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Canada
Law & Practice
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CANADA

Law and Practice

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Contents

1. General

1.1 General Characteristics of the Legal System

Legislative and regulatory authority in Canada is conferred on the federal, provincial and territorial levels of government. All legal systems in Canada are based on the English common law, except for the Province of Quebec, where the private legal system is governed by a civil code that finds its roots in French civil law.

Both legal systems are subject to the Canadian Constitution, which includes the Canadian Charter of Rights and Freedoms, the Constitution Act, 1867, various treatises between the Crown and Indigenous Peoples, and unwritten principles, conventions and traditions.

The Canadian legal system follows an adversarial model that can include motions or applications and trials, either before a judge or before a judge and jury. Proceedings usually include both oral arguments and written submissions.

1.2 Court System

There are two classes of courts in Canada: Superior Courts with original jurisdiction, and courts of more limited jurisdiction. These courts are creatures of statute which limit the scope of the matters they preside over.

Each province and territory has its own Superior Court and its own Court of Appeal. The Superior Courts are constituted under s. 96 of the Constitution Act, 1867; although they are provincial/territorial courts, the federal government has exclusive authority to appoint judges to these courts.

Superior Courts have jurisdiction over all matters, unless a matter has been conferred to the jurisdiction of another court or administrative tribunal by statute. Superior Courts preside over civil and criminal matters in jury and non-jury cases, and can hear judicial reviews of administrative actions.

Inferior provincial courts include small claims court, and courts constituted to hear less serious criminal matters and some family disputes. Judges of these courts are appointed by the provincial government.

There are also specialised courts at the federal level, including the Federal Court of Canada, which hears cases in areas such as immigration, intellectual property and maritime law, and the Tax Court of Canada, which deals with cases regarding federal tax issues.

Both the provincial and federal governments may by statute establish administrative tribunals. These tribunals maintain limited jurisdiction to the matters set out in their enabling legislation and deal with specific subject matters. For example, each province has its own securities law, which is administered by its own securities commission.

Depending on the jurisdiction, the courts may be organised by some specialisation or subject matter. For example, in the Province of Ontario, the Superior Court of Justice in the City of Toronto maintains a Commercial List and an Estates List. The judges who hear cases on these lists have experience in managing complex cases within their respective area of law. Specific Practice Directions are issued to guide practitioners in the effective and efficient management of these complex proceedings.

The highest court in Canada is the Supreme Court of Canada, which is comprised of nine judges appointed by the federal government. Three of these judges must be from Quebec, and by convention the remaining judges are divided up between Ontario, the western provinces and the Atlantic provinces. The Supreme Court hears appeals from federal, provincial and territorial Courts of Appeal, and may be asked to decide disputes or questions referred to it by the federal government.

1.3 Court Filings and Proceedings

Canadian court proceedings are premised on the open court principle: unless a court orders otherwise, hearings and filings are open to the public.

In criminal proceedings, special considerations for excluding members of the public include the impact on public morals, the maintenance of order, and the proper administration of justice.

In order to obtain a court order that seals the court file or seeks a publication ban on the proceedings, the applicant must generally prove two elements:

- that the order is necessary to prevent serious risk to an important interest (eg, a commercial interest, the administration of justice, etc) because reasonable alternative measures will not prevent the risk; and
- that the salutary effects of the order or publication ban outweigh its deleterious effects on the rights of the parties and the public's interest in open and accessible court proceedings.

1.4 Legal Representation in Court

Generally, individual litigants may be self-represented in legal proceedings, while other entities, such as corporations, cannot have a non-lawyer representative without permission from the court. The rationale for this rule is that it helps ensure that the person who represents the company acts in its best interests and not for his or her own interest.

Lawyers are licensed and regulated at the provincial level. They are also self-regulated through their provincial and territorial law societies. Canadian lawyers may practise in provinces and territories outside the jurisdiction in which they are licensed for up to 100 calendar days per year through a National Mobility Agreement and in Quebec through the Canadian Legal Adviser special status.

Lawyers from other countries who have not been admitted to the bar of a Canadian province or territory are not permitted to conduct cases or provide legal advice or representation in the common law provinces. However, in Quebec, foreign-trained lawyers may apply for a special temporary status to practise law in that province.

2. Litigation Funding

2.1 Third-Party Litigation Funding

Third-party litigation funding is generally permissible in Canada, but the specific terms on which it is permissible vary between provinces. Restrictions and limits applicable to third-party litigation funding are generally imposed not by statute, but by judicial treatment. Judges have historically given careful consideration to proposals for third-party litigation funding, wary of having third parties interfere in legal disputes and changing the dynamics of such disputes.

2.2 Third-Party Funding: Lawsuits

Historically, third-party litigation funding contravened the common law doctrines of maintenance and champerty, and such funding was not permitted.

However, the attitude towards third-party litigation funding in Canada has changed in recent years; statutory restrictions have been removed, and it is gaining popularity. Its use in Canada is most commonly found in class action and personal injury disputes, but it can be applied to many types of cases. For example, in its decision in 9354-9186 Quebec Inc. v. Callidus Capital Corp., 2020 SCC 10, the Supreme Court of Canada unanimously upheld the supervising judge's decision to approve third-party litigation funding as a form of interim financing in the context of an insolvency proceeding.

2.3 Third-Party Funding for Plaintiff and Defendant

Third-party funding is available for both plaintiffs and defendants, but it is most often used by plaintiffs.

2.4 Minimum and Maximum Amounts of Third-Party Funding

There is no minimum or maximum amount that a third-party funder will fund.

2.5 Types of Costs Considered under Third-Party Funding

The costs that a third-party funder will consider funding depend on the facts and circumstances of each case. The funder will focus on the complexity and expected duration of the lawsuit. Also, the parties to the funding agreement will likely have to decide whether the funding agreement deals with the possibility that a decision may be appealed and cost awards redistributed.

