

Introduction

Why I Wrote This Book— and Why You Need It Now More Than Ever

In the following eleven chapters we are going to cover quite a bit of legal ground, and it is legal ground that I think Canadians—new and old—need to be familiar with, particularly as the Canadian economy and the world economy have taken a turn for the worse. Now more than ever, Canadians need to know how to protect themselves. Now more than ever, Canadians need to know about such things as:

- Business law, regarding corporations and franchises;
- Employer/employee interests, including hiring, firing, and quitting;
- Workplace privacy;
- Contracts—legal and illegal;
- Payday loans;
- Buying and selling a house or a condo;
- The perils of self-representation in court;
- The mysteries of judges and juries;
- Suing and being sued and new alternatives such as mediation and arbitration;
- Evidence and how it is used;
- Costs and legal fees;
- Family law, from divorce to property division and support;
- Wills and Powers of Attorney and guardianship of children;
- Organ donations and funeral arrangements;
- Criminal law and dealing with police;
- Criminal records and pardons;
- How to handle lawyers and paralegals;

- Real estate fraud;
- The marijuana grow op that might be next door;
- Violence in the workplace;
- Whistle-blowing;
- Trademarks, patents, and copyright;
- Protecting inventions;
- DNA and the law;
- Animals and the law;
- Sports injuries
- Golf course liability (that's right, you are not even safe on a golf course now) and much, much more.

In this book I have included hundreds of useful tips and insights on Canadian law. This is law that you can use to protect yourself, your property, your job, your company, and, most important, your family.

Why do I think it's so important for Canadians to understand the law? Because the Canadian justice system is based on a very profound and, to me, beautiful concept—the “rule of law.” All of us are under one law, enforced impartially for our collective benefit. The success of the rule of law is what separates us from other parts of the world that seem to be tearing themselves apart. The success of the rule of law is what creates our civil society, a society that I truly believe is a model for the world. I know Canadian society is not perfect; there is much that we can improve. But, you know what? It works, in large part because of the rule of law.

But as rosy as that sounds, I am worried. I am worried that the core principle is in danger. Our justice system is no longer accessible to many, many Canadians. It has become too expensive to use. It has become too slow to have meaning. It has become too mysterious and too opaque.

I know this from the questions people asked me when I hosted *Strictly Legal* on BNN and I see it in the faces of people I meet when speaking to the public and with clients who

sit across from me every day. I have been practising law for 30 years in Canada and now I am worried that Canadians are losing touch with Canadian law at the moment they may need it most.

Canadians enthusiastically ask me questions about their wills and estates, about their divorces, about starting their businesses, about collecting debts, and protecting their inventions. They are interested in criminal law, business law, real estate law, employment law, and hundreds of other areas. They are interested not because they have a deep love of the law, but rather because this is a part of real life. This is a part of having families, homes, jobs, and of “bumping into each other” in a society that gets busier and more complicated every day. I think that their interest in these areas illustrates just how important the law is to the lives of average Canadians.

A pattern emerged from the questions. Whether they live in British Columbia, Saskatchewan, Prince Edward Island, Ontario, Nunavut, or any other province or territory, Canadians have the same questions and interests in specific areas of our law. Callers to the *Strictly Legal* television program asked very smart, very sensible and practical questions, and they didn't want legal mumbo-jumbo or weaselly fine-print answers. They wanted accessible, understandable, practical answers. They wanted legal information they could use in their personal lives. That's what this book is about: information about the law that Canadians can use.

I have organized this book around eleven of the most popular areas of interest and eleven of the most common questions I've been asked. The title of the book is *Things You Absolutely Have to Know about Canadian Law*. There are thousands of pieces of information in the book, all of which will be useful to Canadians. Each chapter is, of course, not meant to be an exhaustive examination of a particular area of the law. It is meant to be enough law for you to use. I try to

provide straight answers and information that will help you solve problems and save money. After reading the book maybe you will have more questions, maybe you will want to speak with a lawyer. You are always welcome to email me your thoughts, comments, or questions at mcochrane@rickettsharris.com.

This book is *not* legal advice. It is *not* a legal encyclopedia. It is some legal information designed to penetrate the wall going up around justice. Justice should not be mysterious. It should be understood. Canadians should not fear lawyers, judges, or our courts. We should not fear financial ruin because we have a legal problem. If we do, then the rule of law and our civil society will erode.

The justice system needs help right now and Canadians need help right now, more than ever. This is my small contribution.

Michael G. Cochrane
Partner, Ricketts, Harris LLP
181 University Avenue, Suite 816
Toronto, Ontario M5H 2X7
www.rickettsharris.com
www.michaelcochrane.ca

Chapter 1

Ten Things You Absolutely Need To Know About “The System”

A few years ago, a client met me at my office prior to heading off to court. We had a morning appointment with a judge. This client was not from Canada. He had grown up in another country and had moved here seeking a better life. As we packed up my briefcase and got ready to head up the street to the courthouse, he turned to me and said, “How much do you need for the judge?” I did not quite understand what he meant, and I asked him to repeat the question. He winked at me and said again, with a cynical smile, “How much money do you need for the judge?” I told him that I did not need anything for the judge, but he went on to say that he had ten thousand dollars that I could use to bribe the judge, if needed. I explained to this fellow that, in Canada, that was not only illegal, but also quite unnecessary and that he would be assured of an impartial hearing. We went off to court. He received an impartial hearing, and I think he left the courthouse convinced that we had a wonderful court system, governed by the rule of law. It was a concept previously utterly unknown to him.

In Canada, the “rule of law” means that all of us, regardless of how much money we have, where we come from, our religious background, our level of education and so on, will be treated equally under the law. There is one law, and we are all ruled equally by it. This concept is the foundation of a civilized society like the one we enjoy in Canada.

Now, all of that sounds quite rosy. We do have a rule of law, and we do have an impartial justice system, but that “system” can also be a confounding maze of red tape, bureaucracy, inefficiency, expense, legal mumbo-jumbo, emotional tur-

moil, and mind-numbing delay. So, “the system” is based on a beautiful concept, but some days it can certainly feel like someone has made it as difficult and as expensive as possible to have access to the rule of law.

In this chapter, I want to demystify at least ten key features of “the system” (and by “the system,” I mean the justice system in Canada), in the hope that it will be easier for you to use it, easier for you to solve your problems (or defend yourself from problems other people have created for you) and to do so in a cost-effective way.

Canadians should not fear lawyers. We should not fear our courts. We should not fear judges and juries. We should not fear financial ruin because we have a legal problem. In this chapter, I want to remove any fear and replace it with a healthy dose of consumer smarts.

Part 1 — Lawyers

I am not ashamed to admit that most people would rather have a root canal at the dentist’s than be forced into a lawyer’s office in order to deal with some problem. I know exactly why this is the case: lawyers are associated with conflict, and that conflict is associated with spending money. People do not drop in to see a lawyer just to shoot the breeze. It is not uncommon to meet clients who constantly check their watch to make sure that they get as much advice as they can in as little time as possible. I do not blame them because in Canada lawyers can be very, very expensive. However, we are often unavoidable partners for you. You need us sometimes. So, it is better to learn how to manage the relationship than to fear it or avoid it.

The lawyer-client relationship is a unique one. The lawyer is part psychologist, part hand-holder, part teacher, part gladiator, and part priest (for those who finally get an opportunity to confess their “sins” in confidence). One of the special features of the lawyer-client relationship is secrecy. Everything a

person tells a lawyer must be kept in absolute confidence. This is known as **lawyer-client confidentiality**. Other than revealing facts necessary for representing a client, there are only two circumstances in which a lawyer may be justified in breaching lawyer-client confidentiality:

- If the client is about to commit a crime, the lawyer has an obligation to speak up to stop it. So, if a client tells a lawyer that they are going to kill their neighbour, the lawyer has an obligation to report that to the police. No one will fault the lawyer for breaching lawyer-client confidentiality.
- The same is true if a lawyer learns that there may be some danger of harm, either emotional or physical, to a child. We have a professional obligation to contact child protection authorities.

From time to time, you may see ads on television from lawyers who will negotiate a settlement with Canada Revenue Agency on behalf of people who have not been paying their taxes. This can happen through a lawyer's office because the lawyer and the client have lawyer-client confidentiality. The lawyer will contact Canada Revenue Agency and say that a person whose name they cannot reveal because of **lawyer-client privilege** has hired them. The person, the lawyer says, would like to voluntarily agree on a settlement with Canada Revenue Agency to pay taxes that should have been paid earlier. Canada Revenue Agency then negotiates a settlement with the lawyer. If the settlement is confirmed with Canada Revenue Agency, then the lawyer reveals the client's name to Canada Revenue Agency, and the taxes are paid pursuant to the settlement. If the lawyer and Canada Revenue Agency cannot come to terms, the lawyer thanks Canada Revenue Agency for their time and does not reveal the individual's name. Usually, Canada Revenue Agency is more than happy

to make an arrangement to have some taxes paid, rather than forego the possibility of getting anything at all.

