UBC SAUDER SCHOOL OF BUSINESS

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CHAPTER 1

FUNDAMENTALS OF LAW

Learning Objectives

After studying this chapter, a student should be able to:

- ☑ Describe the sources of our laws
- ☑ Explain the doctrine of *stare decisis* and how it is applied by the courts
- ☑ Describe the difference between common law and equitable principles, and how they are applied today in British Columbia
- ☑ Describe how the federal, provincial, and municipal governments obtain their power to pass statutes, and give an example of a law each level might pass
- ☑ Give an example of a public law matter and a private law matter
- ☑ Discuss the historical basis of our real property law
- ☑ Describe the jurisdiction of administrative tribunals in British Columbia
- ☑ Identify and describe the jurisdiction of the two trial courts in British Columbia
- ☑ Describe the appeal process for each court
- ☑ Distinguish between the role of the trial court and the appellate court
- ☑ List and describe the steps in a typical court case
- ☑ Discuss why many cases are settled before trial
- ☑ List and describe the various methods of enforcing a judgment
- ☑ Explain the purpose of limitation periods

INTRODUCTION

The purpose of this chapter is to provide a background for the various chapters in this book that deal with legal topics. This chapter introduces some basic legal ideas and concepts, and is not intended to be exhaustive.

THE SOURCES OF OUR LAWS

"Law" can be defined as the enforceable body of rules which governs a society. In British Columbia, our law comes from two sources: common law and statute law. These two sources of law are briefly discussed below.

Common Law

Common law refers to court-based, judge-made law that is typically recorded in written decisions. Common law derives its authority from historical customs and the decisions of judges originally settling disputes between people in accordance with these social customs.

common law
a system of law made up of principles and rules of action based upon the ancient customs and usages of the people of a nation which have been recognized, affirmed or enforced by the courts

Our common law system originated in England many hundreds of years ago and evolved during the first three centuries after the Norman Conquest of England in 1066 A.D. This English common law was introduced into British Columbia during England's colonization of Canada. Today, in Canada and BC, the common law continues to develop and evolve.

stare decisis
literally, "let the former decision stand" – to abide by prior decisions and not to disturb the doctrine of the courts that, when the court has once laid down a principle of law applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases where the facts are substantially the same, regardless of whether the parties and property are the same

An important concept in our common law system is the doctrine of *stare decisis*. This doctrine, developed in England, gives our law security and certainty. "*Stare decisis*" is a Latin phrase that means "let the former decision stand". This principle was adopted by the early common law judges so that people could predict the consequences of their actions with some certainty. By following earlier decisions dealing with the same problem, the judges created uniformity in the law. Today, in British Columbia, if a court has already decided a particular point, and a subsequent court is faced with the same issue, the earlier decision should govern the subsequent decision. This is particularly true when the earlier decision was made by a court higher than the court hearing the subsequent case. The earlier cases that are followed are referred to as "precedents".

Applying this doctrine is not as easy as it seems. It is uncommon for courts to be faced with new cases identical to previously decided ones. Therefore, a judge must review all of the facts of a former decision, and decide which of those facts were crucial to the decision. The judge then compares those facts to the facts before the court. If there is a difference that the judge feels is crucial, the judge will "distinguish" the former case and determine it not to be binding in the circumstances before the court.

Under the doctrine of *stare decisis*, decisions made by the Supreme Court of Canada have the most weight in our law. Next, the decisions of the appeal courts of the various provinces are binding upon the lower courts of those provinces. Such decisions will also be very persuasive to the lower courts of other provinces. Finally, the provincial trial court decisions may govern future decisions on the same points. If no Canadian authority can be found, a judge may refer to English cases or to those from other Commonwealth countries with a common law system, even though these decisions are not viewed as legally binding until they have been adopted by a Canadian court. In this way, a body of precedent has been developed which may be referred to in any dispute. As the precedents are followed or adapted to new facts, or as new precedents are created, the common law continues to evolve.

Equity

equity (in common law)
the concept of justice being administered by the courts according to fairness as contrasted with the strictly formulated rules of common law. In law the term "equity" denotes the spirit and habit of fairness, justness, and right dealing which would regulate interaction of person with person

During the reign of the Tudors and Stuarts in England, the common law precedent system became firmly established in English law. In fact, it became so firmly established that the rules became very rigid and unfair results frequently occurred. As a result, litigants began to petition the king for relief, who was looked to as the source of all legal rights. As the king began to decide cases based upon principles of fairness or "*equity*", liti-

gants were sometimes able to avoid the rule-bound common law courts and petitions to the king to solve disputes became more and more popular. Eventually, the king passed on his function to his chancellor and vice-chancellor and a separate court system administering equitable rules based on fairness was created. These courts were known as the courts of chancery or the courts of equity. The courts of equity operated to correct the laws, not overrule or overwhelm the common law. Equity operated to relieve from the harshness of the common law. It had a discretionary function to meet individual circumstances.

