# *Law and Business Administration in Canada (Canadian) 14th edition Smyth Solutions Manual*

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## CHAPTER 2

## THE MACHINERY OF JUSTICE

The parts of this chapter that describe the various courts and levels of courts in Canada, the United States and England are useful background. They are reference material that students should not be expected to memorize.

The machinery of justice or procedural law contrasts nicely with the rest of the text which contains almost entirely substantive law. Procedural law covers the form or the organization of a legal system and its methods of conducting trials. For business purposes, procedural law has a substantive component. Businesses must decide whether to sue or simply to accept a loss; to defend an action or to settle out of court. Legal risk management plans often approach the litigation process in a strategic way; they may settle most claims in order to reduce costs or they may prefer to litigate everything to discourage frivolous claims. An awareness of the related costs and risks is necessary to make these decisions, as well as any necessary limitation periods.

Since students receive a great deal of American information from literature and the media, they may well have ideas about court costs and contingency fees that are incorrect as far as Canadian procedural law is concerned. For example, the Canadian (and English) practice of awarding costs to the winning side means that a business person contemplating litigation faces a greater risk in the event of failure than does a counterpart in the United States. Hence, litigation strategy is often different in the two countries. See International Issue – The System of Courts in the United States (Source p. 30)

### THE NEED FOR CONSISTENCY AND PREDICTABILITY (Source p. 23)

Unpredictability is one litigation risk that is common to all countries. The legal system is a social institution comprised of fallible human beings and the machinery of justice is not so perfect that it can avoid unpredictable results. Courts must obtain their facts from documents and other exhibits, and from oral testimony given under oath by witnesses subjected to cross-examination. In the process there may be "many a slip 'twixt the cup and the lip." When conflicting evidence is given by two or more witnesses, the choice of which set of facts to accept depends on the judge's personal assessment of the credibility of the witnesses. Some people who should have been called as witnesses are never requested to appear. As a result of this list of possibilities for error—and there may well be others—business people are almost always faced with uncertainty when they undertake litigation. As noted, there are substantial costs associated even with winning. Party and party costs do not reimburse the successful litigant for the time, lost productivity, effort, and nervous exhaustion involved in litigation.

### COMMON LAW: THE THEORY OF PRECEDENT (Source p. 24)

Class discussion on the meaning of the theory of precedent, as expressed in the doctrine of *stare decisis*, is worthwhile at this stage. Some students are surprised to learn how

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much scope for discretion is reserved for a court within the concept of *stare decisis*. Others are surprised that judges are not completely free to do whatever they want. A legal system which relies exclusively on precedent would seem to provide greater certainty (although even that statement can be questioned), but it would be tied to the past, incapable of adapting to social changes. A legal system that ignored the authority of existing law (including that of decided cases) might be readily adaptable to change, but would provide almost no guidelines for conduct. The very term *stare decisis* ("let the decision stand") implies a preference for the objective of certainty, but courts have interpreted their terms of reference to import a considerable amount of flexibility while still formally accepting the authority of their earlier decisions. As in so many things, it is a question of balance.

Two important limitations on the theory of precedent should be highlighted. First, the jurisdictional limits of *stare decisis* mean that a lower court is bound by a decision of a superior court in the same jurisdiction, but the decision will only have persuasive value in other provinces. The matter can be resolved only by a decision of the Supreme Court of Canada; its decision is binding on all other courts in Canada. Second, factual limitations mean lower courts are only required to follow a decision when the facts of a case before them substantially coincide with (are not "distinguishably different" from) the facts of the earlier Supreme Court decision. Therefore, they still have considerable scope to "distinguish" the earlier case on the basis of its facts.

Most decisions by trial courts and provincial appellate courts are not appealed. While the decision of a lower court is not a binding authority on other courts, the facts of the case may still be of wide general interest, and the reasons for judgment so lucid that the decision may have considerable influence and even be "followed" in other, later cases-unless and until the Supreme Court of Canada has an opportunity to rule finally on the matter and comes to a contrary decision. Decisions of respected English and American judges as well as those from other common law countries may similarly influence the decisions of Canadian courts.

## THE SYSTEM OF COURTS IN CANADA (Source p. 27)

The text sets out the structure of the courts in Canada, noting that the provinces have jurisdiction over the court systems, although judges in the superior trial courts and the provincial courts of appeal, and of course the Supreme Court of Canada, are all federally appointed. The court structure is like a pyramid, and while the names of the courts may vary from province to province, the function and jurisdiction of the courts are similar. It is noted as to how matters are appealed, with a final appeal being to the Supreme Court of Canada, but only with leave of the court in a private matter.