2.6 Contingency Fees

Contingency fee agreements are permitted in every Canadian province and territory and are commonplace. They are common in class proceedings, personal injury cases, and tort claims. They are not permitted in criminal and family matters.

Restrictions and conditions relating to contingency fee agreements vary from province to province, but in most jurisdictions there is a requirement that any such agreement be "fair and reasonable" in the circumstances. There has been a movement to standardise contingency agreements, with the Province of Ontario recently introducing legislation to require a standard form agreement for most contingency matters involving individuals.

2.7 Time Limit for Obtaining Third-Party Funding

There are no time limits as to when a party should obtain third-party funding. Funding may be sought earlier on as the litigation strategy is being developed, or later in a case when funding is needed or when the merits of the case have become clearer.

3. Initiating a Lawsuit

3.1 Rules on Pre-action Conduct

Parties are generally not required to send a demand letter or a pre-action letter before starting litigation.

However, in certain cases notice is required. For example:

- notice may be required by statute before an action can be brought against certain municipal or provincial governments (for example, for actions arising out of an injury suffered on a public road, notice may be required within a short period of time, typically ten to 30 days);

- in certain claims for defamation a potential plaintiff is typically required to serve a notice of libel prior to starting litigation; and
- in enforcement proceedings, specific notices may be required by the governing security or insolvency legislation.

In several provinces, the rules of professional conduct governing the legal profession require lawyers to advise and encourage their clients to compromise or settle a dispute where it is possible to do so on a reasonable basis. Lawyers must discourage their clients from commencing or continuing useless legal proceedings.

3.2 Statutes of Limitations

Canada's limitation periods vary greatly depending on numerous factors, including:

- the level of government;
- the specific province;
- the claim's underlying subject matter;
- the plaintiff's capacity; and
- the defendant's identity.

Keeping these differences in mind, each province has a "basic limitation period", which applies to a claim unless a different limitation period is specifically mandated by statute. These basic limitation periods vary from two years to six years depending on the province.

Generally, the "discoverability principle" applies to limitation periods in Canada: a cause of action arises – and therefore the limitation period starts running – when a plaintiff discovers, or ought to have discovered by exercising due diligence, that it has suffered a loss or injury giving rise to a claim. The full extent of damages to the plaintiff does not need to be known before the limitation period starts to run.

Depending on the jurisdiction, the basic limitation period may be paused while the parties attempt to reach a settlement. Parties may also contractually alter or suspend the basic limitation period.

Some provinces also have "ultimate limitation periods", which run from when the event giving rise to the claim occurs, irrespective of when the plaintiff discovered or ought to have discovered it. These ultimate limitation periods range from six to 30 years. These are especially important in environmental and construction claims given the long time it may take to discover the defendant's wrongful conduct. There are often carve outs from the application of ultimate limitation periods for certain types of claims, such as sexual assault.

3.3 Jurisdictional Requirements for a Defendant

For a defendant to be subject to a lawsuit in Canada, the court must be satisfied that it has jurisdiction to deal with the matter. Courts will apply a "real and substantial connection" test, which considers certain factors that will presumptively bestow jurisdiction on the court, namely whether:

- the defendant is domiciled or resident in the province;
- the defendant carries on business in the province;
- a tort was committed in the province; or
- a contract connected with the dispute was made in the province.

The defendant may rebut a presumption of jurisdiction by adducing evidence of the weakness of these factors or their irrelevance to the issues in the action.

Even if jurisdiction is established and not successfully rebutted, the court may nevertheless decline to exercise its jurisdiction. Generally, this will occur when a more appropriate forum is clearly available.

These requirements are generally the same throughout the country and do not differ between jurisdictions. Notably, some provinces (for example, British Columbia) have enacted statutes to more fully address jurisdiction. These statutes generally codify the "real and substantial connection" test, but may differ slightly and should be consulted if a jurisdictional question arises in a legal proceeding in those provinces.

3.4 Initial Complaint

Since each province maintains its own rules of civil procedure, the initial complaint or document that is filed to initiate the lawsuit varies across the country. Generally, the originating process that commences a lawsuit is a statement of claim, notice of action, notice of application, or petition.

Allegations in an originating process must comprise sufficient material facts that, if accepted as true, would support a cause of action at law. The failure to plead such facts may result in a claim being dismissed. The originating process is meant to plead allegations of fact and is not meant to set out the evidence by which a claimant intends to prove its case.

Generally, it is possible to amend an originating process after it has been filed, provided that the amendments are legally tenable. The rules for doing so vary from province to province and are generally dependent on the stage in the proceeding when the amendments are proposed. In some cases, such as before a defence has been filed or where there is consent, an originating process may be amended without permission from the court. In other circumstances, permission may be needed. Permission

will generally be granted, unless doing so would prejudice the defendant(s) in a manner that is not compensable by costs.

3.5 Rules of Service

Although service requirements vary by province, generally an originating process must be served personally or by a prescribed alternative to personal service. Service on a legally competent individual is effective upon leaving a copy of the document with him or her. Service on a corporation is effective upon leaving a copy of the document with a director, officer, agent of the corporation, or any person who seems to be in control or management at any of the corporation's places of business.

If a defendant is avoiding service or cannot be located, courts may grant orders for substituted service or validating service, which will permit plaintiffs to serve defendants by means other than personal service. Courts also have the power to dispense with the requirement for service if justified under the circumstances.

Service must be effected within a certain period of time after the original process is issued. This time period will vary from province to province. Failing to effect service within this time will render a proceeding a nullity, unless a court order extending the time for service is obtained.

A party located outside of Canada may be sued in Canada. In such cases, service must be effected in a manner permitted by the defendant's jurisdiction. Canada is a party to the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters, which sets out the channels for the international service of documents for its signatory countries. Generally, the Hague Convention requires the service of documents through one "Central Authority" for each member country. The country-specific rules for each signatory should be consulted, as each may have rules and procedures specific to it, such as the requirement to have all documents for service translated into the official language of the country before they are served.