To find a good lawyer, you need to search out someone who has experience in the area in which you have a problem, someone who is honest and a good listener, is respected by their peers and, I think, someone who has a sense of humour. A good lawyer is punctual, considerate, and professional in dealing with the client.

I am always amazed when someone asks whether it is permissible for lawyers to have sex with their clients. There is no specific rule that states that a lawyer will be disbarred (kicked out of the profession) for having sex with a client. If the intimate relationship jeopardizes the lawyer’s ability to represent the client, however, then the lawyer runs the risk of being suspended for a period of time. (It is not the same with doctors. If a doctor has a sexual relationship with a patient, it means an automatic loss of licence.) A truly professional lawyer would not become involved in an intimate relationship with a client because it would create a clear conflict of interest and hinder the lawyer’s ability to provide objective advice to the client.

A good lawyer is also someone who will tell you things about your case that you may not want to hear. After spending 30 minutes with a potential lawyer, you should ask yourself three questions:

- Do I feel comfortable with this person?
- Do I respect their opinion?
- Do they respect my opinion?

These questions are important because whether the lawyer is going to be your psychologist, your gladiator, or your priest, they are going to be your guide through the justice system, and you need to have someone in whom you can have confidence. I recommend that clients avoid blowhards (people who talk about big wins or big cases). Stuffed shirts

are, more often than not, just that. You do not need the most expensive lawyer in town. You do not need the oldest lawyer in town or the lawyer who has the toughest reputation as a “gunslinger.” You need somebody who has experience and who will get the job done in a cost-effective way.

How do you find such a lawyer? You are not going to find them by flipping through the telephone book. Each province has a law society and each law society is more than happy to facilitate connecting people with lawyers who have experience in a particular area.

British Columbia	www.lawsociety.bc.ca/
Alberta	www.lawsocietyalberta.com/
Saskatchewan	www.lawsociety.sk.ca/
Manitoba	www.lawsociety.mb.ca/
Ontario	www.lsuc.ca
Ontario Lawyer Referral Service	www.lsuc.on.ca/public/a/faqs—lawyer-referral-service/
Quebec	www.barreau.qc.ca/?Langue=en
New Brunswick	www.lawsociety-barreau.nb.ca/emain.asp
Nova Scotia	www.nsbs.org/
Prince Edward Island	www.lspei.pe.ca/
Newfoundland & Labrador	www.lawsociety.nf.ca/
Nunavut	www.lawsociety.nu.ca/
North West Territories	www.lawsociety.nt.ca/
Yukon	www.lawsocietyukon.com/

Ask around, because the best references are from people in whom you have confidence. Ask your business associates. Ask your neighbours. Ask people whom you respect, and then go meet with the lawyer to make sure you can answer those three questions positively.

In Canada, all lawyers are both barristers and solicitors. In Britain, for example, barristers focus more on courtroom work, and solicitors focus more on the office work. Here,

while we are all both barristers and solicitors, some lawyers will focus more on one aspect than the other.

You are entitled to a lawyer without a **conflict of interest**. In other words, if you are seeing a lawyer because you are unable to pay your mortgage, you can be assured that in the past the lawyer will not also have represented the bank to which you owe money.

When you hire a lawyer, you know that you are dealing with somebody who is insured, so that if there is a mistake made, you will be protected. You also have the comfort of knowing that the lawyer is supervised by a law society. Lawyers are guided by a set of rules of professional conduct and we face the possibility of being disciplined by our law society if we do not follow those rules. I can tell you that there is no more anxious moment for a lawyer opening their mail in the morning than finding a letter from the law society marked “Personal and Confidential.”

When you find the right lawyer, you will want to make sure that you enter into a written contract to hire them. This contract is discussed in more detail in an upcoming chapter (see Chapter 6—Contracts, Part 5—Lawyer Contracts). In this contract, which is called a **Retainer**, you will set out in writing exactly what the lawyer is going to do for you. The lawyer will commit to charging a particular hourly rate, and the retainer should explain the law firm’s fees and disbursements policy.

Lawyers can be important professionals who assist you in resolving tough problems. They are your guides through the justice system. Make sure you have a guide that you like and a guide that you trust.

Part 2 — The Courts

Let me see, how can I put this? The courts are a maze. Not amazing—a maze. There are civil courts, criminal courts, appeal courts, traffic courts, family courts, federal courts,

provincial courts and, of course, the Supreme Court of Canada, to name a few. Every province has its own court system. Every court system holds trials, where live people actually sit in a witness box beside a judge and give evidence, and every system has appeal courts, where judges higher up the ladder take a second look at the decisions made by the trial judges to see if they made any mistakes in the evidence or in their interpretation of the law. In Canada, there are hundreds of courts across the country and thousands of judges. Now you know why I call it “a maze.” In an upcoming section in this chapter, we are going to look at judges, juries, and justices of the peace, but for now let’s focus on the courts themselves. The best way to find your way through a maze is to get a little higher and look down on it so you can see the path through. That is what I would like to do in this section.

The best way to visualize the court system in a particular province is to imagine a giant triangle with the point at the top. At the base of the triangle are the “trenches” of the justice system—hundreds of courts dealing with thousands of cases. At the top of the triangle is the province’s top Court of Appeal. In between are other courts that also deal with matters and deal, in some cases, with appeals. Cases work their way up from the bottom to the top, if they are being appealed. The vast majority of cases, however, are not appealed and are simply resolved by judges and courts with only one or two court appearances by those involved.

As we look at that giant triangle holding all of the provincial courts, we should imagine it as having two halves. One half of the triangle deals with criminal cases, and the other half deals with civil cases. The criminal side concentrates on charges that have been laid against people under the Criminal Code and under provincial laws such as the Highway Traffic Act. The civil side of the triangle deals with cases involving such things as breach of contract, family law, people suing each other for negligence, and other situations where private

citizens sue each other. On the criminal side, we see Highway Traffic Court. On the civil side, we see Small Claims Court. On the criminal side, we see trials for murder and other serious criminal offences. On the civil side, we see divorce cases, commercial litigation, injunctions, and other serious matters. On the criminal side, we also see, at the very bottom, courts that have been created by municipalities. These are the courts that prosecute people for violating bylaws, building code infractions, not shovelling their sidewalk after a snowstorm and, lately, violating anti-smoking bylaws.

Day in and day out, the courts process tens of thousands of claims. We tend to think only of judges making decisions, but, in fact, there is a vast network of people working at each of these courthouses, helping the cases to flow through the system. Courthouses are filled with clerks and public servants making sure that the paperwork for hundreds of thousands of claims is processed through the court and tracked, filed, kept secure, delivered to the judge’s office on time, and packed up and sent on to the appeal court, if necessary. This network of public servants plays a fairly thankless role.

No discussion of the courts in Canada would be complete without mentioning the Supreme Court of Canada in Ottawa. If you are ever in Ottawa, you should visit this beautiful, impressive place, where so many profoundly important decisions are made every day. The Supreme Court of Canada is the final stop for any case. There are no appeals after the Supreme Court of Canada has dealt with a matter. The Supreme Court of Canada considers appeals from the top courts of the provinces. So, if someone has appealed a case up to the Provincial Court of Appeal and is still dissatisfied with that decision, and if the matter is of national importance, then the Supreme Court of Canada may consider the case. Some of the cases considered by the Supreme Court involve criminal matters and some involve civil matters, but no matter what, this court has the final word.

The purpose of the court structure is to provide a forum in which disputes are resolved—reconsidered if necessary—but then resolved once and for all. Whether you are representing yourself or using a lawyer, understanding how to find your way through this maze of courts is of critical importance. Now that you know the basics, don't be afraid to ask for directions.

