

8. OTHER LEGAL CONSIDERATIONS

8.1 Contractual Considerations

In Canada, a contract, either written or oral, becomes, in effect, the "law" of a transaction. It governs the obligations of the parties, the manner in which such obligations are to be performed, and usually also the remedies available to a party where a breach of contract occurs. The role of the lawyer in Canada is therefore greatly expanded from that in some other jurisdictions. Typically, the Canadian lawyer will become involved in the negotiation process and provide legal and business advice where appropriate. The lawyer will also ensure that the contract accurately and specifically delineates the terms of the relationship between the parties with clarity and precision.

Generally speaking, Canadian courts will enforce written agreements entered into between the parties. Careful craftsmanship and thorough documentation are accordingly of the utmost importance. It must be borne in mind that Canadian courts also have an equitable jurisdiction to address situations where the strict application of the common law would produce an unjust or unfair result. The presence or absence of good faith on the part of a party can therefore significantly influence the outcome of litigation.

The most common remedy for a breach of contract, or a threatened breach of contract, is damages. The measure of damages is, in theory, the amount of money required to put the injured party in the position he or she would have been in had the breach not occurred. It is the duty of the innocent party to take reasonable steps to reduce or mitigate the damages sustained. In certain circumstances, a party may obtain an order for specific performance which would require the contractual obligations to be performed. Such an order might be granted where the legal remedy of damages is not adequate and the innocent party is willing to perform the contract. The availability of such a remedy is, however, limited and dependent upon the discretion of the court. In addition, certain types of contracts are not regarded as the proper subject for an order for specific performance. These include contracts for personal services and contracts which the courts would be required to supervise on an ongoing basis. Contracts for the purchase and sale of land, unique chattels or shares of closely held corporations are often considered to be the proper subject matter of an action for specific performance.

8.2 Intellectual Property

(1) General

Canadian law recognizes that rights can be created in certain types of intangible property, generally known as intellectual property, and that these rights deserve legal protection. Patents, trade marks, copyright, industrial designs and integrated circuit topographies are protected by specific statutory authority. Business reputation (goodwill), trade secrets and confidential information are afforded protection by the common law. It is important for the investor to give early consideration to such matters since proper protection of vital intellectual property rights can be inadvertently lost through improper documentation or failure to make the necessary filings.

Generally, the remedies available for infringement of intellectual property rights are an injunction prohibiting use, an order for delivery or destruction of the infringing materials, if any, and the payment of damages to compensate the owner of such right(s) for the loss suffered as a result of the infringement. Damages are usually awarded on the basis of the actual monetary loss sustained.

(2) Patents

A patent protects the physical manifestation of an idea in a device. Accordingly, it may be granted to an inventor of any new and useful art, process, machine, composition of matter, or any new and useful improvement thereof. In order to qualify for patent protection, the invention must have practical utility, be novel and not be obvious to an ordinary person skilled in that area. The applicant must be the original inventor and generally cannot have made the invention public prior to filing an application. An exception is possible where the inventor or someone who has been informed of the idea from the inventor has made it publicly known, in which case the individual may still obtain a patent so long as an application

is filed within one year following the disclosure.

To obtain a patent, an application must be filed which fully describes the invention and its operation to enable any person, skilled in the art or science to which it pertains, to make, construct, compound or use it. Every applicant must reside or carry on business at a specified address in Canada or must nominate as his or her representative a person or firm residing or carrying on business at a specified address in Canada. The individual must formally request examination of the application within 5 years of the filing date or the applicant will be deemed to have abandoned the application. If a request is not made within this time, a patent will not be granted and the public will be permitted to use or sell the processes described in the application.

Once granted, patent protection is valid for up to a maximum of 20 years from the date the application is filed in Canada. A patent gives the inventor an exclusive right to make, use or sell the invention. It should be noted that the patent protection is geographically limited to Canada, although protection in other countries may sometimes be available by international convention. For example, Canada is a member of the Patent Cooperation Treaty, which allows a Canadian national or resident to receive patent protection in any nation that is a party to the agreement through the filing of only one international application.

