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What non-Canadian attorneys should know about the Canadian legal system

Mtre. Christopher Richter
(*Woods LLP*, Montreal)

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Mtre. Christopher Richter, *Woods LLP*, Montreal

Canada and the United States share many traditions, beginning with our common heritage as former colonies of the British Empire joined together into federations. Basic notions such as the rule of law, a written constitution defining the roles of the different orders of government and protecting the rights of the people, *audi alteram partem* and the adversarial process, apply both north and south of the border. Despite this overwhelming agreement on most fundamental principles of law, significant differences remain, and it is of course more interesting to discuss these differences.

Beyond the reputation of Canadians as a less litigious people, there are significant differences between the Constitutions, law and procedure in Canada and the United States, and among the Canadian provinces, which may surprise unwary litigants and their non-Canadian lawyers. One dramatic example, discussed later, is that pending criminal proceedings will not usually prevent a witness from being forced to testify in a civil suit in Canada.

Although Canada and the United States were both founded on the federal model, the descriptions of the judiciary and of the federal division of powers in Canada's

Constitution create a distinct environment for lawyers and their clients. Further, there are significant substantive and procedural differences, such as the different standards for the evaluation of damages, and the different availability of punitive or treble damages, jury trials and fee shifting. Moreover, while the adversarial process is equally familiar to lawyers in both the USA and Canada, discovery and other procedural tools do not necessarily operate in the same manner. This is especially true in the Province of Quebec, where many civil law traditions of France continue to apply.

This conference aims to describe the elements of Canada's legal system that most distinguish it from the American, with particular attention paid to those elements relevant to litigious situations. After a brief description of the Canadian Constitution and court structure, we will highlight several important differences of the Canadian legal system, laws and procedures, including those mentioned above, which have been chosen for their practical value. Given the brevity of the treatment of each topic, you are encouraged to consult a Canadian attorney for further information!

1. The Canadian Constitution[1]

Americans will certainly find many things familiar about the Canadian Constitution. Canada is a federation of provinces that exercise sovereign legislative authority within their areas of jurisdiction. Since 1982, the Canadian Constitution also includes the *Canadian Charter of Rights*, guaranteeing to the people basic rights and freedoms such as

[1] See in general, Peter W. Hogg, *Constitutional Law of Canada* (loose-leaf ed.) (Scarborough, Ontario: Carswell)

freedom of religion, expression, assembly and association, electoral rights, mobility rights, equality rights, due process and the rights of the accused.[2] The Canadian Charter is not dissimilar to the American Bill of Rights, which served as an important example to the drafters of the Canadian Charter. The Canadian Charter also protects the educational rights of Canada's French and English linguistic minorities, and preserves the aboriginal and treaty rights of Canada's First Nations.

Unlike the Constitution of the United States, however, the Canadian Constitution is not entirely in written form. Important parts of it are founded upon customs and usages (constitutional conventions) inherited from Britain, including the relationship between the executive and legislative branches of government, which is based upon the parliamentary system of executive government responsible to the lower house of Parliament (the House of Commons). The Canadian Constitution also foresees a judicial system that is unitary in nature, with only a small role for federal courts.

a. The federal division of powers

The *Constitution Act, 1867* sets out the division of legislative power between the provinces and the federal government.[3] The provinces have many of the most important areas of jurisdiction, including property and civil rights (notably tort and contract law). While efforts are continually made to bring more uniformity to the laws of the provinces, notably through the Uniform Law Conference of Canada, important differences in statute

[2] *Constitution Act, 1982*, Sch. B., *Canada Act 1982*, c. 11 (U.K.).
[3] *Constitution Act, 1867*, (U.K.) 30 & 31 Vict., c. 3, R.S.C. 1985, App. II, No. 5, sections 91 to 95.

law exist among the provinces. Furthermore, Quebec retains a system of property and civil rights founded upon the *ancien régime* codified in the *Civil Code of Québec*,[4] rather than following the common law tradition which the other nine provinces inherited from England.