The courts of chancery and the common law courts developed separately for hundreds of years until 1873.

Joining of the Two Systems

In the 1870s the English Parliament passed the *Judicature Acts*, which joined or "fused" the courts of equity with the common law courts. Today, in Canada, the two court systems are also combined; consequently, judges in all the provinces (except Quebec, which operates under a different system of law) can apply both common law and equitable principles in deciding a matter. If there is a conflict between the two, equitable principles take priority.

Example

George and Kevin enter into a contract whereby George agrees to sell his house to Kevin. On the day the deal is to be completed, George refuses to sign the documents to transfer the property, saying he wants more money than he had originally agreed to. Kevin sues George for breach of contract.

specific performance
the court, rather than granting damages in lieu of performance, orders that the terms of the contract be carried out by the party in default

injunction
a court order which either restrains a party from doing something or requires a party to do something

At common law, Kevin would only have the remedy of damages. The court would order George to pay Kevin the amount of money it would cost to put Kevin in the position he would have been in if the contract had been performed. But Kevin might want something other than money in his pocket. The courts of equity could grant an equitable remedy such as *specific performance*, whereby George would be ordered to perform the contract by transferring the property to Kevin. Today, by virtue of the *Judicature Act*, a judge in British Columbia has the power to grant either common law or equitable remedies. However, because equitable remedies are awarded at the discretion of the court, Kevin could be refused specific performance in some cases (for example, if he delayed too long in bringing his case before the court).

Another equitable remedy is the *injunction*, which is most commonly an order of the court prohibiting a defendant from doing or continuing to do an unjust act. A mandatory injunction is an order requiring a defendant to do a particular thing.

Today, the expression "common law" can have several meanings. Sometimes, it refers to the original set of principles that developed separately from equitable principles. More often, it is used very loosely to cover both common law principles and equitable principles as they have developed through decisions of the courts. In this sense, "common law" is contrasted with statute law.

Statute Law

Statute law, or legislation, is the body of law made by our government representatives in the federal Parliament, provincial legislature, or municipal council. The power of the provinces or the federal government to make laws is set out in our Constitution. For example, the federal government has exclusive authority to pass legislation dealing with matters which involve banking, bankruptcy, currency, postal services, marriage and divorce, criminal matters, patents, copyrights, shipping, fisheries, and national defence. The provincial governments are responsible for property and civil rights, municipal institutions, the administration of justice within the province, education and generally matters of a purely local or private nature. The residual power to legislate over areas not specifically covered is left with the federal government.

Municipal governments are not given their authority to legislate under the Constitution; instead, specific powers are "carved out" of the provincial power and passed down to the municipalities or cities within the province. These local governments pass bylaws that govern matters within their jurisdiction. For instance, many of our street and traffic regulations and local building bylaws are enacted by local government councils. All three levels of government provide an ever-increasing volume of laws governing our day-to-day activities.

The development of new principles using the case law approach is very slow. The role most often played by legislation is to change the common law. For example, there was no requirement at common law for a person acting as a real estate agent to have a licence. That requirement was created by the *Real Estate Services Act*.

Therefore, in answering a legal question, a judge will first look to see if a statute has been passed that provides an answer. Under the doctrine of *stare decisis*, the judge will interpret that statute in the same way as courts have done previously. If no statutes exist on the question, or if the statute provides an incomplete answer, the judge will turn to case law. Figure 1.1 illustrates the two sources of laws discussed above.

FIGURE 1.1: Sources of Our Law

Common Law	Statute Law
• includes both common law and equitable principles and rules found in judicial decisions • uniformity created as a result of *stare decisis* (courts follow former similar decisions)	• laws passed by federal, provincial, and municipal governments • federal and provincial powers found in the Constitution • municipal power carved out of provincial power • used to change the common law or to create rules in areas untouched by the common law

As a Licensee...

You will engage with law derived from a variety of sources, including both statutes and common law. For example, licensees must be familiar with statutes such as the *Real Estate Services Act*, which provides the law governing the provision of real estate services in British Columbia. Another relevant statute is the *Personal Information Protection Act*, which establishes privacy guidelines that licensees must obey when handling their clients' information. On the other hand, licensees may enter into an agency relationship with their clients, and many aspects of the law of agency (discussed in a later chapter) are derived from common law. Furthermore, licensees often assist their clients in preparing or reviewing the contract of purchase and sale; contract law is also governed largely by the common law.