Department of Justice	www.justice.gc.ca/eng/index.html
Helpful links	www.justice.gc.ca/eng/jl/index.html#court <i>(includes list of websites for all courts across Canada)</i>
Ministry of the Attorney General (Ontario)	www.attorneygeneral.jus.gov.on.ca/english/
Ontario Court Services	www.attorneygeneral.jus.gov.on.ca/english/courts/ <i>(includes many links to other Courts such as Family, Estates, Small Claims, etc.)</i>
Canadian Courts	
Appeal Court:	www.cmac-cacm.ca/index_e.html
Alberta	www.albertacourts.ab.ca
British Columbia	www.courts.gov.bc.ca
Manitoba	www.manitobacourts.mb.ca/
New Brunswick	www.gnb.ca/cour/03COA1/index-e.asp
Newfoundland	www.court.nl.ca/
Nova Scotia	www.courts.ns.ca/Appeals/index_ca.htm
Ontario	www.ontariocourts.on.ca/coa/en/
Prince Edward Island	www.gov.pe.ca/courts/
Quebec	www.tribunaux.qc.ca/mjq_en/c-appel/index-ca.html
Saskatchewan	www.sasklawcourts.ca
Nunavut	www.nucj.ca/index.htm
Northwest Territories	www.justice.gov.nt.ca/dbtw-wpd/nwtjqbe.htm

Yukon

www.yukoncourts.ca

Federal Court of Appeal:

<http://decisions.fca-caf.gc.ca/en/index.html>

Part 3 — Self-Representation

There is no law in Canada that says a person has to have a lawyer for a dispute. I have seen people do a very capable job of representing themselves in Small Claims Court, in Traffic Court, and even in Family Court. It can be risky, however, to represent yourself when an important asset, your freedom, or your children are involved. For any criminal issue that may result in a significant fine, a jail sentence or a criminal record, it is essential that you consult a lawyer before trying to represent yourself. If you are in a family dispute and the custody of your children or division of your property and income is at stake, again, consulting an experienced lawyer is absolutely critical. If you are involved in a dispute that may result in an award of damages against you or could affect your property in some way (for example, non-payment of your mortgage), again, speak to an experienced lawyer to obtain at least an hour or two of advice before going ahead.

On any given day in any province in Canada, thousands of people are representing themselves before the courts. In many cases, these individuals cannot afford to hire a lawyer, or they have lost confidence in lawyers and simply feel that they must go it alone. If you find yourself in such a position, I hope that this section demystifies (or at least opens your eyes to) some of the advantages and disadvantages of self-representation.

On the advantage side, if you represent yourself there are no legal fees. (There will still be disbursements because the court system will charge a fee to issue a claim and to take certain steps when you are in a civil proceeding.) Preparation is easier—no one knows the case better than you. And last, and certainly not least, if the case does not turn out well, you have no one to blame but yourself.

On the disadvantage side, if you are successful, you are not going to obtain costs of any significance against the other person, because costs (as we will see in an upcoming section) are designed to reimburse you for legal fees and disbursements incurred in bringing your case. In preparing, while it may be an advantage that no one knows the case better than you, it can sometimes mean that you lack perspective. You become so immersed in it that you cannot see the forest for the trees. In addition, just because you know the facts of your own case it does not necessarily mean that you will understand how the law is applied to those facts.

Another disadvantage of self-representation is that you are going to find the system a little hostile. Lawyers do not like dealing with people who are representing themselves. Let's face it; people in the justice system are not going to welcome you with open arms because they will see you as making trouble. I know that doesn't sound fair, but that is the reality. Here are some guidelines for anybody considering self-representation:

- Be reasonable. Self-representation can be very frustrating and you are going to be tempted to lash out from time to time at the people on the other side of your case, the court staff, the judge, and others. You are going to find yourself asking people for help from time to time, but do not be one of those people who becomes difficult the minute you think you can take advantage of someone else's mistake. What goes around comes around in the justice system, just like in real life.
- Representing yourself does not mean that everyone is going to give you the benefit of the doubt. People are not going to ignore deadlines, paperwork requirements, legal procedures, and so on. The fact that you have decided to represent yourself means that things are going to slow down in the system. You are going to be making it harder

for people to move your case through the system. You are going to be stopping to ask for advice frequently. In order to avoid any disappointment, do not expect anyone to do favours for you. I am not saying that no one will do you a favour, but don't expect it and you will never be disappointed.

- If there is a lawyer on the other side of your case, they are not going to be very willing to talk to you. Every lawyer has had an experience of dealing with a self-represented person. Perhaps, they had a meeting with them in a hallway and discussed the case for a few minutes. Later in the day, or weeks later, that same self-represented person jumped up in court and told the judge, “Mr. or Ms. so and so (the lawyer) told me that I was supposed to....” The person may or may not have understood what the lawyer was saying. They may or may not be repeating it accurately, and what they are telling the court may or may not be in compliance with the rules. The only way for a lawyer to avoid this kind of incident in a courtroom is to insist that all communication with a self-represented person be in writing. That's why lawyers don't like dealing with the self-represented.
- Many self-represented people do not understand the meaning of a discussion that is “off the record” or “without prejudice.” When lawyers are talking to each other they can, more often than not, determine when a discussion is without prejudice. In other words, the lawyers can have the conversation and both of them know that neither is going to mention it in court at a later date because it is confidential. This allows lawyers to discuss settlement scenarios without the fear of having either party mention it to the judge if the settlement does not materialize. Self-represented people can be confused about what it means to have a discussion “without prejudice” so, naturally, lawyers are reluctant to talk to them. If you write some-

thing to a lawyer in a letter, and you want that letter to be used in court, do not mark it “Without Prejudice.” However, if you want to raise a possible settlement discussion in a letter with a lawyer, and you do not want that letter to be shown to the court, mark it “Without Prejudice.”

- You may find, as you represent yourself, that you do not trust people. This will tempt you into taping telephone calls with lawyers or with other people involved in the case. First, this can be illegal, depending on the circumstances and, second, it just makes everyone even more reluctant to talk to you if they find out that you are taping telephone calls. Judges rarely have time to listen to these tapes, and most of the time everything on the tape is inadmissible. I was once involved in a case where I was asked by a judge to view a videotape that was produced at the last minute by a self-represented client. Reluctantly, I sat and watched it. The self-represented person on the other side of the case had presented terrific evidence—in favour of my client! I readily agreed that the judge should see the tape, so the videotaping backfired.
- Be polite and respectful with everyone in the system. Do not send outrageous, inflammatory letters or faxes or emails. There is never a need for foul language or threatening talk. If something needs to be said, put it in a short, to-the-point letter, fax, or email, and keep a copy of every communication. You should run your file as if you were a lawyer. Keep copies of all documents and, in particular, make copies of important evidence.
- On the issue of being polite and respectful—many court staff, lawyers, and judges have seen frightening outbursts at the courthouse. The emotional strain of being involved in a court case can be compounded by the stress of representing yourself. Most court buildings have metal detectors and security screening devices, but this does not stop

some self-represented people from engaging in screaming matches or even pushing and shoving and fighting, right at the courthouse. These outbursts can seriously harm a self-represented person’s case. I saw one incident where the court security staff had to get involved, and a note was put on the court file. Every time the self-represented person appeared before a judge, two uniformed police officers slipped into the courtroom and sat near the self-represented person. You can imagine the impression that this gave the judge. Fairly or not, I think it hurt that self-represented person’s case.

- Be patient. The justice system, as you can probably tell by now, does not work quickly. There is a lot of waiting and standing around. If something is scheduled to start at ten, you should be there ten minutes early, but do not expect your case to actually be reached until an hour or more later.
- When you are in court, remember the judge knows very little about you. Judges have hundreds of cases to deal with and your judge may or may not have read your file. Their first reaction is going to be one of caution in dealing with a self-represented person, and they are not going to look forward to having to spend time explaining the procedures to you. You can also bet that the lawyer on the other side of the case (if there is one) is going to resent the judge spending a lot of time explaining the case, when that lawyer’s client is paying good money for them to be there.
- Regardless of which court you are in, always refer to the judge as “Your Honour,” and refer to the other lawyers in the case as “Mr.” or “Ms.” and use their full surname.
- At some point, you will be given an opportunity to speak. Just remember that this is not an invitation to tell your life story to the judge. Try to make short, effective points. Tell the judge what you would like to have happen in your par-

ticular case. I have seen many people arrive in court and start rambling on in a long narrative. Simply tell the judge who you are, what you want, and what evidence you have to present.

- You may find that you accomplish one or two steps quite effectively in a proceeding. Do not let this go to your head. I have seen self-represented people get quite full of themselves in court, tossing around references to rules and evidence. When the judge saw this, he cut them right down to size.
- Be prepared to be physically and emotionally drained. It is stressful. The courthouse is never a stimulating environment. People who represent themselves often find that the strain makes them ill. Be aware of the old saying that lawyers are taught in their first year of law school, “A lawyer who represents himself has a fool for a client.”
- Always consider consulting with a lawyer from time to time during the course of your self-representation. It never hurts to buy an hour of advice about how your case is proceeding and how to go forward with it.

Self-representation is not for everyone, but, with the right attitude and in certain kinds of disputes, there is absolutely no reason why you cannot represent yourself in the Canadian justice system. I wish you good luck.

