to be provided before the hearing?

Depending on the type of proceeding, witness statements may be provided prior to a hearing in the form of sworn, commissioned affidavits.

9. What is the process for pre-hearing expert disclosure (if any)?

(a) Are expert reports or written summaries required to be exchanged?

Generally, a party calling an expert must serve the expert's report in advance of trial. For example, in Ontario, an expert report must be served 90 days before a mandatory pre-trial judicial conference is held. A responding expert report (if one is provided) must be served 60 days before the pre-trial conference. In B.C., expert reports must be served 84 days before trial, and responding expert reports must be served 42 days before trial (Supreme Court Civil Rule 11-6(3) and 11-6(4)).

Similar rules apply to Quebec. Except with leave of the court, no expert witness may be heard unless his written report has been communicated and filed in the record in accordance with the procedure and the time limit for communicating exhibits agreed upon between the parties in the proceeding timetable, or as determined by the court.

(b) Are the parties entitled to conduct a pre-hearing oral examination of opposing experts?

A pre-hearing oral examination of opposing experts is generally not permitted although some jurisdictions permit it in certain circumstances.

(c) Are there provisions requiring experts to meet and narrow issues before the hearing?

While the practice may vary depending on the jurisdiction, experts may be required to meet prior to trial to narrow the issues.

10. Are there other notable discovery rules?

Documentary discovery pertaining to e-documents must also comply with the Sedona Canada Principles Addressing Electronic Discovery, which include the requirement that the steps taken in the discovery process are proportionate to: (1) the nature and scope of the litigation; (2) the relevance of the available electronic information; (3) the importance of the

information to the court's adjudication in a given case; and (4) the costs, burden and delay imposed on parties in obtaining the documents.

Some jurisdictions require parties to agree to a discovery plan prior to carrying out any physical, oral or documentary discovery. The plan must include information concerning the intended scope of discovery as well as the timing, manner and costs of production. Parties have a duty to ensure that the discovery plan is up to date. A court may refuse to grant relief or to award costs where parties have not agreed to a discovery plan.

11. Is there a prehearing conference (for trial management, settlement or other purposes)? Who conducts it? How long before the hearing?

Typically, a pre-trial conference is required in all litigation. The primary purpose of the pre-trial conference is to encourage and achieve settlement, but the conference may also be used as an opportunity to narrow issues and ensure that litigation proceeds expediently. Generally, lawyers and their clients must attend in person. The pre-trial conference is presided over by a judge but typically, if a judge presides, then the judge cannot preside over any hearing that follows. Similar rules apply to Quebec.

12. Can a prehearing motion for judgment be brought? If so, what is the threshold test for judgment?

Generally, each province allows for parties to bring a motion for summary judgment or a motion to strike the pleadings in advance of trial.

At the hearing of a motion for summary judgment, the court must determine whether there is a genuine factual issue requiring trial.

A motion to strike pleadings may be brought where the pleaded facts, if assumed to be true, still do not disclose a valid legal claim.

13. Is there a process for obtaining pre-hearing rulings with respect to evidence admissibility including admissibility of expert testimony? What is the process and when does it occur?

The usual process for determining the admissibility of evidence is through a voir dire that occurs during a trial. The voir dire must be requested by one of the parties and permitted by the presiding judge. On a voir dire, the court must determine whether challenged evidence: (1) is relevant; (2) is subject to any exclusionary rules; and (3) has probative value that outweighs its prejudicial effect. The court retains discretion to exclude expert evidence entirely where the court determines that the expert is not properly qualified or lacks independence.

14. What is the standard for admissibility of expert evidence?

Generally, a set of preconditions must be met. The preconditions are: (1) the proposed opinion must relate to a subject matter that is properly the subject of expert opinion evidence; (2) the witness must be qualified to give the opinion; (3) the

proposed opinion must not run afoul of any exclusionary rule apart from the expert opinion rule; and (4) the proposed opinion must be logically relevant to a material issue.

Second, the judge must perform a "gatekeeper function" to determine whether the benefits of admitting evidence outweigh the costs. This analysis focuses on proportionality and criteria such as the *Daubert* standard may be applied to consider the reliability of the expert evidence in question.

