CHAPTER 2
LITIGATION AND ALTERNATIVE DISPUTE RESOLUTION

CONTENTS

TEACHING APPROACH

Perhaps more so than any other chapter, Chapter 2 is practical in focus. It provides information that students might well put into practice in a very specific way. That is especially true, for instance, with respect to the discussion of small claims courts.

Students therefore should be encouraged to think about the materials in a practical light. While issues such as pleadings may not be as inherently interesting as some others, they can easily enough be brought to life by asking students to consider the steps that they would need to follow in order to commence or defend a lawsuit.

In that respect, precedents of pleadings are readily available online or in any law library. Students might even be encouraged to try their hand at drafting — not so much with a view to preparing their own pleadings some day, but rather with a view to better understanding the nature of the process.

Likewise, students might be broken into small groups, assigned legal problems, and be required to explore the possibilities for alternative dispute resolution (ADR).

ADDITIONAL TEACHING SUGGESTIONS

Class Actions

Although long familiar to American lawyers and consumer protection groups, class actions only recently have become popular in Canada. That popularity, however, has grown by leaps and bounds in a short period of time. There are several explanations for that development—some perhaps more honourable or desirable than others. First and

foremost, class actions now make it feasible for large groups of individuals, each of whom has suffered relatively little, to bear the expense of litigation. As a corollary of that fact, class actions also increase the likelihood that wrongdoers will be held accountable.

Those aspects of class action litigation are illustrated by the proceedings that emerged after an outbreak of listeriosis was traced to one of Maple leaf Foods' meat packing plants. Several people died and many others became ill. Maple Leaf initially responded by recalling contaminated products and shutting down operations while the affected facilities were sanitized. In the second phase of the case, class action proceedings were commenced on behalf of affected consumers. Within four months, the company acknowledged responsibility and settled the matter for $25 000 000. The allocation of that fund is telling. $750 is available top any person who claims to have consumed tainted products and become ill. (It is not necessary to produce either proof of purchase of a physician's report.) $120 000 is available to the estate of any person who died as a result of consuming contaminated meat. And finally, as often occurs, the single-biggest recipients are the lawyers involved on behalf of the claimants, who will receive in excess of $3 000 000.

The Maple Leaf Foods case accordingly also illustrates a third factor in the growth of class action litigation: financial incentives for lawyers. Reasonable people can reasonably disagree on the desirability of that last phenomenon. Lawyers quite rightfully emphasize two facts: (1) without class action litigation, many legitimate claimants simply cannot afford representation, and (2) because of the tremendous costs and high risks associated with class action claims, lawyers cannot be expected to act without the promise of substantial rewards. In contrast, it also may be true that the promise of such rewards improperly encourage lawyers to foment discord. Class action claims occasionally may be commenced not as a means of righting wrongs, but rather with a view to growing rich.

Against that backdrop, it is interesting to consider some of the recent data. The following table contains information regarding a number of recent, high-profile class actions that have been settled out of court (sometimes after key issues have been judicially resolved). In each instance, the lawyers' remuneration consists of their costs and fees subject to a *multiplier*. That multiplier is a formula used by Canadian courts to determine the appropriate level of compensation in each instance. It is influenced by a number of factors that reflect the complexity of the matter and the success of the lawyers' efforts. The resulting figure ranges from less than 3% of the final settlement (*McCarthy v Red Cross*) to nearly 50% of the damages awarded against the defendant (*Garland v Consumers Gas Ltd*). As a result, both sides of the class action debate would be able to draw support for their position from the table.

CLASS ACTION SETTLEMENTS[1]					
Class Action	**Nature of Case**	**Settlement**	**Costs & Fees**	**Multiplier**	**Legal Fee**

[1] *National Post*, 27 April 2009, A6.

Maple Leaf Foods (2009)	listeriosis-contaminated meat products	$25 000 000	$3 160 000	1.67	12%
Union Gas Ltd (2009)	illegal late payment penalty	$9 230 000	$2 750 000	2.19	30%
Garland Consumers Gas Ltd (2006)	illegal late payment penalty	$22 000 000	$10 100 000	2.78	46%
Vitapharm v Hoffmann-LaRoche (2005)	price fixing amongst vitamin manufacturers	$100 000 000	$15 000 000	2.78	15%
Hislop v Canada (2004)	discriminatory definition of "spouse" in Canada Pension Plan	$81 000 000	$14 700 000	4.8	18%
McCarthy v Red Cross (2000)	hepatitis-infected blood	$785 000 000	$20 000 000	3.25	2.55%

Standard of Proof

As explained in the text, the standard of proof in civil litigation is the *balance of probabilities*. However, it sometimes is suggested in civil cases involving allegations of great moral turpitude (*eg* battery arising from incestuous sexual assault) that the standard of proof is raised to be "commensurate with the occasion" (to borrow Lord Denning's phrase. The Supreme Court of Canada emphatically rejected that proposition in *FH v McDougall*.[2] The court confirmed that the standard of proof remains the balance of probabilities. On a similar note, the court confirmed that there is no requirement that a sexual assault victim must provide independent corroborating evidence. Although allegations of sexual assault raise difficult evidentiary issues, especially if the alleged events occurred many years earlier, the usual rules of proof remain applicable.

Ontario Costs Grid

As noted in the text, Ontario has recently adopted a new system for calculating costs. That system is based on the concepts of *partial indemnity* (in place of party-and-party costs) and *substantial indemnity* (in place of solicitor-and-client costs). A costs grid then determines the amounts that are available for certain services. As the following materials indicate, that amount will reflect a number of factors, including the nature of the proceedings, the experience of the lawyer, and the amount of time devoted to a task. The courts also have a discretion to modify the amounts if, for instance, the lawyer has special expertise in an area. (The following grid was accurate at the time of writing. It is, however, amended from time to time.)

[2] (2008) 297 DLR (4th) 193 (SCC).

See <www.ccla.ottawa.on.ca/ccla_images/Cost_Grid.html>

1. Fees other than Counsel Fee
Hourly rates for pleadings, mediation under Rule 24.1, financial statements, discovery of documents, drawing and settling issues on special case, setting down for trial, pre-motion conference, examination, pre-trial conference, settlement conference, notice or offer, preparation for hearing, attendance at assignment court, order, issuing or renewing a writ of execution or notice of garnishment, seizure under writ of execution, seizure and sale under writ of execution, notice of garnishment, or for any other procedure authorized by the *Rules of Civil Procedure* and not provided for elsewhere in the costs grid.

	Partial Indemnity Scale	Substantial Indemnity Scale
Law Clerks Student-at-law Lawyer (less than 10 years) Lawyer (10 or more but less than 20 years) Lawyer (20 years and over)	Up to $80.00 per hour Up to $60.00 per hour Up to $225.00 per hour Up to $300.00 per hour Up to $350.00 per hour	Up to $125.00 per hour Up to $90.00 per hour Up to $300.00 per hour Up to $400.00 per hour Up to $450.00 per hour

2. Counsel Fee — Motion or Application

	Partial Indemnity Scale	Substantial Indemnity Scale
0.25 hour 1.00 hour 2.00 hours (half day) 1 day	Up to $400.00 Up to $1,000.00 Up to $1,400.00 Up to $2,100.00	Up to $800.00 Up to $1,500.00 Up to $2,400.00 Up to $3,500.00

3. Counsel Fee — Trial or Reference

	Partial Indemnity Scale	Substantial Indemnity Scale
Half Day Day Week	Up to $1,500.00 Up to $2,300.00 Up to $9,500.00	Up to $2,500.00 Up to $4,000.00 Up to $17,500.00

4. Counsel Fee — Appeal

	Partial Indemnity Scale	Substantial Indemnity Scale
1.00 hour 2.00 hours (half day) 1 day	up to $1,000.00 up to $1,250.00 up to $2,000.00	up to $1,500.00 up to $2,000.00 up to $4,000.00

Apology Acts

Litigation occurs for many reasons. A person who has suffered a loss that involves substantial expense likely wants to receive monetary compensation. Some claimants, however, simply seek some means of being vindicated in their belief that the defendant "did wrong." Nevertheless, even though an apology may obviate the need for litigation, a defendant may be reluctant to provide one for fear of being taken to have accepted *legal* responsibility. With a view to removing that obstacle, and perhaps facilitating fast and inexpensive settlements, Manitoba and Saskatchewan have enacted *Apology Acts*. British Columbia has amended its *Evidence Act* to the same effect. And finally, at the time of writing, a bill in the Ontario Legislature had been introduced for the same purpose.