A good classroom activity might be to set out a few “instances” and have students discuss what court a matter would start in, and where a final appeal would be heard. For example, a criminal case for assault would start in a provincial inferior court, a court of first instance, be appealed to a superior trial court of first instance, then to a provincial court of appeal, and if of national importance, it could be appealed to the Supreme Court of Canada.

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**INTERNATIONAL ISSUE** (Source p. 30)

The System of Courts in the United States

This theme box compares the Canadian and American court systems. The first key difference is in the level of integration of courts within the two countries. State courts in the United States stand independent of the federal courts, unlike provincial courts in Canada which all flow into the federal Supreme Court of Canada. The second key difference lies in the American practice of election rather than appointment of judges. All four questions in this section are designed to identify the following points:

Question 1 - Elected judges are directly accountable to the public and may be removed from office relatively easily if the public is dissatisfied with the performance of the judge.

Question 2 - As a result of the points made in Question 1, judges may be tempted to make publicly popular decisions rather than unpopular, but legally sound ones. If you teach in an area that receives American television commercials, invite students to pay attention to the ads for judicial election. They often describe a "tough on crime" position, how many criminals they have sent to jail, what other lawyers think of them, etc.

Question 3 - Alternatively, life appointments free judges from the wrath of public opinion and arguably allow them to make legally sound decisions without fear of losing their jobs. Still critics argue that this makes a judge accountable to no one and substandard judges are nearly impossible to remove. Here the instructor may want to mention judicial complaints processes in place to monitor inappropriate judicial behavior and distinguish between errors in the law (which are designed to be handled by appeals) and misconduct (which may be the subject of discipline). In addition, the selection of judicial appointments can become a form of political patronage rather than a symbol of excellence, and the instructor may want to discuss the judicial appointments advisory boards now commonly used as part of the appointments process. Recent, reforms discussed for Supreme Court appointments are also relevant here.

Question 4 - The same-sex marriage issue is a specific example of a "political hot potato" that parliament left to the courts rather than addressing themselves. Fear of electorate retaliation may be the reason. Students should be asked to consider whether elected judges might have felt the same way as the politicians. Refer to the decisions of the Ontario Court of Appeal and the Supreme Court described in Chapter 1.

*Reference re: Same-Sex Marriage*, (2004) 246 D.L.R. (4th) 193; *Halpern* v. *Attorney General of Ontario et al.,* (2003), 65 O.R. (3d) 161 (C.A.)

Helpful information to advance the discussion includes the polling data on public opinion in 2002 (45% in favour vs. 47% against) by CBC/EKOS (November 10, 2002). A very useful summary of the history of same -sex marriage has been prepared by Steve Beattie (*Tracing the steps towards same-sex union and marriage in Canada*, April 2004) and is available at samesexmarriage.ca.

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**PROCEDURAL LAW: USING THE COURTS** (Source p. 31)

Topics covered in this section include:

- Who May Sue
- Standing to Sue
- Class Actions
- Procedure Before Trial
- The Trial
- Appeals
- Costs

  -Who Provides Funds for the Court System?

  - Solicitor-Client Fees

  - Party and Party Costs

  -Total Costs of Litigation
- The Economics of Civil Litigation
- Contingent Fees

  -Origins in the United States

  - The Use of Contingency Fees in Canada
- Settlement Out of Court
  - Advantages
  - Growing Delay in the Court System

The rules of court procedure, as set out in the text, vary slightly as the function of the courts is a provincial matter. Students can still grasp a good understanding of the procedures followed through a review of the materials presented. The costs of a legal action and the economics of civil litigation, the discussion on class actions and settlement options are important topics for business. (Source pp. 31- 36)

**ALTERNATIVE DISPUTE RESOLUTION** (Source p.39)

Alternatives to traditional lawsuits come in many forms. Simplified procedures (for small claims) are an alternative to the long, complicated, and expensive litigation process. Class actions are an alternative to multiple individual lawsuits dealing with common issues. Finally, private-sector ADR providers of arbitration and mediation offer an alternative to the publicly funded judicial system. The pros and cons of ADR should be discussed in class, with attention focused on the aspects critical to business, including the choice of a knowledgeable arbitrator or mediator, and the ability to keep proceedings confidential. In the Ethical Issues box, students are asked to address how each of these alternatives impact