15. Does the Court have the power to appoint its own experts? Under what circumstances and what type?

This may vary depending on the jurisdiction but by way of example, and although very rare, the Ontario Court may appoint experts, either on a motion from a party or on a judge's own initiative. Courts in B.C. may also appoint experts (Supreme Court Civil Rule 11-5). In Quebec, the Court also has the capacity to appoint experts under given circumstances. For instance, if the court is of the opinion that the ends of justice would, as a result of the appointment, be better attained.

16. Does your jurisdiction protect privilege? If so, what privileges are protected from disclosure (attorney client / legal advice; documents prepared in anticipation of litigation; settlement discussions; other)?

Canadian Courts strictly protect solicitor-client and police informant privilege. Governmental institutions and actors may also seek protection from the disclosure requirements via Crown privilege, public interest immunity, Parliamentary privilege and legislative privilege. Generally, during litigation proceedings, litigation privilege applies to documents whose dominant purpose is to prepare for litigation. This form of privilege expires when the proceedings that give rise to the privilege are terminated. Settlement privilege also applies to communications made for the purposes of settling an ongoing proceeding. The test to determine whether all other forms of confidential communications (e.g., doctor-patient communications) will be protected as privileged is the Wigmore test. To satisfy the Wigmore test, a communication: (1) must originate in confidence; (2) must arise in a relationship to which confidence is essential; (3) must be based on a relation that should be "sedulously fostered" in the name of the public good; and (4) must be such that the interests served by protecting the communications from disclosure outweigh the interests served by disclosing the communication.

17. If privilege is not protected, are there other protections from disclosure (i.e. privacy) that could prevent disclosure of otherwise privileged information, and what is the basis for those protections?

In Canada, numerous pieces of legislation protect privacy by allowing individuals to register complaints of interference with privacy and to trigger investigations where appropriate. The Federal rules for privacy protection in the public sector are set out in the *Privacy Act*, while the Federal rules that apply to the private sector are set out in the *Personal Information Protection and Electronic Documents Act*. The Ontario *Personal Health Information Protection Act* and *Quality of Care Information Protection Act* also protect the confidentiality of information that specifically pertains to the giving and receiving of health care. Limits on the disclosure of public information that is subject to freedom of information requests are set out in the Ontario *Freedom of Information and Protection of Privacy Act*. The B.C. *Freedom*

of Information and Protection of Privacy Act places similar limits on the disclosure of public information. The common law tort of intrusion upon seclusion also protects individuals from unwanted invasions of reasonably expected privacy.

In Quebec, limits on the disclosure of personal information are set out in the Act Respecting the Protection of Personal Information in the Private Sector. This Act has been deemed substantially similar to the federal law. Moreover, the "Commission d'accès à l'information", may, on written request, grant a person authorization to receive communication of personal information for study, research or statistical purposes, without the consent of the persons concerned, if it is of the opinion that (1) the intended use is not frivolous and the ends contemplated cannot be achieved unless the information is communicated in a form allowing the persons to be identified; (2) the information will be used in a manner that will ensure its confidentiality. Such authorization is granted for the period and on the conditions fixed by the Commission. It may be revoked before the expiry of the period for which it is granted if the Commission has reasons to believe that the person authorized does not respect the confidentiality of the information communicated to him or does not respect the other conditions.

Typically, privacy law is superseded by litigation requirements unless privilege applies.

18. Who determines privilege disputes, or disputes with respect to other forms of protection described in 17 above?

Superior Courts, as courts of inherent jurisdiction, generally determine privilege disputes as well as disputes pertaining to the *Personal Health Information Protection Act*, the *Quality of Care Information Protection Act*, the *Freedom of Information and Protection of Privacy Act* and the common law tort of intrusion upon seclusion. Ontario's Information and Privacy Commissioner may also receive complaints from the public in relation to any of these statutes. The Information and Privacy Commissioner's rulings and public policy statements based on such complaints serve to influence both courts and the Provincial Legislature. B.C.'s Information and Privacy Commissioner has a similar mandate.