Manitoba's Act provides a good illustration of such legislation. The entire statute can be reproduced. (The *Uniform law Conference of Canada* has produced a model for uniform legislation across the country.[3])

The Apology Act
SM 2007, c 25 (Man)

Definitions

1 The following definitions apply in this Act.

"apology" means an expression of sympathy or regret, a statement that one is sorry or any other words or actions indicating contrition or commiseration, whether or not the words or actions admit or imply an admission of fault in connection with the matter to which the words or actions relate.

"court" includes a tribunal, an arbitrator and any other person who is acting in a judicial or quasi-judicial capacity.

Effect of apology on liability

2(1) An apology made by or on behalf of a person in connection with a matter

(a) does not constitute an express or implied admission of fault or liability by the person in connection with the matter;

(b) does not, despite any wording to the contrary in a contract of insurance and despite any other enactment, void, impair or otherwise affect insurance coverage that

(i) is available, or

(ii) would, but for the apology, be available, to the person in connection with the matter; and

[3] <http://www.ulcc.ca/en/poam2/Uniform_Apology_Act_Policy_Paper_En.pdf>

(c) must not be taken into account in determining fault or liability in connection with the matter.

Evidence of apology not admissible in court

2(2) Despite any other enactment, evidence of an apology made by or on behalf of a person in connection with any matter is not admissible in a court as evidence of the fault or liability of the person in connection with the matter.

DISCUSSION BOXES

Business Decision 2.1

Judgment Debts and the Decision to Sue

This question is designed to make students realize that litigation can often end in a hollow victory. In this case, there is little to be gained and much to be lost from suing the hacker. Although the company is legally entitled to $750 000 in compensation as a result of the incident, it apparently has no chance of actually recovering that amount. The boy presumably does not have large assets and the evidence indicates that he probably never will. Consequently, from the company's perspective, the most likely result of litigation would merely be a large fee from its lawyer. (Looking ahead to Chapter 17, the company might consider obtaining hacker insurance as protection from similar incidents in the future.)

Ethical Perspective 2.1

Contingency Fee Agreement

1. The facts illustrate a shortcoming of the litigation system. Even if the defendant is held liable and the court awards costs on a solicitor-and-client basis (or, in Ontario, substantial indemnity basis), the plaintiff will not truly receive *full* compensation. In other words, in a tort action, the plaintiff will not be restored to the pre-tort condition. Between the tort and the legal system, there inevitably will be a shortfall.

That difficulty is simply highlighted by the existence of a contingency fee agreement. The plaintiff's lawyer takes a substantial portion of the damages that the court awarded as compensation for the plaintiff's loss. The plaintiff cannot possibly recover enough to "be whole again."

There is no right answer in this case. The decision to accept or reject the lawyer's offer will be a function of the client's personality and position. The bottom line is that 60 percent of something is better than 100 percent of nothing. The case cannot be won without a lawyer, and that lawyer will want to be paid. The plaintiff might, however, explore a few options. First, negotiations with the lawyer might lead to a lower fee structure. Second, the plaintiff might continue to search for more affordable representation. And third, if the lawyer is hired on the proposed basis, and if the case is won easily, the client might ask the court to review the final bill.

2. Yes indeed — lawyers are human and it is often human nature to take a bird in the hand, rather than try for two in the bush. That may be true even if the lawyer is acting honestly. Decisions are often clouded by subconscious desires.

You Be the Judge 2.1

Court Structure

1. There are four precedents: trial decisions from British Columbia and Quebec, and appeal decisions from Saskatchewan and Ontario. None of those decisions is binding. A decision is binding only if it is given by a court that stands in a higher position in the same court hierarchy. Consequently, in this case, only a decision of the Alberta Court of Appeal or the Supreme Court of Canada would be binding.

Nevertheless, the case must be decided. As the trial judge, the student would therefore be entitled to consider the four precedents. They are not binding, but they may be persuasive. It should be noted, however, that the decision from Quebec would probably be less valuable, all else being equal. Alberta is a common law province, whereas (as explained in Chapter 1) Quebec is governed by the civil law. That difference is especially important in private law matters.

2. It might indeed be desirable to have the same rule consistently applied across the country. For instance, given that mobility rights are entrenched in the *Charter*, it might be desirable if a person could be assured of being subject to the same expectations wherever they were located. Although the various courts of appeal might eventually agree on a common approach, it seems likely that the issue can only be settled by the Supreme Court of Canada. Once that court spoke, every other court in Canada would be required to follow suit.

The present situation involves the rules of tort law, which are a provincial matter. However, students might also recognize that if the issue fell within the federal jurisdiction, consistency could be achieved across the country if the Parliament of Canada enacted a new law.

Business Decision 2.2
Arbitration Clause
The question asks for additional information that could be added to the arbitration clause. The text provides some examples — students would be expected to come up with others. The London Court of International Arbitration provides a useful set of sample clauses <http://www.lcia.org/>.

- *Law and Procedure* — The purchaser is a Canadian company, the seller is a German company, and the steel will be delivered to South Korea. If a dispute arises, a question will arise as to which set of laws applies: Canadian, German, South Korean, or some other. The parties should stipulate one set of substantive law (*eg* the laws of the Province of Ontario). The parties should also decide the procedures to be used during the arbitration.
- *Place of Arbitration* — For the same reason, it is important for the parties to state where the arbitration will take place. Common choices include the London Court of International Arbitration in England, and the International Court of Arbitration which is based in Paris. The parties are, however, free to make their own choice.
- *Language of Arbitration* — Again, because of the multi-national nature of the contract, the parties should decide which language will be used during arbitration.

- *Costs* Although reduced cost is one of the benefits that ADR has over litigation, the process can still be expensive. The parties should decide who will pay for the arbitration.
- *Number of Arbitrators* — The parties should decide on a number of arbitrators (usually one or three). A larger number obviously involves a larger expense.
- *Selection of Arbitrators* — The parties should set up a clear mechanism for selecting the arbitrator(s). They might, for instance, each select one arbitrator and allow that person to select a third. Or they might select from a list of pre-approved nominees. Or they might allow a neutral third party to select the arbitrator(s). The parties might also place restrictions on the nationality of the arbitrator(s) (*eg* the arbitrators cannot all be Canadian).
- *Decision* — The parties should decide whether the arbitrator(s) decision is binding and whether it can be appealed.
- *Confidentiality* — The parties should decide whether or not the matter will remain confidential.

REVIEW QUESTIONS

1. The statement is not entirely true. It is important to distinguish between different types of organizations.

- *Corporations* — Legally speaking, a corporation is a type of person. As a general rule, a corporation can be sued in the same way as a natural person.
- *Clubs and Associations* — In contrast, clubs and associations are *not* regarded as legal persons. As a general rule, they cannot be sued. It is necessary to sue the individual members instead. In some jurisdictions, however, an exception exists for trade unions.
- *The Crown* — The traditional rule said that "the King can do no wrong." As a result, it was impossible to sue the Crown unless the Crown agreed to be sued. That traditional rule has now been changed by legislation. The statutes are, however, complicated and they often introduce unusual restrictions. They need to be read very carefully.