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access to justice. Instructors may want to discuss the new "Apology Legislation" adopted (or considered) by various provinces (British Columbia, Manitoba, Saskatchewan, and Ontario), for example *Apology Act*, S.O. 2009, c. 3. This legislation prohibits an apology from being used as an "admission against interest" in subsequent litigation. (See Ellen Desmond "Saying Sorry: Apology legislation makes it a lot easier" *Lawyers Weekly,* Vol. 28, No. 33, March 28, 2008)

**ETHICAL ISSUE** (Source p. 49)

Access to Justice

Question 1 – This question addresses the role of class actions. When small claims are combined in a class action, lawyers tend to be more willing to accept a contingency fee. Critics argue that this encourages frivolous lawsuits that would not otherwise be processed. Supporters suggest that without class actions monetarily small claims go unaddressed and undesirable business conduct is not deterred. Key cases on the role of Class Actions are:

*Western Canadian Shopping Centres v. Dutton* [2001] 2 S.C.R. 534

(The Supreme Court created a process for establishing class actions even before Alberta passed legislation.)

*Bisaillon* v. *Concordia University* [2006] 1 S.C.R. 666

(The Supreme Court characterized class actions as procedural rather than substantive in nature despite a clear social dimension.)

*Kerr* v. *Danier Leather* 2007 SCC 44

(The Supreme Court makes interesting comments about the role of costs in class actions)

Question 2 - This question asks students to consider forced ADR – this can be in the form of mandatory mediation in court annexed programs or binding pre-dispute arbitration clauses: see *Dell Computers* v. *Union des Consommateurs* and *Rogers Wireless Inc. v. Murroff* in the Case Summaries)

Question 3 – This question asks students to consider whether we should extend legal aid to include private litigation or not. This issue involves fairness and respect for the interests and rights of many stakeholders – plaintiffs, defendants, society as a whole. Invite students to consider the following questions:

- Is access to justice a human right?
- Is access to justice the same as access to the courts?

The cost of litigation is high, but so is the cost of legal aid. Should taxpayers bear the cost and therefore the risk of a private legal dispute? Can government afford another public service when costs are already so high and the economy uncertain?

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While there is no doubt that the cost of court litigation has increased rapidly and has limited access to the justice system, access to other forms of dispute resolution is now more widely available and less costly.

As for decreasing the costs of a full trial, the availability of class actions (Source p. 37) and contingency fees (Source p. 45) greatly reduce the costs to litigants.

For contrasting views on the value of class actions and arbitration clause enforcement see:

Shelley McGill, "Consumer Arbitration and Class Actions: The Impact of Dell Computer Corp. v. Union des Consommateurs" *Canadian Business Law Journal* 45: 334-355.

Andrew D. Little, "Canadian Arbitration Law after Dell Computer Corp. Union des Consommateurs" *Canadian Business Law Journal* 45: 356- 381.

## QUESTIONS FOR REVIEW

1. The common law system originated in feudal times in England and covers most of the English-speaking world. It is based on recorded reasons given by judges and adapted by judges in later cases. The civil law system has its roots in Roman law and is used in most of Western Europe (apart from England) and those parts of the world colonized by those countries using that system. It is based on codes setting out the general principles needed to decide cases. (Source pp. 23-24)
2. It is the need for consistency that explains the theory of precedent. Parties need to be able to rely on the law and predictable outcomes if they are to enter into arrangements with others and be reasonably secure about the result. (Source p. 24)
3. The strictness in the early period of common law courts led to rigid and often unfair decisions. First the king himself, then his chancellor, began responding to petitions for justice. The chancellor eventually set up a court to hear such petitions. Known first as the court of chancery it became the court of equity, where remedies were created to fill gaps in the common law system. (Source pp. 25-26)
4. When an important area of the law becomes very complicated because so many cases have arisen, the legislature may appoint a committee to codify the law in a statute—to summarize the law and create general principles in the area to provide guidance. Two prime examples are the *Sale of Goods Act* and the *Partnership Act*. (Source p. 42)
5. The increasing complexity of society, primarily in economic matters, makes it difficult, if not impossible, for Parliament to enact very detailed regulations in specific areas. Accordingly, Parliament enacts legislation establishing administrative agencies with powers to issue detailed rules to execute and promote the general provisions and purposes of the legislation. (Source pp. 43-44)
6. No witnesses are called and no new evidence is submitted. The complete record of the trial proceedings is available. Usually, only questions of law are argued. A number of judges hear the appeal as a panel. (Source p. 31)