(3) Trade-Marks

A trade-mark can be a word, design, logo or symbol, or a combination of any of these elements, the essential characteristic of which is its distinctiveness. A trade-mark serves to distinguish the goods or services of the owner from those of others. The validity of a trade-mark may be vulnerable to attack if its distinctiveness is lost or by the unauthorized use of it by others.

Canada has recently revised its “first to use” system and now registers trade-marks on a “first to file” basis. Trade-mark applications are placed in sequence and those with the earliest date of filing are given priority. If there is no confusion with a mark that is pending when the application is filed, and if other requirements are fulfilled, the application is accepted for advertisement by the Registrar. Although registration is *prima facie* evidence of ownership, a party who claims previous use and confusion with his own mark may file a statement of opposition under section 38 of the *Trade-marks Act*.

The use of a trade-mark in Canada is a prerequisite to obtaining the registration of a trade-mark, and such use must continue in order to maintain registration rights. Under the *Trade-marks Act* (Canada), the use of a trade-mark by a licensee is deemed to be used by the owner provided that such use is under the direct or indirect control of the owner with respect to the character or quality of the goods or services of the licensee in association with the trade-mark. Both registered and unregistered trade-marks may be licensed by or with the authority of the owner through third parties.

Although a trade-mark must be used in Canada prior to registration, there is no requirement for use before an application for registration is filed. Under the *Trade-marks Act* (Canada), an application for registration can be made on the following basis:

- (a) actual use in Canada;
- (b) making the trade mark known in Canada;
- (c) a foreign application or registration abroad; or
- (d) proposed use in Canada.

Applications based on proposed use are filed primarily to protect and reserve trade-marks for future use. A proposed use application takes its priority from the date the application is filed. However, the trade-mark is not registered until it is actually used in Canada and a Declaration of Use is filed. Generally, it is possible to receive extensions for a period of 3 years from the initial deadline of 2 years

following the registration being granted. Should the applicant fail to use the trade-mark beyond this point, compelling reasons will have to be provided as to why use has not yet commenced. In a “first to file” system, it becomes imperative that a business considering registering a trade-mark proceed with registering an application based on proposed use in order to ensure that priority is obtained ahead of other applications. Given the lengthy processing period for trade-mark applications and the considerable administrative delays that often result, a trade-mark protection should be sought promptly and not be deferred.

Although not legally required, the registration of a trade-mark affords a number of advantages, particularly if it is to be licensed for use by third parties. The primary advantage is that it provides evidence of ownership and validity. Additionally, registration grants to the owner of the trade-mark an exclusive right to use the trade-mark in Canada for an initial term of 15 years, and such registration may be renewed for an indefinite number of subsequent 15 year terms.

The *Trade-marks Act* (Canada) prohibits the registration of a trade-mark which is:

- (a) primarily merely the name or surname of a person who is living or has died in the preceding 30 years;
- (b) clearly descriptive or deceptively mis-descriptive of:
 - (i) the character or quality of goods or services in association with which it is used or proposed to be used;
 - (ii) the conditions of or persons employed in the production of the goods or services; or
 - (iii) the place of origin.
- (c) confusingly similar to another registered trade mark; or
- (d) a trade mark which is the subject of a pending application with an earlier priority.

An exception to the above prohibitions is available if the applicant can show that at the time of registration the trade-mark has acquired distinctiveness or gained secondary meaning due to previous use in Canada.

To maintain exclusive rights to a trade-mark, the owner must ensure that no other person makes any unauthorized use of the same or a confusingly similar mark in association with the same or similar goods or services in the same territory. Where a trade-mark is proposed to be licensed to third parties, the owner should enter into a detailed license agreement which protects the owner's interest in the trade-mark. Such a license agreement provides evidence of the nature of the owner's care and control over the use of the trade-mark if the validity of the trade-mark registration is attacked.