2. A class action is a type of lawsuit in which a single person, or a small group of people, can sue on behalf of a large number of people. A class action tends to be most desirable if a defendant is accused of wrongfully causing each member of a large group of people to suffer a small loss. In *Garland v Consumers' Gas Co,* for example, the defendant charged its customers an illegal rate of interest. It thereby collected over $150 million, but since that sum was collected from as many as 500 000 people, the individual burden in each instance tended to be quite low. Applying the usual rules of litigation, it was unlikely that the defendant would ever be sued. Each individual customer was likely to decide that the potential damages (perhaps $300 dollars) did not justify the potential costs of litigation (which could easily run to thousands of dollars). A class action, however, overcame that difficulty. By spreading a single set of costs over a large number of claimants, a class action lawsuit made it possible to hold the defendant accountable for its wrongdoing. (The class action was made even more attractive to the claimants when the lawyers agreed to act on a contingency fee basis.)

3. The statement is false. As discussed in Chapter 2, "certification" refers to a court's decision to allow a class action to proceed to trial. Because of the associated risk and inconvenience, a class action is permitted to proceed only if the plaintiff satisfies a number of issues (*ie* the existence of "common issues" between the members of the class, the plaintiff's status as a "representative plaintiff," a workable plan for "notification" of potential class members regarding the lawsuit, and proof that the proposed class action is a "preferable procedure" for resolving the class members' claims against the defendant). If the court decides that a class action is appropriate in the circumstances, then it grants "certification." Quite often, a case settles once certification is granted. Once the court allows the class action to proceed and the defendant recognizes the enormous liability that it may face, settlement becomes an attractive option.

4. The statement is not true. A paralegal is a person who is not a lawyer, but who nevertheless offers *some types* of legal service. A paralegal therefore works *within* the legal system. However, because paralegals have not qualified as lawyers and have not been admitted to the *bar*, they are entitled to undertake *some types* of legal services, but not others. In Ontario, for example, the new regulations allow a paralegal to appear in *Small Claims Court*, to act in relatively less important criminal matters, and to deal with cases under the *Provincial Offences Act*. A paralegal cannot, however, appear in other types of cases, nor can they perform services, such as drafting wills or handling real estate transactions or estates, that are available to lawyers only.

5. The statement is not true. Within each province or territory, a Law Society (the precise name varies from one jurisdiction to the next) exercises considerable control over its lawyers. That proposition is forcefully illustrated by the fact that it is against the law for a person to work as a lawyer without permission from a Law Society. The Law Society grants that permission by admitting a person to the *bar*. Moreover, the Law Society establishes standards, primarily in the form of a *Code of Conduct*, and it is empowered to impose substantial penalties (*eg* fines, suspension, disbarment) for violations.

In addition to regulating the conduct of lawyers, the Law Society in each jurisdiction operates an *assurance fund* that provides a source of compensation for people who are hurt by lawyerly misconduct. The assurance fund, however, is a secondary source of relief. An aggrieved individual should first sue the lawyers in question. One of the conditions of being a member of the bar is the requirement to hold *professional liability insurance*, which provides a source of compensation in the event that a lawyer is held liable to a client or another party.

6. The statement is not true. It is true that the defendant must respond quickly to a statement of claim. If a response is not given within a certain period (usually less than a month), then the plaintiff may obtain "default judgment" from a court—*ie* the plaintiff may win judgment even though the court has not heard from the defendant. That rule, however, has nothing to do with limitation periods.

A limitation period is a period of time within which an action must be started. It is not true that the same period applies to every lawsuit. The details vary depending upon the nature of the claim and the jurisdiction in which the claim is brought. It is, however, possible to offer a few general observations.

- In the past, the limitation for contract was usually six years, while the limitation period for tort was usually two years. Recently, however, many provinces have adopted a simpler system in which most claims are governed by a two-year period. It nevertheless remains true that, in certain circumstances, the period may range from days to decades. It is, for instance, usually necessary to act *very* quickly if you intend to sue a municipality or the Crown. But you may have twenty years to sue someone who has been improperly occupying your land.
- If an action is not commenced within the stipulated period, then, as a general rule, the plaintiff is barred from suing at all. In some situations, the result may be even more dramatic. If the plaintiff fails to take action against a defendant, who has occupied the plaintiff's land for decades, then the plaintiff may lose title to that property.

7. Most types for claim are governed by a limitation period that is created by statute. If a lawsuit is not started within the relevant period, then, as a general rule, the plaintiff no longer is entitled to sue. Some types of claim, however, are not governed by legislated limitation periods. (Although not discussed in the text, that generally is true of claims arising in equity.) In such situations, the courts apply the doctrine of *laches*. *Laches* does not stipulate a specific period of time within which an action must be commenced. Instead, it holds that a lawsuit cannot be commenced if (1) the plaintiff has waited an unreasonably long time, and (2) the defendant would be unfairly prejudiced by a new action.

8. A statement of claim is a document in which the plaintiff outlines the nature of the complaint. The defendant usually responds to a statement of claim with a statement of defence that sets out its version of the facts and indicates how it intends to deny the claim.

9. Examination for discovery is a process in which the parties ask each other questions in order to obtain information about their case. Although discoveries occur outside of court, they are conducted under *oath* and the answers that they generate may be used as evidence during the trial. While discoveries may be time-consuming, they are cheaper and more flexible than court proceedings. Furthermore, by revealing the strengths and weaknesses of a claim, they may indicate which side is likely to lose if the case goes to trial. If so, thy may lead the parties to agree on an out-of-court settlement.

10. A pre-trial conference is a meeting that occurs between the parties and a judge. After the parties outline their positions, the judge may indicate which of them is likely to lose if the case goes to trial. If so, the likely loser may be persuaded to settle. Depending upon the jurisdiction, a pre-trial conference may be required, or it may be initiated by the

parties or by the judge. Ontario and Alberta have gone even further. They have adopted mandatory mediation systems. Mediation is a process in which a neutral person—called a *mediator*—helps the parties reach an agreement. Under mandatory mediation, the parties are required to meet with a mediator within 90 days after the defence has been filed. The parties cannot go to trial until they have gone through mediation, and a party who refuses to cooperate may be punished. Even when that process does not produce a settlement, it speeds up the litigation process considerably.

11. Both phrases refer to the standard of proof. They indicate the extent to which the person making a complaint must satisfy the court that a particular version of events is correct. Civil claims require proof on a balance of probabilities. That means that the plaintiff must prove that her version of events is more likely than not (*ie* 51 percent or higher). Criminal proceedings require proof beyond a reasonable doubt. That means that the Crown must show that there is no reasonable chance that the accused is innocent.

12. *Hearsay evidence* is information that a witness heard from another person, rather than directly from the source. Going back to an example in the previous paragraph, the court is not interested, for instance, in what the pedestrian's father heard about the accident from his daughter. The main problem with hearsay evidence is that it cannot be tested in court. The pedestrian's father does not have direct knowledge of the facts. He cannot explain precisely where the pedestrian was standing, what she saw, what she heard, and so on.

13. If the appellate court believes that the decision in the court below was correct, it will *affirm*. If it believes that the lower court decision was wrong, it may have a number of options depending upon the circumstances. It may *reverse* the lower court decision (for instance, by saying that the defendant was liable rather than not liable), *vary* some part of it (for instance, by saying that the defendant was liable, but for $15 000 rather than $10 000), or send the case back for a *re-trial* (if it does not have enough information to make the right decision itself). Appellate courts usually sit in panels of three or more. The majority rules. A member of the panel who disagrees is entitled to dissent.