CATEGORIES WITHIN OUR LEGAL SYSTEM

There are two major categories into which the different areas of law fall: civil law and *public law*. In this sense, civil law (or *private law*) covers those types of law that deal with aspects of relationships between individuals that are of no direct concern to the state. For example, a breach of contract, a divorce, or a tort action are civil law matters. Public law, on the other hand, comprises those areas of law that deal with the Constitution and bodies of government, the relationship between individuals and the state, and relationships between individuals that are of direct concern to the state. For example, public law includes tax law, constitutional law, and criminal law.

public law
the law that regulates disputes between individuals and the public as a whole (i.e., the state). The term "public" may be: (i) general (applying to all persons within the jurisdiction); (ii) local (applying to a geographical area); (iii) special (relating to an organization or authority charged with a public interest)

private law
the law that deals with disputes between two or more individuals

From the point of view of a real estate licensee, civil law is most important, and particularly, the area of real property law. Contracts, agency, and tort law are also civil law matters of daily concern to licensees.

REAL PROPERTY LAW

Historical Basis

Due to the unique characteristics of land, a body of legal principles has developed to deal exclusively with real property. These principles come from previous court decisions and current legislation. The historical basis for our real property laws dates back to the Norman conquest of England in the 11th century A.D. After the conquest, William the Conqueror considered himself the owner of all of England. He divided the land into parcels, and these were given to his barons and knights in return for their assistance in the conquest and for services that they performed for the king. As long as these services were performed, the barons and knights (later called tenants-in-chief) were able to keep the land. Failure to meet these requirements meant that the land would revert back to the Crown. Through the tenant-in-chief, the rights to the land were further subdivided to middle lords and, finally, to the peasantry who actually occupied and worked the land. In each case, the land was given over to the next person lower on the scale in return for services. These services might be of a military, agricultural or personal nature. In all cases, failure to live up to a promise of services usually meant losing the right to occupy the land. As a result, land was not "owned" as we often think of the term; instead, it was held for a period of time (limited or unlimited) in return for the services rendered. Later, these services were changed to a money payment known as scutage. This was known as the feudal system, and the rights acquired by the tenants were referred to as estates. Today, the estates system is the theoretical basis for our land-holding system in British Columbia whereby the Crown still possesses underlying title to all lands.

Real Property Statutes

Because property and civil rights are matters within the jurisdiction of the provinces, legislation dealing with real property can vary widely from province to province. For example, the western provinces have a Torrens land registration system, while most eastern provinces have a less comprehensive system of title registration. Also, the federal government sometimes has jurisdiction within a province to affect real property in that province, by, for example, expropriating land for federal purposes.

THE JUDICIAL SYSTEM IN PRACTICE: THE BRITISH COLUMBIA COURT SYSTEM

In British Columbia, court cases are often categorized as criminal cases or civil cases. This chapter will focus upon civil cases. Refer to Figure 1.2 for a summary of the different courts and their functions.

Administrative Tribunals

Administrative tribunals are not part of the court system. Instead, they are less formal adjudicative bodies established to hear disputes in specific areas. To ensure administrative tribunals act fairly and according to the law, certain decisions are reviewable by the courts. Decisions are reviewable if there has been a breach of the rules of natural justice, or if a party wants to challenge the administrative tribunal's power or jurisdiction.

Civil Resolution Tribunal

Established by the *Civil Resolution Tribunal Act*, the Civil Resolution Tribunal, or "CRT", is a newly created online tribunal tasked with resolving almost all strata corporation disputes, including non-payment of strata fees or non-enforcement of strata bylaws; certain small claims disputes; and certain motor vehicle accident injury disputes. It is the first online tribunal of its kind in Canada. There is no monetary limit for strata corporation disputes submitted to the CRT. Small claims disputes for $5,000 or less relating to debt or damages, recovery of personal property, personal injury, or specific performance of agreements involving personal property or services must be submitted to the CRT. Small claims disputes above $5,000 can be made to the CRT, but the amount above $5,000 must be abandoned and cannot be claimed anywhere else. In addition, certain motor vehicle accident injury claims of up to $50,000 may be submitted to the CRT. The CRT does not have legal authority to deal with certain matters such as libel, slander, claims against the government, and claims with constitutional questions. Lastly, the CRT can only decide disputes related to events arising within British Columbia.

The CRT also has jurisdiction over disputes about housing cooperative associations. Claims made to the CRT typically concern access to documents, issues with meetings or voting, enforcing a cooperative's constitution

or bylaws, or interpreting the *Societies Act*. The *Civil Resolution Tribunal Rules* require cooperative associations to retain a contact person – who must be a director, officer, or authorized employee – for a CRT claim.

There are three potential phases involved in settling a dispute through the CRT: negotiation, facilitation, and adjudication. The first phase, negotiation, involves the parties communicating online in an effort to settle the dispute. If negotiations are unsuccessful, the next phase is facilitation, where CRT staff will assist the parties in attempting to reach a settlement. If the parties are still unable to resolve the dispute, the last phase is adjudication, where an adjudicator will make a decision that is enforceable by the courts. A party who disagrees with a CRT decision may be able to ask the BC Supreme Court for judicial review of the decision. In a judicial review, the court cannot overturn the tribunal's decision merely because the judge finds that they would have decided differently. A judicial review will only overturn a tribunal's decision if it finds that the decision meets the more stringent standard of being patently unreasonable. Persons who wish to pursue judicial review of a CRT decision should obtain legal advice, first.