(4) Copyright

A copyright protects the form by which an idea is expressed; namely, it protects every original literary, dramatic, musical and artistic work, including computer software. The protection is valid for the lifetime of the author plus 50 years after his or her death, subject to several exceptions stipulated in the *Copyright Act* (Canada) which apply to some sound recordings, performances, photographs, cinematographic works, Crown copyright and communication signals. In order to be protected, the work must be original. A copyright will protect its owner against the production and reproduction (copying) of the original work.

Copyright is conferred by statute automatically upon publication. In addition, Canada, like most countries, is party to the Berne Convention which requires reciprocal recognition of copyright without registration. A copyright may, however, be registered in the Copyright Office for evidentiary purposes.

(5) Industrial Designs

An industrial design may be described as a pattern representation, i.e. shape or configuration, which can be applied to a manufactured article. The registration of an industrial design does not protect the mode of constructing the article. Rather, protection under the *Industrial Design Act (Canada)* extends only to the appearance of the article. Hence, others can manufacture the same type of article as that registered so long as it looks different. An industrial design must be original and be registered within one year from the date on which it was first offered to the public in Canada. Registration is for a ten-year term beginning on the date of registration. However, before the expiry of five years and six months from that date, a maintenance fee must be paid or the protection will cease. Once the ten-year term has expired, anyone is free to make, import, rent or sell etc., the design in Canada.

(6) Integrated Circuit Topographies

Integrated circuit topographies are the three-dimensional configurations of electronic circuits found in semiconductor chips and microchips. Under the *Integrated Circuit Topography Act (Canada)*, both the completed product as well as the layout design may be protected for 10 years beginning on the date the application was filed or the date of first commercial use, whichever is earlier. This protection guards against the duplication of the topography as well as the commercialization of circuits that contain the topography. An application must be filed within 2 years of the date of first commercial use for a registration to be valid.

(7) Trade Secrets and Confidential Information

A trade secret is an idea which is not known or available to the public generally. Protection is available so long as the information or idea remains undisclosed. The right to protection of trade secrets and confidential information can be based on contract or on trust and confidence. Persons in a position of trust and confidence may be restrained from using or disclosing to others trade secrets, proprietary technology or other confidential information. The obligation to maintain confidentiality will not necessarily terminate with the relationship, such as an employment relationship, that gave rise to the obligation of secrecy.

(8) Passing Off/Goodwill

Anyone who represents himself or herself as being connected in any way with a business enterprise without the latter's authority (known as "passing off"), and thus misappropriating its goodwill or reputation, may be restrained from so doing. There are no restrictions on the kinds of persons entitled to protection from passing off violations. Such protection may even be available to persons who do not carry on business in Canada, provided that their products or reputation are known in Canada.

8.3 Privacy Law

There are two federal laws relating to privacy rights in Canada. The *Privacy Act (Canada)* applies to federal government departments and agencies and regulates the collection, use and disclosure of personal information. Under the *Privacy Act*, these governmental organizations must provide individuals with access to their own personal information as well as allow them to request corrections.

Privacy rights in the private sector are governed by the *Personal Information Protection and Electronic Documents Act (Canada)* ("PIPEDA"), which contains similar provisions to those provided under the *Privacy Act (Canada)* but instead regulates the manner in which personal information is collected, used and disclosed by all private sector organizations in the course of business, both those obtaining and using information across Canada as well as those operating only within a single province or territory. The purpose of the PIPEDA is to balance an organization's need to obtain such information for legitimate commercial purposes with a person's right to safely guard details about him or herself. Generally, a person must give consent to the collection, use and disclosure of any personal information he or she provides to an

organization. Under the PIPEDA, the definition of “personal information” is quite broad and includes such things as name, race, age, education, contact information and numerical identifiers such as social insurance numbers. The personal information of employees of these organizations is not included under the PIPEDA.