14. A defendant who has been found liable and ordered to pay money to the plaintiff is called a judgment debtor. Unfortunately, even if the court has said that the plaintiff is entitled to remedy, the judgment debtor simply may not have anything to give. For instance, it may be a company that is bankrupt. And even if the judgment debtor does have enough money to pay its debt, it may be reluctant to do so. There are, fortunately, several ways to deal with that second sort of problem. For instance, it may be possible to *garnishee* a judgment debtor's income by forcing his or her employer to pay money to the plaintiff. Or it may be possible to *seize and sell* some of the judgment debtor's assets, such as computers, vehicles, and land. (There are, however, limits to that type of remedy. The judgment debtor cannot be stripped bare or left without any way to earn an income.) Court officials and other types of public authorities, such as the sheriff, are available to help with those enforcement procedures.

15. Costs are the expenses that a party incurred during litigation. As a general rule, they are awarded to whichever side wins the lawsuit. As a result, losing a case usually hurts twice. If the plaintiff loses, then it will be denied the remedy that it wanted *and* it will have to pay the defendant's costs. If the defendant loses, then it will have to pay for both the judgment *and* the plaintiff's costs.

Costs are usually awarded on a party-and-party basis (or, in Ontario, a partial indemnity basis). The losing party is not normally required to pay for *all* of the winner's expenses. Party-and-party costs are calculated instead according to a tariff or grid. The situation may be different, however, if one party has misbehaved (*eg* by bringing a frivolous or vexatious claim) or acted inefficiently (*eg* by refusing a reasonable offer to settle). In those situations, the court may, depending upon the circumstances, award solicitor-and-client costs (or, in Ontario, substantial indemnity) or some multiple of the usual costs. Solicitor-and-client costs (or, in Ontario, substantial indemnity) more accurately reflect the amount that the winning party's lawyer actually charged for the case.

16. The statement is not true.

- A court may punish a party if, for instance, that party wasted time during a lawsuit by refusing to accept a reasonable settlement offer from the other side. That penalty, however, takes the form of *costs*. As a general rule, the winning party is awarded costs against the losing party. Those costs are usually calculated on a "party-and-party" (or, in Ontario, "partial indemnity) basis that covers only part (*eg* 40-50%) of the fee charged by the winning party's lawyer. The defendant's misconduct, however, may lead the court to award costs on a "solicitor-and-client" (or, in Ontario, "substantial indemnity) basis, which comes closer (*eg* 70-80%) to reflecting the amount actually charged by the plaintiff's lawyer.
- A *contingency fee* is completely different. In a typical case, a lawyer may charge the client a fee consisting of an hourly rate (*eg* $250 per hour) plus disbursements (*ie* expenses incurred by the lawyer for postage, photocopying, and whatnot). Quite often, however, the client simply cannot afford to run the risk of losing the case and paying the fee. A lawyer may then offer to act in exchange for a contingency fee. For example, in a negligence lawsuit, the lawyer may agree that the client need not pay unless and until the lawyer actually wins the case and recovers money from the other side. Much of the risk is thereby shifted from the client to the lawyer. In exchange for accepting that risk, the lawyer charges a higher fee. Instead of a fixed hourly rate, the client may be required to pay over a fixed percentage (*eg* 25-40%) of any successful judgment. The parties' agreement may also contain other elements. The client, for instance, may be required to pay for disbursements in any event.

17. Small claims courts are often particularly attractive to business people because they are faster, simpler, and less expensive than regular courts. Since the rules and procedures are less complicated than usual, many parties act on their own behalf (though they are entitled to hire lawyers or paralegals). Furthermore, small claims courts are, by

their very nature, well-suited to deal with a variety of situations that frequently arise in the business context. The disadvantage to suing in a small claims court is that the court can only hear *small* claims. The dollar limit varies between the jurisdictions. While a claim that is worth more than that limit may be brought in a small claims court, it will not be possible to recover the excess amount. Nor will it be possible to split a single large claim into two smaller ones.

18. The inter-related concepts of a court hierarchy, the doctrine of precedent, and the rule of law lay at the heart of the Canadian legal system.

- To say that the courts are in a hierarchy simply means that they are arranged according to importance. One court is on top, some are in the middle, and several are on the bottom.
- The doctrine of precedent requires a court to follow any other court that is above it in a hierarchy.
- The rule of law states that disputes should be settled on the basis of laws, rather than personal opinions. The concept of a hierarchy and the doctrine of precedent support the rule of law by requiring judges to follow the courts above them.

That system has a number of benefits. One of the most important is consistency. Once an issue has been decided by a court, every court that is lower in the hierarchy must apply it. Consequently, similar cases are decided in similar ways. That sort of consistency also creates another important benefit: respect for the legal system. Even if a litigant disagrees with the trial judge's decision in a particular case, he or she can be confident that the decision was based on law, and not merely on the judge's personal preference.

19. "Judicial review" occurs when a court is asked to decide whether or not a decision of an administrative tribunal can stand. An administrative tribunal is a body, somewhere between a government and a court, that resolves issues and disputes that arise in administrative law. Given their nature and purpose, administrative tribunals occupy an interesting place in our legal system. Although they are not courts, they regularly deliver decisions that profoundly affect the people and organizations that appear before them. Furthermore, because the members of tribunals generally are appointed because of their special knowledge and experience in their area, their decisions are not easily overturned.

Even though a dissatisfied party may ask a court for judicial review of a tribunal's decision, the judge will often *defer* to the tribunal's expertise. Depending upon a variety of factors, the court may ask not whether the tribunal's decision is *correct*, but rather whether it is *reasonable*. It is more difficult to prove that a decision not only was incorrect, but also unreasonable. It becomes even more difficult to overturn a tribunal's decision in the face of a *privative clause—ie* a statutory provision that attempts to prevent a court from exercising judicial review over a tribunal decision. For example, a statute may say that the decision of a tribunal "on a matter in respect of which the tribunal has jurisdiction is final and conclusive and is not open to question or review in a court on any grounds." In that situation, the dissatisfied party might be limited to arguing that the tribunal or the legislature, in setting up the administrative scheme, acted contrary to the *Constitution*. Such an argument seldom succeeds.

20. Alternative dispute resolution (or ADR) is a process that allows the parties to settle an argument without a binding court order. There are three important forms of ADR: negotiation, mediation, and arbitration. Each has advantages and disadvantages.