As a result of the COVID-19 pandemic, many courts across Canada have altered service rules to permit more situations where documents may be served and filed electronically.

3.6 Failure to Respond

If a defendant does not duly respond to a lawsuit, the plaintiff may seek default judgment from the court. The procedure will vary from province to province and is dependent on the type of claim.

Simpler claims, such as enforcement of a written loan agreement or other claims where the amount of damages is readily ascertainable, may entitle a plaintiff to default judgment from an administrative court officer such as a registrar, whereas more complicated claims that require an assessment of damages will likely require a plaintiff to bring a formal motion to a judge.

A defendant may bring a motion to set aside a default judgment. The factors that a court will consider in assessing whether to grant such a motion include:

- whether the motion was made as soon as possible after the defendant became aware of the judgment;
- whether there is a plausible explanation for the defendant's default; and
- whether the defendant has an arguable defence on the merits.

Where a defendant has not been properly served, this will be a standalone basis for setting aside a default judgment.

3.7 Representative or Collective Actions

Class proceedings are permitted in Canada. The substantive and procedural rules governing such proceedings are determined at the provincial level, and can vary between jurisdictions. Cases that involve a national class of residents across Canada may be advanced in a single province, but it is common for plaintiff's counsel to advance parallel claims in multiple provinces across the country, which are then co-ordinated based on the specific factors of the case.

In the common law provinces, the representative plaintiff's claim must be certified (or "authorised" in Quebec). Generally, a claim will be certified where:

- a cause of action exists based on the pleadings or notice of application;
- there is an identifiable class of persons that can be represented;
- the class members' claims (or defences) raise common issues; and
- the preferable procedure for the resolution of the common issues is through a class proceeding.

The court must also be satisfied that the representative plaintiff:

- fairly and adequately represents the interests of the class;
- has produced a plan for the proceeding which sets out workable methods for advancing the claim; and
- does not have a conflict of interest with any class members.

Most of the provinces maintain an opt-out model. Therefore, once the class is certified, members are deemed to be part of the proceeding unless they follow procedures to formally opt

out, which class members may decide to do in order to pursue claims on an individual basis.

3.8 Requirements for Cost Estimate

Lawyers in Canada are not required to provide clients with a cost estimate relating to the conduct of a litigation matter. Although most lawyers across Canada charge by the hour, some enter into contingency fee agreements, flat fee agreements or combinations thereof. Contingency fee agreements can be subject to rules relating to form and content.

Regardless of the type of costs agreement, lawyers must ensure they communicate transparently with their clients regarding legal costs; such communications could (and likely should) include discussions about the length of the litigation, its complexity, possible difficulties and the overall chance of success.

Lawyers have professional obligations to inform clients that unsuccessful litigation will likely result in adverse costs awards being made against them.

4. Pre-trial Proceedings

4.1 Interim Applications/Motions

Parties may make various interim or interlocutory motions or applications in the course of a proceeding, which may give rise to substantive remedies.

A common example of a substantive remedy available on an interim basis is an injunction. Superior courts may grant injunctive relief, which is generally granted if the moving party can satisfy a judge that:

- there are serious issues to be tried on the merits;
- the moving party will suffer harm that is not compensable in costs – termed "irreparable harm" – if the injunction is not granted; and
- the balance of convenience favours granting the injunction.

Injunctive relief may include a Mareva order, by which a moving party freezes the assets of a defendant; an Anton Piller order, by which a moving party may execute a civil search warrant; and a Norwich order, by which a moving party may obtain an order to seize and/or preserve the records of a third party.

Other more procedural motions are common in legal proceedings, and can include motions to:

- grant an extension of time before a step must be done;
- amend pleadings;
- require the production of various documents;
- require a responding party to answer questions posed during examinations; and
- add other parties to the proceeding.

4.2 Early Judgment Applications

Depending on the jurisdiction, a motion or application for summary judgment may be brought by either a plaintiff or a defendant. Generally, motions for summary judgment will proceed based on a paper record, without the need for live evidence.

Summary judgment will be awarded where there is no genuine issue requiring trial. The judge must be able to reach a fair determination of the merits of the case with limited evidence, usually comprised of affidavit evidence.

There was a pendulum swing in Canadian law in the 2000s towards summary judgment, with its advocates touting the ability to obtain substantive justice faster and more cost-effectively than going to a full trial, and provincial rules of civil procedure were expanded to give judges more powers when considering summary judgment motions. However, the pendulum has swung back in recent years, with courts cautioning against summary judgment in certain circumstances, and even forbidding parties from bringing such a motion where the court is not convinced that it will result in any time or cost savings compared to a trial.

Summary judgment motions can generally be brought any time after a defendant has filed its Statement of Defence, although their timing may impact the cost/benefit analysis when comparing summary judgment to a trial, and may therefore affect whether the court will permit the motion to be brought.

Parties may also seek to strike a pleading or claim on the basis that it is redundant, irrelevant, scandalous, vexatious or an abuse of process, or does not disclose a reasonable cause of action. Unlike summary judgment, such motions usually proceed based on the pleading itself and without evidence.

If a motion to strike a pleading is successful, it can result in the full dismissal of an action, although courts tend to prefer to permit plaintiffs to rectify deficiencies in the pleadings via amendment, if possible.

4.3 Dispositive Motions

Parties may seek a final disposition of an action before trial by a motion for summary judgment, as described in **4.2 Early Judgment Applications**.

Defendants may also bring a motion to have a proceeding stayed or dismissed on the grounds that:

- the pleadings are insufficient (as described in **4.2 Early Judgment Applications**);
- the court lacks jurisdiction over the subject matter or lacks territorial jurisdiction (see **3.3 Jurisdictional Requirements for a Defendant**);
- the plaintiff lacks capacity to sue; or
- another proceeding is pending in a different jurisdiction between the same parties regarding the same subject matter.