Small Claims Court

www.attorneygeneral.jus.gov.on.ca/english/courts/scc/

Part 4 — Paralegals

As we have seen above, there is no rule that says you must use a lawyer when trying to deal with some legal issue. In other words, you can do it yourself. But, what if your brother-in-law is particularly helpful and he wants to assist you with the case and, perhaps, even speak on your behalf when the

matter goes to court? Again, there is no problem with someone helping you represent yourself. What if your brother-in-law wants to charge you for the work that he does helping you? Then we move into a different area: non-lawyers or “paralegals” representing the public for a fee. It is an issue that has troubled the Canadian justice system for more than a decade now.

Paralegal specialists have popped up in the justice system, helping people with everything from Small Claims Court appearances to Traffic Court cases, to landlord-tenant problems and even, in some cases, separation and divorce and drafting of wills. Paralegals have emerged for a few reasons: people cannot afford lawyers; they are afraid of lawyers; or, in some cases, there is a language barrier that the paralegal can solve that a lawyer cannot. Sometimes, it is simply a matter of convenience or (dare I say it?) the paralegal is better at this particular work than a qualified lawyer.

Retired police officers often work in Traffic Court helping people charged with provincial offences, and there is little doubt that most of those police officers know far more about that process than lawyers. Their fee arrangement—if you are convicted, no charge (in some cases)—is certainly better than a lawyer’s arrangement, where the hourly rate for the advice probably exceeds the potential fine. In a situation like that, the paralegal probably knows more about that corner of the justice system “maze” than an ordinary lawyer and offers a much more affordable service than a lawyer. So, what’s the problem? Why aren’t paralegals everywhere?

Until recently, there were limits on paralegals’ work because lawyers had one of the last remaining monopolies on the delivery of a professional service. Provincial laws prohibited anyone but lawyers from delivering legal services. At one time, doctors had a monopoly on the delivery of medical services. Their monopoly ended when governments decided that x-ray technicians and other sub-specialists could start to do

things that only doctors had been able to do. The same thing happened with architects when architectural technologists were allowed to offer certain kinds of services. Over the years, cracks began to emerge in the monopoly that lawyers had on the delivery of legal services. I think lawyers were able to hang on to their monopoly longer because no one could ever define what a “legal service” was. There are so many nuances to some of the things that lawyers do that they simply said that everything is a legal service and only they can deliver it! Not everyone agreed: people began to appear as “agents” in Small Claims Court or in Traffic Court; “immigration consultants” began to help people with their immigration applications; and some people got help with simple divorces from paralegals. Lawyers screamed loud and clear and insisted that the law societies prosecute these paralegals for the “unauthorized practice of law.” Sometimes, there were convictions; sometimes, there were not. For example, the courts said that it was okay for people to hire an “agent” to represent them in Small Claims or Traffic Court. Slowly but surely, the monopoly started to dissolve, and more and more paralegals arrived on the scene.

There are advantages and disadvantages to this development. One advantage is that some experienced paralegals are able to help consumers with smaller legal problems that lawyers cannot afford to work on. However, in some cases, the individuals providing the paralegal service have no experience and know little, if anything, about the legal problem with which the client is confronted. They are simply charging a fee to try to figure out a solution. Sometimes, they solve the problem, but sometimes, they make it worse. Paralegals are able to charge lower fees than lawyers, in large part because they do not have to pay for insurance and they do not have any educational investment to recover. The advantages and disadvantages really depend on the kind of service that a consumer is looking for from a paralegal.

Once paralegals became more common, horror stories began to circulate. In one situation, a paralegal arranged for a woman to get an immediate divorce. Unfortunately, getting the divorce terminated her rights to claim an interest in a valuable matrimonial home. Lawyers had to get involved to fix the matter, and it was very expensive. In another case, a paralegal helped a woman with a claim for compensation after a car accident. She had lost her hand in the accident, and the paralegal settled the case for a very low sum and took a very large fee. Lawyers, again, had to get involved to set aside the settlement and get the woman the proper compensation. Many wills and estates lawyers live in fear of wills that have been done by paralegals. Problems will surface only once the person who made the will has passed away, and then, of course, it is too late to do anything. A person who is upset about a poorly drafted will is likely to find that the paralegal had no insurance and there will be no compensation.

But, enough about the problems caused by paralegals. Many paralegals are experienced and do have a legitimate, affordable service to offer to the public. Ontario recently passed the Access to Justice Act, meaning paralegals in the province will now be regulated by the Law Society of Upper Canada. There is a method of certifying paralegal services for the public, a method of ensuring that they are trained, and a method of ensuring that there is some form of compensation for a consumer if things go wrong. The entire regulatory system for paralegals in Ontario is being created and implemented as I write. The first wave of certified paralegals will emerge over the next couple of years. Other provinces will likely follow suit and law societies across Canada will begin to regulate paralegals. In the meantime, be very careful using paralegals, especially for serious claims for compensation, family law, and wills and estates.

The lawyers' monopoly on the delivery of legal services is dead. Long live *qualified* paralegals.

Paralegal Society of Canada
Paralegal regulation (Ontario)

www.pscanada.ca/main/index.php
www.lsuc.on.ca/paralegals/

Part 5 — Judges and Juries

Judges and juries are two of the more mysterious elements of our justice system. In this section, I would like to demystify their roles.

Judges—and there are thousands of them in Canada—are former lawyers. Both the federal government and the provinces and territories have the authority to appoint judges to courts. Judges that have been appointed by the federal government deal with cases involving offences under the Canadian Criminal Code and, when dealing with civil disputes, hear cases involving large claims for negligence, breach of contract, labour disputes, and other serious matters.

Provincially appointed judges, on the other hand, do not deal with matters that are any less serious than the federally appointed judges, but the cases that come before them are usually related to provincial or territorial law. There is a great deal of overlap in the duties of judges. For example, in the area of family law, provincially appointed judges can consider family law cases under provincial family laws, but federally appointed judges also consider family law matters as they relate to the Divorce Act.

Thrown into the mix we have **justices of the peace**. They are not necessarily lawyers but are judicial officers appointed by the province or the territory. They deal with thousands of issues related to such things as provincial offences, municipal bylaw problems, parking issues, and so on. While many of the disputes that arrive before a justice of the peace may seem small in comparison to disputes considered by provincially appointed and federally appointed judges, we should not forget that it is justices of the peace who look after such things

as making sure that people accused of crimes are able to arrange for bail and be released from jail. In some cases, they also deal with mental health issues, and they can issue arrest warrants and summonses to require that people attend court. They have considerable authority, and they operate in the true “trenches” of our justice system.

Federally and provincially appointed judges, as I mentioned above, have spent time practicing law. Typically, lawyers cannot be appointed as judges until they have practiced for at least ten years. In order to be considered for appointment, lawyers must submit their names to a committee composed of lawyers, judges, and others. The committee considers the application and usually passes it on to the provincial attorney general for consideration for “appointment to the bench.” Appointment to the bench means becoming a judge. Once appointed, a judge cannot practice law and must stop working on cases immediately.

It is a considerable honour to be appointed a judge in Canada and, despite what some judges may tell you, the remuneration is quite good. Lawyers often say that they earn more money if they continue to practice law, but judges earn more than \$150,000 per year, plus very good benefits, ensuring their financial independence and therefore impartiality. Judges appointed by the federal government earn more than \$240,000 per annum, plus benefits, and judges appointed to the Supreme Court of Canada earn even more than that. It is a job for life, with most judges retiring at age 75. It is a good job, with a lot of prestige.

The judge’s role in the justice system is to act as an impartial decision-maker for disputes. Those disputes can include criminal cases, where citizens are being prosecuted by the government, and private disputes between individuals and/or companies. Because judges are often asked to rule on cases involving the government (for example, criminal cases), it is critical that they be impartial in their decision-making. For

this reason, the law says that a judge cannot be removed from the bench unless there have been extraordinary circumstances. The Canadian Judicial Council deals with complaints against judges appointed by the federal government. Judges have been removed from the bench for misconduct, but it is very rare.

Some judges describe their work as being lonely. It is difficult, for example, to continue to socialize with lawyer friends because judges need to be seen as impartial, which means that they cannot be seen socializing with some lawyers and not others. With a few minor exceptions (after all, no one is perfect), our judges are excellent. They work long hours, and they struggle with very important decisions virtually every day. The matters before them mean a lot to the parties, in terms of money, families, and their future; there is tremendous pressure to get it right.

As judges hear the evidence and testimony, they sift through and make decisions about validity of evidence and credibility of witnesses and then render a decision. That decision is subject to appeal and reconsideration by other judges further up the ladder, but appeals are really confined to a minority of cases. In the vast majority of situations, once a judge rules that is the end of the matter.

Juries are used in both the civil justice system and in the criminal justice system, although they are used far more often in the latter.

