DISPUTE RESOLUTION

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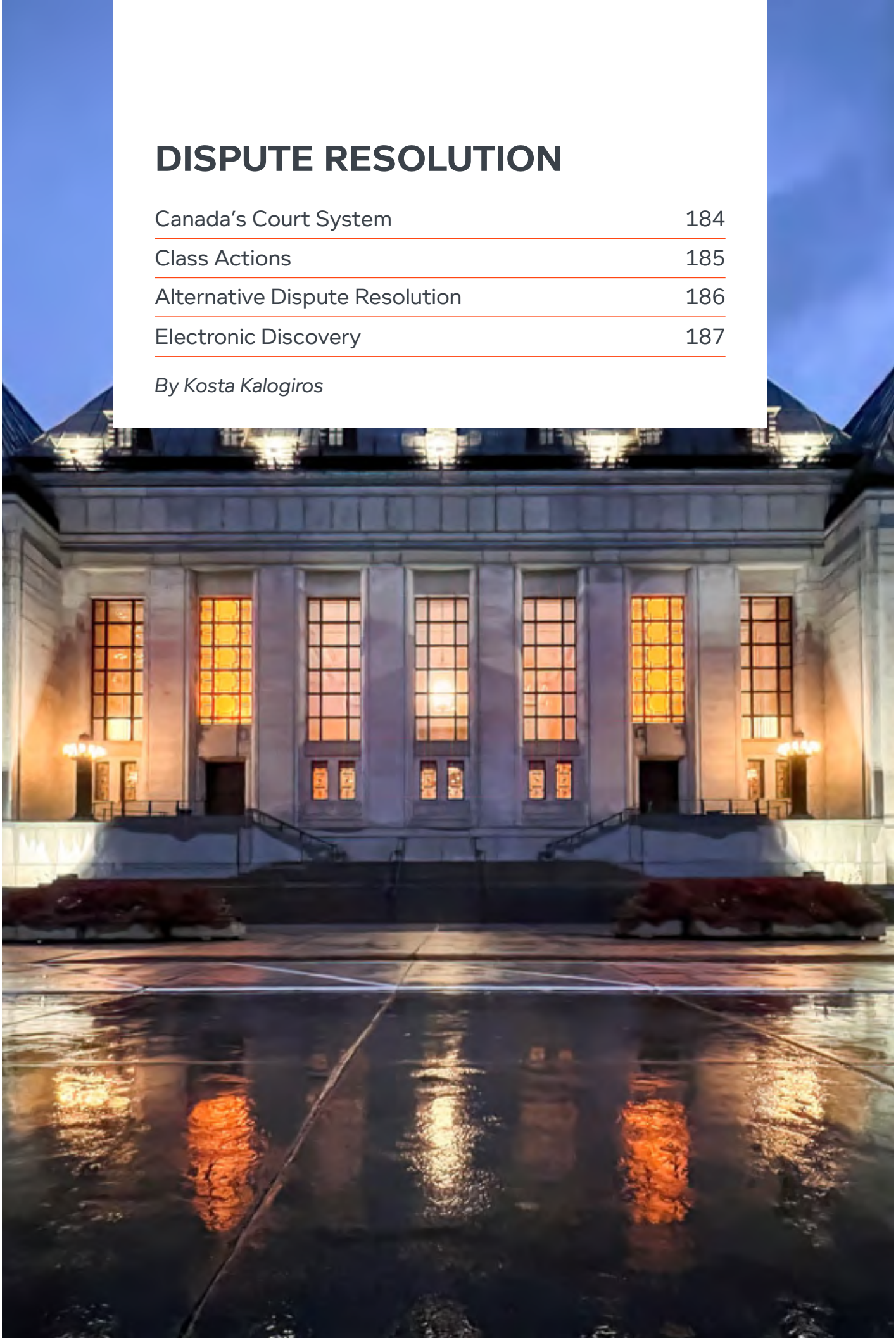

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Canada's Court System

Under the *Constitution Act, 1867*, the judiciary is separate from and independent of the executive and legislative branches of government. Judicial independence is a cornerstone of the Canadian judicial system. Judges make decisions free of influence and based solely on fact and law. Canada has provincial trial courts, provincial superior courts, provincial appellate courts, federal courts and a Supreme Court. Judges are appointed by the federal or provincial and territorial governments, depending on the level of the court.

Each province and territory (with the exception of Nunavut) has a provincial court. These courts deal primarily with criminal offences, family law matters (except divorce), traffic violations and provincial or territorial regulatory offences. Private disputes involving limited sums of money are resolved in the small claims divisions of the provincial courts. The monetary ceilings for the small claims division vary from province to province (e.g., British Columbia is set at C$35,000, Alberta is set at C$50,000, and Ontario is set at C$35,000).

The superior courts of each province and territory try the most serious criminal cases, as well as private disputes exceeding the monetary ceiling of the small claims divisions of the provincial courts. Although superior courts are administered by the provinces and territories, the federal government appoints and pays the judges of these courts.