A court may grant such a motion to dismiss in full or in part, in which case it will dismiss some claims and permit other claims to proceed to trial.

4.4 Requirements for Interested Parties to Join a Lawsuit

The rights of interested parties not named in the pleadings to join a lawsuit vary with the subject matter of the claim (eg, estates proceedings or Constitutional issues). For example, in Ontario, a party can join a proceeding if it can prove that:

- it maintains an interest in the subject matter of the proceeding;
- it will be adversely affected by a judgment; or
- there is some common question of law or fact between that party and the one subject to the proceeding.

A party may also seek to intervene as a "friend of the court" (ie, amicus curiae). In this role, the party will be limited to assisting the court by way of legal argument and may not participate in the development of the factual record.

Interventions can take place at the trial or appeal stage. The appropriate procedure is to bring a motion for the party to "intervene" in the proceeding. On that motion, the court will determine whether the intervention is appropriate and under what terms, including whether the interested party may be subject to costs of their intervention.

4.5 Applications for Security for Defendant's Costs

A defendant may apply for an order that the plaintiff/claimant post security for costs as a term of continuing the litigation. Security for costs may be awarded where:

- the claimant is ordinarily resident outside the province or territory;
- the claimant has another ongoing proceeding for the same relief in the same or another jurisdiction;
- the claimant has an order against it for costs in the same or another proceeding that remains unpaid;
- the claimant is a corporation or nominal plaintiff and there is good reason to believe that it has insufficient assets in the jurisdiction;
- the proceeding is frivolous and vexatious; or
- there is good reason to believe the claimant has insufficient assets in the jurisdiction to pay the costs of the defendant.

Such awards are discretionary and the amount of security ordered to be posted will vary depending on the circumstances of the particular case. Security can take a variety of forms, including a cash deposit or letter of credit.

4.6 Costs of Interim Applications/Motions

Awarding costs for interim application/motions varies between jurisdictions. In some jurisdictions, such as British Columbia, costs for interim steps are generally not available. For jurisdictions where these costs are available, some courts have wide discretion to award costs as deemed appropriate, while others are restricted by applicable tariffs that govern the amount of costs that may be awarded for a certain step.

4.7 Application/Motion Timeframe

Each province and territory has its own timeframe for dealing with applications or motions. Even within a province, factors that may influence how quickly a motion may be heard include the expected length of the motion, the nature of the relief sought, and the urgency of the matter.

While Canadian courts have generally been very adaptive to the changes necessitated by the COVID-19 pandemic, including by hearing motions virtually and by increasing the number of motions heard in writing, an inevitable consequence of government shutdowns that has affected courthouses across the country is that backlogs in hearing motions have worsened.

5. Discovery

5.1 Discovery and Civil Cases

Discovery is generally available in civil cases across Canada, the purposes of which are to:

- enable the parties to know the case they have to meet;
- obtain admissions that eliminate the need for formal proof and weaken the opponent's case;
- facilitate settlement;
- narrow issues; and
- avoid surprises at trial.

Although the specific rules vary across the provinces, the general components of the discovery process are similar.

First, parties must disclose documents that are relevant to any matter in issue, subject to proportionality considerations. Unless privilege is claimed or the relevant documents are not in the party's control or possession, they must be listed in an "affidavit of documents" and produced to the other side.

Secondly, parties may conduct oral examination for discovery (similar to US depositions). These examinations will usually take place in the absence of the judge before a certified reporter, who will transcribe what is said at the examination. Video recordings are not usually made of examinations.

5.2 Discovery and Third Parties

Discovery may be obtained from third parties not named in the proceedings by seeking permission from the court. Generally, such permission will be granted if:

- the information could not be obtained from the parties to the litigation;
- it would be unfair to proceed to trial without the discovery; and
- the discovery will not unduly delay the commencement of trial, create unreasonable expense, or result in unfairness to the third party.

5.3 Discovery in This Jurisdiction

Please see **5.1 Discovery and Civil Cases**.

5.4 Alternatives to Discovery Mechanisms

This section is not applicable in Canada.

5.5 Legal Privilege

Solicitor-client privilege and litigation (or work product) privilege are recognised across Canada.

As held by the Supreme Court of Canada, solicitor-client privilege can only be waived by the client, and is:

- a fundamental civil and legal right;
- a principle of fundamental justice;
- a rule of evidence;
- absolute in scope; and
- permanent.

Communications with in-house counsel may also be considered solicitor-client privileged, but the privilege will only attach to legal advice, and not business advice.

Litigation privilege creates a "zone of privacy" to protect documents and communications created for the dominant purpose of litigation.

There are other forms of privilege recognised in Canadian law, including settlement privilege, which protects documents or communications that are exchanged for the purpose of attempting to resolve a dispute.

5.6 Rules Disallowing Disclosure of a Document

Litigants may seek protective orders from the court to prevent the disclosure of documents that are publicly produced as evidence in affidavits on motions or at trial, but courts are hesitant to grant such orders because of the open-court principle.

Documents produced by parties in litigation that are not produced as evidence on motions or at trial are subject to the "deemed undertaking" rule. They cannot be used for any purpose other than the litigation that they were produced in connection with, absent either the agreement of the party that produced them or subject to an order of the court.

Statutes, such as privacy legislation, may further prevent or restrict the disclosure of specific documents.

6. Injunctive Relief

6.1 Circumstances of Injunctive Relief

As a general matter, injunctive relief is available when necessary to prevent or restrain injuries to property, or to ensure that a party is not deprived of its legal rights. Canadian courts may grant injunctions on either a temporary basis pending trial or on a permanent basis, and the injunction may be either mandatory (compelling certain conduct) or prohibitive (restricting certain conduct). A party may request an interim or interlocutory injunction from the court, with or without notice to the other parties.