The provinces are charged with regulation of the professions (including lawyers and, in Quebec, notaries), insurance, trust companies and credit unions, securities regulation, consumer protection, labour relations (except in federally-regulated industries), social security and most natural resources within the province. The provinces also have jurisdiction over most family matters, although divorce and the definition of marriage are federal competencies.[5]

Federal legislative jurisdiction includes banking, bankruptcy and insolvency law, federal company law, international and interprovincial transportation and tele-communication, citizenship and immigration (with some provincial involvement in the selection of immigrants, especially by Quebec). Companies may also be incorporated under provincial law, providing a choice of legislative regime for incorporators. Criminal law and procedure is federal legislative jurisdiction in Canada, although policing and prosecution are mostly performed by the provinces. The federal trade and commerce power is not as strong in Canada as in the United States, as the provinces have jurisdiction to regulate most industries under their property and civil rights power. Thinly disguised trade barriers between provinces are common.

[4] S.Q. 1991, c. 64.
[5] See, for example, *Re Same-Sex Marriage*, [2004] 3 S.C.R. 698 confirming the jurisdiction of the federal Parliament to legalize same-sex marriage.

Like in the United States, funding for many programmes is shared between the orders of government, with the attendant interminable negotiations that seem an inevitable part of any federal system of government.[6]

b. A more unitary court system

The *Constitution Act, 1867* continued the court systems then existing in each province; however, the judges of the superior provincial courts of each province are appointed and remunerated by the federal government, during good behaviour.[7] Judges of the inferior provincial courts and administrative tribunals are appointed and remunerated by the provinces, also during good behaviour. This arrangement of provincial court systems in which the judges of the superior courts are federal appointees, creates a much more unitary court system than in the United States.

Federal appointments are made at the discretion of the Minister of Justice of Canada (or of the province, for provincially appointed judges), after candidates are reviewed by a judicial appointments advisory committee. Appointees do not face any questioning by legislators, except in the case of the most recent appointment to the Supreme Court of Canada, who faced questioning by a committee of the House of Commons in February 2006. This practice seems likely to continue in the future for appointments to Canada's highest court. The Constitution protects the judicial independence of both federally and

[6] An important example is the *Canada Health Act*, R.S.C. 1985, c. C-6 which provides for federal funding to support universal medical and hospital insurance programmes administered by the provinces.
[7] See *Constitution Act, 1867*, ss. 96 to 101.

provincially appointed judges with respect to their tenure, remuneration and administrative independence.[8]

The provincial court systems handle cases founded upon both federal and provincial law, including bankruptcy and insolvency, most criminal matters, divorce, bills of exchange, and shareholder disputes, as well as cases founded upon provincial tort, contract and property law. Civil procedure is a matter of provincial jurisdiction, as one would expect in civil courts that are created and administered by the provinces. Each province has its own court of appeal for appeals from the provincial courts of the province. There is a further appeal from the provincial courts to the Supreme Court of Canada in Ottawa.

In addition to the provincial court systems, Canada also has a Federal Court and a Federal Court of Appeal which have exclusive jurisdiction in cases of judicial review from federal boards, commissions and other federal tribunals, as well as in cases concerning the statutory registration or grant of intellectual property rights.[9] The Federal Courts have concurrent jurisdiction with the provincial courts to hear claims against the federal government, admiralty cases and cases alleging infringement of intellectual property rights. The Federal Court also has certain specific criminal and other jurisdictions where created by federal statute.[10] The Federal Courts have no "diversity jurisdiction" where the parties have their domiciles or residences in difference provinces. The federal government has also established the Tax Court of Canada to hear appeals regarding

[8] See *Constitution Act, 1867*, s. 99; *Charter of Rights*, s. 11(d); and *Re Remuneration of Judges*, [1997] 3 S.C.R. 3 in which provincial legislation reducing the salaries of all civil servants was struck down with respect to provincial court judges.
[9] *Federal Courts Act*, R.S.C. 1985, c. F-7.
[10] See for example the *Competition Act*, R.S.C. 1985, c. C-34, s. 73.

federal income tax decisions. The Supreme Court of Canada is the final court of appeal from the Federal Courts.