In the **civil justice system**, a jury is made up of six people, and it is sufficient if five of the jurors agree on the verdict or the answer to any questions submitted to them. Their decisions do not have to be unanimous. The Jury Acts (each province and territory has one) ban certain categories of people from serving on juries, including Members of Parliament, Senators, judges, justices of the peace, lawyers, law students, doctors, coroners, people involved in law enforcement, jail guards, police officers, and (interestingly) the spouses of peo-

ple in those categories. In addition, people cannot serve on a jury if they have a physical or mental disability that would seriously impair their ability to discharge their duties as a juror. Finally, if you have been convicted of an indictable offence and have not been granted a pardon, you can be denied the opportunity to serve on a jury.

In **criminal trials**, juries are much more common, and the situation is a little different. First of all, there are 12 jurors, selected by both the Crown Attorney and the lawyers representing the accused. If a juror gets sick or dies during the course of a criminal trial, it is possible for the jury to complete its work with fewer than 12 jurors. Also, unlike in civil proceedings, for a jury to convict an accused person of a criminal offence, the decision must be unanimous.

Sometimes, we hear the expression a **hung jury**. This means simply that the jury could not come to a conclusion. One or more people on the jury could not agree with the rest on some aspect of the case, but, in particular, on whether the individual should be convicted. In a situation where the jury cannot agree on its verdict, and where a judge thinks that it would be a waste of time to ask the jury to continue working, the judge can either discharge the jury and ask that a new one be selected to start the trial over again, or the judge may simply adjourn the whole trial and let the Crown Attorney think about what they want to do next.

The requirement for unanimity in a criminal verdict leads, in some cases, to an interesting moment in a courtroom. If the defence lawyers watch the jurors closely when they come back with a unanimous verdict of guilty, they may see little flinches or hints in the jurors’ body language that suggest that maybe they are not as unanimous as they say. Maybe one of the jurors was pushed into concluding that the accused was guilty when they really, in their heart of hearts, think the person is not guilty. If that situation arises, the defence lawyers may ask the judge to “poll the jury.” This means that each

juror is asked individually to stand up and state that they consider the accused person to be guilty.

The members of a jury are prohibited by the Criminal Code from divulging any information about the discussions that happen in the jury room. Those conversations are intended to be kept in the strictest confidence so that jurors are free to speak their minds and debate the evidence that they have heard during the trial. It is not uncommon in the United States to see jurors interviewed on television after the conclusion of a trial, but it is virtually unheard of in Canada.

There was an exception to this rule of confidentiality in British Columbia a few years ago when a woman juror in a murder trial began an affair with the accused (I know, what was she thinking?). The affair continued during the course of the trial, and the woman managed to keep it a secret from the judge, the prosecutor, and the defence lawyers. Her lover was acquitted—of course. When the affair was finally discovered, the juror was charged with obstructing justice. During the course of her trial, other jurors who had served with her gave evidence about what went on in the jury room. The other jurors reported that she virtually demanded the acquittal of her lover. The woman was convicted of obstruction of justice and sentenced to 18 months in jail. That case had at least two remarkable aspects. First, the fact that the jurors gave evidence about what happened in the jury room was extraordinary and, second, the juror who was convicted of obstructing justice maintained, even as she was taken off to jail, that she had done nothing wrong and that she was “the victim.”

If called for jury duty, you can expect to spend some time cooling your heels at the local courthouse. The process for jury selection in a criminal case can be quite involved. The juror’s name, number, and address are written on a card, and the card is deposited in a box. Cards are selected from the box, and the individual’s name or number is called out. Each juror steps forward and the Crown Attorney and the lawyers for the

accused person are given an opportunity to either select that juror as acceptable or to challenge them. If a juror is acceptable, they are given the oath and asked to take a seat in the jury box. The science of selecting a jury for a criminal trial is quite involved and can be something to watch when the prosecutor and the lawyers for the accused person exercise between them dozens of challenges to jurors who come forward. In some cases, it may be a matter of race, gender, economic level, and so on. Each side is hoping to select a complete jury of 12 men and women who will give the accused person a fair hearing but will also be sympathetic to their side of the case.

Judges and juries are the decision-makers in civil and criminal proceedings. Their job is to listen to the evidence, weigh credibility, and make profoundly important decisions with respect to money, family, and, in some cases, liberty.

Office of the Commissioner for Federal Judicial Affairs
www.fja-cmf.gc.ca/home-accueil/index-eng.html

Role of the Public (including Jury Duty)
www.justice.gc.ca/eng/dept-min/pub/just/09.html

Part 6 — Suing and Being Sued

I wish I could say that either of these experiences is exciting or even remotely satisfying, but anyone who has to sue another person or ends up being sued themselves is in for a draining—financially and emotionally—experience.

If you are suing or being sued, then you are not in the criminal system. The criminal system is reserved for allegations by the Crown that an individual has broken a specific law. The onus is on the Crown to prove **beyond a reasonable doubt** that the crime was committed. In rare situations, the criminal process may allow a private citizen to lay a charge against another person, but that is unusual.

In the civil justice system, private citizens and corporations (and, in some cases, governments) sue each other and ask the courts to provide them with a judgment. The judgment can be for damages related to some wrong that was committed, such as a negligent act, or damages related to breach of contract. Civil courts, in some cases, grant injunctions, or they may order a person to follow through on a contract that they signed (this is known as specific performance), but the bottom line is that when people sue or are sued in the civil justice system, they are asking for the court to order the other party to do something or to pay some sum of money to them. It is not a case of seeking a finding of innocence or guilt.

The process of suing and being sued is governed by hundreds of rules and has evolved over hundreds of years of litigation. Regardless of which level of court, lawsuits are always started by someone issuing a claim. The claim is then delivered to the other side, and the person who receives the claim then has an opportunity to respond. Each province sets a specific number of days within which the response must be given. The times can change a little, depending on what level of court is being used. In Small Claims Court, the response time may be different than if the claim was launched in the Superior Court of the province. In either case, though, the person who starts the case, generally known as the **plaintiff**, sends the claim to the **defendant** and the defendant then has an opportunity to go and speak with a lawyer and prepare a defence. The defence may also include a counterclaim, where the defendant counter sues the plaintiff for some type of judgment from the court as well. The plaintiff and defendant send various documents back and forth to each other (known as the **pleadings**), and through those pleadings the issues in dispute become clearer. The pleadings are designed to provide the court with a summary of what is actually in dispute between the plaintiff and the defendant.

Once the pleadings have been exchanged, there may be

some preliminary matters that need to be sorted out with the court. This is sometimes done by way of **motions**, whereby one of the parties to the lawsuit can ask the court to make orders related to how the lawsuit moves forward through the courts. These motions can be very time-consuming and expensive and can involve a lot of sniping back and forth between lawyers and clients.

In some cases, it is possible to ask the other party in the lawsuit questions about the case under oath in advance of the trial. When this questioning occurs, a court reporter is present, and a transcript of the questions and answers is made. This process is known as **questioning** or **examinations for discovery**. The point of the exercise is to “discover” what the other side’s case is about and to determine what evidence they have to prove their case. In civil proceedings, there is no such thing as “trial by ambush,” whereby one side waits until the last moment and then at trial whips out a piece of paper with some important evidence, thereby winning the case. The whole process of discovery is designed to avoid exactly that type of situation. Any piece of evidence that a person intends to rely upon in a civil lawsuit must be provided to the other side well in advance of any trial. This approach is designed to encourage people to settle cases without having a trial. The examinations for discovery and the disclosure of evidence can be very time-consuming and, if there are many documents involved, it can be expensive just coming to grips with the paperwork.

Anyone can start a civil lawsuit, provided they are over the age of majority for the province in which they live. If you are not over the age of majority, it is possible to have a guardian appointed to look after the case on your behalf. I was involved in a case many years ago where an uncle had taken his nieces and nephews to a drive-in movie. Unfortunately, they arrived too late and could not get into the drive-in. The children were disappointed and, I think, in a way, the uncle was trying to appease them by taking them on a “special ride”

on their way home. He decided to take a little-used road and drive quickly over an old wooden bridge. The objective of this special ride was to get the car airborne as it went over the old wooden bridge, à la *Dukes of Hazzard*. You can imagine what happened. On that particular evening, there was another vehicle coming in the opposite direction at exactly the moment they crossed the bridge. The cars collided head-on and the children were injured. One child was pushed under the front seats of the car, and another one ended up under the dashboard. Those children, obviously, had the right to sue their uncle and his insurance company, but it was necessary to have **litigation guardians** appointed to look after their rights. The litigation guardians are usually the minor's parents, unless children are suing their parents. The court must approve any settlement involving children.

The goal of the process of being sued or suing is to resolve the issue somehow. Certainly, everyone encourages people to settle, but if the case is not settled, then it is put before a judge (and, in some cases, a judge and jury) and a decision is made. Once the decision is made, it is recorded in a **judgment**, and it is then left to the person who was successful to recover not only the judgment but also their legal costs.