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7. Surprise witnesses or confessions, used frequently in movies and on television for their dramatic effect, are rare in fact. Pre-trial procedure is designed to apprise each side of the nature of the opponent's case to minimize the element of surprise, to ensure an orderly trial and often to encourage settlement before trial. (Source pp. 32-33)
8. In the United States, a three-tiered system of federal courts operates throughout the country to handle all litigation that falls within the federal jurisdiction. Each state has its own system of state courts to hear cases falling under state law. Cases heard under either court system may be appealed to the United States Supreme Court only with leave. In Canada, by contrast, provincial courts decide cases involving federal law with the exception of a few matters, such as taxation, reserved to the Federal Courts. In the United States, all judges of the Supreme Court are appointed by the president with a public confirmation process through the senate. The state court judges are usually elected, but it differs from state to state. While in Canada, all district and superior court judges of the provincial courts are appointed by the federal government. (Source p. 30)
9. The advantages to the parties of settlement are: it is fast, definite, and less expensive; it avoids the risk of losing at trial; compromise between the parties is more likely to maintain an amicable relationship than is a court battle; the public nature of a trial is avoided. (Source pp. 38-39)

10.

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|---|---|
| *Appellant* | the party who petitions for an appeal (Source p. 27) |
| *Respondent* | the party who defends on an appeal (Source p. 27) |
| *Counterclaim* | a claim by the defendant arising from the same facts as the original action by the plaintiff to be tried along with that action. (Source p. 33) |
| *Counsel* | lawyer representing a plaintiff or defendant (Source p. 33) |
| *Bench* | the judge or panel of judges (Source pp. 31-32) |
| *Writ* | legal process which commences an action; a formal document setting out the plaintiff's claim which is served on the defendant. The writ has been replaced in a number of provinces by the "statement of claim" (Source p. 39); or an ancient form required in order to take a grievance to court. (Source p. 32) |
| *Settlement* | an out-of-court procedure by which one of the parties agrees to pay a sum of money or perform an act in return for a waiver by the other party of all rights arising from the grievance (Source p. 38) |
| *Pleadings* | documents filed by each party to an action providing information it intends to prove in court (Source p. 33) |

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| | |
|---|---|
| *Party and party costs* | an award that shifts some of the costs of litigation to the losing side according to a published scale of fees (Source p. 43) |
| *Res judicata* | a case that has already been decided by a court and cannot be brought before a court again (Source p. 32) |

11. A class action is one in which an individual represents a group having the same cause of action; and where the judgment decides the matter for all members of the class at once. Class actions are used when there are numerous claims for small amounts that would not be worth litigating individually as they would clog up the courts and not be cost effective. (Source p. 31-32)
12. A judge will apply generalized legal principles and logic to the case and she will reason by analogy from other cases. Other sources available to the judge include trade practice, local customs, other systems of law and sometimes the opinions of experts in the field. (Source p. 34 and Chapter 1)
13. Each province has exclusive jurisdiction in certain fields and legislation may, and quite often does, differ from province to province. (Source p. 22 and Chapter 1)
14. The publication of the decision and reasons for judgment will inform other members of the business community what the result is likely to be in similar circumstances. Accordingly, business people can learn from the judgment and settle their own disputes without going to trial; also they can order their own affairs in the future to avoid disputes. (Source p. 38)
15. Even when a successful litigant is awarded costs, it will usually be only party and party costs, and not the larger solicitor and client fee that she actually has to pay her own lawyer. (Source p. 35)
16. A contingent fee is paid to a lawyer for services *only* if the action is successful and the client receives an award of damages. The fee is usually a percentage of the damages awarded. In Canada, so as not to encourage unnecessary litigation, contingent fees are subject to court supervision. (Source pp. 36-37)
17. The primary advantages of ADR are: speed, low cost, the ability to choose the adjudicator or mediator (expertise), confidentiality, and the possibility of preserving ongoing relations between the parties (since ADR tends to be less adversarial). (Source pp. 39-41)

## CASE SUMMARIES

***Buck Bros. Ltd.* v. *Frontenac Builder* [1994] O.J. No. 37 (Ontario Court of Justice – General Division)**

Two companies entered into a joint venture; the venture was to be a 50/50 split with each partner contributing $2,400,000. The Frontenac group was unable to come up with the

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funds, and so the other party, the Newport Group loaned the Frontenac group the money to continue the project. The loan was not paid. Some eleven years later, the Frontenac Group attempted to obtain further financing from a bank, however, the bank required the Newport Group to guarantee the debt, effectively making them liable for 200% of their investment. Not surprisingly, Newport declined to guarantee the debt. An arbitration agreement was eventually reached stating that the Frontenac Group would obtain financing and repay the capital contributed by the Newport Group, as well as the loan from the project. The issue before the Court was whether the arbitrator had the power to determine its own jurisdiction in making a decision regarding a disagreement over interpretation of the arbitration agreement. The Court held that s. 17(1) of the *Arbitration Act* conferred such power on the arbitrators.