The CRT has three key advantages compared to the traditional court system when resolving certain strata corporation, small claims, and motor vehicle accident injury disputes. These advantages are the online process, the efficiency of the process, and the costs associated with seeking dispute resolution with the CRT. The disputes are resolved online, which is ideal for parties with busy schedules. Additionally, the CRT aims to resolve disputes within around 60 days, which is a much faster time frame than going through the court system. Fees involved with CRT dispute resolution total around $200, as lawyers are not involved in the process. In comparison, resolving disputes at trial would require attending court in person; typically a much longer time frame from the first filing to the final decision; and greater court and lawyers' fees.

Courts of Original Jurisdiction

In each province, if a dispute is not heard by an administrative tribunal, it is first heard and judgment first passed upon it in the courts of original jurisdiction. These courts are also referred to as trial courts. At this level, all the evidence is presented, including the oral testimony of witnesses, documents and any other relevant materials. The judge reviews the evidence, decides which evidence is to be believed, looks at former cases and statute law, and makes a decision.

There are two civil courts of original jurisdiction in British Columbia: the Small Claims Court and the Supreme Court.

Small Claims Court

Small claims courts are located throughout British Columbia and have jurisdiction to deal with most claims of $35,000 or less. In addition to this monetary limitation, there is also a territorial limitation imposed upon actions in this court. A person must be able to establish:

1. that the cause of action (i.e., the circumstances that give rise to the claim) arose within the territorial jurisdiction of the court; or
2. that the person being sued lives or carries on business there.

If the amount claimed is greater than the monetary limit, the claimant can either reduce the claim or bring the action in the Supreme Court.

Supreme Court of British Columbia

The British Columbia Supreme Court is the top trial court in the province; there is no monetary limitation on claims which it will hear, nor is there any territorial limitation within the province. One can bring an action before the Supreme Court of British Columbia in any of the Supreme Court locations in British Columbia.

Appellate Courts

After a trial judge has made their decision, either party may appeal that decision to a higher court. The higher court is called an appellate court and the person bringing the appeal is called the appellant. In most cases, an appellate court will not rehear the evidence that was presented at the trial level; instead, it will review the legal principles applied by the trial judge. If the trial judge made an error in applying those principles, the decision may be modified or reversed.

Appeal from Small Claims Court

An appeal from the Small Claims Court is to the BC Supreme Court, but it does not automatically lead to a new trial. The party filing the appeal will first appear before a judge to argue that there are legal or factual errors in the trial judge's order. If the judge hearing the appeal allows the appeal, a new trial may be ordered. This means that all of the evidence is reheard and the new trial judge gives their own decision on the matter.