The Federal courts determine disputes with respect to the *Privacy Act* and the *Personal Information Protection and Electronic Documents Act*. The Office of the Privacy Commissioner of Canada may also address complaints arising from breaches of the *Privacy Act* or the *Personal Information Protection and Electronic Documents Act*, providing persuasive decisions and policy documents in response. Canada's Privacy Commissioner may also bring cases arising from privacy issues to Federal Court.

19. Briefly describe the trial process.

Each has its own trial process but Ontario is typical, described below.

(a) Are there opening submissions, in what form and of what length?

In Ontario, opening submissions are intended to narrowly focus on describing the evidence to be presented, and are not intended to provide conclusions, arguments or other direct statements that would direct the trier of fact on how to think about the evidence. The Plaintiff usually makes the first opening statement. The Defendant's opening statement is usually not made until the close of the Plaintiff's evidence. Judges have discretion to vary this order. There is no explicit time limit on the length of statements, but judges will control opening statements to ensure that they do not stray from their

intended narrow purpose – if they do, then this could result in a mistrial and an adverse finding with respect to costs. Opening statements are common in Quebec, although not mandatory.

(b) What is the order of presentation of witnesses?

The specific order of witnesses is determined on a case-by-case basis. In general, the Plaintiff's witnesses and case will be presented before the Defendant's witnesses and case are heard in response. The court has discretion to vary this order and to recall witnesses for further examination where necessary to secure a fair and just determination. Where an action pertains to a personal injury, the Plaintiff him/herself will usually be called as a witness before the Plaintiff's medical experts are called.

(c) Who conducts examination and in what order?

The party who calls a witness begins by carrying out the examination in chief. Any party who is adverse in interest to the party calling the witness may then carry out a cross-examination. Following cross-examination, the witness may then be re-examined by any party who is not entitled to cross-examine.

(d) What is the process for closing submissions?

During closing submissions, each party is given an opportunity to summarize their positions while the court is permitted to ask questions to test the strength of these positions. Parties are generally given broad latitude with respect to the scope of closing submissions. However, a judge may exercise discretion to impose restrictions on these submissions where a party violates fundamental principles of justice (e.g., inviting the jury to consider irrelevant matters, denigrating opposing counsel, making inflammatory statements). In criminal matters, closing statements also cannot comment on the failure of the accused, or the accused's spouse, to testify.

20. Please identify any other notable trial procedures.

Most civil actions in Canada are tried by a judge alone, who sits without a jury. Where a jury is appointed, it will consist of six individuals. Only five jurors need to agree on any given question when rendering a verdict.

In Quebec, there is no jury in civil actions.

21. Who bears the burden of proof of liability? Causation? Damages? What is the standard of proof for each?

In general, Plaintiffs must establish liability, causation and damages on the balance of probabilities standard. The Canadian Supreme Court confirmed that there is one civil standard of proof, which requires that a fact must be proven to be more probable than not. In exceptional cases, the onus of proof will be reversed upon the Defendant with respect to causation. In Ontario, such exceptional cases include injuries inflicted while trespassing onto a person or their property, and cases where drivers of motor vehicles on highways injure individuals who are not involved in an accident and who are

not passengers. In Quebec, such exceptional cases include injuries inflicted by a "thing". According to article 1465 Civil Code of Quebec, the custodian of a thing is bound to make reparation for injury resulting from the autonomous act of the thing, unless he proves that he is not at fault.

22. What heads of damage are recoverable (compensatory, pre-judgment interest, punitive damages, other)?

General damages are recoverable and consist of both pecuniary and non-pecuniary heads of damage. Pecuniary damages compensate for lost future earnings and costs of future care, with adjustments made for the discount rate and gross up for income tax. Non-pecuniary damages compensate for pain, suffering and loss of enjoyment or life. The amount that is recoverable under the non-pecuniary head of damage was capped at $100,000 in 1979, and indexed to inflation. By the end of 2014, the indexed amount is approximately $360,000.

Special damages are also recoverable to compensate for readily calculable pecuniary losses incurred up to trial.