Suing and being sued is not a pleasant experience. Anyone contemplating a lawsuit, other than perhaps something in Small Claims Court (note, however, that Ontario is now moving the jurisdiction of Small Claims Court to \$25,000, which is a lot of money), should certainly speak with a lawyer in advance to make sure you not only have a claim and have evidence to support the claim, but also that you have a reasonable prospect of collecting any judgment that you obtain against the other person.

Part 7 — Evidence and Proving a Case

One of the most interesting, but also one of the trickiest, areas of law concerns evidence. There are different standards in the ways that the civil justice system and the criminal justice system handle evidence. Since a person’s liberty is at stake in the criminal justice system and because the impact of being convicted of a crime can be so serious, with at least a criminal record involved, the criminal justice system has a very high standard for accepting evidence. This does not mean that the civil justice system has low standards for accepting evidence, but the ways in which the courts look at various issues of proof and the evidence related to those issues is slightly different in the two systems. The difference in these courts’ treatment of evidence is seen in the way in which they come to a conclusion. In the criminal justice system, a person will not be convicted of a crime unless the court is satisfied *beyond a reasonable doubt* that this person committed the crime in question. It is not a question of the court thinking that the evidence is fairly good, and the person probably committed the crime. The court must be convinced beyond a reasonable doubt that the person committed the crime in order to have a finding of guilt. It is different in the civil justice system, where the standard is based on **a balance of probabilities**. If the plaintiff or the defendant has slightly better evidence and is able to convince the judge that their version of events is probably right, then that person may get a judgment. In other words, 51% versus 49% may just win the case.

Related to this difference in approach is a difference in the way that the courts handle evidence, and when I say **evidence**, I mean information that can be documents, electronic data, oral testimony, experts’ opinions, or, in some cases, even circumstantial evidence.

Before we go any further, I want to add one small note about evidence in family law proceedings. If any court has “different” standards for the receipt of evidence, I think most

lawyers would agree that it is the family law courts. Evidence that would never be accepted in a criminal proceeding or in a serious civil lawsuit (such as third party emails, recordings, or hearsay) may very well be accepted in a family law case if judges think it is relevant and may assist them in coming to a conclusion. This is just something that family law lawyers have come to accept about the way in which family law cases are decided in Canada. The hard and fast rules of evidence applied in serious civil cases and in criminal law cases are just not used in the family law system.

I met with a client recently to review his case. It was related to a civil claim that would be proceeding through Superior Court. As we worked on this person's pleadings (those documents that are exchanged between plaintiffs and defendants), he looked at me and said confidently, "I have a great case, don't I?" I said that I thought the facts were strong, but we now needed to concentrate on the evidence. He looked a little puzzled and repeated to me step-by-step what had happened and said, "There, you see, the evidence is quite strong. I have a good case, don't I?" I then spent a few minutes explaining to the client the difference between "a fact" and "evidence of a fact." If I take a trip on a train, that is a fact. If I produce a copy of the train ticket that I purchased, that is evidence. The evidence proves the fact. If my client is being sued for damages caused by a fire that occurred in the lockers in his apartment building, that may be a fact. If the person suing him proves that he was a smoker who regularly carried matches, was seen going into the locker area after having an argument with the landlord, and then ten minutes later a fire started, that may be **circumstantial evidence**. The evidentiary circumstances suggest a conclusion of fact. When proving a case, in civil court or in criminal court, it is not only important to understand all of the facts of a case, but also to have specific pieces of evidence to prove each fact. Oral testimony in a court can be extremely important. Unfortunately, we have

learned from scientific studies that eyewitness testimony about certain events can also be notoriously unreliable. We do not often see as much as we think we see, and for this reason courts are often in search of hard evidence (for example, documents) that backs up someone’s version of events.

A confusing, but very common, form of evidence is **hearsay evidence**. TV lawyers are regularly seen objecting to a particular individual’s evidence on the basis that it is “clearly hearsay.” A court is not interested in hearsay evidence because it is considered essentially unreliable. By hearsay, I mean a person coming to the court and saying, “Mr. Brown said the following to Mr. White,” without actually having heard it. In other words, a witness tells the court what a third person said. The court will not consider that evidence for the purpose of establishing the truth of what the third person said or that it even occurred. Unless the person who actually said it is available, he or she cannot be cross-examined in the court, so the evidence cannot be tested to see if it is true. This is why the court does not want to hear hearsay evidence. If oral testimony is being given, it must be a first-hand account (for an exception to this rule though, see an upcoming paragraph dealing with experts).

Most of the evidence considered by courts is oral testimony. A witness is sworn in (using a religious text, such as the Bible) or asked to affirm (this is where they do not make a commitment based on religion, but rather just promise to tell the truth) that they are telling the truth, and then they tell their story, usually with some guidance from their lawyer. When they give their oral testimony, the lawyer asking them the questions is not allowed to ask **leading questions**. By “lead,” I mean suggesting the answer to the question in the question itself. So, for example, a leading question would be, “Mr. Brown, you arrived at the scene of the collision by taking Highway 401 westbound from the City of Toronto?” A proper question would be to ask, “Mr. Brown, how did you come

to be at the scene of the collision?” The only time a lawyer is allowed to lead a witness is during a cross-examination. Lawyers are allowed to ask leading questions on cross-examination because they wish to test the evidence of the person. They wish to probe it and poke holes in it. The court allows the lawyers to suggest answers to the witnesses. In fact, it is a rule among experienced trial lawyers that they should never ask a question to which they do not already know the answer during cross-examination.

Although it can be difficult for them to restrain themselves, judges are not supposed to ask witnesses questions, other than to obtain a clarification on some piece of evidence. It is the lawyer’s job to ask a witness important questions during the course of a trial. In fact, there have been some cases that have been successfully appealed because the judge became too involved in the questioning of witnesses and lost the appearance of impartiality.

One last comment concerns evidence from **experts**. By its very nature, the evidence of an expert is hearsay and is often about something of which the expert may not have first-hand knowledge. Medical experts, engineering experts, and scientific experts all give evidence to the court that typically begins with the statement, “Based upon my experience, training, and expertise in the area, I suggest that certain conclusions be drawn....” The experts have a special insight into an area. In order to receive their evidence, the court must first be convinced that the person is indeed an expert and that it can ignore the rule against hearsay evidence and listen to what is, essentially, an opinion rather than a statement of facts. In some cases, the court insists on some introductory questioning of an expert witness to determine whether the court will accept this individual as an expert witness or not. This is called, “qualifying the expert.” In this process, the party wishing to rely on the expert offers the individual to the court as an expert witness. The lawyers then spend a few minutes zero-

ing in on the expert’s credentials. They cross-examine the expert to satisfy themselves that the person is indeed knowledgeable enough about the particular issue in question.

The complications within the law of evidence bedevil law students and lawyers throughout their careers. It is not uncommon to see experienced trial lawyers poring over their cases from the outset, ensuring that every single fact has a piece of evidence supporting it.

In an earlier section, we discussed self-representation, and if ever there were an area that would trip up people trying to represent themselves, it would be a situation involving rules of evidence.

Part 8 — Costs

At the end of any legal proceeding, the court has an opportunity to deal with what is known as **costs**. Each party to the dispute will have a few minutes to express to the judge their view about division of responsibility for the legal fees incurred in bringing the case to the court. It is difficult, although not unheard of, for people who have lost in court to ask the judge that their legal fees be paid. Usually, parties who have been successful ask the judge to order the unsuccessful party to reimburse them for all or a portion of their legal fees and any disbursements that have been incurred bringing the case to court. Legal fees include the charges that the lawyers make to the client for their time. Disbursements include such things as photocopying, long-distance telephone charges, courier expenses and, if it was a part of the case, transcripts of questioning that may have been ordered, if one or both of the parties were examined under oath in front of a court reporter. Transcripts can be very, very expensive and their cost is a disbursement for which any successful party will want to be reimbursed. Other disbursements that form a part of the ordinary expenses in a case that has gone to court can be the cost of subpoenas to witnesses, the cost of medical reports or

experts' reports, and even mileage claims. It is not unusual for disbursements on a particular case to reach into the thousands of dollars. At the end of the case, the lawyer for the successful party will present what is known as a **bill of costs**. The bill of costs summarizes all of the hours that the lawyer spent working on the case and all of the disbursements that were incurred. The bill of costs is handed to the judge, and the judge makes a decision about how much of that total expense should be reimbursed. It is unusual to see a successful party recover all of their costs. Somewhere in the vicinity of half to three-quarters would be considered a good recovery. This means that *even if you are successful* in a claim before the court, you will still likely be out of pocket for some of the legal fees and disbursements that you incurred pursuing the case. If you do not use a lawyer, then you will not be able to recover any fees for your own time. You will, however, be able to recover your disbursements.