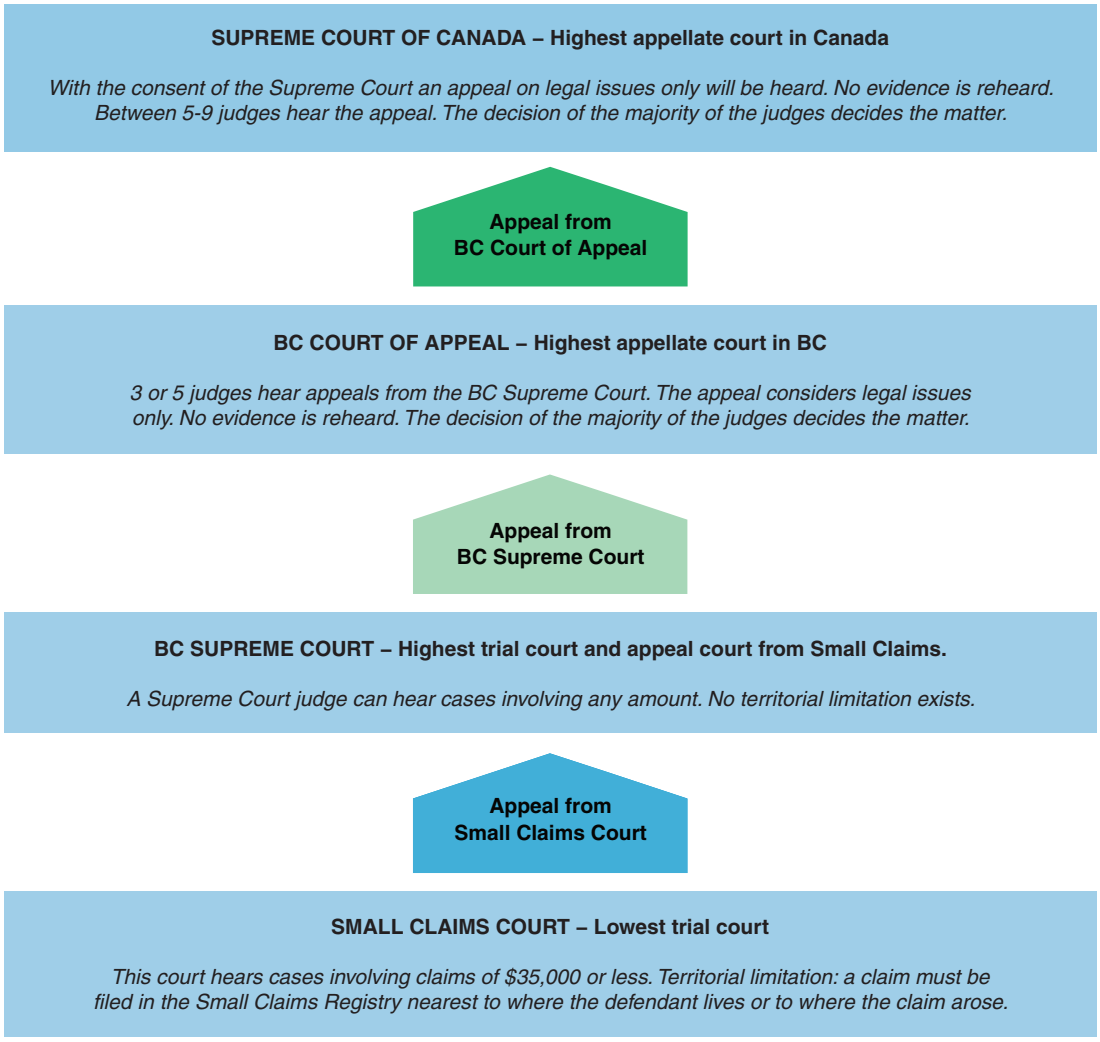
Appeal from BC Supreme Court

An appeal from the British Columbia Supreme Court is taken to the British Columbia Court of Appeal, the provincial appellate court. Although only one judge sits in the trial courts, a panel of judges hears the appeal in the Court of Appeal, and the majority view decides the matter. For example, if there are three judges hearing an appeal, a 2 to 1 decision in favour of the appellant will result in overturning the lower court's decision. There are usually three judges, but there may be five where an important precedent may be overturned.

Appeal from the BC Court of Appeal

No matter which party succeeds in the Court of Appeal, leave to appeal to the Supreme Court of Canada in Ottawa may be sought. However, unlike the British Columbia Court of Appeal, the Supreme Court of Canada can decide not to hear the appeal. If this happens, the Court of Appeal's decision will stand. Supreme Court of Canada appeals come before a panel of a minimum of five judges, but more commonly, seven or nine judges. Again, the evidence is not reheard and the majority view decides the matter.

FIGURE 1.2: British Columbia Civil Court System



As a Licensee...

In addition to the court system, licensees may become involved with various administrative tribunals including the CRT as described previously. Where it appears that the *Real Estate Services Act*, its regulations, or the *Real Estate Services Rules* have been contravened, a disciplinary order from BC Financial Services Authority (BCFSA) may be issued. This disciplinary order can be appealed to the Financial Services Tribunal, and from there, judicial review from the British Columbia Supreme Court may be sought.

Procedure for Bringing a Claim

Where a civil wrong is committed, the injured party may decide to seek a remedy in the court system. To do so, they commence a lawsuit. Figure 1.3 illustrates how such a lawsuit proceeds through the court system.

The Parties to a Lawsuit

Our common law system is based on an adversarial process. This means that each party to a dispute presents their case or point of view as persuasively as possible, and then an impartial trier of fact, either judge or jury, makes findings of fact, applies the law to those facts, and comes to a decision that is binding on both parties. The person who is alleging a wrong by the other party is known in Supreme Court as the plaintiff. The person defending the lawsuit is called the defendant. In Small Claims Court, the parties are known as the claimant and the defendant.

Not every claim results in a trial. Most claims are settled out of court. Two major reasons for this are the effect of our pre-trial process, and the risk of paying court costs. The pre-trial process tends to narrow and clarify the points in dispute, often leading to a settlement, while court costs remain a monetary concern for any party proceeding with a weak case. The following is the procedure for bringing a claim in Supreme Court.

The Pre-Trial Process

Pleadings. Under the BC *Supreme Court Civil Rules*, a plaintiff begins an action by filing a notice of civil claim, which outlines the details of the plaintiff's claim. The defendant answers by filing a response to civil claim, which is a written document denying some or all of the claims set out in the plaintiff's notice of civil claim. Sometimes, the plaintiff may respond to the response to civil claim by filing a reply. In addition, if the defendant has its own claim against the plaintiff, the defendant may also file a document called a counterclaim and the plaintiff may file a response to counterclaim if it contests the defendant's counterclaim. Once filed, each of these documents (which are referred to as pleadings) must be served on the opposing party. The object of the pleadings process is to narrow and define the disputed issues that need to be decided by the court.