Every province and territory has enacted their own respective privacy legislation governing the collection, use and disclosure of personal information held by governmental organizations and/or those in the private sector. In some provinces/territories, privacy legislation is substantially similar to the federal law and thus may supercede the PIPEDA, as the federal government is entitled to exempt an organization in a province/territory with substantially similar laws. In recognizing such laws as substantially similar, PIPEDA provides a common standard for privacy protection across both federal and provincial domains. In cases where an issue falls under both provincial and federal jurisdiction, and a substantially similar status has not been made, federal legislation prevails, however, there may be occasion for the provincial and federal offices to undertake independent investigations to deal with an issue and to work out arrangements to provide for mechanisms for the handling of any such complaint in which they are mutually interested.

In Ontario, the principal privacy legislation include the *Freedom of Information and Protection of Privacy Act* (Ontario), the *Municipal Freedom of Information and Protection of Privacy Act* (Ontario) and the Personal Health Information Protection Act (Ontario) (“PHIPA”). These acts contain specific rules on how government and health care practitioners and organizations may collect, use, retain, disclose and dispose of personal information. Only the PHIPA has been deemed by the federal government to be substantially similar to Part 1 of the PIPEDA. The PHIPA came into force on November 1, 2004, and sets rules that health information custodians must abide by when collecting, using and disclosing personal health information within the Ontario health care system.

There are also sector specific laws enacted by both federal and provincial/territorial governments that relate to the protection of personal information. For example, the *Bank Act* (Canada) includes provisions governing the ways in which federally regulated financial organizations may use and disclose private financial information. Certain provinces, including Ontario, have also adopted legislation to regulate the method in which health care providers and other health care agencies collect, use and disclose personal health information. In addition, consumer credit reporting is regulated through laws in most provinces/territories which restrict the right of credit reporting agencies to disclose information, and enables individuals to request corrections to this information as well as challenge its accuracy.

8.4 Employment Law

When establishing a business in Canada, a non-resident should be familiar with the various legal considerations governing employment relationships. Employers should also expect changes to the labour regulations, as these laws are constantly evolving. Because both the federal and provincial/territorial governments legislate in this area, employers may be subject to differing laws depending on the province in which they operate. Generally speaking, the employment relationship is subject to the common law principles governing contract and master and servant. However, there are also noteworthy examples of legislation including the *Canada Labour Code*, the *Employment Standards Act* (Ontario), the *Labour Relations Act* (Ontario) and the *Pay Equity Act* (Ontario).

The *Canada Labour Code* contains statutory employment provisions applicable to industries that are considered to be a "federal work, undertaking or business", which include air, rail and highway transportation, radio broadcasting and telecommunications, marine transport, and banking. It also includes an undertaking that is wholly within a province but is declared by Parliament to be for the general advantage of Canada or two or more provinces of Canada.

The *Employment Standards Act, 2000* (Ontario) (“ESA”) provides for a general minimum hourly wage of \$9.50 effective March 31, 2009, a higher overtime wage after 44 hours of work per week, at least 2 weeks paid vacation upon the employee's completion of 12 months of employment, a 17 week maternity leave without loss of seniority rights (employment may not be terminated by reason of pregnancy) and a notice of termination of employment ranging from 1 to 8 weeks depending on the employee's length of service. Where 50 or more employees are terminated within a four week period, the Act provides for

longer periods of notice. It should be noted that the ESA sets out only the minimum standards and for employers, compliance with these standards are not always adequate protection. For example, at common law, the requisite period of a notice of dismissal is frequently much longer than the minimum standards set out in the ESA.

Furthermore, provincial human rights legislation also affects employee rights and employer obligations. The Human Rights Code (Ontario) (“HRC”) protects against discrimination in employment, accommodation, goods, services and facilities, and membership in vocational associations and trade unions. The HRC offers protection against discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability in the workplace.