### *Canada (Minister of Justice) v. Borowski* (1981), 130 D.L.R. (3d) 588 (Supreme Court of Canada)

Borowski brought an action against the federal Ministers of Justice and Finance for a declaration that the provision of the *Criminal Code*, S.C. 1974-74-76, c. 93, allowing therapeutic abortion was inoperative under the *Canadian Bill of Rights* on the ground that it denied the fetus as an individual its right to life. The Supreme Court of Canada considered the preliminary issue of his standing to sue. It held that Borowski must show that he had a genuine interest as a citizen in the validity of the legislation and that there was no other reasonable and effective manner in which the issue might be brought before the courts. The majority held that Borowski met this test, because there was no else directly affected by the legislation who would have cause to attack it. There was a dissenting opinion to the effect that Borowski failed to show a judicially recognizable interest in the matter since there were other groups directly affected, such as husbands whose wives were seeking abortions, who might challenge the legislation.

The case went to the Supreme Court of Canada on its substantive merits, but was moot and his appeal was dismissed on that ground. See *R.* v. *Morgentaler* (1988), 44 D.L.R (4th) 385 (S.C.C.) and *Borowski* v. *Canada (Attorney General)*, [1989] 1 S.C.R. 342.

### *Canadian Council of Churches* v. *Canada*, [1992] 1 S.C.R. 236 (Supreme Court of Canada)

The appellant Council of Churches represented a large number of member churches who dealt with refugees. The Council brought an action to have the *Immigration Act* declared unconstitutional as violating the *Charter of Rights and Freedoms.* The issue of standing was raised. The Supreme Court held that the appellant did not have standing. They laid out the test as follows: (1) serious issue of invalidity of the legislation in question; (2) genuine interest on the part of the plaintiff; and (3) other better options to bring the issue before the court. The court held that in this case, the individual refugees were already bringing claims before the court and that, therefore, there were other more reasonable ways to bring the matter before the court. Standing was denied.

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***Canadian National Railway Co.* v. *Lovat Tunnel Equipment Inc.* (1999), 174 D.L.R. (4th) 385 (Ontario Court of Appeal)**
The parties entered into a contract for the purchase of a tunnel boring machine. The plaintiffs brought an action in damages alleging the machine was defective. The defendant brought a motion to have the matter referred to arbitration as per the contract. The Court of Appeal held that as per the contract the defendant had the choice of acquiescing to the litigation or electing for binding arbitration; the matter was referred to arbitration.

***Dell Computers v. Union des consummateurs* 2007 SCC 34 (Supreme Court of Canada)**
Approximately three hundred consumers purchased Dell computers online at a time when the website displayed an erroneous low price. Dell refused to supply the computers and Union commenced a class action on behalf of the consumers. Dell brought a motion to stay the action under the Quebec arbitration legislation because the online contract contained a mandatory arbitration clause. Both the motions judge and the Court of Appeal found the arbitration clause unenforceable against the consumer but the Supreme Court of Canada upheld the consumer arbitration clause and stayed the action.

***Deluce Holdings Inc.* v. *Air Canada* [1992] O.J. No. 2382 (Ontario Court – General Division)**
Air Canada acquired shares in Air Ontario and entered into a unanimous shareholder agreement with the other major shareholder, the Deluce family. Air Canada originally agreed to allow the Deluce family to continue the day-to-day operations of Air Ontario without interference. At some point in 1991 Air Canada decided to acquire 100% interest in its connectors. One of the provisions in the USA allowed Air Canada to acquire the remaining shares when the two remaining Deluce members were no longer employed. The plaintiffs brought a motion in the oppression remedy alleging that Air Canada improperly exercised its majority control of directors by not renewing the employment contracts of the Deluces in order to buy out the minority interest of the Deluces. Air Canada argued that under the terms of the USA it is entitled to obtain the shares, and further, that any disputes are subject to arbitration. The Court held that the plaintiffs had demonstrated a *prima facie* case that Air Canada's actions were oppressive and therefore, Air Canada could not rely on the agreement for the purpose it had in mind.