To obtain a temporary injunction, an applicant must satisfy the three-part test set out in **4.1 Interim Applications/Motions**.

A different test applies when an applicant seeks a permanent injunction: the applicant must establish its legal rights and show that an injunction is an appropriate remedy. In applying this test, the court will consider (i) whether the wrong is sufficiently likely to recur in the future, such that a permanent injunction is necessary, and (ii) whether there is an adequate alternative remedy, such as damages.

Examples of the types of injunctions typically granted by Canadian courts include injunctions freezing assets (known as a Mareva injunction), prohibiting breaches of contract, prohibiting the use or disclosure of confidential information, prohibiting intellectual property infringement, and preventing the destruction of evidence (known as an Anton Piller order).

6.2 Arrangements for Obtaining Urgent Injunctive Relief

Where a matter is sufficiently urgent, a party can move for an interim injunction without notice on an ex parte basis. Interim injunctions are generally to preserve the status quo until the court can hear full argument on a motion for an interlocutory injunction. An appearance before a judge is generally required to obtain an interim injunction, and such an appearance can ordinarily be scheduled on very short notice when necessary. Each jurisdiction has specific practice directions and procedures for obtaining this urgent relief.

6.3 Availability of Injunctive Relief on an Ex Parte Basis

As discussed in **6.2 Arrangements for Obtaining Urgent Injunctive Relief**, injunctions can be obtained on an ex parte basis where urgency or the circumstances demand, such as on a motion for a Mareva injunction where there is a risk that the responding party will disperse its assets if given notice of the motion. A party bringing a motion on an ex parte basis has an obligation to make full and fair disclosure of all material facts, including those that are not favourable to the applicant. If such injunctions are granted, they are usually granted on a time-limited basis, and the renewal of the injunction is then argued with notice to the responding parties.

6.4 Liability for Damages for the Applicant

An applicant will be held liable for damages if they obtain an injunction that is later vacated. The applicant will be liable for all damages suffered by the respondent as a result of the injunction. To obtain an injunction, an applicant will normally be required to provide an undertaking as to damages.

6.5 Respondent's Worldwide Assets and Injunctive Relief

Canadian courts can and will grant injunctions against a party's worldwide assets, subject to considerations of comity and enforceability.

6.6 Third Parties and Injunctive Relief

Injunctive relief is available against non-parties where necessary.

6.7 Consequences of a Respondent's Non-compliance

A party may be found in contempt of court if it fails to comply with the terms of an injunctive order. Penalties for contempt can include fines and imprisonment.

7. Trials and Hearings

7.1 Trial Proceedings

Trial proceedings are conducted through a combination of oral submissions by counsel and live testimony from lay and/or expert witnesses. Counsel for the parties will typically each make opening submissions, followed by examinations in chief and cross-examinations of each party's witnesses, followed by closing submissions by counsel for each party. The court controls its own process, however, and may modify procedural rules as necessary or appropriate in a particular case. A common example is permitting parties to offer their affirmative evidence by written affidavit rather than oral examination, in the interests of saving court time.

7.2 Case Management Hearings

Rules pertaining to case management hearings vary between provinces, but many jurisdictions institute judicial case management and permit parties to seek case conferences in order to informally resolve disputes without bringing formal motions.

Most jurisdictions also require parties to attend pre-trial conferences, where a judicial officer will attempt to settle the dispute or narrow the issues before scheduling the matter for trial.

7.3 Jury Trials in Civil Cases

As a general rule, jury trials are rare in civil cases in Canada, other than for personal injury claims. However, the specific availability of jury trials in civil matters varies by province. Some jurisdictions limit civil jury trials to specific causes of action, while Quebec, by contrast, does not permit civil jury trials at all.

Notably, even where civil jury trials are permitted, a jury notice can be struck if the subject matter is found to be too complex for lay persons.

7.4 Rules That Govern Admission of Evidence

The admissibility of evidence is governed by provincial and federal legislation, as well as the common law (except in Quebec).

The overarching principle is that all evidence relevant to an issue in a proceeding is admissible. The exception to this general rule is if the evidence is subject to an exclusionary rule (such as those pertaining to privilege or hearsay). Hearsay evidence is generally inadmissible, but can be admitted into evidence if it falls within a recognised exception to hearsay or is found to be sufficiently necessary and reliable.

Opinion evidence from a lay witness is generally inadmissible. The use of opinion evidence from an expert witness is discussed under **7.5 Expert Testimony**.

7.5 Expert Testimony

Expert evidence, including expert opinion evidence, will generally be permitted where it is relevant, necessary in assisting the trier of fact, from a properly qualified expert, and does not contravene an exclusionary rule of evidence.

The trial judge is charged with determining whether expert evidence will be admissible in a particular case and, if so, how much weight the expert evidence will be afforded by the court when making its judgment.

7.6 Extent to Which Hearings are Open to the Public

Canadian court proceedings are generally open to the public. As set out in **1.3 Court Filings and Proceedings**, Canadian courts apply the "open courts" principle. Orders excluding the public from a hearing or sealing court records are available in extraordinary circumstances but are rare.

Documents disclosed to the other party as part of the pre-trial discovery process and the transcripts of examinations for discovery are not presumptively part of the public record, and only become so if filed with the court. Documents obtained by a party in a proceeding are generally subject to the "deemed undertaking rule", which prohibits parties from using documents obtained in a legal proceeding for purposes other than that legal proceeding.

7.7 Level of Intervention by a Judge

The level of judicial intervention during a hearing or trial will vary by jurisdiction, by judge, and by circumstance. During submissions by counsel, most judges will regularly intervene with questions or to seek clarification. During witness testimony, however, judges typically reserve questions for a witness until the end of the witness's testimony and will only interrupt an examination if they require clarification of a question or answer.