Punitive and aggravated damages are permitted and occasionally awarded in the civil tort area and, rarely, for breach of contract. Typically, much smaller amounts are awarded under these heads of damages than in the United States. Pre-judgment interest on damages for non-pecuniary loss in an action for personal injury is also recoverable. In Ontario, the rate is set at 5 percent per year. Where an injured Plaintiff contributed to housekeeping work, as the case may be, housekeeping damages are also recoverable.

In Quebec, the liable defendant will be held accountable for interest at the legal rate (currently 5%) on the amount of the final judgment. Interest will start to run generally as of the reception of a letter of demand, also known as a mise en demeure. Moreover, courts will routinely add to this an additional indemnity provided for by the Civil Code of Quebec. Such an indemnity is discretionary, however. In all, the effective interest rate (legal rate plus additional indemnity) is currently around 6 percent per year.

Statutory Damages may also be available. In Ontario, dependent family members may recover damages to compensate for funeral expenses, costs of travel and loss of guidance and companionship resulting from the tortious injury or death of a family member.

In contract-specific cases, expectation damages, consequential damages, liquidated damages and equitable restitutionary damages are also available.

23. If punitive damages are available, what is the threshold for recovery, and range of awards?

Punitive damages are awarded only in exceptional cases. To justify punitive damages, a Defendant's conduct must be malicious, oppressive and high-handed in a way that markedly departs from decent behaviour. Furthermore, awards of punitive damages must be: (1) rationally connected to the goals of retribution, deterrence and denunciation and (2) proportional with respect to the quantum. A proportional quantum must take into consideration the degree of harm caused, the degree of misconduct, the vulnerability of the Plaintiff, the advantage gained by the Defendant, and the need for deterrence in light of other criminal or civil penalties. Appellate courts will exercise a broad discretion to review trial level

awards in relation to these principles. Awards have ranged from $10,000 at the low end to $4.5 million as the highest awarded amount.

In Quebec, punitive damages are also rarely granted since they must be provided by a law or statute. According to 1621 of Civil Code of Quebec, the amounts must not exceed what "is sufficient to fulfil their preventive purpose". The amount of such damages is assessed in light of all the appropriate circumstances, including the gravity of the debtor's fault, the debtor's patrimonial situation, the extent of the reparation for which he is already liable to the creditor and, where applicable, the fact that the payment of the damages will be wholly or partly assumed by a third person, such as an insurer.

24. Are there time limits for bringing claims? Responding to claims? Please describe.

In Canada, each province sets its own limitation period as well as the time to respond. The limitation period in Canadian provinces is either 2 years or 6 years, except Quebec, which is 3 years. By way of example, in Ontario and in B.C., the basic limitation period for bringing claims is two years from the date when the claim is discovered. Some exceptions are made by the acts where potential claimants are minors, under disability or victims of sexual assault. The ultimate limitation period for bringing a claim is fifteen years after the act or omission giving rise to the claim occurred. Ontario courts strictly abide by these limitation periods and will not extend them through an exercise of discretion in special circumstances.

In Quebec, the limitation period, also known as extinctive prescription, is generally 3 years, except in defamation cases, where the limitation period is one year. The time starts to run as soon as the potential plaintiff has acquired knowledge of the cause of action.

Once a Statement of Claim is filed, the time limit for the Defendant to file a Statement of Defence is: (1) 20 days where the Defendant is served in Ontario; (2) 40 days where the Defendant is served elsewhere in Canada or anywhere in the United States; or (3) 60 days where the Defendant is served anywhere else. Each of these periods may be extended by ten days if the Defendant submits a Notice of Intent to Defend within the prescribed time period.

In B.C., a defendant has 21 days after being served with a Notice of Civil Claim to file a Response to Civil Claim if served anywhere in Canada; 35 days to respond to a Notice of Civil Claim if served in the United States; and 49 days to respond if served anywhere else.

25. What are the requirements to establish jurisdiction over a foreign defendant in your court? Can a foreign defendant request that the court decline jurisdiction on the basis that there is a more convenient forum?

Establishing jurisdiction in the court of a Canadian province is based on the test established in 2012 by the Supreme Court of Canada. That test requires that a real and substantial connection exist between the matter and the province's jurisdiction. The presumptive factors that allow a court to assume jurisdiction over a dispute are: (1) the Defendant is domiciled in the province; (2) the Defendant carries out business in the province; (3) the tort giving rise to the claim was committed in the province; and (4) the contract connected to the dispute was made in the province. Other connecting factors may also be considered by the court to determine whether these have a presumptive effect.