As a Licensee...

It is important to know your brokerage's policies regarding receiving any court documents. These documents can require a time-sensitive reply or response if a licensee is intending to dispute the claim, and/or make a claim to the Real Estate Errors and Omissions Insurance Corporation (discussed in the next chapter).

One way for court or Civil Resolution Tribunal documents to be served is through registered mail. When receiving a document by registered mail, the named recipient must sign for the item and that signature is used as proof that the individual received the notice. For this reason, it is extremely important that nobody signs for registered mail except the person to whom it is addressed. If you receive any court documents, it is important to let your managing broker know as soon as possible so that a reply can be prepared and an insurance claim filed.

Failure to address court documents within the time limits prescribed by the court can lead to a default judgment against a licensee. If a licensee chooses to appeal such a judgment, a brokerage policy may state that they do so at their own expense. Therefore, licensees should be aware of their brokerage policies regarding receiving court documents in order to ensure compliance.

Discovery. In addition to the pleadings there are many legal devices for bringing out the relevant evidence in the case before it ever gets to trial. These proceedings are referred to as "discovery" proceedings. They include examinations for discovery, and discovery of documents. The examination for discovery is like a "mini-trial"

that takes place between the parties to the dispute and their lawyers, without a judge present. At the examination for discovery, each party can examine the opposite party under oath, and the evidence is recorded by a court reporter. With a few exceptions, such as the hearsay rule of evidence, the transcripts from the examination for discovery can be introduced as evidence at the later trial. It is a common practice to use them in the cross-examination of the party who gave the evidence under oath. The discovery of documents is the process under which each party is required to provide all relevant documents to the other party before the actual trial.

The pre-trial process is intended to reveal as many of the relevant facts as possible before the actual trial so that the important issues for the court to hear are identified. The practical result is that the parties can more plainly see the strengths or weaknesses in their positions. As a result, they may be more likely to settle their dispute out of court. The delay involved in such proceedings also encourages a settlement. Rather than wait months or sometimes years to have a case heard, it may be to the parties' advantage to settle for a lesser sum now.

The Trial

In order to succeed in court, the plaintiff must prove its case on what is known as the balance of probabilities. This means that by the time all the evidence has been heard, the plaintiff must have convinced the court that it is more likely than not that the plaintiff's version of the facts is true and is supported by the evidence. If the plaintiff fails to convince the court, or if the court believes the defendant's story is equally possible or more likely, then the court must dismiss the action against the defendant. This obligation of the plaintiff to prove its case is called the burden of proof.

To establish its case, the plaintiff will first call its witnesses and question each witness under oath. There is then an opportunity for the defendant's lawyer to cross-examine each witness called by the plaintiff. After the plaintiff calls all of its witnesses, the defence goes through the same process. The defendant calls and examines its own witnesses, after which the plaintiff has the opportunity to cross-examine. After all the evidence is in, each side summarizes its legal position before the court.

The Judgment

Finally, the court will issue a decision that will resolve the issues between the parties. The judgment will set out the duties or liabilities, if any, that are owed by each party to the other, and may include an order of a particular remedy or course of action.

Court Costs

A factor which may influence a decision to settle out of court is the risk of court costs being awarded against the unsuccessful party. Court costs refers to the monetary allowance that the court orders the unsuccessful party to pay the successful party as a partial reimbursement of the legal expenses (legal fees and disbursements) of bringing or defending the lawsuit. The rules of court prescribe a tariff that sets the amounts to be paid for each stage of the lawsuit. For example, a specific amount would be paid for the filing of a notice of civil claim, a response to civil claim, and other documents issued in the pleading process. There are also fees set for letters sent, conferences held, attendance at the examination for discovery, and for the trial itself. The longer the litigation proceeds, the greater the court costs for which the unsuccessful party will eventually be responsible. While costs are normally paid by the loser to the winner, costs are within the court's discretion to award and, in appropriate circumstances, costs could be awarded to the loser, or each party could be ordered to bear its own costs.

Example

Alana sues Bob for $60,000 damages in the Supreme Court of British Columbia. Alana succeeds and the Court awards her court costs as well as the $60,000 damages. A list of these costs would be drawn up by Alana's lawyer according to the amounts set out in the rules of court. This list will be agreed to by Bob's lawyer or brought for review before the Registrar of the Court. In this case, the court costs might be $3,500 so that the total amount awarded to Alana would be $63,500. If Bob had settled the action before going to court, he might have paid much less to Alana, and his own legal fees would have been reduced as well.

If an appeal is taken from the trial decision and the decision reversed in the Court of Appeal, the court costs would usually be reversed as well, with the effect that Bob, the defendant, would not have to pay any damages to Alana and might be awarded court costs in both courts to be paid by Alana.