- *Negotiation* A negotiation is a discussion that leads to the settlement of a dispute. Although the parties may use their lawyers, they are not required to do so. Negotiation has many advantages. It tends to be quicker, less complicated, and less expensive than litigation. It often helps the parties to remain on good terms with each other. It allows business people to take advantage of their own bargaining skills. And since it is a private procedure, it can be used to avoid bad publicity. However, the process also has certain limitations and dangers. First, since negotiation requires cooperation, it may not be possible if a dispute has already turned ugly. Second, the parties may not have equal bargaining power, especially if one is inexperienced and unrepresented by a lawyer. As a result of having fewer resources and less information, that person may not be capable of securing a fair settlement. Indeed, it may be exploited. Third, if a dispute concerns a loss that is covered by an insurance policy, the insured must let the insurance company take control of the negotiations. If the party attempts to settle the matter itself, it may lose the benefits of the policy. Finally, there is no guarantee of success. Negotiations may collapse and a dispute may remain unresolved. If so, the effort put into the negotiations will be largely wasted.
- *Mediation* Mediation is a process in which a neutral person, called a mediator, helps the parties reach an agreement. The important point is that mediation is non-binding. The mediator brings the parties together, listens to their arguments, outlines the issues, comments on each side's strengths and weaknesses, and suggests possible solutions. But the mediator does *not* give a decision and the parties are *not* required to obey any orders. In that sense, mediation is unlike formal litigation, but like negotiation. It has many of the same benefits, limitations, and dangers as negotiations, except that it also provides the parties with a neutral perspective.
- *Arbitration* Arbitrations look more like court proceedings. Arbitration is a process in which a neutral third person, called an arbitrator, imposes a decision on the parties. Accordingly, the fundamental difference between arbitration and mediation is that an arbitrator's decision is almost always *binding*. The parties must obey it. Indeed, it is quite common for the parties to agree beforehand that the arbitrator's decision, unlike a trial judgment, cannot even be appealed. Finality is therefore one of the benefits of arbitration. There are others. Like negotiation and mediation, it tends to be quicker, more private, less expensive, and less adversarial than formal litigation. Furthermore, arbitrators usually have greater expertise than judges. The government selects people to be judges for a variety of reasons. And once those people are *on the bench* (that is, once they have become judges), they generally hear every type of case. Sometimes they have a great deal of experience in an area, but sometimes they have none at all. An arbitrator, in contrast, is selected by the parties to a particular dispute precisely because he or she does have expertise in the area. A professor of contract law may be chosen to decide whether or not an agreement is valid, or a person with an extensive background in employment relations may be asked to resolve a labour dispute.

CASES & PROBLEMS

1. The concept of a class action exists to a multitude of similar claims to be resolved in a single set of proceedings. The benefits are largely those of *expediency and expense*. To the extent that many people are pursuing similar claims against the same defendant, it makes sense to save time and money by bringing the actions together into a single case. Class actions also serve the interest of *access to justice*. Without the possibility of a class action, individuals who personally have little to gain—but cumulatively hold rights of considerable value—are unlikely to vindicate their claims. By banding together, however, it becomes feasible for the individuals members of the class to receive the redress that they deserve. The corollary of that proposition is equally important. To the extent that individual claimants are economically dissuaded from suing, a wrongdoer is able to escape liability. In the absence of class action proceedings, a wrongdoer is likely to escape liability, despite injuring many people, as long as the individual claims are of relatively little value. By changing the economics of the situation, class action proceedings consequently serve the societal interest in imposing *responsibility* for those who wrongfully injure.

Against that backdrop, it may seem that Antonio Salazar's proposal makes sense. By means of a class action, he could bring together three categories of employees who otherwise might be unlikely to enforce their rights against SCI. Salazar's attempt to commence a class action nevertheless will fail. A court undoubtedly would deny *certification* and thereby prevent him from proceeding. That is true for several reasons.

- *Cause of Action* Most significantly, Salazar himself has no interest in the litigation. A class action is available only to someone who is among the class of individuals with a right to sue. Salazar, however, has no cause of action against SCI.
- *Representative Plaintiff* For the same reasons, Salazar obviously would not be suitable as a *representative plaintiff*.
- *Common Issues* A class action also presumes that the claims available to the various members of the class contain *common issues*. A class action saves time and money because it allows a court, with a single determination, to resolve an issue that otherwise would have to be decided several times over. In this instance, however, it does not appear that there is any single issue of fact or law that would have to be settled for each of the claims. (It may be, however, that a much small class action would be appropriate for the members of any given category of claimants—*eg* the employees who were systematically underpaid).
- *Preferable Procedure* For all of the preceding reasons, it would be preferable to use some other procedure for resolving the various claims against SCI. The individual categories of claimants might support three different class actions. Alternatively, each employee with a valid claim might individual sue the company.

2. This exercise requires students to address several issues regarding the litigation process. None of Merkel's concerns are particularly worrisome.

- *Limitation Period* A lawsuit must be started within a period of time that is set by a statute of limitations. Although the details vary from one jurisdiction to the next, a claim for breach of contract usually has to be commenced within two to six years. That might seem to suggest that Merkel is out of time. In fact, however, the limitation period does not begin to run (at the earliest) until all of the elements of the plaintiff's cause of action are in place. It is irrelevant that the parties' agreement was created nine years ago. Merkel's allegations pertain to misconduct allegedly occurring within the past year. As long as it issues a statement of claim reasonably promptly, it certainly need not worry about the limitation period.
- *Stare Decisis—Doctrine of Precedent* Merkel's central allegation pertains to a disputed point of law. Since all of the facts are connected to the same province, the law of that home province would govern. The courts in the home province, however, have yet to pronounce on the disputed point. It also appears that the Supreme Court of Canada has yet to address the point. Consequently, as a matter of precedent or *stare decisis*, the point is entirely open. It is true that some trial courts elsewhere have favoured Merkel's position, while some appellate courts elsewhere have favoured Papandreou's position. None of those courts, however, stand in the same *judicial hierarchy* as the courts of the home province. The decisions of those other courts therefore may be relevant, and possibly even persuasive (if well-reasoned), but not binding. The doctrine of *stare decisis* states that a court is bound only by a decision of a court that occupies a higher position within the *same* hierarchy.
- *Pre-trial Activity* Merkel is concerned that its ability to prove its allegations depends upon information that Papandreou refuses to disclose. Pre-trial litigation procedures provide ways of overcoming such problems. Merkel may compel Papandreou to disclose relevant information by conducting *examinations for discovery*. The relevant parties within Papandreou can be compelled to answer questions under oath. Merkel also is entitled to use the pleadings process to issue a *demand for particulars*, which again would compel Papandreou to disclose the required information.
- *Claims and Counterclaims* Merkel is right to be concerned about the very high costs of litigation. It need not worry, however, that it would be faced with two completely separate sets of expenses if, in response to Merkel's claim, Papandreou pursued its own allegations. Assuming that the two sets of allegations are connected to the same contract, they would be combined within a single set of proceedings as a *claim* and a *counterclaim*.

3. This case raises several issues regarding the basis upon which a client may be liable for a lawyer's services.

- *Contingency Fee* A bill for a lawyer's services often consists of two elements: (1) *disbursements* representing expenses (*eg* photocopying, postage) that the lawyer incurred in the course of the file, and (2) an *fee* representing the amount of time that the lawyer worked on the file multiplied by the lawyer's *hourly rate* (*eg* $250 per hour). In the alternative, however, a lawyer may act for a client on the basis of a *contingency fee agreement*. Such an agreement requires the client to pay only if the lawyer recovers money or property on the client's behalf.

And because the lawyer takes the risk of not being paid anything if the case is lost, the fee is inflated somewhat in the event of success. Malcolm and Ellie appear to have entered into such an agreement in this case. Significantly, however, there is a danger that lawyers may abuse their position of authority by creating unfair contingency fee agreements. For that reason, such agreements are governed by a number of rules. Most obviously, a contingency fee agreement has to be written, dated, and signed by the parties. In this case, the facts state that Malcolm and Ellie *verbally* agreed to the payment scheme. As a result, their fee agreement almost certainly is unenforceable.

- *Taxing Officer* Regardless of the formal validity of the parties' purported arrangement, Ellie's fee is excessive. A typical contingency fee agreement entitles the lawyer to 25-40 percent of any amount recovered on behalf of the client. In this instance, Ellie is demanding a fee of 75 percent. Whether or not the fee is couched in terms of a contingency fee, an unhappy client generally is entitled to have a fee dispute adjudicated by a court official known as a *taxing officer*. It is very likely that the taxing officer in this case would reduce Ellie's fee substantially.
- *Reasonable Sum* Even if the parties' purported contingency fee agreement is struck down for informality or if Ellie's demand otherwise is rejected, Malcolm will not be entitled to deny all payment for Ellie's services. In such circumstances, a lawyer normally is entitled to receive a *reasonable fee*.
-

4. Acme Inc has raised several arguments in its attempt to overturn the tribunal's decision. While most of those arguments will fail, the final argument should succeed.