If a person's conduct has been abusive or uncooperative, the judge has the discretion to order more costs. It is in such situations that a court will be tempted to order a full reimbursement for legal fees and disbursements incurred. One of the things that a judge will consider when awarding the costs is whether the parties were reasonable in their attempts to settle. After the case is complete (and only after the case has been completed), a judge will ask the parties to show any written offers that they made to settle. (Remember those "without prejudice" offers you made?) At that time, lawyers will stand up and show the judge letters that were written or formal documents offering to settle the case. The lawyers will tell the judge that they should receive the maximum amount for reimbursement of legal fees and disbursements because, prior to trial, they offered to settle the case for less than what the judge has just ordered. This means that making **offers to settle** a case is not only a good idea in order to try and get the matter resolved, but also it can be strategically very helpful at the end

of the case when speaking to costs. Remember, judges will not look at an offer to settle before deciding the case. They will only consider the offer to settle in the context of setting costs that need to be reimbursed to a successful party.

Let’s consider the situation of a party who has lost the case in front of the judge at the trial but made an offer to settle the case prior to coming to court. If the judge finds that the person who was ultimately successful could have got the same thing or better from the losing person without having to come to court, then the judge has the discretion to deny the successful party recovery of any of their costs and disbursements or reduce the amount, perhaps, to a nominal one. Making an offer to settle is very important in improving your chances of receiving your costs. All offers to settle should always be in writing, and you should keep a copy for your own records. These offers are always marked “Without Prejudice” and are kept confidential until the end.

There is an unusual provision in the rules of most courts in Canada that allows a judge to order *the lawyers* to take responsibility for some of the legal fees and expenses incurred. This can happen if the judge thinks that it is the lawyer’s fault that the case dragged on or that the lawyer did not do a very good job. The rules of court sometimes authorize a judge to order that a lawyer not charge the client for work that was done or to reimburse a client for legal fees that were paid. In very unusual cases, the judge can also order a lawyer to pay costs, if the judge thinks that the lawyer was responsible for trouble in the case. If a judge is going to order that the lawyer be personally responsible for the costs, the judge will give the lawyer some advance notice so that they can speak to a lawyer of their own and make presentations to the judge about why they should not be ordered to pay the client’s costs. It is a rare thing to see a judge order the lawyer to pay the costs, but it does happen. It is a way of keeping difficult lawyers under control. In a recent Ontario case, a lawyer

was ordered to personally pay \$25,000 in costs to the client on the other side. Ouch!

Costs are a very important consideration when going to court. There can be little joy if a client goes all the way through a process, is successful, but does not recover the cost of hiring a lawyer. That is why it is important to make offers to settle and to keep an eye on the costs of litigating. The important goal is to *net* money, not to spend more money on the process than you actually recover.

Part 9 — Alternatives to Court

When people face a legal problem, they usually assume that they will end up in a courtroom in front of a judge. Traditionally, this has been true. People hire lawyers. The lawyers battle it out. If it settles, it settles, but if it does not, we are off to court. This approach, which we call the “adversarial approach” (where each party is an adversary to the other), is the way our court system evolved. The judge is above the dispute and impartial. The clients, with their lawyers (if they can afford them), try to convince a judge to accept their version of events. In the past, this approach applied whether they were arguing over a defective automobile, a breach of contract, a car accident, or a divorce. I think, in large part, many people lost confidence in lawyers and the justice system because of this one-dimensional approach to legal problem solving.

Over time, some alternatives emerged that gave people a different way to tackle their problems without necessarily going to court. The two main alternatives to the court system are **mediation** and **arbitration**. A third method of problem solving related primarily to family law cases has also developed recently. It is known as **collaborative law**. In this section, I would like to set out the meaning of these alternative approaches and some of the advantages and disadvantages.

Mediation is a process in which two (or more) parties to

a dispute, any kind of dispute, use a skilled third party to assist them in discussing the legal issue they face. The mediator helps the parties reach a mutually satisfactory solution. Instead of having a judge impose a solution, the parties to the dispute design their own. Mediation is different from the adversarial courtroom approach because the mediator, who has very specific training, encourages the parties to look at the problem from different angles and to develop an understanding of each side’s needs and interests. The goal is not to develop two competing positions and then slug it out. The goal is to determine whether everyone’s interests can be met through some creative solution that might not otherwise be available in a courtroom. After all, who is in a better position to develop a solution than the people who are involved in the dispute? This is particularly so in family law cases where mediation is very, very popular. For the most part, mediation is voluntary and non-adversarial, and it works best when you have a skilled, impartial mediator leading the discussion. One of the advantages of using mediation is that people who go through it report that they actually develop better negotiating skills and are then able to resolve subsequent disagreements without the use of a mediator. In other words, mediation seems to empower people. The other advantages are that mediation seems to be faster, less expensive, and it tends to produce happier people, if a settlement is reached. It can also be much less stressful than participating in an adversarial courtroom process.

In some court systems, such as Ontario’s, mediation is mandatory for certain types of cases such as fights over estates. Judges will not let a case come into a courtroom unless there has been an effort to resolve it through mediation. The vast majority of mediations, however, are voluntary. This is probably the best way to conduct mediation because a settlement is really only achievable if both parties to the dispute want to be there and negotiate in good faith.

In the family law area, all provincial family laws and the federal Divorce Act encourage families to use mediation to resolve their disputes, however, the process is not mandatory. In other words, for family law, if you accept mediation, it is because you have agreed to mediate, not because you are being forced to.

There are national and provincial organizations that train, certify and organize mediators in Canada. Participation in these organizations is voluntary. This means that anyone can hang out their shingle and say that they are a mediator. You should only use mediators who are trained and who are members of provincial or national professional associations. It is important that you be cautious and select a mediator who is experienced and qualified.

A mediator will usually meet with both sides at the same time at the outset, listen to the respective problems, and then help the people explore some options. In some cases, the mediator may separate the parties to the dispute in different rooms and shuttle back and forth trying to find a solution that meets everyone's interests.

Do mediators help avoid the need for lawyers? In some situations, such as Small Claims Court cases or disputes between neighbours, it is not necessary to obtain independent legal advice if a mediator has helped you reach a satisfactory solution, provided you used an experienced and qualified mediator. However, in cases involving substantial sums of money or family law problems, it is important that people obtain independent legal advice to ensure that the mediator has heard the full story and developed options that are acceptable to both sides. Lawyers will look over a settlement and, in some cases, strengthen it to make sure that it holds up in the long term.

At the outset of mediation, the mediator will ask the parties to the dispute whether they want the mediation to be **open** or **closed**. If the mediation is open, then statements made in

mediation may be admissible later in court if the mediation fails to achieve an agreement. A closed mediation is the opposite. It is confidential. Nothing said in the sessions can be used in a court. For most mediations, it is better to err on the side of caution and only participate on the understanding that it is a closed mediation.

Another advantage of mediation, aside from its being faster and possibly less expensive, includes the privacy that is given to the people involved. There is no need to thrash things out in a public courtroom. It is also more creative because the parties to the dispute can come up with a solution that might not be available to a judge, who is often required to see things in black and white. I think the overriding advantage of mediation is that most people just feel better having gone through it. It is rare to meet someone who has a warm and fuzzy feeling after spending a day or a week or months in a courtroom.

Mediators charge an hourly rate, and it can range from \$50 to \$500 per hour, depending on how complicated the dispute is and how senior the mediator is in terms of training and experience. Remember, though, that the two parties (or more than two if it is a multi-party dispute) will share the mediator's fees, so the cost of mediation can be quite reasonable.

If the dispute is over something that is significant and important to you, you will want to speak with a lawyer prior to going into mediation. Lawyers can find experienced mediators in the community, or by contacting a provincial or national mediation association.

Arbitration is different from mediation. Arbitration is the same as hiring a “private judge.” It is a process that has been used for hundreds of years in commercial matters and in construction matters. When using arbitration, the parties to a dispute select a private individual, often an experienced lawyer, a retired judge, or some other expert in a particular field, to hear their dispute in private. After the hearing, the arbitrator renders a decision. It can be a fast, effective, and less expen-

sive way of resolving a problem.

One of the reasons I like arbitration is that you are able to select the person who will resolve the dispute. In the justice system, judges are often randomly assigned to the cases on which they work day-to-day. This can mean that the judge assigned to your case may or may not have an interest or expertise in whatever issue your case concerns—motor vehicle accidents or family law cases, for example. In arbitration, the parties hire the absolute best and most effective person to decide that case.