In terms of issuing a ruling, while judges are able to rule from the bench, and will do so where appropriate or required by the exigencies of the case, it is common for judges in more complex cases to reserve their decision in order to give them time to further review the parties' evidence and the submissions of counsel, and to write their reasons for their decision. Those reasons will then be transmitted to the parties by court staff.

7.8 General Timeframes for Proceedings

The timeframe for a proceeding to advance through to trial varies from province to province and from case to case. It will often be dependent on numerous factors, including the complexity of the matter, the volume of discovery and pre-trial motions, and the availability of court time for trial. However, by way of example, an uncomplicated matter requiring minimal discovery or pre-trial motions might progress through trial in one to two years, while a complex commercial case can easily take five years or more to reach a trial decision.

8. Settlement

8.1 Court Approval

Settlements of civil actions in Canada do not generally require court approval. Exceptions to this general rule include class proceedings and settlements involving minors or persons under disability, which both require court approval.

8.2 Settlement of Lawsuits and Confidentiality

Settlements can be made confidential, but this will generally not be possible for settlements that require court approval, as the open court principle will require parties to publicly disclose the settlement and its terms in order for approval to be granted.

8.3 Enforcement of Settlement Agreements

A settlement agreement is a binding contract. If a party does not comply with the agreement, then another party to the agreement may bring a motion before the court to enforce a settlement.

8.4 Setting Aside Settlement Agreements

Because a settlement agreement is a contract, it may be set aside on the same grounds as a contract. Potential grounds to set aside a settlement agreement include the following:

- mistake – miscommunication of a client's instructions to its legal counsel, or genuine mistake as to the terms of the settlement agreement;
- misrepresentation – mis-statements or misunderstandings between the parties with respect to certain fundamental facts upon which the settlement agreement is based;
- duress/undue influence/unconscionability – questions as to the competence and independence of the party entering into the settlement agreement; and
- illegality – an agreement that is prohibited by law.

9. Damages and Judgment

9.1 Awards Available to the Successful Litigant

The most common award to a successful litigant is a monetary award of damages, which can include general damages, aggravated damages and punitive damages:

- General damages are meant to be compensatory for economic loss or non-economic damages flowing from physical injuries.

- Aggravated damages are also compensatory in nature and are meant to account for intangible injuries like humiliation.
- Punitive damages are non-compensatory and are imposed where a party's behaviour represents a marked departure from ordinary standards of decent behaviour. While punitive damages are available, they are the exception rather than the norm, and are rarely awarded in Canada.

In addition to monetary damages, permanent injunctive relief or mandatory orders requiring a party to take some positive action are also available, as discussed under **6.1 Circumstances of Injunctive Relief**.

9.2 Rules Regarding Damages

In Canada, damages are generally not capped and the award and amount of damages is, in most circumstances, at the full discretion of the court.

One exception to that rule is for damages regarding pain and suffering. In a trilogy of cases decided by the Supreme Court of Canada in 1978, the Court imposed a "cap" of CAD100,000 on damages for pain and suffering; the amount has grown via inflation to more than CAD350,000 in today's dollars. There are exceptions to this cap, including for cases of defamation and loss of reputation.

9.3 Pre and Post-Judgment Interest

In Canada, pre- and post-judgment interest are available pursuant to statute. The specific restrictions, conditions and rates of interest vary between provinces. Most provinces permit judges the discretion to award higher rates of interest or compound interest if agreed to by the parties, as may be the case in contractual disputes where, for example, a default interest rate may be specified in the contract itself.

9.4 Enforcement Mechanisms of a Domestic Judgment

In Canada, there are numerous mechanisms available to enforce a domestic judgment. The most common methods are by garnishing wages or bank accounts and by filing writs of seizure and sale, which effectively prevent a judgment debtor from transferring real property without payment of the debt.

Canadian provinces and territories, other than Quebec, are reciprocating jurisdictions, which means that judgments issued in one province can be registered and enforced via court application in another province.

In Quebec, enforcement of an extra-provincial judgment requires the commencement of an originating process.

9.5 Enforcement of a Judgment from a Foreign Country

In Canada, the enforcement of a foreign judgment will generally require a party to commence an originating proceeding and satisfy a court that the foreign judgment:

- was issued by a court of competent jurisdiction;
- is final in the original jurisdiction, meaning it is not subject to an appeal; and
- is adequately precise, meaning that it is for a debt or definite sum of money or is of a nature whereby the principle of comity requires the court to enforce it.

Canada is also a party to several international conventions that affect the enforcement of foreign judgments, including the Convention Between Canada and the United Kingdom of Great Britain and Northern Ireland Providing for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters. If such convention is applicable, it may be possible for a party to enforce a foreign judgment by simply following administrative steps to register a certified copy of the judgment with the court, rather than bringing an originating proceeding.

After a judgment from a foreign country has been recognised by a Canadian court, it can be enforced using the same enforcement methods used for domestic judgments, as described in **9.4 Enforcement Mechanisms of a Domestic Judgment**.

10. Appeal

10.1 Levels of Appeal or Review to a Litigation

Each of Canada's provinces and territories has its own court of appeal, which will hear both criminal and civil litigation decisions rendered by the superior courts of that province or territory. Each jurisdiction will have its own rules about whether parties can appeal as of right, or whether they require leave (permission) to appeal – this is usually dependent on the nature of the order being appealed, including whether it is final or interlocutory.

Canada's highest appeal court is the Supreme Court of Canada, which hears appeals from all provincial, territorial and federal courts of appeal. Parties to civil actions have no automatic right of appeal to the Supreme Court of Canada, and must be granted leave to do so by convincing a three-member panel of the Supreme Court of Canada, in writing, that the proposed appeal is of national importance or that there are conflicts in the jurisprudence and unsettled areas of the law that require appellate clarification.