It is important to realize that court costs are not the same as legal fees. A litigant will have agreed to their lawyer's fees when first meeting the lawyer. Court costs will only cover a fairly small percentage of a litigant's actual out-of-pocket expenses. Court costs do two things: they partially reimburse the successful party for legal fees, and they discourage people from bringing or defending weak cases, due to the risk of having to pay costs if the other party is successful in court.

Mediation

mediation
a dispute resolution process wherein the disagreeing parties attempt to resolve their dispute by agreement, through negotiations that are facilitated by a neutral third party

Because going to court is risky and expensive, and courts are often overburdened with cases, the BC Government encourages potential litigants to avoid trial by attending *mediation*. In the mediation process, a neutral third-party mediator helps facilitate an agreement between the parties to the dispute in a private and informal setting. The mediator does not, however, decide the dispute nor issue a decision. Rather, the dispute is settled if the involved parties agree to a settlement. Mediation is characterized by its collaborative nature and its focus on bringing the parties towards a mutually acceptable settlement agreement focused on the interests and needs of those involved.

The mediation process is often commenced through a voluntary agreement to mediate between all involved parties including the mediator. However, the *Notice to Mediate (General) Regulation* under the *Law and Equity Act* allows any one party to an action in the BC Supreme Court to require all other parties to the action to enter mandatory mediation by delivering a Notice to Mediate form to every other party to the action. Similarly, Rule 7.3 of the *Small Claims Rules* allow any party to a proceeding to initiate mediation by filing a Notice to Mediate for Claims Between $10,000 and $35,000 form and delivering notice to every other party named in the claim. After delivery of notice, the parties must jointly agree upon a mediator. If the parties are unable to agree on a mediator by the prescribed deadline, any party may apply to the Alternative Dispute Resolution Institute of British Columbia (ADRBC) to appoint a mediator. Attendance at the mediation is typically mandatory. Where a party refuses to participate in the mediation process despite delivery of the Notice to Mediate, the court has the power to impose sanctions against the offending party.

Since mediation is usually successful in resolving disputes and is far less expensive than litigation, satisfaction rates of the participants in mediations programs in British Columbia are high, and the scope of mediation programs continues to grow.

Arbitration

arbitration
a dispute resolution process wherein the disagreeing parties authorize a neutral third party (or parties) to decide the outcome of their dispute. The decision is typically binding on the parties

Another alternative to litigation is *arbitration*. Arbitration differs from mediation in that the arbitrator, after reviewing the evidence and arguments from the parties, will make a binding decision, similar to a judge, whereas a mediator works to assist the parties to achieve a consensual binding agreement themselves. Arbitration may be preferred to litigation before the courts due to its flexibility, privacy, speed, and the freedom it allows for parties to choose a decision-maker based on their expertise. Commercial leases often include an arbitration clause stating which kinds of disputes shall be referred to arbitration. Arbitration in this context will be governed by the *Arbitration Act* (formerly the *Commercial Arbitration Act*), unless the parties agree otherwise. Parties may negotiate on the processes used to appoint the arbitrator(s), the procedures to be followed, or the allocation of arbitration costs. An arbitrator's award is private, final, and typically binding, with the exception of certain appeals in limited circumstances.

FIGURE 1.3: The Civil Trial Process in British Columbia	
STAGE 1	**Cause of Action Arises** A civil wrong (e.g., breach of contract or tort) is committed.
STAGE 2	**Commencing the Action and Pleadings** The injured party consults with a lawyer. The lawyer prepares and files a notice of civil claim, naming the injured party as the plaintiff and the wrongdoer as the defendant. The defendant answers with a response to civil claim. Additional pleadings may also be filed. Collectively, the filed pleadings outline the case that each intends to present if the matter goes to trial.
STAGE 3	**Discovery** Each party is examined under oath by the other party's lawyer. In addition, all relevant documents are examined. Most actions are settled after discoveries have taken place.
STAGE 4	**Trial** A judge alone or a judge and jury hear all of the evidence and gives the decision at a later date.
STAGE 5	**Judgment** The defendant will either be found liable or not liable to the plaintiff. The successful party, at the discretion of the court, might be awarded "costs", payable by the losing party, which will partially cover the legal expenses of bringing the action.

Enforcing a Judgment

Let us suppose that a plaintiff has been successful. The defendant has not appealed. It is now necessary to consider how this judgment can be enforced if the defendant does not make prompt payment of any damages awarded. A losing defendant who has not yet paid the judgment is also known as a judgment debtor. There are several courses that may be taken; however, the best procedure to use depends on the particular circumstances of the judgment debtor.