- *Informal Procedures* The fact that the tribunal received hearsay evidence and otherwise refused to follow evidentiary rules that normally apply in court probably will not help Acme's case. Although the precise requirements vary with the circumstances, administrative tribunals generally operate much more informally than courts. Unless this particular tribunal was expected to proceed by close analogy to the courts, Acme will not prevail on this argument.
- *Standard of Judicial Review* Acme's lawyer suggests that while the tribunal's decision was supported by the facts and not far-fetched, a better answer was available. Whether or not that argument will persuade a court to overturn the tribunal's decision depends upon the applicable standard of review. The *reasonableness standard* requires judicial deference, such that the tribunal's decision will stand as long as it was *reasonable* in the circumstances. In contrast, the *correctness standard* does not entail judicial deference, but instead allows a court to impose its own decision if the tribunal did not arrive at the correct conclusion. The choice between those two standards depends upon the circumstances. Since the tribunal's decision largely turned on its application of its experience and expertise, this presumably is a case that calls for the reasonableness standard. Acme Inc consequently will not prevail on this argument.

- *Privative Clause* The preceding point is further supported by the fact that the tribunal's enabling legislation contains a *privative clause* that purports to immunize the tribunal's decision from judicial review.
- *Jurisdiction* Although the substantive issue addressed by the tribunal fell within its area of experience and expertise, and although the tribunal's decisions purportedly are protected by a privative clause, it appears that Acme Inc might well succeed in seeking judicial review. Notwithstanding everything said to this point, the issue of *jurisdiction—ie* the question of whether the tribunal or its enabling legislation enjoy proper authority over Acme—must be subject to the *correctness standard*. Neither the provincial legislature, nor its tribunal, can give itself authority to deal with an issue that falls within federal jurisdiction. As explained in Chapter 1, the *Constitution* contains a division of powers. Section 91 assigns certain subjects to the federal sphere, while section 92 gives authority over some subject to the provinces. The facts of this case indicate that the relevant issues pertain to international trade. International trade is enumerated under section 91 of the *Constitution* as being subject to federal power. A court therefore would be required to find that the tribunal, as well as its enabling legislation, are *ultra vires* ("beyond the power") and hence void by virtue of section 52 of the *Constitution*.

5. This problem is based on the *Federal Rules of Court* that govern the award of costs. The relevant provisions are set out below. The aim of those provisions is to encourage parties to accept reasonable offers to settle out of court, and to thereby avoid the costs that are associated with court proceedings. Although the same principles apply under the rules that are in force in each jurisdiction, the rules that apply in the Federal Court are especially hard upon parties who reject reasonable settlement offers.

The plaintiff offered to settle for $400 000. The defendant offered to settle for $200 000. The question presents three different scenarios, depending upon how the court resolved the dispute.

- *Defendant is Liable for $500 000* — The defendant is held liable for *more than* the amount for which the plaintiff offered to settle. Consequently, the court will find that the defendant acted unreasonably in not accepting the settlement offer. According to Rule 420(1), the court may hold the defendant liable for party-and-party costs for the period leading up to the time when the plaintiff made the offer, as well as *double* party-and-party costs from the time that the plaintiff made the offer.
- *Defendant is Liable for $100 000* — The defendant is held liable for *less than* the amount for which the defendant offered to settle. Consequently, the court will find that the plaintiff acted unreasonably in not accepting the settlement offer. According to Rule 420(2)(a), the court may hold the defendant liable for party-and-party costs for the period leading up to the time when the defendant made the offer, but the plaintiff will be liable for *double* party-and-party costs for the period following the defendant's offer.
- *Defendant is Not Liable* — The defendant is held not liable despite the fact that it had offered to pay money in settlement of the claim. Consequently, the court will

find that the plaintiff acted unreasonably in not accepting the settlement offer. According to Rule 420(2)(b), the court may hold the plaintiff liable for party-and-party costs for the period leading up to the time when the plaintiff made the offer, as well as *double* party-and-party costs from the time that the defendant made the offer.

Application to other proceedings

419 Rules 420 and 421 apply, with such modifications as are necessary, to parties bringing and defending counterclaims and third party claims, to applicants and respondents in an application and to appellants and respondents in an appeal.

Consequences of failure to accept plaintiff's offer

420 (1) Unless otherwise ordered by the Court, where a plaintiff makes a written offer to settle that is not revoked, and obtains a judgment as favourable or more favourable than the terms of the offer to settle, the plaintiff shall be entitled to party-and-party costs to the date of service of the offer and double such costs, excluding disbursements, after that date.

Consequences of failure to accept defendant's offer

(2) Unless otherwise ordered by the Court, where a defendant makes a written offer to settle that is not revoked,

(a) if the plaintiff obtains a judgment less favourable than the terms of the offer to settle, the plaintiff shall be entitled to party-and-party costs to the date of service of the offer and the defendant shall be entitled to double such costs, excluding disbursements, from that date to the date of judgment; or

(b) if the plaintiff fails to obtain judgment, the defendant shall be entitled to party-and-party costs to the date of the service of the offer and to double such costs, excluding disbursements, from that date to the date of judgment.

Offer to contribute

421 Subsection 420(2) applies to a third party, or to one of two or more defendants who are alleged to be jointly and severally liable to the plaintiff in respect of a claim, who makes a written offer to other defendants or third parties to contribute toward a settlement of the claim.

Disclosure of offer to Court

> 422 No communication respecting an offer to settle or offer to contribute shall be made to the Court, other than to a case management judge … or to a judge or … at a pre-trial conference, until all questions of liability and the relief to be granted, other than costs, have been determined.

6. The facts suggest that CBSI's only claim against Tepes would be for breach of contract. However, even if that is true, it may be entitled to a variety of remedies, depending upon the circumstances. Those possibilities were set out in Concept Summary 2.1. (Contractual remedies are discussed in greater detail in Chapter 12.)

- *Rescission* Rescission would allow the company to terminate its contract with Tepes. That remedy would be available only if a court was convinced, *inter alia*, that Tepes improperly tricked CBSI into creating the agreement.
- *Nominal Damages* If the agreement is not rescinded, but CBSI is able to persuade a court that Tepes is in breach, then the company will succeed in its claim for breach of contract. That is true even if the court is unable to find that CBSI suffered any loss as a result of the breach. In that situation, nominal damages would be awarded simply to symbolically recognize that Tepes did wrong.
- *Compensatory Damages* If CBSI was able to prove not only that Tepes breached the agreement, but also that that breach caused the company to suffer a loss, then a court would award compensatory damages so as to provide monetary reparation of the loss.
- *Punitive Damages* In addition to some other remedy, a court might impose punitive damages upon Tepes if it was convinced that acted so badly as to warrant punishment.
- *Specific Performance* If a court agreed that Tepes had failed to fulfill a contractual obligation to transfer a piece of land to CBSI, then a court might award specific performance. Such an order would compel Tepes to honour the contract.

Most of those remedies would require Tepes to pay a stipulated amount of money to CBSI. The company is concerned, however, that Tepes would simply refuse to comply. Obstinate judgment debtors undoubtedly are a serious problem in practice. There often is a substantial difference between *winning* a judgment and *enforcing* a judgment. If Tepes was bankrupt, for instance, CBSI simply would not receive everything to which it was entitled. In contrast, if the problem is not bankruptcy, but rather a lack of cooperation, then there are several procedures that would enhance the company's likelihood of receiving payment. Two examples are mentioned in the text.