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If a real and substantial connection is established by a Plaintiff, the Defendant can respond by proving that there is a more convenient forum. To do this, the Defendant must prove, on balance of probabilities, that the matter has a real and substantial connection with the other forum and must show that the forum proposed by the Plaintiff is an inconvenient forum. To determine whether the domestic forum is inconvenient, a court must generally consider whether it is the natural forum for addressing the dispute and whether injustice to the Plaintiff or Defendant will result from preventing the action from proceeding in either forum. Some factors considered in determining whether a forum is inconvenient are: (1) the comparative convenience/expense of litigating in the forum; (2) the law to be applied; (3) the need to avoid multiple proceedings and conflicting decisions; (4) the possibility of enforcement; (5) the fair and efficient working of the forum's legal system; and (6) the likely outcome of proceedings in the forum.

The Civil Code of Quebec provides that Quebec authorities have jurisdiction when the Defendant is domiciled in Quebec, unless a provision states otherwise. Under 3148 Civil Code of Quebec, Quebec courts can assume jurisdiction where: (1) the defendant has his domicile or his residence in Quebec; (2) the defendant is a legal person, is not domiciled in Quebec but has an establishment in Quebec, and the dispute relates to its activities in Quebec; (3) a fault was committed in Quebec, injury was suffered in Quebec, an injurious act occurred in Quebec or one of the obligations arising from a contract was to be performed in Quebec; (4) the parties have by agreement submitted to them the present or future disputes between themselves arising out of a specific legal relationship; (5) the defendant has submitted to their jurisdiction . However, Quebec authorities have no jurisdiction where the parties have chosen by agreement to submit the present or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Quebec authorities. The Defendant may exceptionally request that the Court decline jurisdiction, if it is clear that foreign authorities are the much preferable forum to adjudicate the matter . The following factors , none of which is individually determinative, will be considered: (1) the parties' residence, that of witnesses and experts; (2) the location of the material evidence; (3) the place where the contract was negotiated and executed; (4) the existence of proceedings pending between the parties in another jurisdiction; (5) the location of the Defendant's assets; (6) the applicable law; (7) advantages conferred upon a Plaintiff by its choice of forum, if any; (8) the interest of justice; (9) the interest of the parties; (10) the need to have the judgment recognized in another jurisdiction.

26. Are there procedures for a defendant to bring other potentially responsible parties into the proceeding? Briefly describe.

Each province has its own rules but they typically allow Defendants to bring potentially responsible third parties into claims. The third party may then file a separate defence or, otherwise, be bound by the determination made in the main action between the Plaintiff and the Defendant. Third parties may make claims against fourth parties, who may do the same against fifth parties and so forth.

Generally, each Defendant may make crossclaims against other Defendants involved in the action. Defendants who are subject to a crossclaim may then respond by providing a separate defence against the crossclaim.

A Defendant is generally allowed to make a counterclaim against the Plaintiff based on any right or claim. The result of a counterclaim is that both the original claim and the counterclaim between the same parties will be tried together.

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27. Are legal costs recoverable by either party? If so, under what circumstances, and how is the amount calculated? (i.e. is it a loser pays costs system).

While each province sets its own rules, many jurisdictions allow the successful party to recover their costs. For example, in Ontario, the determination of costs payment orders are at the discretion of the courts. The exercise of this discretion should generally consider the purposes of awards of costs as recognized by common law. These are: (1) indemnification for the person who wins; (2) encouragement of settlement, (3) deterrence of unnecessary procedure and frivolous proceedings, and (4) promoting access to justice. The usual practice is to make an award of costs in favour of the successful or deserving litigant. By default, costs are awarded on a partial indemnity basis, in which the awarded party receives payment of approximately 50 percent of their legal fees. In exceptional cases, costs are awarded on a substantial indemnity basis, in which the awarded party receives payment of 75% or higher of their legal fees.