At common law, all employment relationships which are not subject to a collective agreement or a written contract of employment are governed by an implied contract. An implied term of this contract is that the employer will not terminate the employee's position without just cause unless adequate notice or salary in lieu of notice is given. The onus is on the employer to prove just cause for dismissal; namely, the employer must show actual incompetence or misconduct on the part of the employee. Mere dissatisfaction with the employee's performance has been held to be insufficient cause for dismissal without notice. Adequate notice is to be determined by, *inter alia*, the duration of the employment, the age of the employee and the availability of similar positions. If the notice is inadequate, the employer may be liable for damages including the salary, bonuses and benefits that the individual would have been entitled to had the proper period of reasonable notice been given.

The Courts have generally reaffirmed that the common law remedies described above do not apply to written contracts for service which contain clear termination provisions. Thus, a comprehensive written contract of employment which includes a specified period of notice upon termination will likely be enforced by the Courts, and for this reason are especially recommended for key and high-salaried employees.

The *Labour Relations Act, 1995* (Ontario) (“LRA”) is designed to ensure the freedom of employees to associate in a trade union. Both the employer and the trade union may not interfere with each other's organization and bargaining rights. In addition, a trade union may not persuade workers to join the union at the employer's premises during working hours. The lawful right to strike arises only after the mandatory bargaining procedures required under statute have been followed. The LRA also requires an employer to notify the trade union and provide an adjustment plan when a member of a trade union is to be terminated, prohibits the dismissal of an employee without cause, allows the use of replacement workers during a strike or lock-out, and permits the trade union to make contributions towards employee benefits during a strike or lock-out. The recently enacted *Labour Relations Statute Law Amendment Act, 2005* (Ontario) makes several changes to the LRA. Most notably, this new legislation restores the power of the Ontario Labour Relations Board (“OLRB”) to grant an automatic certification to a union as a remedy to a major breach of labour legislation on behalf of an employer, and also enables the OLRB to dismiss a certification application when a union is in severe violation of the law. However, this provision is only meant to apply to cases involving the most serious of breaches when no other sufficient remedy is available.

The *Pay Equity Act* (Ontario) requires employers in the public and private sectors to develop and implement pay equity plans pursuant to which work of equal value will be subject to equal pay irrespective of gender, and provides penalties for non-compliance. This does not apply to employers that are federally regulated or those private sector firms with 10 or fewer employees. A Pay Equity Commission supervises the implementation of the legislation through support programs and services.

8.5 Environmental Protection

As in most other parts of the world, there is growing concern in Canada for the protection and preservation of the environment. As a result, it is becoming increasingly important for those considering investment in Ontario/Canada to consider the potential impact of these laws. Jurisdiction over the environment is shared amongst municipal, provincial and federal governments, with the latter two traditionally being most actively involved, although municipal governments have recently been increasing

their involvement in environmental regulation.

The *Canadian Environmental Protection Act, 1999* (Canada) ("CEPA") is the principal piece of federal legislation regulating environmental matters; namely the release, potential release, import or export of toxic substances. The CEPA establishes a unified and standardized approach to environmental problems. The federal government has exclusive jurisdiction over fisheries and shipping and thus has assumed the task of pollution control in these areas and is also now active in the areas of pest control products and the transportation of dangerous goods. Its involvement in these areas arises under the *Fisheries Act* (Canada), the *Canada Shipping Act*, the *Pest Control Act* (Canada) and the *Transportation of Dangerous Goods Act, 1992* (Canada). In addition, Canada has recently ratified the *Kyoto Protocol* and in accordance with this has announced its plans to reduce national levels of greenhouse gas emissions.

In Ontario, the predominant environmental legislation is the *Environmental Protection Act* (Ontario), the purpose of which is to protect and conserve the natural environment. The key pollution prohibition states that no person shall discharge a contaminant into the environment that causes or is likely to have a negative impact on the environment. Liability under this Act extends to the owner, the person in occupation, and the person having the charge, management or control, of a source of contamination. Thus, liability may be attached to persons like landowners, lenders, officers and directors of a corporation, tenants, and employees who are directly responsible for the contamination or who knowingly allowed the contamination to occur or continue. Both civil liability, leading to claims for damages, and quasi-criminal liability, which involves fines and/or imprisonment, can be imposed.