- *Garnishment* It may be possible to *garnishee* a judgment debtor's income by forcing his employer to pay money to the plaintiff. Consequently, if Tepes receives a regular income from some third party, CBSI may be able to intercept part of his pay cheque even before it reaches him.
- *Seizure and Sale* It may be possible to *seize and sell* some of a judgment debtor's assets, such as computers, vehicles, and land. There are, however, limits to that type of remedy. Tepes could not be stripped bare or left without any way to earn an income.

CASE BRIEFS

Garland v Consumers' Gas Co (2004) 237 DLR (4th) 385 (SCC)—note 6

The defendant, a natural gas provider, was required to apply periodically to the Ontario Energy Board (OEB), a provincial body, for approval of its pricing scheme. Beginning in the 1970s, that scheme included a late payment penalty (LPP) of 5 percent of unpaid charges. Three important events ten followed. (1) In 1981, the federal government introduced section 347 of the *Criminal Code* to prohibit the receipt of interest at a rate exceeding 60 percent per annum. The effect of that provision was not immediately apparent. (2) In 1994, however, the plaintiff commenced proceedings for the purpose of arguing that the scheme was illegal. And indeed, if a customer paid very soon after the due date, the LPP could be astronomical when expressed as an annual interest charge. (3) In 1998, the Supreme Court of Canada agreed that the LPPs constituted a criminal rate of interest: *Garland v Consumers' Gas Co* (1998) 165 DLR (4th) 385 (*Garland No. 1*). (Remarkably, however, the defendant continued to request, receive and enforce the same pricing scheme for another three years!)

Garland No. 1 set the scene for the restitutionary portion of the proceedings. Since 1981, the defendant had illegally collected as much as $150 000 000 in LPPs. The plaintiff accordingly demanded repayment on behalf of himself and a class comprising as many as 500,000 customers. The claim failed in the lower courts, but the Supreme Court of Canada held that *some* of the LPP payments were recoverable.

Iacobucci J held that restitution for unjust enrichment will be available if three conditions are met.

- The defendant was enriched.
- The plaintiff suffered a corresponding deprivation.
- There was an absence of juristic reason for the enrichment.

On the third issue, Iacobucci J formulated a two-part test.

- The plaintiff must demonstrate that the facts do not fall within one of the "established categories" of juristic reason: contract, disposition of law, donative intent, or "other valid common law, equitable or statutory obligations." If so, restitution *prima facie* is available.
- The burden of proof then shifts to the defendant to show some other reason as to why the enrichment should be retained. Two factors are particularly important at that stage: public policy and the parties' reasonable expectations.

On the basis of that test, the defendant was liable for *some* of the money that it had received.

- It was enriched by the receipt of the LPP payments.
- The plaintiff (and the other customers) suffered a corresponding deprivation because they paid the LPP.
- There was an absence of juristic reason. The facts did not fall within one of the established categories of juristic reason. Although the defendant pointed to the fact that the LPP scheme had been approved by the OEB under the *Ontario Energy Board Act*, those orders contravened the Criminal Code and therefore were invalid. Public policy argued in favour of recovery because a wrongdoer

> should not be entitled to benefit from a crime. However, Iacobucci J also held that the defendant had reasonably assumed that the OEB orders were valid. That assumption became unreasonable only after the plaintiff had made his complaint and started his action.

In the final analysis, the defendant: (i) was not liable at all for payments received before the plaintiff started his action, but (ii) was liable for the LPP payments received after that time — but only to the extent that they exceeded the rate of interest that was allowed by the *Criminal Code*.

Law Society of Upper Canada v Boldt 2007 ONCA 115 (Ont CA)—note 13
Maureen Boldt worked as a paralegal and a mediator. In 1998, she was convicted of one count of practicing law without a licence. She paid a $100 fine and gave an undertaking to the Law Society that she would behave herself. In 2000, however, she was found to be in breach of her undertaking and the Law Society was granted an injunction to prevent Boldt from future violations. Persistent as ever, Boldt breached that injunction and accordingly was held in contempt of court. The Law Society sought a term of four months in prison; Boldt's lawyer suggested a fine of $5000.

The Ontario Court of Appeal upheld the lower court's decision on point. Boldt was found to be in cynical and repeated breach of her obligations. She also was found to have profited from her wrong. Consequently, because the court perceived a need for both special and general deterrence (*ie* a need to discourage both Boldt personally and others generally), it believed that serious sanctions were required. Boldt therefore became subject to three orders: (1) she was subject to house arrest for a period of four months, (2) she was prohibited from carrying on business for four months, and (3) her punishment was to be published as a notice in a local newspaper. The court also required Boldt to pay costs on a *substantial indemnity* basis.

R v Romanowicz (1999) 178 DLR (4th) 466 (Ont CA) — note 11
The accused was charged with failing to remain at the scene of an accident. At trial, he chose to be represented by a paralegal, rather than a lawyer. The judge questioned the accused to ensure that he understood the difference between the two. The accused did understand that difference. The trial proceeded and the accused was convicted. On appeal, he argued that he had not been properly represented.

The Court of Appeal noted that sections 800 and 802 permit an accused of certain crimes to be defended by an "agent," rather than a lawyer. It also held that a trial judge should ensure that the accused understands the nature of the choice, but that the trial judge is *not* required to conduct an inquiry into the agent's competence. A judge may, however, disqualify an agent who would bring the administration of justice into disrepute (*eg* on the basis of incompetence, dishonesty, or conflict of interest). In the course of that discussion, the court said, somewhat harshly, that a "person who decides to sell t-shirts on the sidewalk needs a license and is subject to government regulation," but "the same person can … without any form of government regulation, represent a person in a complicated criminal case."

Finally, the court said that once the choice has been made as between a lawyer and a paralegal, the accused must live with the potentially adverse consequences of being represented by someone who is not a lawyer.

Koliniotis v Tri Level Claims Consultants Ltd (2005) 257 DLR (4th) 297 (Ont CA)— note 14
Nicki Koliniotis suffered an injury while working at the Toronto General Hospital. She hired Tri Level Claims Consultants Ltd, a paralegal firm, to represent her in her claim against the Workplace Safety and Insurance Board (WSIB). The parties agreement entitled Tri Level to a $600 retainer plus "a percentage of fees (not to exceed 20%) on any settlement achieved as a result of [Tri Level's] intervention on [Koliniotis'] behalf." Koliniotis tried to terminate the agreement after learning that she could represent herself before the WSIB, but Tri Level refused. The company therefore carried on with its work and Koliniotis eventually was awarded $22 176.

The lower courts held that Tri Level was entitled to a fee of $4800 plus disbursements under its agreement with Koliniotis. She appealed that decision. The Ontario Court of Appeal sided with her. It held that the parties' agreement was *champertous* (*ie* one person became involved in another's lawsuit with a view to sharing in its proceeds). Although lawyers are sometimes entitled to work on a contingency fee basis, paralegals do not enjoy the same option. Tri Level was entitled to be paid for its services, however, on a *quamtum meruit* basis (amounting to $1300).

Harrison v Carswell (1975) 62 DLR (3d) 68 (SCC) — note 55
The accused was employed by a store that was located in Polo Park Shopping Mall in Winnipeg. The accused became involved in a labour dispute with her employer. She therefore tried to picket within the mall. The owner of the mall objected to the picket and charged her under the *Petty Trespass Act* when she refused to stop. An offence was in fact committed unless the accused had a legal right to picket within the mall. A majority of the Supreme Court of Canada held that she had no such right. The owner of a mall issues an unrestricted invitation for people to visit the premises. Nevertheless, under traditional property rights, it also retains the ability to control activities on its premises and to exclude trespassers. It was irrelevant that the accused was involved in a labour dispute with her employer. Although traditional property rights could be modified so as to allow picketing in such circumstances, that change had to be introduced by the legislature. A court is not in a position to properly weigh the competing social values.