The result of these principles is that the provincial court systems hear the great majority of civil, family and criminal cases, whether based upon federal or provincial law. Canada's court system can thus be seen as ten unitary court systems (one in each province), with a small federal court system. As the ultimate court of appeal from both the provincial and federal court systems, the Supreme Court of Canada is able to bring a certain amount of uniformity to the interpretation of both federal and provincial law throughout Canada.[11] Furthermore, the Supreme Court of Canada has held that the Canadian Constitution requires the provinces to give "full faith and credit" to judgements coming from other provinces.[12] The ten autonomous provincial court systems (plus the Federal Courts) have similar structures and function mostly in harmony thanks to the significant degree of comity and deference they accord one another.[13]

2. Absence of or limits on jury trials in civil matters

The constitutional right to trial by jury in Canada is limited to criminal cases where the maximum punishment for the offence is imprisonment for five years or a more severe punishment.[14] The *Charter of Rights* also guarantees trial by a "fair and impartial

[11] *Supreme Court Act*, R.S.C. 1985, c. S-26.
[12] See *Morguard Investments Ltd.* v. *De Savoye*, [1990] 3 S.C.R. 1077 and *Hunt* v. *T. & N. plc*, [1993] 4 S.C.R. 289.
[13] This may be in large part due to the fact that all Federal Court and superior court judges are federally appointed, and thus see themselves in some way as part of the same judiciary, although superior courts are provincially created and administered.
[14] *Charter of Rights*, s. 11(f).

tribunal", and the *Criminal Code* provides for trial by jury in the case of all indictable offences, although in some provinces the accused is able to opt for trial by judge alone in certain cases.[15]

In civil matters, the possibility of trial by jury is restricted to where permitted by provincial law. In Quebec, there are no jury trials in civil matters. On the other hand, jury trials are still frequent in Ontario and British Columbia. In Ontario, most actions in the Superior Court may be tried with a jury, if a jury notice is served by one of the parties; however, the legislation allows the Court to strike out the jury notice in complex cases, or where a jury trial would be inappropriate, and to proceed by judge alone.[16] Jury trial is most commonly available in personal injury cases and claims of libel, slander, malicious arrest, malicious prosecution and false imprisonment. It is generally not available where equitable or declaratory relief is claimed, and in cases against the Crown or a municipality. In 1999/2000, the Ministry of the Attorney General of Ontario reported that twelve *per cent* (12%) of civil cases were decided by jury.

3. Limits on the quantum of damages[17]

Perhaps as a result of the less frequent use of juries in civil matters, the development of the law of damages in Canada has resulted in what most agree is a lower scale of damages than in the United States. This is true both as a result of the existence of certain

[15] *Charter of Rights*, s. 11(d); *Criminal Code*, R.S.C. 1985, c. C-46, ss. 471 and 473.
[16] *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 108; *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, Rule 47. See Holmested & Watson, *Ontario Civil Procedure* (looseleaf ed.), (Scarborough, Ontario : Carswell) at Rule 47.
[17] See generally, S.M. Waddams, *The Law of Damages* (looseleaf ed.) (Toronto : Canada Law Book).

legal principles limiting quantum, and the lesser availability of punitive and exemplary damages.

a. Standards in the evaluation of prejudice

Without attempting to summarize the law of damages in Canada (the principles of which are largely the same as in the United States), an idea of the Canadian attitude towards compensating for injury may be gained by looking at awards of non-pecuniary losses in personal injury cases. In 1978, the Supreme Court of Canada issued a trilogy of decisions in which they canvassed the law of damages in such cases in an effort to bring some uniformity to these types of awards across Canada.[18] The Court fixed a figure of one hundred thousand dollars ($100,000) as the appropriate amount of compensation for non-pecuniary damages in cases involving very severe disabilities. This figure creates a ceiling for such damage awards (although subject to inflation over time).[19] The Supreme Court has held that "the trial judge should instruct the jury as to an upper limit, if … he or she is of the opinion that the damages by reason of the type of injury sustained might very well be assessed in the range of or exceeding the limit."[20] Cases following these decisions of the Supreme Court have attempted to set similar awards of damages for similar injuries. Such case law has removed much of the incentive for a "lottery approach" to personal injury litigation in Canada.

[18] *Andrews* v. *Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *Thornton* v. *Prince George School Board*, [1978] 2 S.C.R. 267; and *Arnold* v. *Teno*, [1978] 2 S.C.R. 287.
[19] The upper limit would therefore be over four hundred thousand dollars ($400,000) today.
[20] *Ter Neuzen* v. *Korn*, [1995] 3 S.C.R. 674 at para. 112.

b. Punitive and exemplary damages

Canadian law allows for the award of punitive damages (also called exemplary damages). Such damage awards are regarded as exceptional because they are contrary to the general rule that all damages are compensatory in nature. In Quebec, punitive damages are only available where specifically provided for by statute (notably for violations of the *Quebec Charter of Human Rights and Freedoms*).[21] Elsewhere in Canada, several provinces have statutory provisions calling for punitive damages in cases of unfair business practices,[22] but such damage awards are also generally permitted under the common law.