In Quebec, the general rule is that the losing party pays for costs, including costs of expertise. However, the court retains discretion to order otherwise. In family matters, legal costs are rarely awarded. In certain cases, the Code of Civil Procedure establishes which party will be responsible for costs. For instance, the party who unilaterally discontinues an action is liable for the costs of that action. Lawyer fees, also known as extrajudiciary fees, are rarely recoverable. The only exception to the foregoing is in the event the losing party has abused its right to pursue a civil claim against the winning party, in which case the winning party may also recover the extrajudiciary fees.

28. Are contingency fees allowed?

The issue of contingency fees is governed by each province. In Ontario and in B.C., lawyers are allowed to enter into contingency fee agreements with their clients. Contingency fees are permitted in all proceedings except family law or criminal law proceedings. Where such agreements are entered into, they must be in writing. Ontario law permits the Provincial Government to establish a maximum percentage of recovery that may be taken by a lawyer as a contingency fee. At present, no regulations exist to establish such maximum percentages. In practice, however, a lawyer is not entitled to receive more than a Plaintiff recovers as payment in a contingency fee agreement.

In B.C., there are two circumstances in which contingency fees are capped. In personal injury claims that result from motor vehicle accidents, contingency fees cannot be greater than one third of the amount recovered. Contingency fee agreements for other types of personal injury claims not involving motor vehicle accidents are limited to 40% of the amount recovered. In Quebec, contingency fees are allowed as long as they are reasonable. Reasonableness varies according to, among others, the lawyer's experience and the degree of difficulty of the case. By way of example, a contingency-fee agreement of 20% of the recovered amount has been determined to be non-abusive. However, there cannot be such an agreement if the object of the litigation relates to support in a family-law case since such an agreement would be contrary to public order.

29. Is third party funding of claims permitted? Under what circumstances?

At least in Ontario, the Ontario Superior Court has found that third-party funding agreements are permitted under certain conditions. Such agreements must be promptly disclosed to courts and must receive court approval. In the context of a

class action, this requires courts to be satisfied that: (1) the agreement is fair and reasonable to the class; (2) the agreement is necessary to provide access to justice; and (3) the agreement does not impair the lawyer's judgment or diminish the representative plaintiff's rights to instruct and control the litigation. The third-party funder may be required to pay security for the Defendant's costs into the court.

The B.C. Supreme Court recently upheld a third party funding agreement in *Stanway v. Wyeth Canada In.,* 2014 BCSC 931. The three Ontario requirements also apply in B.C.

30. Are class or multi-party actions allowed? Under what circumstances? For what types of claims?

Nine provinces have enacted class action legislation and the Supreme Court of Canada has held that class actions are available even in provinces that have not enacted class action legislation. Class proceedings generally follow the same procedure as regular actions with the proviso that the Plaintiffs must be certified as a "class" before the action can proceed to the discovery and trial stage.

The certification of a class begins with a motion for certification made by a representative Plaintiff. Canadian courts in the common law provinces generally apply a five-branch test for certification. First, the court determines whether the pleadings disclose a cause of action. Second, the court determines whether the pleadings establish an identifiable class of two or more persons. Third, the court determines whether there is a sufficiently shared common issue among the class. In determining whether an issue is sufficiently shared, the court considers whether the class could be more narrowly defined without arbitrarily excluding some who share the common issue. Fourth, the court considers whether proceeding via a class action represents a preferable procedure. In making this determination, the court considers three policy objectives, these are: (1) judicial economy; (2) access to justice; and (3) the need for deterrence/behavior modification. Fifth, the court determines whether there is a representative Plaintiff who fairly and adequately represents the class, produces a workable plan for proceeding and has no adverse interests on the common issue to other class members.

In Quebec, a court will authorize the bringing of a class action and ascribes the status of representative to the member it designates if of opinion that (a) the recourses of the members raise identical, similar or related questions of law or fact; (b) the facts alleged seem to justify the conclusions sought; (c) the composition of the group makes the application of article 59 or 67 difficult or impracticable (i.e. a single action instituted under a mandate or power of attorney, as contemplated in article 59 C.C.P. or a group of persons exercising a joint action under Article 67 C.C.P.); and (d) the member to whom the court intends to ascribe the status of representative is in a position to represent the members adequately. Amongst the Canadian provinces, it is believed that Quebec offers the lowest threshold to certification with the fewest procedural rights for defendants. The main reason is that the judge needs only to consider if the facts alleged in the Motion "seem to justify the conclusions sought". Furthermore, there is no right of appeal for Defendants on a judgment authorizing the exercise of a class action.