In addition to personal liability, environmental laws can impact upon the commercial value of existing properties and enterprises by, for example, preventing the continuation of operations causing environmental contamination or prohibiting the use of contaminated properties or facilities. Moreover, governmental imposition of conditions designed to prevent or rectify environmental damage can significantly affect the value of an investment or the feasibility of an otherwise commercially viable project.

In view of the foregoing concerns, increasing use is being made of "environmental audits" in which experts investigate the environmental condition of a property, project or enterprise before an investment is made. The expertise of those experts varies widely. There is also a great deal of variety in the quality of their written reports produced after an environmental audit. The adequacy of these reports can be crucial in determining legal responsibility. It is therefore important to ensure that the expert selected is reputable and has the required knowledge and experience to deal with the particular situation.

8.6 Matrimonial Property

Matrimonial property in Ontario is governed by the provisions of the *Family Law Act*, (Ontario) ("FLA"). Provisions of the FLA relating to family property and the matrimonial home apply to married heterosexual couples only. Upon marriage breakdown, either spouse can apply under the FLA for an equalization of "Net Family Property" ("NFP"). NFP is the value of business and non-business property earned during the marriage net of the debts and liabilities accumulated during the marriage. Property owned on the date of marriage, property received by way of a gift or inheritance, a damage award and insurance proceeds are excluded from NFP. If such excluded property has been converted into another asset, it will continue to be excluded so long as it is traceable unless it was used to buy a matrimonial home. The spouse with the greater NFP so calculated is required to make an "Equalization Payment" of one-half the difference to his or her counterpart. Special treatment is given to the matrimonial home; namely, the place in which the spouses cohabited at the date of separation. The value of the matrimonial home is to be divided equally between the spouses irrespective of ownership. The Act further provides that property division is not to be made so as to seriously harm an operating business unless there is no reasonable alternative.

Parties may contract out of the provisions of the FLA regarding the division of matrimonial property and determine in advance the distribution of such property upon marriage breakdown through the execution of a domestic contract, which can be entered into at any time before or during marriage or cohabitation. A domestic contract entered into outside Ontario is enforceable in Ontario if entered into in accordance with Ontario law.

When a spouse dies leaving a Will, the surviving spouse must elect within 6 months to take what property is bequeathed to him or her under the Will or to seek an equalization of NFP under the FLA. Distribution of the deceased spouse's estate cannot occur until that election is made. An election in favour of the entitlement under the FLA is deemed to be a disclaimer of the benefits under the Will, under an insurance policy and under a pension plan or similar plan providing a payment on the death of a spouse, unless the Will provides otherwise. The surviving spouse's entitlement under the FLA is calculated as if both spouses were still alive and the marriage had broken down.

8.7 Resolution of Legal Disputes

In the Canadian legal system, courts remain the predominant forum for the resolution of disputes and other matters, although the majority of cases that are litigated are settled through a variety of negotiation practices. For example, arbitration has become a preferred method of dispute resolution in international commerce and is presently gaining increased acceptance in Canada as a means of settling disputes. However, many industries are governed by federal or provincial administrative tribunals which necessitate certain matters being referred to them for decision.

(1) Arbitration

The *Arbitration Act, 1991* (Ontario) provides a standard method for the appointment of arbitrators, the submission of disputes and the enforcement of arbitration awards if the contract between the parties provides for such arbitration. Subject to leave from the court, an arbitration award may be enforced in the same manner as an order or judgment of the court. Such awards are nonetheless subject to judicial review on matters of law. Moreover, even if a contract contains a provision for submission of disputes to arbitration, either party may still commence a legal action. Although the court is likely to stay the judicial proceedings until the arbitration process is completed, the court will not, under normal circumstances, be deprived of the jurisdiction to review the arbitration proceedings.