Statutes allowing "treble damages" are rare in Canada.[23] In fact, the recognition of foreign judgements awarding treble damages has been questioned on the basis that the recognition of such foreign damage awards would be against public policy. This argument appears to have been dismissed in Canada, although the size of foreign damage awards has been raised in other cases as a motive for refusing recognition.[24]

The Supreme Court has stated that the discretion to award punitive damages under the common law should be "most cautiously exercised" and has emphasized their exceptional

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[21] *Civil Code of Québec,* S.Q. 1991, c. 64, art. 1621; *Charter of Human Rights and Freedoms,* R.S.Q., c. C-12, s. 49.
[22] See, for example, the Ontario *Consumer Protection Act, 2002*, s. 18(11).
[23] One of the rare examples is *An Act concerning Monopolies, and Dispensation with penal laws, etc.,* R.S.O. 1897, c. 323 (*The Statute of Monopolies*). See also the *Distress Acts* of Manitoba, C.C.S.M., c. D-90, s. 4, and Saskatchewan, R.S.S. 1978, c. D-31, s. 5.
[24] See Janet Walker, *Canadian Conflict of Laws* (6th ed., looseleaf), (Markham, Ontario: Butterworths) at s. 14.8.c. citing *Old North State Brewing Co.* v. *Newlands Services Inc.*, [1998] B.C.J. No. 2474, 113 B.C.A.C. 186 (C.A.), aff'g [1997] B.C.J. No. 2484, 47 B.C.L.R.(3d) 254 (S.C.) and *Kidron* v. *Grean*, [1996] O.J. No. 5420, 48 O.R.(3d) 775 (Gen.Div.).

nature.[25] The case law generally requires intentional, deliberate or high-handed behaviour in violation of the plaintiff's rights, or misconduct that requires punishment and deterrence because of its reprehensible nature. Although such damages are most commonly awarded in tort cases, they may also be awarded in contractual cases where the misconduct constitutes a separate actionable wrong. This would be the case, for example, for breaches of a fiduciary duty or breach of trust, such as an insurer's breach of its duty of good faith. In *Whiten* v. *Pilot Insurance Co.*, the Supreme Court of Canada restored a jury award of one million dollars ($1,000,000) against an insurance company that had wrongfully and obstinately refused to properly investigate the insured's claim, and had nevertheless falsely accused the insured of arson.[26] This was considered a very large award (three times the amount of compensatory damages awarded by the same jury, and much higher than most previous awards of punitive damages), but is still far from the award of US$145 million set aside by the United States Supreme Court in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*.[27] It could be argued that the relative size of the insurance companies in question justifies smaller awards in Canada without diminishing the deterrent effect, which is one of the major objectives of punitive damages.

In contrast to the Supreme Court's decision in *Whiten*, the Ontario Court of Appeal recently reduced a jury award of punitive damages in a drunk driving case.[28] The victim had been awarded two hundred fifty thousand dollars ($250,000) for general, non-

[25] *Vorvis* v. *Insurance Corp. of British Columbia*, [1989] 1 S.C.R. 1085 at 1104; and *Sylvan Lake Golf & Tennis Club Ltd.* v. *Performance Industries Ltd.* (2002), 209 D.L.R.(4th) 318 (S.C.C.).
[26] [2002] 1 S.C.R. 595, 209 D.L.R.(4th) 257.
[27] 123 S.Ct. 1513 (2003).
[28] *McIntyre* v. *Grigg* (2006), 83 O.R.(3d) 161 (C.A.).

pecuniary damages (the limit at the time of trial being $299,000), and a further one hundred thousand dollars ($100,000) in aggravated damages. The Court of Appeal eliminated the award of aggravated damages as being without a legal basis where compensatory and punitive damages have already been given. Furthermore, the Court of Appeal reduced the quantum of punitive damages because of the defendant's "lower level of moral blameworthiness given the isolated nature of the misconduct, the lack of a relationship between the parties (in comparison to a relationship of trust) and the fact that the misconduct was not specifically directed at the plaintiff." The majority of the Court of Appeal concluded that the jury award could not be rationally justified, and reduced it from one hundred thousand dollars ($100,000) to only twenty thousand dollars ($20,000). The dissenting judge would not have awarded any punitive damages at all.