31. Can claims be commenced by a consumers association or other representative organization? Under what circumstances?

A consumer association or other representative organization may commence claims where these claims directly pertain to the organization's business (e.g., litigation with respect to a contract between the organization and some other party). However, such organizations are not usually entitled to commence claims on behalf of individual litigants where those

individual litigants are identifiable. In such cases, individual litigants are expected to bring the claim for which they have standing before the court. Where appropriate individual litigants bring claims before a court, consumer organizations and other representative organizations can participate in the proceedings as interveners. Organizations can intervene either as added parties to be affected by the judgment or as friends of the court, whose role is limited to assisting with argument. To intervene in a matter, an organization must show: (1) sufficient direct interest; (2) the potential for useful contribution; (3) whether their involvement would prejudice or delay proceedings; (4) whether such prejudice or delay is counterbalanced by useful contribution; and (5) whether certain terms and conditions may be imposed to ensure useful contribution while minimizing prejudice and delay. In Quebec, in order to intervene in a given litigation, an organization would have to demonstrate a real and direct interest based on a legal relationship either with one of the parties, or with regard to the main object of the litigation. Moreover, intervention may be allowed where the rights of the proposed intervener could be affected by the result of the litigation. Where the litigation interests the general public, such as matters pertaining to human rights, the rules on intervention are somewhat relaxed to favor intervention. If a party intends to intervene, it must notify a declaration to all parties involved who will then have 10 days to express their opposition in writing.

32. On average, how long does it take to get to trial/final hearing, and what factors can affect that?

The time required to get to a trial/final hearing is highly variable and depends upon multiple factors. The factors that affect how long it takes to get to trial include: the complexity of issues to be tried, how a Defendant responds to a Plaintiff's claim, the volume of evidence to be examined, the quantity and nature of expert evidence involved, the accessibility of witnesses, the type of claim (i.e., small claim, family, commercial, etc), and the number of parties involved.

33. Is an appeal process available (distinguish between final and interlocutory/procedural orders as needed)? Who hears the appeal? How are they appointed? What are their qualifications?

Generally, final orders of the Superior Court can be appealed as of right. Appeal routes vary by province but generally they proceed to either the Court of Appeal or to the Divisional Court, depending on which court has jurisdiction over the appeal. The Court of Appeal's decisions may be further appealed, with leave, to the Supreme Court of Canada.

Matters before both the Divisional Court and Court of Appeal are usually heard by a panel of three judges. The Supreme Court of Canada consists of nine judges. All nine judges of the Supreme Court usually sit for appeals, but a panel of five is sufficient to constitute a quorum. Judges of the Divisional Court are appointed by the Federal Government through the same process as judges of the Ontario Superior Court (i.e., the Divisional Court is considered the appellate branch of the Superior Court). Judges of the Court of Appeal undergo additional vetting by the Federal Minister of Justice. Judges of the Supreme Court undergo further additional vetting by the Prime Minister and Canada's Federal Parliament. In Quebec, the process is very similar. However, there is no equivalent to the Divisional Court. Hence, judgments are appealable to the Court of Appeal.

34. Are hearing rooms available for electronic trials or appeals (i.e. where documents and transcripts are presented on computer monitors; witnesses can testify by video conference)?

CANADA

Some courtrooms are equipped with facilities for a telephone or video conference. Where this is the case, some steps in a proceeding may be carried out by telephone or video conference.

35. What is the practice regarding the use of graphics, computer animation, power point and the like, in trials? In appeals?

In most courts, some form of demonstrative evidence is permitted subject to the normal rules of proof. Generally, appeals rely only on a written record.

36. Will the lawyer at trial be the same as the one responsible for pre-trial procedures? Is there a solicitor / barrister distinction?