10.2 Rules Concerning Appeals of Judgments

The appellate standard of review is established in the case law and is dependent on the type of issue before the appellate court. In general:

- questions of fact will be reviewed for palpable and overriding error;
- questions of law will be reviewed for correctness; and
- mixed questions of fact and law will be reviewed on a sliding scale between correctness and palpable and overriding error.

10.3 Procedure for Taking an Appeal

Each jurisdiction will have its own rules for taking an appeal; however, as a general matter, appeals are commenced by a notice of appeal, or, if leave is required, by way of a leave application. Generally, appeals must be commenced within 30 days after the entry of the judgment or order in respect of which an appeal is sought.

Subject to the specific rules of each court, the parties will usually each file written submissions and a panel of three judges will hear appeals.

10.4 Issues Considered by the Appeal Court at an Appeal

Canada's appellate courts will review whether a lower court made reasonable factual determinations and correctly applied the law to the facts.

Appellate courts do not rehear cases, and it is generally impermissible for parties to raise new issues on appeal that were not raised before the lower court. However, fresh evidence may be admitted on appeal if:

- it was not available at the lower court proceeding;
- it is relevant to the issues on appeal; and
- it is credible and – if believed – could reasonably have affected the outcome of the proceeding.

10.5 Court-Imposed Conditions on Granting an Appeal

The conditions that an appellate court might impose in connection with hearing an appeal include limiting the issues to be considered, declining to hear oral argument, or directing a hearing on its own jurisdiction. Appellate courts may also hear interim motions, such as a motion for security for costs of the appeal.

10.6 Powers of the Appellate Court after an Appeal Hearing

The court may affirm, modify, vacate, set aside or reverse a lower court's judgment or order. An appellate court may also direct the case back to the lower court for further review and consideration, either by the same decision maker or by someone different.

11. Costs

11.1 Responsibility for Paying the Costs of Litigation

While rules vary from province to province, the general principle in Canadian civil litigation is that costs are awarded to the successful party. In some provinces, this means that a successful party is usually entitled to be reimbursed for roughly 60% of its legal costs (which can be increased to 90% or even 100% depending on the circumstances). In other provinces, entitlement to costs is governed by a tariff, which will specify exactly how much the successful party is entitled to as compensation for its legal costs.

An award of costs by a court can be appealed; however, leave of the court is usually required where the appeal is only as to costs. Such awards are highly discretionary and are seldom overturned on appeal.

11.2 Factors Considered When Awarding Costs

Canadian courts will consider a variety of factors when awarding costs in a proceeding, which can vary from province to province. Common considerations when fixing costs include:

- the result of the proceeding;
- the amounts claimed and the amounts recovered;
- the importance and complexity of the issues;
- any written offer to settle;
- the amount of work required;
- the public interest in having the issues litigated;
- any conduct of a party that tended to shorten or unnecessarily lengthen the duration of the proceeding;
- the failure by a party to admit anything that should have been admitted or to serve a request to admit;
- what the unsuccessful party could reasonably have expected to pay in the event it was unsuccessful; and
- any other matter that the court considers relevant.

11.3 Interest Awarded on Costs

Some provinces permit interest to be charged on costs via statutory provision, which will set out how it is to be calculated. Absent a statutory allowance, interest does not accrue on costs awards.

12. Alternative Dispute Resolution

12.1 Views of Alternative Dispute Resolution within the Country

Because of the increasing cost and delays associated with court proceedings, alternative dispute resolution has become increasingly popular in Canada in recent years. Some of the most commonly cited reasons for using ADR instead of traditional litigation are that it is quicker and cheaper, the parties are able to choose their decision maker or facilitator, and there is increased potential to achieve creative and mutually beneficial outcomes.

The most popular ADR methods in Canada are mediation and arbitration. Mediation is mandatory in some jurisdictions, where parties are required to obtain a certificate from a qualified mediator certifying that they attempted to settle their dispute via mediation and failed before the court will schedule a trial in their action.

Arbitration is not mandatory in any jurisdiction in Canada (except for certain matters) and instead requires the consent of both parties, either through a pre-existing contract or a specific arbitration agreement entered into after the dispute has arisen.

Another new form of ADR that is increasingly being utilised is a mediation-arbitration, where the parties initially try to reach a resolution through mediation; if unsuccessful, an arbitrator (the same person who acted as mediator) renders a decision for the parties.

Canadian courts can, and will, stay court proceedings where the parties have agreed in a contract to mandatory ADR. Many commercial contracts now include provisions whereby mediation and arbitration are to occur before, or as a complete substitute for, court proceedings in the event of a dispute, and those provisions will generally be enforced by Canadian courts.

It should be noted that the vast majority of court proceedings in Canada – well over 90% – end in a settlement rather than a judicial pronouncement at trial.

12.2 ADR within the Legal System

Canadian courts cannot require litigating parties to engage in a binding ADR process. However, several provinces, including Alberta and Ontario, have introduced mandatory mediation as part of the litigation process to encourage early settlements between parties. Many courts will also use pre-trial conferences to actively encourage the parties to engage in ADR. However, there are no real sanctions in Canada for parties who refuse to engage in mediation in good faith.

12.3 ADR Institutions

ADR institutions in Canada are extremely well organised, professional and efficient. Canadian institutions offering ADR include the Canadian Arbitration Association, the ADR Institute of Canada, Arbitration Place and the Arbitration Committee of the Canadian Chamber of Commerce.

There are various institutions and tools across Canada that offer ADR services that operate at the international level. There are also arbitration services that specialise in various areas of the law, such as construction law, labour and employment law, and commercial law.

13. Arbitration

13.1 Laws Regarding the Conduct of Arbitration

In Canada, arbitration is governed by provincial statutes. There is also a federal Commercial Arbitration Act, but it applies only to arbitrations where the federal government is a party, or to maritime and admiralty matters.