4. Fee shifting and the recovery of costs from the losing party

Another aspect of the Canadian legal system that acts to discourage litigiousness is the general availability of fee shifting. Canada follows the "English Rule" with respect to fee shifting; that is, the Court will usually order that the unsuccessful party pay costs of the motion or trial to the successful party. The amount of costs awards and the degree of discretion given to the Court varies from province to province. Costs awards generally include reimbursement of disbursements such as court fees, court reporter's fees, expert's fees, etc., as well as an amount for attorney's fees. It is the calculation of these latter fees that varies most across the country.

In Quebec, attorney's fees are determined according to a tariff that determines the amount recoverable from the unsuccessful party according to a fee-per-service grid.[29] Unfortunately for a successful litigant, the amounts set out in the grid are nominal (being very out of date). For example, the fee for success on an interlocutory motion is fifty dollars ($50), unless the Court orders that the costs of the motion are to follow suit. An exception to the low amounts is the rule that (rather arbitrarily) increases the amount of attorney's fees to one *per cent* (1%) of the amount of the judgement (or of the claim, where the defendant was successful in having the claim entirely dismissed). On average, the resulting costs awards may amount to about ten *per cent* (10%) of the costs which the successful party has actually spent in obtaining judgement. Obviously, such low costs awards have little or no dissuasive effect upon procedures of dubious merit. The Quebec Courts may also order reimbursement of the successful party's legal costs where there has been abuse of process in the proceedings before the court; however, this has been interpreted very narrowly.[30]

In Ontario, on the other hand, the Courts are given wide discretion to award costs as they see fit, with the general rule being that the successful party will usually be indemnified for a more significant part of his actual costs.[31] In addition to the result of the proceeding, the Court will take into account settlement offers made before trial, the complexity of the proceeding, novelty of the issues, conduct of the parties, vexatious or

[29] See *Code of Civil Procedure*, R.S.Q., c. C-25, arts. 477 to 481, and the *Tariff of Judicial Fees of Advocates*, R.R.Q. 1981, c. B-1, r. 13.
[30] *Viel* v. *Entreprises immobilières du terroir ltée*, [2002] R.J.Q. 1262 (C.A.).
[31] *Courts of Justice Act*, R.S.O. 1990, c. C-43, s. 131; and *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, Rule 57. See Holmested & Watson, *Ontario Civil Procedure* (looseleaf ed.), (Scarborough, Ontario : Carswell) at Rule 57.

improper steps in the proceedings (such as the refusal to make appropriate admissions), and any other relevant circumstances (including the financial capacity of the parties). The Court even has discretion to award costs to the unsuccessful party, where appropriate (for example, where the case never should have gone to trial), or to order a non-party to pay costs (including, exceptionally, an attorney). Following representations as to costs made by the parties after the judgement on the merits, the Court will fix an amount as attorney's fees, taking into account the amount of time reasonably spent on the proceeding and the experience of the attorney. These awards generally amount to about sixty to seventy-five *per cent* (60% - 75%) of the actual amounts spent by the party in attorney's fees.

Some other provinces (such as Nova Scotia and Alberta) use a tariff or grid while allowing the Court wide discretion to vary the amount of costs.

In the common law provinces, the Court may also increase the costs award by making attorney's fees payable on a solicitor-and-client scale (now called "substantial indemnity scale" in Ontario and "special costs" in British Columbia). This scale results in almost complete reimbursement of the party's actual legal fees. It is available only in rare and exceptional cases where the Court wishes to mark its disapproval of the conduct of a party, either in the circumstances giving rise to the cause of action or in the proceedings themselves.

It is argued that fee shifting dissuades litigants from pursuing unmeritorious litigation, or from taking steps in a court proceeding that are disproportional to their potential benefit. There is concern, however, that regularly ordering costs on a solicitor-and-client scale impedes access to justice for risk averse parties, which is perhaps the principal reason that costs awards in Canada generally provide for only partial reimbursement, unless special circumstances exist. On the other hand, access to justice is improved for those with meritorious claims, as the cost of obtaining justice is generally reduced by the amount of the costs awarded in their favour.