It is permissible and typical, but not necessary, for the lawyer at trial to also be responsible for pre-trial procedures.

Licensing requires completion of both a barrister and solicitor exam, as all practicing lawyers are licensed to serve in both roles. The concept of a "trial lawyer" as distinct from the litigation lawyer in carriage of a matter is not common in Canada.

37. What are the contributory negligence laws in your jurisdiction? Is there a comparative fault assessment, joint and several or proportionate liability among tortfeasors? Does a plaintiff's negligence reduce or eliminate liability of defendants named in the litigation?

All Canadian common law jurisdictions allow for contributory negligence on the part of the Plaintiff. Though joint and several liability applies at common law to negligence in Ontario, the *Negligence Act* allows any tortfeasor to recover contribution or indemnity from other tortfeasors, either in the same action or through a separate action. The *Negligence Act* requires courts to apportion liability between tortfeasors according to the degree of fault or negligence found against the parties. The same is true in B.C.

Similarly, in Quebec, the Civil Code of Quebec provides for the situation in which more than one party is negligent and has caused an injury. In such cases, liability is apportioned between all parties at fault, in proportion to the seriousness of the fault of each one. In all cases, defendants are condemned on a joint and solidary basis (Article 1478 C.c.Q.).

38. Is service of a complaint issued outside your country permitted in your country by "informal" means, or must the Hague Convention be followed?

Though Canada is a signatory to the Hague convention, informal means may also be used to serve complaints issued from outside of Canada. While the time frame for formal service via the Hague Convention is approximately 1.5 months, informal service may be completed within a shorter time frame.

This document is a resource tool only. The information was compiled in 2014.
Please verify all current laws and regulations before proceeding as items could have changed since the time of publication.

CANADA

39. Do your laws prohibit export of relevant documents from your jurisdiction for the purposes of litigation outside your jurisdiction? (Consider privacy rules)

The federal *Personal Information Protection and Electronic Documents Act* applies to any private entity transferring commercial information outside of the province in which it was collected. The *Privacy Act* applies to any public entity transferring information on the basis of a warrant. Each act sets out privacy protections that apply to the export of relevant documents without prohibiting such export.

40. Please point out any litigation Best Practices employed by Courts in your jurisdiction but not yet referenced in the survey.

In Canada, e-discovery guidelines that apply to the discovery of electric documents follow the Sedona Canada Principles, as based upon The Sedona Conference in the United States. These principles set out that electronically stored information is discoverable, that steps must be taken to ensure that discovery is proportionate and that parties should make early agreements with respect to the electronic format in which e-documents are to be produced. Ontario's E-Discovery Implementation Committee has also created and issued several resources to assist parties in implementing the Sedona Canada Principles.

In some jurisdictions, including Ontario and B.C., parties are encouraged to settle through unique rules that apportion any eventual costs payments on the basis of earlier offers of settlement made between parties. In Ontario, written offers of settlement are exchanged between parties and disclosed to the court after a jury verdict or trial judgment. For Plaintiffs who make offers to settle and recover at least the offered settlement amount at trial, the Rules provide for a recovery of costs on partial indemnity basis up to the date of the offer and on a substantial indemnity basis thereafter. For Defendants who make offers to settle and suffer judgment at trial for an amount that is as favourable or less favourable to the Plaintiff, the Rules provide for a recovery of costs by the plaintiff on partial indemnity basis up to the date of the offer, but by the defendant on a partial indemnity basis thereafter.

41. Are there any significant areas in which you believe the playing field between plaintiff and defendant is not level that you think need to be addressed?

No.

42. Are there legislative efforts under way that address any of the litigation practices in your country?

The Law Commission of Ontario has been asked by the Ontario government (Ministry of the Attorney General) to undertake a review of the Ontario Class Proceedings Act. Recommendations coming out of that review could result in legislative change in Ontario, and possibly in other Canadian provinces.

In Quebec, a new Code of Civil Procedure is expected to come into force on January 1, 2016. The new Code will, among other things, place greater importance onto parties to consider private modes of dispute prevention and resolution before referring their dispute to the courts. The Code will also enhance the obligation of the parties to co-operate and to keep

each other informed.