The specifics of the various provincial statutes vary, but as discussed in **12.1 Views of Alternative Dispute Resolution within the Country**, Canadian courts have the power to enforce arbitration agreements between parties by granting a stay of proceedings where one party begins a court proceeding in the face of a valid arbitration agreement. Notably, the Supreme Court of Canada has recently placed some limits on the enforceability of mandatory arbitration clauses where the arbitration provision is found to be unconscionable. In Uber Technologies Inc. v. Heller, 2020 SCC 16, the Supreme Court of Canada held a mandatory arbitration clause unconscionable because it was part of a standard form contract that was non-negotiable and because there was a significant "gulf in sophistication" between the parties.

Provincial legislation also provides that arbitration awards can be enforced once they are entered as orders of the provincial courts. All of the usual methods of enforcement, as described in **9.4 Enforcement Mechanisms of a Domestic Judgment**, are available.

13.2 Subject Matters Not Referred to Arbitration

Generally, an arbitration may be conducted in Canada with respect to any issue that can be litigated, excluding criminal law matters. Additionally, many provinces also place restrictions on the arbitration of family law disputes, with some exceptions.

13.3 Circumstances to Challenge an Arbitral Award

In Canada, an arbitration award can be set aside on grounds relating to the validity of the arbitration agreement or the tribunal's jurisdiction, and over concerns of fairness.

If the arbitration agreement is silent on appeal rights, a party may, with leave of the court, appeal a question of law (excluding arbitrations in Quebec and arbitration proceedings under the federal Arbitration Act). Appeals of questions of fact or mixed fact and law are not available under Canadian legislation.

Conversely, where an arbitration agreement provides for rights of appeal, leave of the court is not required. Courts in Canada are often hesitant to interfere with an arbitration award. In Teal Cedar Products Ltd v British Columbia, 2017 SCC 32, the Supreme Court of Canada affirmed that, even on a question of law, an appeal of an arbitration award should generally be reviewed on a reasonableness standard, and not a correctness standard.

As with appealing the decisions of a court, a party should be cognisant of any time limitations for appeals after an arbitration. These time limits vary from jurisdiction to jurisdiction. As an example, the Ontario Arbitration Act provides that a party has 30 days after an award to commence a leave application, whereas the British Columbia Arbitration Act provides for 60 days.

13.4 Procedure for Enforcing Domestic and Foreign Arbitration

A person who is entitled to enforcement of an arbitration award made in Canada may make an application to the court for the enforcement of said award. Once an award is converted into a court judgment, all usual remedies available to the holder of a court judgment are available to that party.

Canadian courts will enforce international commercial arbitration awards rendered under the New York Convention and the UNCITRAL Model Law. The court will enforce an arbitral award unless the respondent satisfies the court that one of the criteria to refuse enforcement under the UNCITRAL Model Law is met. Generally, it is relatively quick to enforce an arbitration award, unless the enforcement proceeding is opposed by the other party.

14. Recent Developments

14.1 Proposals for Dispute Resolution Reform

The use of online platforms to resolve legal disputes is not yet widespread in Canada. However, in 2017, British Columbia implemented the Civil Resolution Tribunal (CRT) as Canada's first online dispute resolution centre, which can resolve "strata property disputes" and small claim disputes up to CAD5,000. The tribunal has been so successful that the government of British Columbia introduced legislation in 2018 to expand the CRT's jurisdiction to include some motor vehicle accident disputes, disputes under the Societies Act (which deals with how not-for-profit organisations are created and run) and the Co-operative Association Act (which deals with housing co-ops).

Despite only currently being available in one province, with the impact of the COVID-19 pandemic on the world and the increased need to utilise the internet and technology to function in our personal, professional and legal lives, online dispute resolution may become increasingly popular. All courts across Canada, including the Supreme Court and Federal Court, have had to adopt virtual hearings whenever possible.

Given those shifts in the practice of law in Canada, it is possible – and perhaps even probable – that a semi-permanent shift to virtual dispute resolution is afoot in Canada, particularly for small claims matters.

14.2 Impact of COVID-19

COVID-19 has significantly impacted the operation of the provincial and federal courts. In the initial stages of the pandemic in March 2020, most courts throughout the country stopped in-person attendances and were restricted to hearing only urgent matters (either by phone or by video-conference). Most non-urgent hearings, motions and other court attendances were postponed. Very quickly, however, many courts began conducting online hearings and case conferences using platforms such as Zoom. Within a few weeks, courts began expanding their operations to hear non-urgent matters via online hearings. The use of online hearings has continued throughout the year and remains the norm for many courts. As of November 2020, only some courts have reopened for in-person attendance and others are in the process of doing so, subject to local health guidelines.

The pandemic has also led to some provincial governments suspending limitation and procedural periods. The particulars of these suspensions have varied by province. For example, in Ontario, limitation and procedural periods were suspended from 16 March 2020 to 14 September 2020. At the federal level, the Time Limits and Other Periods Act (COVID-19) suspended limitation periods from 13 March 2020 to 13 September 2020. These provisions gave parties extra time to commence legal proceedings, or to take required steps within proceedings, in light of the pandemic.

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Thornton Grout Finnigan LLP is a leading boutique firm in Toronto, with 27 lawyers practising exclusively in commercial litigation and restructuring. TGF's trial lawyers practise at all levels of court, including the Supreme Court of Canada, and before arbitration and regulatory tribunals. They have expertise in litigating complex insolvency, construction, shareholder, financial services, class action, estate, real estate, franchise and other commercial litigation matters. They teach and serve in leading roles in Bench–Bar committees and professional organisations. TGF's expertise is reflected in the high-profile retainers it has enjoyed over the years and in its wide range of clients, including financial institutions, regulatory agencies, publicly traded companies, and officers and directors. The firm would like to thank William Loumankis and Bogdan Nae, articling students in the firm, for their contribution to the chapter.

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