Contingency fees are now allowed in all of the provinces, as another means to increase access to justice. In 2002, the Ontario Court of Appeal ruled that they did not necessarily violate the rule against champerty (which remains a tort under Canadian law), making Ontario the last province to legalize this method of payment.[32] Contingency fees are specifically permitted by statute in the case of class actions, but are subject to review by the Court.

5. Discovery and confidentiality

Oral examination (deposition) is the most common form of discovery in Canada, although the rules in all provinces also provide for written interrogatories, medical examinations and inspection of evidence. As with other aspects of civil procedure, the rules governing discovery vary significantly among the provinces (the Federal Courts

[32] *McIntyre (Estate) v. Ontario (Attorney General)* (2002), 61 O.R. (3d) 257, 218 D.L.R. (4th) 193, 164 O.A.C. 37. See now the *Solicitors Act*, R.S.O. 1990, c. S-1, s. 28.1.

also have their own rules). Whereas the rules of civil procedure in the common law provinces provide for significant and automatic disclosure of documents prior to oral examinations, the Quebec *Code of Civil Procedure* requires specific requests for documents to be made before any disclosure can be required.

In Ontario and the other common law provinces, discovery includes the obligation of each party to serve an affidavit of documents (including electronic documents, etc.) disclosing every document relating to any matter at issue in the action that is or has been in the possession, control or power of the party, whether or not privilege is claimed. Relevance is determined with reference to the written pleadings, and includes all documents that might reasonably be supposed to contain information that may directly or indirectly tend to establish the truth or falsity of the facts alleged. It does not, however, include documents relevant only to credibility. Following service of the affidavit of documents, non-privileged documents must be produced for inspection by the adverse party.[33] Oral examinations of adverse parties follow. Discovery of non-parties requires leave of the Court.

In contrast, discovery of documents in Quebec takes place during oral examinations by formulating reasonably specific requests for disclosure by way of undertaking.[34] There is no general obligation of disclosure by the parties. Furthermore, the standard of relevance in Quebec is perhaps more strict than in the common law provinces, with the Courts taking a dim view of "fishing expeditions" for new evidence. This is perhaps simply the

[33] *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, Rule 30. See Holmested & Watson, *Ontario Civil Procedure* (looseleaf ed.), (Scarborough, Ontario : Carswell) at Rule 30.
[34] See *Code of Civil Procedure*, R.S.Q., c. C-25, arts. 395 to 413.

result of the fact that discovery is a relatively new institution in Quebec, as until 1983 complete transcripts of any depositions before trial were automatically filed in Court as proof, making them poor tools for discovery of the adverse party's evidence. The defendant may examine the plaintiff on discovery before filing its written defence, although the examination is then limited to the facts alleged in the plaintiff's claim.

Information and documents collected during discovery in Canadian proceedings are protected by a rule of confidentiality (often referred to as the "implied undertaking of confidentiality") that prohibits the party receiving the information from using it for any purpose other than that of the proceeding in which the evidence was obtained.[35] The existence of this rule makes confidentiality agreements and orders less common than in the United States, although they are still required in order to maintain the confidentiality of evidence filed with the Court or disclosed outside of the discovery process.

6. Taking away the Fifth : Testimony in civil and criminal proceedings

Unlike the U.S. Constitution's Fifth Amendment, the Canadian Constitution provides only limited protection against being forced to provide self-incriminating evidence in civil proceedings.[36] Section 13 of the *Canadian Charter of Rights* provides : "A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution

[35] *Lac d'amiante du Québec, Ltée.* v. *2858-0708 Québec Inc.*, [2001] 2 S.C.R. 743 in which our firm represented the successful party. In Ontario, this rule has been codified at *Rules of Civil Procedure*, R.R.O. 1990, Reg 194, Rule 30.1.