There are also many factors which recommend Canada as a favorable state for parties who wish to engage in international arbitration. Canada is a vibrant, multicultural country with a common law and civil law legal system that have been recognized for being fair and neutral. Canada was one of the first states to adopt the 1985 UNCITRAL Model Law on International Commercial Arbitration, with amendments as adopted in 2006 ("Model Law"). The Model Law is designed to assist various jurisdictions in reforming and modernizing their laws on arbitral procedure so as to take into account the particular features and needs of international commercial arbitration. It covers all stages of the arbitral process from the arbitration agreement, the composition and jurisdiction of the arbitral tribunal and the extent of court intervention through to the recognition and enforcement of the arbitral award. It reflects worldwide consensus on key aspects of international arbitration practice having been accepted by many different economic and legal systems of the world. One of the salient features of the Model Law is the aspect of the reciprocal registration and enforcement of awards rendered pursuant to it. This allows for an arbitration award to be enforceable in any state that has signed onto the Model Law which restricts those parties who wish to frustrate an award against them. Parties may agree in writing to be contractually bound to the provisions of the Model Law by an arbitration agreement or arbitration clause which refers to it.

(2) Courts

Unlike in many parts of the world, the litigation process in Canada and the United States is utilized by business persons as a customary means of resolving disputes. A fully developed court system consisting of several trial and appellate level courts exists throughout Canada. The justice system within each province is administered and controlled by that province. The Ontario Court of Justice has jurisdiction over criminal offenses as well as family law disputes in the province. Monetary claims of \$10,000 or less are dealt with in Small Claims Courts, while those exceeding \$10,000 are dealt with by the Superior Court of Justice (Ontario). Trial decisions dealing with claims of \$25,000 or less may be appealed to the Divisional Court. Appeals from the Divisional Court or from trial decisions dealing with claims exceeding \$25,000 lie to the Court of Appeal, which is the court with the highest jurisdiction in Ontario. Decisions of the Ontario Court of Appeal may be appealed to the Supreme Court of Canada (the "SCC"), the court of last resort.

Generally, appeals are only heard by the SCC if leave is given, which occurs if a panel of three judges of the SCC believe that the case involves an issue of public significance or a question of law of sufficient importance to warrant the SCC's consideration. There are, however, certain criminal cases where leave is not required and the case may be appealed as a right, such as where one judge in the Court of Appeal dissents on a point of law.

Recent amendments to the *Rules of Civil Procedure* (Ontario) provide for simplified procedures designed to reduce cost and time requirements. For example, in instances where the civil action amounts to \$50,000 or less, these new rules prohibit cross-examination and discovery, allow for automatic dismissal in cases of delay, and require parties to enter into a settlement discussion prior to trial.

While a special commercial court does not exist *per se* at the provincial level, the Superior Court of Justice (Ontario) maintains a special "commercial list" to which cases, and Judges having demonstrated expertise in complex commercial matters, are assigned. In addition, estates and trusts, criminal, and family matters are dealt with by specialized Judges.

Canada has two federal courts, the Federal Court and the Federal Court of Appeal. The former is the national trial court of Canada, which has exclusive jurisdiction over admiralty cases, most intellectual property issues, immigration affairs, and matters involving federal regulatory tribunals. The latter court hears appeals from the Federal Court as well as the Tax Court of Canada. Appeals from the Federal Court of Appeal lie to the Supreme Court of Canada.

The litigation process is for the most part conducted by the individuals involved. The complexity of the proceedings and the length of time which it takes to reach a resolution, and as a result the costs incurred by the parties, will be largely determined by the approach taken by the respective parties. In addition, the litigants themselves must pay the legal costs incurred for professional services obtained during the course of the litigation. The successful party in judicial proceedings is customarily awarded compensation for the costs incurred, but the amount recoverable is almost invariably less than the actual amount paid by the successful party to its lawyer. Usually, the maximum recovery is between 50% and 75% of the actual expenses incurred by the successful party.