***Diamond & Diamond* v. *Srebrolow,* [2003] O.J. No. 4004 (Ontario Court of Appeal)**
The defendants were lawyers, formerly with the plaintiff firm. When the defendants left a dispute arose, and in the minutes of settlement the parties agreed to binding arbitration in the case of a breach of the settlement. When the plaintiff brought the suit, the defendants brought a motion to have the matter referred to arbitration. The Court held that the arbitration clause of the settlement agreement was too broad and did not contemplate the dispute now before the court and could therefore, not be referred to arbitration, but could only be decided by a court. The Court of Appeal upheld the decision.

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***Finlay* v. *Minister of Finance*, [1986] 2 S.C.R. 607 (Supreme Court of Canada)**

Mr. Finlay brought an action for a declaration that certain federal cost-sharing payments are illegal and an injunction to stop them. The issue of whether Mr. Finlay had standing to bring such an action was raised. The Supreme Court held that he did not have sufficient direct personal interest in the matter to have standing, but that under *Thorson v. Attorney General of Canada,* [1975] 1 S.C.R. 138,*Nova Scotia Board of Censors v. McNeil* (1975), 55 D.L.R. (3d) 632 and *Canada (Minister of Justice) v. Borowski,*[1981] 2 S.C.R. 575 he did have public interest standing to bring his action.

***Household Realty Corp., v. Liu* (2005), 261 (4th) 679 (Ontario Court of Appeal)**

Ms. Chan, spouse of the property owner Lui, registered a fraudulent power of attorney and then used that power of attorney to mortgage the property first to CIBC, and second to Household Realty without Mr. Lui's knowledge. The mortgages secured lines of credit used by Ms. Chan to finance her gambling addiction. When both mortgages fell into arrears, the mortgagees sought possession and sale of the property. The argument that the fraudulent mortgages were void failed before the Court of Appeal. The *Land Titles Act* validated the mortgages and Lui was dispossessed. (Overruled by *Lawrence*)

***Kanitz* v. *Rogers Cable Inc*. (2002) 58 O.R. (3d) 299 (Ontario Superior Court)**
During the first year of Rogers' high speed internet service Kanitz experienced frequent and prolonged interruptions to his service and he sued for recovery of the $200.00 service fee. The paper contract under which the service was installed contained an amending clause. Under this authority, Rogers added a mandatory arbitration clause to the terms. No specific notice of the new clause was given to consumers; it was displayed on the Rogers' website as part of the terms and conditions. Under the Ontario arbitration legislation, Rogers successfully obtained a stay of the Kanitz action. This decision of the Ontario Superior Court is cited by the Supreme Court in *Rogers v. Murroff* 2007 SCC 35.

***Lawrence* v. *Maple Trust Co., et al.* (2007), 84 O.R. (3d) 94 (0ntario Court of Appeal)**

An imposter assumed Mrs. Lawrence's identity and conveyed her property to a fictitious purchaser. The fake purchaser mortgaged the property to Maple Trust and absconded with the proceeds. The mortgage soon went into default and Maple Trust tried to extinguish the interest of Mrs. Lawrence. The Court of Appeal held that Maple Trust had the opportunity to avoid the fraud if they had been more vigilant and Mrs. Lawrence's interest was preserved. The Court expressly overruled its previous 2005 decision in *Household Realty Corp*. saying it was wrongly decided.

***Nova Scotia Board of Censors* v. *MacNeil* (1975), 55 D.L.R. (3d) 632 (Supreme Court of Canada)**

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The Nova Scotia Board of Censors banned a film from being played in Nova Scotia theatres. Mr. McNeil brought an action to have the Nova Scotia act declared unconstitutional. The question of whether a private citizen had the standing to bring this action was appealed to the Supreme Court of Canada. The court held that as members of the public were directly affected by the legislation this was sufficient to grant the respondent standing in this matter.

***Onex Corp.* v. *Ball Corp* (1994), 12 B.L.R. (2nd) 151 (Ontario Court of Justice – General Division)**

The applicant and respondent companies were involved in a joint venture and had a very complex joint venture agreement drawn up. The applicant brought an application to enforce a certain "put" clause in the agreement; the respondents requested a stay of proceedings based on a clause of the agreement requiring mandatory arbitration. The Court referred the parties to arbitration as per the joint venture agreement.