One of the disadvantages, however, of arbitration is the added cost. Now the parties are paying for two lawyers and “a judge.” At least in the public courts, the judges are “free,” since our tax dollars pay their salaries. A private judge, however, can cost between \$2,000 and \$3,000 per day, for each day of a hearing. True, that cost is shared by the parties, but it is still an added expense that must be dealt with.

Like mediators, arbitrators are certified by provincial and national associations, and you should only ever use an arbitrator who is certified. A lawyer can direct you to a recommended list of arbitrators in your community.

I want to add a caution about mediation and arbitration, particularly mediation. If you go into this type of process, make sure that everyone is there in good faith. The last thing you want to do is waste your time and money in a mediation only to find out that the reason the other party is there is to find out what your “real” bottom line is before they drag the matter back into court. The point of mediation or of arbitration is to do things quickly, effectively, and inexpensively. Make sure that the process does not simply add to your costs. Lawyers and clients have used mediation and arbitration for many years in the family law area, and there is no doubt that it works. In fact, the justice system is often so slow and ineffective that many people cannot afford to stay in it, and they opt out to use mediation or arbitration simply to get the case

over with. This is a sad comment on the state of our justice system for families.

Collaborative law is a new way of trying to solve problems in the area of family law. It developed because some people who are going through separation and divorce do not necessarily want to follow the exact letter of family law in their province or territory. In collaborative law, the lawyers and clients work in a process of principled negotiation to try and meet each client’s interests through creative solutions. What distinguishes collaborative law from mediation is that there is no mediator present. It is just a simple negotiation involving parties and lawyers. The clients and lawyers sign an agreement stating that if the collaborative process does not produce a settlement, neither lawyer can be hired to take the matter to court. In other words, the clients must drop the lawyer they used for the collaborative process and hire a new lawyer to take the matter to court. That added expense can be a strong disincentive to wasting time in a collaborative law process. This approach is relatively new and requires special training for the lawyers involved. People using collaborative law for a family law dispute will only enter into such a process if the lawyers are qualified to do so. If you are interested in this kind of process, speak to your lawyer about it to see if they are qualified to handle it. If not, perhaps they can recommend you to a qualified lawyer in your community.

So, when it comes to resolving any kind of dispute, whether it’s a fight with your neighbour, a breach of contract, or a separation and divorce, consider being creative and using mediation or arbitration or—in family law cases—a collaborative law process. It may just save you not only time and money, but your sanity as well.

Ministry of the Attorney General - Family Mediation

www.attorneygeneral.jus.gov.on.ca/english/family/divorce/mediation/

Collaborative Family Law & Mediation

www.familylawcentre.com/04resources/res14-Collab-Fam-Law-Med.htm

ADR www.adrcanada.ca/

Part 10 — Lawyers' Fees

I left the scariest section for last because, let's face it, the most frightening thing about speaking with a lawyer is the potential cost. Lawyers charge their fees in a number of ways. The most common is an hourly rate. The lawyer will charge \$200, \$300, \$400, \$500 (or even more) per hour for their advice. A client is, essentially, paying the lawyer for their time, and when I say "time," I mean every second that a lawyer spends working on a case is recorded and billed. Telephone calls, reading emails, sending letters, doing research, thinking about strategies, talking to other lawyers, and so on. Obviously, the lawyer working on a case does not work in blocks of one hour at a time. Sometimes it is a ten-minute telephone call or forty-eight minutes of research or one minute arranging for a meeting. In order to capture all of that time for an account, lawyers divide their work hours into tenths or units of six minutes. Ten units of six minutes make up each hour. The lawyer will, regardless of how much time was actually spent, never record less than one-tenth of an hour being spent on a matter because that is the smallest unit of time that a lawyer records. I have met some lawyers who will only record two-tenths as the smallest unit of time. This means that if the lawyer works on something for one minute, the client will be billed *as if the lawyer spent twelve minutes working on the case*.

Throughout the day, lawyers keep track of their time, sometimes by way of written dockets, sometimes on the computer. Every single step taken is recorded and the time is accumulated in the office computer. At the end of the case, or at periodic points throughout the matter, the lawyer will produce

a “statement of services.” This statement will list every single step taken on behalf of the client. The total time will be multiplied by the lawyer’s hourly rate, and the fee is calculated. Added to the fee are any disbursements that have been made on behalf of the client for such things as photocopying, couriers, or service of documents. GST is added to that amount and once it is all tallied up, the lawyer has an account to render to the client. If the client has given the lawyer some money in advance, as a part of the initial retainer, that amount will likely be deducted from the account, and any balance owing will be due at that time.

In some cases, lawyers charge “block fees.” In other words, they quote a fee for delivering a particular service. Perhaps, a real estate transaction can be done for \$900, including disbursements. Perhaps, a will can be drafted, along with Powers of Attorney, for \$1,000 plus disbursements.

Clients who cannot afford to pay a lawyer must apply for **legal aid**. Legal aid is delivered individually in each province and territory, and it is a matter of near-unanimous agreement among lawyers that legal aid plans are woefully underfunded. Legal aid is now reserved primarily for serious criminal cases, family law cases, and refugee or immigration cases. In order to see if you qualify for legal aid in your province, contact the provincial legal aid plan. There will be a “means test,” which means the legal aid plan will want to know how much you earn, how much you owe, how much you own, and how much, if any, you are likely to recover in the litigation that you are pursuing. There are people who own their own homes and still qualify for legal aid. However, in a case like that, legal aid will often take a lien against the individual’s home. The lien is repaid at a later date, if the home is sold or if the litigation is successful and funds are available to pay the legal aid back.

Contingency fees are available in Canada. A true **contingency fee** means that the lawyer is agreeing to take the case

on the understanding that a fee will be charged only if the lawyer is successful in recovering money for the client. No recovery means no fees. In other words, the fee is *contingent* on success. Contingency fees are also often tied to a percentage of the recovery. A lawyer will take the case contingent on success but also state that in the event of success, the lawyer's fee will be a percentage of the sum recovered. The lawyer will not be calculating their time on an hourly basis and then simply charging for the work that was done. Instead, they are saying to the client, "I will take your case, and I will work on it. If I am successful, I expect to receive, for example, thirty per cent of what is recovered, regardless of the amount of time I spend working on the case." I heard recently of a lawyer who represents people in the financial services sector when they are negotiating termination packages. This lawyer does not record his time on an hourly basis. Instead, his fee is 15% of any improvement that he secures in the termination package for the employee—regardless of the amount of time that he has spent working on the case.

It is important to have any fee arrangement with a lawyer in writing. This writing can be in the form of a retainer or contract that a client has with a lawyer. The retainer should set out the work that is being done on behalf of the client, the hourly rate that is being charged, how fees and disbursements are calculated and charged to the client, and so on. If the fee is to be a block fee, that should be in writing. If the fee is a contingency arrangement, that, most assuredly, must be in writing.

Of course, lawyers and clients will sometimes end up in conflict over fees charged. Many clients are shocked when they see how much time was spent on a case, and they object to paying the fee that the lawyer wants to charge. If the agreement between the lawyer and the client is in writing, this type of difficulty is less likely to arise. However, if a client is unhappy about a lawyer's bill, it is possible to have that bill reconsidered by a judicial officer. Every province in Canada

has a way for clients to have their lawyers’ bills reviewed by an assessment officer. This person will consider the details of the retainer, the details of the work that was done, and the details of the account that was rendered by the lawyer. The assessment officer not only looks at what was done and how much was charged, but whether the work was of value to the client. On any given day in Canada, thousands of lawyers’ accounts are being assessed. In some cases, the assessment officer explains to the client that the bill is fair and that it should be paid, but, in many cases, the assessment officer tells the lawyer that his or her retainer was not clear enough, that services should not be charged for, and that the account must be reduced.

The answer to the disputes that arise between lawyers and clients over fees lies in the retainer. Personally, it is my view that lawyers should be required to enter into written retainers with clients and that those retainers should be standardized, province by province. The retainer should set out, in detail, what the client expects the lawyer to do, what the lawyer promises to do, the hourly rate to be charged by the lawyer and how the fee is to be calculated, and how that bill is to be paid. This improvement would go a long way towards assuring Canadians that the work done on their behalf by lawyers and the fees charged are appropriate, if not fair.

Dept of Justice - Legal Aid Program www.justice.gc.ca/eng/pi/pb-dgp/arr-ente/lap-paj.html
Legal Aid Ontario www.legalaid.on.ca/en/

Conclusion

The system can be a confusing maze. It is slow and it can be very expensive. Lawyers and, in some cases, qualified paralegals are best equipped to help you through the maze but you have to be a smart consumer; you have to cut through the legal mumbo-jumbo. Pick your guide carefully and the journey will be a lot easier—not painless, but easier.