Finally, it must be noted that a plaintiff who ordinarily resides outside of Ontario may be ordered, upon the application of the defendant, to pay a sum of money as security for the legal costs of the resident party. These monies are to be paid into court to secure the payment of the costs to be awarded to the other party if the non-resident party is unsuccessful in the proceedings. These monies are refundable if the non-resident party is successful. While the proceedings are pending, interest is paid at a nominal rate.

(3) Administrative Tribunals

Federal and provincial legislation provide for a multiplicity of tribunals in specific areas of commercial, industrial, social and other activities. The agencies involved have powers ranging from limited advisory boards to quasi-judicial institutions. Every major industrial sector is to some extent subject to the control of an administrative tribunal. For example, in Ontario compensation for injured workers falls exclusively under the jurisdiction of the Workplace Safety and Insurance Board. Subject to the legislation creating such tribunals, the decisions of the tribunals may be reviewed by the courts. The courts exercise a supervisory jurisdiction over such public bodies whenever it is alleged that: a statutory or other public duty imposed on that body has not been performed; there has been a denial of natural justice; or the tribunal has acted unfairly, has acted beyond the limits of its jurisdiction, or has made an error in applying the law to the circumstances of the case before it.

In many areas of commercial activity, the policies, internal directives, procedures and attitudes of the administrative tribunals governing a particular industry are just as important as the legal requirements affecting that industry. Therefore, the non-resident investor must satisfy himself or herself that his or her proposed activity is acceptable pursuant to the directives of the respective administrative tribunal.

(4) Alternative Dispute Resolution

As more and more members of the public become dissatisfied with the manner in which the mainstream litigation process serves their needs in resolving their problems, more litigants are turning to the other avenues available to them to achieve their goals. These avenues, generally called Alternative Dispute Resolution ("ADR"), have become so much in demand that Ontario's Rules of Civil Procedure now require mandatory mediation sessions of up to 3 hours for those actions commenced in Toronto, Ottawa and Windsor which are governed by case management as well as those which are governed by simplified procedure and assigned to mandatory mediation by the regional senior judge. This session, which must be attended by the parties themselves and is guided by a trained mediator, attempts to settle the dispute by giving each party a chance to be heard, allowing an objective third party perspective on the dispute and, ultimately, providing unbiased suggestions for the mutually satisfactory resolution of the problem. Since its inception, this procedure has experienced significant settlement rates, making the mandatory nature of the process well worthwhile.

There are also private sources of ADR which have become increasingly popular in Ontario, other Canadian jurisdictions and internationally. Private mediators are available to mediate disagreements very much in the same way as those available through the process described above, although the parties are in this instance required to pay the mediator's fee for his or her services. As well, commercial contracts are increasingly incorporating arbitration and/or mediation clauses, either removing potential disputes from the jurisdiction of the courts altogether or obligating the parties to try to reach an agreement before litigating. Thus, the idea that there are alternatives to court proceedings for the settlement of disagreements is being firmly established in the process itself.

The major advantages of ADR are the speed with which the process can be completed and the control the parties have over both the procedure and the adjudicator. As a normal lawsuit can take as much as three years or longer to come to trial, knowing that an ADR mechanism can resolve the issues much more quickly is of great comfort to many who find themselves needing assistance. Furthermore, depending upon the type of ADR chosen, the parties can choose the mediator or arbitrator and can often set their own rules of disclosure and examination. The disadvantage is that private ADR is not funded by the government. The parties themselves will be responsible for the fees and other costs of the ADR provider chosen, and in some cases must provide the facilities in which the procedure will be conducted. Nonetheless, for those for whom time is money, the ADR route is often preferred, even when the additional "up-front" cost is considered.

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