***Ontario Hydro v. Denison Mines Ltd.,* [1992] O.R. No. 2948 (Ontario Court of Justice – General Division)**

The parties had a dispute under an agreement for the supply of uranium; the agreement contained an arbitration clause. The court granted a stay of the court action pursuant to the provisions of what was then a new domestic arbitration statute. The decision represents a change in approach to the enforcement of arbitration clauses as stated at paragraph 8:

…. sections of the new Act also confirm a legislative directive in favour of arbitration over litigation, where the parties have so provided by agreement. Thus, the new Act provides a forceful statement from the Legislature signaling a shift in policy and attitude towards the resolution of disputes in civil matters through consensual dispute resolution

***R. v. Binus,* [1968] 1 C.C.C. 227 (Supreme Court of Canada)**

Binus was charged with dangerous driving under the *Criminal Code*, S.C. 1960-61, c. 43, and was convicted. He appealed on the ground that a previous decision of the Supreme Court of Canada meant that the prosecution had to establish more than civil negligence in order to obtain a conviction, an onus that the judge had not made clear to the jury in his address to them. The Supreme Court of Canada upheld the trial judge's charge to the jury. In the course of the decision, the Court said that it could depart from its own previous decisions but only for compelling reasons.

***Seidel* v. *TELUS Communications,* 2011 SCC 15 (Supreme Court of Canada)**

The plaintiff brought an action against the defendant for breach of the British Columbia consumer protection legislation. The defendant counterclaimed requesting a stay of proceedings as the contract between the parties included an arbitration clause. The Supreme Court held (in a 5-4 decision) that the stay of proceedings should be lifted in

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part as the consumer protection legislation should be interpreted generously in favour of consumers and that Seidel should be allowed to bring her action to court. The alternative complaints of the plaintiff were still subject to arbitration. The dissenting opinion stated that all of the claims by the plaintiff should first be submitted to arbitration; that access to justice is fully preserved by arbitration.

***Smith* v. *National Money Mart* 2010 ONSC 1334 (CanLII) (Ontario Superior Court of Justice)**

See Case 2.1 at p. 46 in the text. A class action law suit was brought to declare that the defendant's cash advances contravened s. 347 of the *Criminal Code,* R.S.C. 1985, c.46, and it charged a criminal rate of interest. A settlement agreement was reached between the parties whereby the defendant would pay $120 million broken down as $30 million cash payment, $58 million in debt forgiveness, $30 million in transaction credits, and $2 million in defendant's costs. The lawyers' fees amounted to $27.5 million. The court held that the settlement of the parties did not amount to a $120 million *cash* payment by the defendants. The $58 million in transaction credits were not cash as they only purchased more of the defendant's products and, therefore could not be categorized as "cash." The court reduced the lawyer's fees to $14.5 million.

***Smith* v. *National Money Mart* [2011] O.J. No. 1321 (Ontario Court of Appeal)**

Affirming the lower court's decision (above), the Ontario Court of Appeal found the reduced fee of $14.5 million to be fair and reasonable.

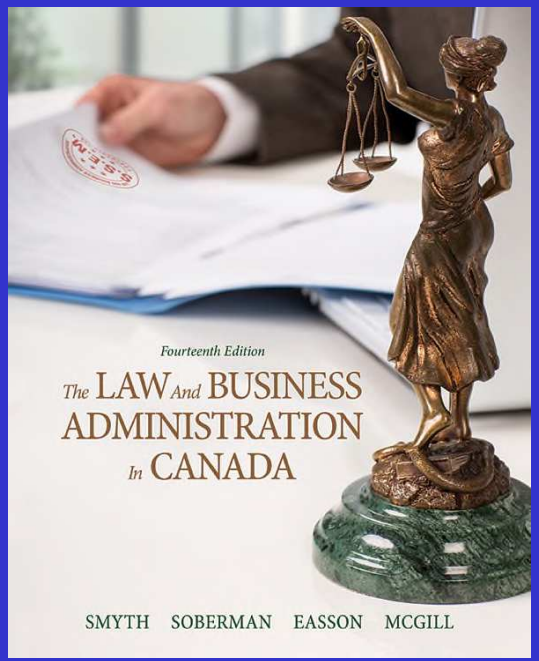
***Western Canadian Shopping Centres* v. *Dutton*, [2001] 2 S.C.R. 534 (Supreme Court of Canada)**

Investors brought a class action against Western Canadian Shopping Centres for mismanagement of funds. The defendants brought an application to have the claim of the plaintiffs representing a class of two hundred and thirty-one investors struck. The application was denied. On appeal to the Supreme Court, the decision was affirmed and the appeal denied. The court lays out the test for when a class action should be allowed to proceed: (1) the class must be capable of clear definition; (2) there must be issues of fact or law common to all members of the class; (3) with regard to the common issues, success for one class member must mean success for all; and (4) the class representative must adequately represent the class.