Examination of the Judgment Debtor

Upon the receipt of a judgment in the plaintiff's favour, the first major consideration is how the plaintiff can collect the amount owed. If a judgment debtor has not paid voluntarily, the plaintiff may have to take further steps to collect from the debtor's income and/or assets. Therefore, as a first step, the plaintiff needs to get an idea of the judgment debtor's income and types of assets owned by the judgment debtor. To do this, the plaintiff will perform a variety of searches such as a land title search (for any real estate owned), a vehicle registration search with ICBC, and a personal property registry search (for any major personal assets owned, such as cars, boats, or major machinery). If these searches do not reveal any or enough assets to potentially satisfy the debt, the plaintiff may apply to examine the judgment debtor under oath about the judgment debtor's assets, income, liabilities and expenses. Depending on the level of court that awarded the judgment for the plaintiff and the exact process used by the plaintiff, the plaintiff may also be able to obtain an order at this stage that directs the judgment debtor to make installment payments to the plaintiff to repay the judgment.

Execution

If the judgment debtor has assets that are known to the judgment creditor (for example, a car), these can be seized and sold. The sale proceeds can be applied towards the amount owing. This is achieved by a process known as "*execution*". At the plaintiff's request, a writ of execution is issued by the court to the sheriff directing seizure and sale of enough of the debtor's assets to pay the judgment plus the costs of seizure. Where there are no assets for the sheriff to seize, the sheriff returns the writ to the court marked *nulla bona* or "no goods".

execution
the process of commencing proceedings to collect an amount owing by reason of a judgment

Remedies Against Land

If the judgment debtor owns an estate or interest in land, the judgment can be registered in the appropriate land title office as a charge against the judgment debtor's estate or interest. This judgment must be satisfied before any purchaser (or in fact any person dealing with the land), can obtain an estate or interest in the land free from the judgment. The registration must be renewed every second year to be valid. A judgment creditor can also apply to the court for a judicial sale of the estate or interest in land. After paying out any prior financial charges registered against the land, the balance of the proceeds from this sale will then be paid to the judgment creditor.

Garnishing Order

Where any third person owes money to the judgment debtor, the plaintiff can obtain that money by means of a garnishing order. A garnishing order is served on the third party and orders them to pay the money into the court instead of to the debtor. The plaintiff will then apply to have the money paid out to it. If the third party disobeys the garnishing order by paying the money to the debtor, the third party is personally liable to pay the amount to the court. Wages or a bank account are two common forms of assets that might be subject to a garnishing order.

It is not possible to garnish all of an employee's wages. Seventy percent of wages are exempt from seizure and this cannot be less than $100 per month for a single person or $200 per month for a married person with dependents. The exemption does not apply where the debt is for lodging or where, in the case of dependents, the judge feels that the exemption is not necessary for the support and maintenance of the family.

There are other methods available to the judgment creditor depending on the nature of the judgment, but they are all less common. A person can no longer be imprisoned merely for non-payment of a debt; something more, such as contempt of court, must be involved.

Limitation Periods

At Law

Once a legal right to bring an action arises, the person having that right must exercise it within a period of time prescribed by legislation. This period of time is called the limitation period. Every form of action has its own limitation period, and, unless an action is brought within its limitation period, the right to bring that action ceases to exist.

The *Limitation Act* is a default statute, meaning it will not apply to claims brought under different statutes that contain their own limitation periods. Under the *Limitation Act*, a "basic limitation period" of 2 years applies to most civil claims, removing the distinction between tort and contract claims. The basic limitation period begins on the day the claim is "discovered", unless liability is acknowledged. The date of discovery is the day on which the claimant knew or reasonably ought to have known:

- of the injury, loss or damage;
- that the injury, loss or damage was caused by an act or omission of the defendant; and
- that a court proceeding would be an appropriate means to seek remedy.

The Act also reduces the ultimate limitation period (ULP), which usually begins on the day on which the act or omission occurred, from 30 years to 15 years. However, if a potential defendant acknowledges liability, then both limitation periods are reset to begin on the date of acknowledgement. Acknowledgement of debt or liability may be established where the defendant makes a partial payment on a claim for a liquidated sum or provides a written confirmation of liability. The passage of either the basic limitation period or the ULP will prevent a claimant from bringing an action.

ALERT

In the event that a court action is brought against you, it is important to consult a lawyer as early as possible so that you do not accidentally acknowledge liability and reset the limitation periods. Additionally, it is crucial to note that as a condition of coverage under the Real Estate Errors and Omissions Indemnity Plan (discussed in the next chapter), licensees are required to give written notice as soon as is practicable to the Real Estate Errors and Omissions Insurance Corporation of any error or circumstance, however unmeritorious, that could reasonably be expected to form the basis of a claim against the licensee.

In Equity

A person bringing an action in equity must bring that action within both the legal limitation period and also within a reasonable amount of time. What constitutes a reasonable amount of time depends on the circumstances of each case. A person taking what the court views as an unreasonable amount of time to assert an equitable claim runs the risk of being denied equitable relief. Consequently, a litigant bringing an action in equity must have "fast feet".