In the Toronto Region of the Province of Ontario, the Superior Court of Justice maintains a Commercial List. Established in 1991, the Commercial List hears certain applications and motions in the Toronto Region involving a wide range of business disputes. It operates as a specialized commercial court that hears matters involving shareholder disputes, securities litigation, corporate restructuring, receiverships and other commercial disputes. Matters on the Commercial List are subject to special case management and other procedures designed to expedite the hearing and determination of complex commercial proceedings. In addition, judges on the Commercial List are experienced in commercial and insolvency matters.

Each province and territory has an appellate court that hears appeals from decisions of the superior courts and the provincial and territorial courts. Ontario also has a Divisional Court that serves as a court of first instance for the review of administrative action. It also hears appeals from provincial administrative tribunals, interlocutory decisions of judges of the Superior Court and appeals from the Superior Court involving limited sums of money (currently C$50,000 or less).

The Federal Court of Canada has limited jurisdiction. Its jurisdiction includes interprovincial and federal provincial disputes, intellectual property proceedings, citizenship appeals, *Competition Act* cases, and cases involving Crown corporations or departments or the government of Canada. The Federal Court, Trial Division hears decisions at first instance. Appeals are heard by the Federal Court of Appeal.

The Supreme Court of Canada is the final court of appeal from all other Canadian courts. It hears appeals from the appellate courts in each province and from the Federal Court of Appeal. The Supreme Court of Canada has jurisdiction over disputes in all areas of the law, including constitutional law, administrative law, criminal law and civil law. There is a right of appeal in certain criminal proceedings, but in most cases, leave must first be obtained. Leave to the Supreme Court of Canada may be granted in cases involving an issue of public importance or an important issue of law.

Class Actions

Class proceedings are procedural mechanisms designed to facilitate and regulate the assertion of group claims. Almost all Canadian provinces have class proceedings legislation. In provinces without such legislation, representative actions may be brought at common law.

Canadian class action statutes are modelled closely on Rule 23 of the United States Federal Court Rules of Civil Procedure, which, together with its state counterparts, governs class action litigation in the United States. Unlike ordinary actions, a proceeding commenced on behalf of a class may be litigated as a class action only if it is judicially approved or "certified." Generally, the bar for certification in Canada is lower than in the United States.

In Canada, common targets of class actions include product manufacturers, insurers, employers, companies in the investment

and financial industries and governments. Class actions may involve allegations of product liability, misrepresentation, breaches of consumer and employment laws, competition law (e.g., antitrust) breaches, securities fraud and breaches of public law.

Class actions have become an increasingly prominent aspect of business litigation in Canada. Businesses may benefit from the fact that individual damage awards tend to be lower in Canada than in the United States. In addition, the availability of punitive damages is limited in Canada.

Alternative Dispute Resolution

Alternative Dispute Resolution (ADR) refers to the various methods by which disputes are resolved outside the courtroom. Such methods include mediation (an independent third party is brought in to mediate a dispute) and arbitration (the dispute is referred to a third party for a binding decision).

In Ontario, the *Rules of Civil Procedure* mandate and regulate mediation in civil cases commenced in Toronto, Windsor and Ottawa. Mediation remains common in other parts of Ontario, and parties to a dispute will often agree to non-binding mediation by mutually selecting a mediator. Arbitration may be pursued on an ad hoc basis under a structure provided for in the local jurisdiction or under local statutory provisions.

Alternatively, arbitration may be conducted under the administrative and supervisory powers of one of the recognized international arbitration institutes, such as the International Court of Arbitration of the International Chamber of Commerce in Paris, the London Court of International Arbitration or the American Arbitration Association. These bodies do not themselves render arbitration awards, but they do provide a measure of neutrality and an internationally recognized system of procedural rules.

One advantage of arbitration compared to domestic court procedure is the confidentiality of arbitration proceedings. The arbitration process is normally private; hearings are not public and written transcripts of proceedings are not generally available to the public. In addition, the arbitration process may be faster than the court system, and there is generally no right of appeal from an arbitration award. This may lead to disputes being resolved more quickly.

Electronic Discovery

The discovery and production of electronically stored information, commonly called e-discovery, is now a standard process for litigants in almost every matter across Canada. A national committee first produced the Sedona Canada Principles in 2008 to establish national guidelines for electronic discovery. These guidelines are thought to be compatible with the rules of procedure in each of the Canadian territories and provinces. The most recent, Third Edition, of the Sedona Canada Principles, was published in 2022, to account for the ubiquity of e-discovery and the proliferation of new technologies and types of data.

Since 2010, parties in Ontario have been required to formulate and adhere to a discovery plan to address all aspects of the discovery process, including the exchange of electronic documents. The parties are expressly required to consult and have regard to the Sedona Canada Principles when preparing their discovery plan. The following principles are among the most significant recommendations of Sedona Canada:

— **Preservation.** Once litigation is reasonably anticipated, the parties must consider their obligations to take reasonable and good-faith steps to preserve potentially relevant electronically stored information.

— **Co-operation.** Parties should co-operate in developing a joint discovery plan to address all aspects of discovery and should continue to co-operate throughout the discovery process, including the identification, preservation, collection, processing, review, and production of electronically stored information.

— **Proportionality.** In any proceedings, the parties should ensure that the steps taken in the e-discovery process are proportionate to the nature of the case and the significance of the electronic evidence in the case.

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