The court had previously dealt with similar situations in other cases. On the issue of whether those earlier decisions were binding, Laskin J said that "[t]his Court, above all others in this country, cannot be simply mechanistic about previous decisions, whatever be the respect it would pay to such decision. … [W]e are free to depart from previous decisions in order to support the pressing need to examine the present case on its merits."

Dobson v Dobson (1999) 174 DLR (4th) 1 (SCC) — note 57

An action in the tort of negligence was brought on behalf of a boy against his mother. During pregnancy, the mother carelessly became involved in a car accident. That accident damaged the fetus and the boy was subsequently born with disabilities. The mother supported the action, which was really against her insurance company, because she too wanted her son to receive compensation for his injuries.

The Supreme Court of Canada denied the possibility of imposing liability. While accepting that injury to the son was a reasonably foreseeable result of the mother's carelessness, the court held that policy factors negated a duty of care. The majority was concerned that a duty of care would intolerably infringe upon a pregnant woman's freedom of choice for a nine-month period. It was also dissuaded by the task of formulating a standard of care. In contrast to the dissenting judge, it did not believe that the obligation to act carefully, if recognized, could be confined to activities like driving.

Dunsmuir v New Brunswick (2008) 291 DLR (4th) 577 (SCC)—note 61
David Dunsmuir was employed, "at pleasure," by the Province of New Brunswick. His probation period was extended twice and he was reprimanded three times for misconduct. As the employer grew more impatient, it provided written notice to Dunsmuir that any further reprimands would carry substantial sanctions, includi9ng perhaps dismissal. The employer did eventually lose patient and terminated Dunsmuir. He then brought a grievance under the *Public Service Labour Relations Act*. The case went through several stages before arriving at the Supreme Court of Canada.

- *Tribunal* The initial adjudicator held that Dunsmuir was entitled to, but did not receive, procedural fairness. He therefore held that the dismissal was void and he ordered Dunsmuir to be reinstated. In that event that he was wrong on that point, the adjudicator found that Dunsmuir should have been given eight month's notice.
- *Queen's Bench* The employer sought judicial review at the Court of Queen's Bench. The court overturned the adjudicator's decision. It held that, under the relevant legislation, the adjudicator did not have authority in the circumstances to question the reasons for dismissal—he was confined to determining whether proper notice had been given. The court did agree, however, with the adjudicator's provisional finding that Dunsmuir was entitled to eight month's notice.
- *Court of Appeal* The New Brunswick Court of Appeal held that the proper standard for judicial review was reasonableness *simpliciter* and that the adjudicator's decision was unreasonable and therefore could not stand. In the circumstances, the governing statute merely entitled Dunsmuir to grieve the notice period, not the grounds for dismissal.

A further appeal to the Supreme Court of Canada was dismissed. The significance of the decision lies largely in the court's decision to revisit the fundamental principles of judicial review with a view to simplifying the system. A distinction previously drawn between *unreasonable* and *patently unreasonable* decisions was found to be hopelessly vague and unworkable. It preferred instead to confine the standards of judicial review to only two possibilities: *reasonableness* and *correctness*.

The *correctness* standard does not entail an element of judicial deference. A reviewing court instead is entitled to reach, and implement, its own decision on the question put to the administrative tribunal.

The *reasonableness* standard is mostly concerned with issues of justification, transparency, and intelligibility. An administrative decision ought to stand as long as it is within the range of reasonable answers. The court therefore ought to adopt a deferential posture on judicial review so as to reflect the legislative policy of allowing expert tribunals to decide issues with some substantial measure of finality.

In deciding which standard to apply, the existence of a privative clause strongly indicates, but is not determinative of, the propriety of the reasonableness standard. Deference also is appropriate if the relevant issue is one of policy or fact. So too if a decision maker is interpreting its own statute, with which it is particularly familiar.

In contrast, the correctness standard is appropriate where the issue pertains to a question of law that is of interest generally, even outside the area in which the tribunal has special experience and expertise. So too, deference should not be shown where the relevant issue pertains to the tribunal's jurisdiction to act.

On the facts, the relevant issue pertained to the interpretation of its own statute. The proper standard therefore was reasonableness. The court found, however, that the adjudicator's interpretation of the Act, so as to give him authority to review the reasons for the employer's decision to dismiss Dunsmuir, was unreasonable. That interpretation was not within the realm of possible reasonable views.

Monsanto Canada Inc v Ontario (Superintendant of Financial Services) (2004) 242 DLR (4th) 193 (SCC)—note 63

In the course of reorganization, Monsanto terminated the employment of 146 members of its pension plan. A Superintendent of Financial Services was created by the authority of Ontario's *Pension Benefits Act*.[4] The Superintendent refused to approve Monsanto's partial winding-up on the ground that the company had failed to arrange for the distribution of surplus assets related to the part of the pension plan that was being wound up. The Financial Services Tribunal disagreed with that decision. It believed that the Act merely entitled pension members to participate in the distribution of a surplus when the plan was fully wound-up. On judicial review, the Divisional Court reinstated the Superintendent's decision and the Ontario Court of Appeal agreed. On final appeal to the Supreme Court of Canada, Deschamps J, writing for a unanimous panel, also sided with the Superintendent. She found, on a plain reading of the *Pension Benefits Act*, that the pension scheme envisaged by the legislature required an immediate resolution of the rights held by the terminated members of the plan. It would be wrong to compel those individuals to wait, until a final winding-up, to participate in the distribution of any surplus.

[4] 1987, SO 1987, c 35 (Ont).

As mentioned in the text, the case also is interesting insofar as the Supreme Court of Canada held — contrary to the view expressed by the lower courts and the parties — that the appropriate standard of judicial review was correctness rather than reasonableness. The live issue required an interpretation of s 70(6) of the *Pension Benefits Act*:

> On the partial wind up of a pension plan, members, former members and other persons entitled to benefits under the pension plan shall have rights and benefits that are not less than the rights and benefits they would have on a full wind up of the pension plan on the effective date of the partial wind up.

As Deschamps J explained, since the question was one of pure law, it could not be resolved through an agreement between the parties.

Deschamps J then considered the four-part test that was discussed in the text.

- *Privative Clause* The governing legislation did not provide a *privative clause*. On the contrary, the statute expressly provided a right of appeal to the Divisional Court.
- *Expertise* The Financial Services Tribunal did not possess any special *expertise* regarding the interpretation of the relevant provision. The Tribunal did not have responsibility for formulating policy and its members did not have to present any special qualifications. The court was therefore equally well-positioned to deal with the matter.
- *Purpose* Deschamps J explained that the *Pension Benefits Act* was "public policy legislation [aimed at] establishing a carefully calibrated legislative and regulatory scheme prescribing minimum standards for all pension plans in Ontario. It is intended to benefit and protect the interests of members and former members of pension plans, and 'evinces a special solicitude for employees affected by plant closures.'" That would tend to suggest that the Tribunal was charged with a discretion to serve the statutory goals. On the narrow question regarding the interpretation of s 70(6) of the Act, however, the Tribunal's function was much more limited and prosaic. As a result, there was no great need for the court to defer to the administrative body.
- *Nature of the Problem* The live issue was simple question of law. The statutory provision merely required interpretation. Such questions generally attract the correctness standard that allows a court to substitute its own view for that of the administrative actor.