[36] See *Précis de la procédure civile* (4th ed.), (Cowansville, Quebec : Yvon Blais, 2003) at pp. 498-500; and *The Law of evidence in Canada* (2d ed.), (Toronto : Butterworths, 1998) at pp. 825 *et seq.*

for perjury or for the giving of contradictory evidence." The witness thus has no general right to refuse to testify where to do so will involve self-incrimination; however, the *Charter* creates an automatic privilege against the use of any self-incriminating testimony against the witness in other proceedings. In exceptional circumstances, the Court may allow an objection to self-incriminating testimony or order that the evidence so given remain under seal (where, for example, it can be shown that the answer could be used to assist the police to find further evidence against the accused). Generally, civil proceedings will not be suspended due to concurrent criminal proceedings.

Quaere whether testimony that a witness may be forced to give in civil proceedings in Canada may be used against him before the courts in the United States? Persons caught in cross-border misdeeds beware!

7. Class actions

Quebec introduced class action proceedings in 1978, inspired by Rule 23 of the United States Federal Rules of Civil Procedure.[37] Most Canadian provinces have now followed suit.[38] American practitioners will recognize the structure of these statutes, which require that the action be certified or authorized by the Court as a class action before it can proceed as such. The criteria for certification vary among the provinces, but generally include an identifiable class, substantial common issues (the common issues need not

[37] See *Code of Civil Procedure*, R.S.Q., c. C-25, Book IX, arts. 999 to 1051.
[38] In Ontario, see the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

predominate), that class proceedings are an appropriate procedure in the circumstances, and the existence of a representative who is capable and not in conflict.

If the class action is certified, notice is then provided to the class members, who have the opportunity to opt out. Although contingency fees are available to incite attorneys to represent plaintiffs in class actions, public funding is also available in some cases. The legislation provides for supervision of the action by the Court. For example, the settlement of a class action must be approved by the Court. Class actions have increased in frequency and size in the last few years across Canada, with more of them coming to trial, despite the often significant incentive to seek settlement.

National and international classes have been certified by the courts of Quebec and Ontario, although the rules for jurisdiction and recognition of judgements in such cases have yet to be fully worked out between the various jurisdictions. In *Currie* v. *McDonald's Restaurants of Canada Ltd.*, the Ontario Court of Appeal refused to enforce a class action settlement approved by the Circuit Court of Cook County, Illinois, because insufficient notice had been given to the Canadian members of the class (notice to Canadian class members was apparently not provided in a similar way to the notice given to class members in the United States).[39]

Where appropriate, national (and international) class actions provide an efficient means for resolving large disputes, which can benefit both defendants and plaintiffs. Some guidance may be received from the Quebec Court of Appeal as to what circumstances are

[39] (2005), 74 O.R.(3d) 321 (C.A.).

appropriate for national and international class actions when that Court hears the appeal from *HSBC Bank Canada* v. *Hocking* in which the Superior Court of Quebec refused to recognize a class action settlement approved by the Ontario Superior Court because, in the opinion of the Quebec Court, the Ontario Court should not have accepted jurisdiction over a national class in the circumstances.[40]

8. Arbitration

Non-Canadian lawyers will recognize many similarities between the laws of Canada and the United States with respect to international commercial arbitration, as Canada is a signatory of the New York Convention and the provinces and federal government have all enacted versions of the UNCITRAL Model Law. In Quebec, the Model Law was used as the basis of arbitration law for both domestic and international arbitrations.[41] In the other provinces, separate legislation based upon the Model Law was enacted to govern international commercial arbitration, and domestic arbitrations continue to be governed by other statutes.[42]

[40] [2006] R.J.Q. 804 (C.S.). The appeal is to be presented by our firm in early 2008 (Quebec Court of Appeal file no. 500-09-016435-067).
[41] See *Code of Civil Procedure*, R.S.Q., c. C-25, Book VII, arts. 940 to 952.
[42] In Ontario, see the *International Commercial Arbitration Act*, R.S.O. 1990, c. I-9 and the *Arbitration Act, 1991*, S.O. 1991, c. 17.

Concluding remarks

While Canada's legal system is based upon many of the same fundamental principles as the American legal system, independent development of these principles has lead to some important differences in application. The foregoing brief descriptions and examples demonstrate both the familiarity of the larger principles and the structure of these legal systems, as well as some important differences that could take a non-Canadian lawyer by surprise. However, given the similarities, non-Canadian and Canadian lawyers can speak the same language (*oui*, even in *La Belle Province* of Quebec), so working together on cross-border disputes should present many opportunities for success.