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# CHAPTER 2




## The Machinery of Justice



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# Objectives

**To discuss such issues as:**

- What is the difference between procedural and substantive law?
- How does the theory of precedent balance the needs of certainty and flexibility?
- What are court costs and who pays?
- What are alternative methods for resolving disputes?



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# Classifying Law: Substantive & Procedural Law

- Substantive law
  - Rules that govern rights and obligations
- Procedural law
  - Rules that determine the enforcement of rights and obligations


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# Classifying Law: Public & Private Law

Substantive law can be divided into public and private law:

- Public law regulates the relationship between government and private citizens
- Private law regulates the relationship between private persons



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# Legal Systems: The Civil Code

- The private law of Quebec is governed by the Civil Code
- Originated in Europe with roots in Roman law
- The law is codified


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# Legal Systems: The Common Law

- Developed in England
- Used in English-speaking Canada and the Commonwealth
- Based on recorded decisions of judges


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# Common Law: The Theory of Precedent

- Under common law, judges are bound by (must apply or follow) previous decisions of higher courts
- Latin term is *stare decisis*
- In civil law systems, less emphasis is placed on precedent


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# Theory of Precedent

- Use of precedent creates tension between
  - Accommodating changes in society's values
  - Certainty, consistency, and predictability
- Cases may be distinguished by differences in material facts
- Decisions may be overruled by the Supreme Court of Canada


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# The System of Courts: How Do Courts Interpret Legislation?

- Literal approach: Words given usual or dictionary meaning
  - Potentially difficult because words may be ambiguous or poorly drafted
- Liberal approach: Views legislation in context (what is statute's purpose?)


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# Equity

- Courts of equity developed principles based on ‘conscience’ and fairness
- Used when common law results were unfair (exceptions when law too harsh)
- Courts of common law and equity merged in 1865


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# Procedural Law: Using the Courts Class Actions 1 of 2

- Can avoid clogging courts with repetitive claims where material facts and applicable laws are common
- Benefits include
  - allowing economic access to justice
  - avoiding multiple actions and inconsistent results
  - deterring wrongful behaviour


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# Class Actions 2 of 2

- One individual or a small number represents the “class”
- If class action is certified any resulting judgment binds all members of the class — ***res judicata***
- Certification determines whether class action is preferable procedure to multiple separate proceedings


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# Costs

- Each side is responsible for own legal costs
- Winning party may be awarded party and party costs
- High cost of litigation may put the court system out of reach for many


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# Costs and Risks of Litigation

- "Loser pays" rule means that at least part of the winning party's legal costs are shifted to the losing side who must pay costs to winner
- Unwise risk to collect a minor sum, pursue an impecunious defendant, or defend an insignificant claim
- **Contingent or contingency fee** — payment for lawyer's services only if client collects and no fees if the client is unsuccessful


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# Settlement Out of Court

- One party agrees to pay a sum of money or do certain things in return for a waiver by the other party of all rights arising from the claims
- Advantages over resolution by trial
  - Is speedy
  - Avoids the expense of litigation
  - Avoids the risk that the court will rule against you


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# Alternative Dispute Resolution

- Mediation: Independent third party assists parties in reaching a settlement
- Arbitration: Ruling by independent third party is a binding resolution
- ADR is
  - Cheaper and faster than litigation
  - Confidential
  - May help preserve future relationship
  - Parties choose adjudicator/mediator


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# Legislation-Government Made Law: Statutes Regulations and Bylaws

Acts of Parliament, legislatures, and municipal governments may

- Codify existing law
- Modify or reform law
- Authorize active government programs



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# Governance of legal service providers

Law societies

- set professional standards of behaviour for lawyers and paralegals
- discipline those who violate the standards
- standards include honesty, integrity, confidentiality, and competency and govern their relationship with clients and the courts
- **paralegal** – non-lawyer who provides some form of legal service to the public


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