Introductory Guide to Civil Litigation in Ontario

OSLER

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INTRODUCTION

This guide contains an overview of the Canadian legal system and court structure as well as key procedural and substantive issues involved in a civil litigation matter in Ontario.

Key differences between U.S. and Canada for civil litigation matters

Jury Trials

In Canada, jury trials are rarely available for civil cases.

Examination for Discovery

In Canada a deposition is called an Examination for Discovery and the scope of oral discovery in Canada is far more limited than that allowed in the U.S. For example, in Canada only one corporate representative may be examined where a corporation is a named party.

Non-Parties

It is considerably more difficult to obtain documents or testimony from non-parties in Canada than it is in the U.S.

Costs

In the usual course the party that loses a civil proceeding or motion has to make a significant contribution to the winning party's costs.

Discovery

Canada and the U.S. have different standards for what is discoverable in an action. In Canada, a document must be disclosed if it is relevant to a matter at issue in the pleadings. In the U.S., a document is discoverable so long as it is reasonably calculated to lead to the discovery of admissible evidence. As the U.S. standard is much more broad, the volume of information exchanged between parties is often significantly higher in the U.S. than it would be in Canada.

Appeals

In contrast to the U.S., a provincial appellate court is not the final arbiter of provincial law in Canada; the Supreme Court of Canada has full authority to decide matters of provincial and federal law.

Objections

A witness being deposed in a Canadian case is generally not required to answer any question that has been subject to an objection, unless a court rules otherwise.

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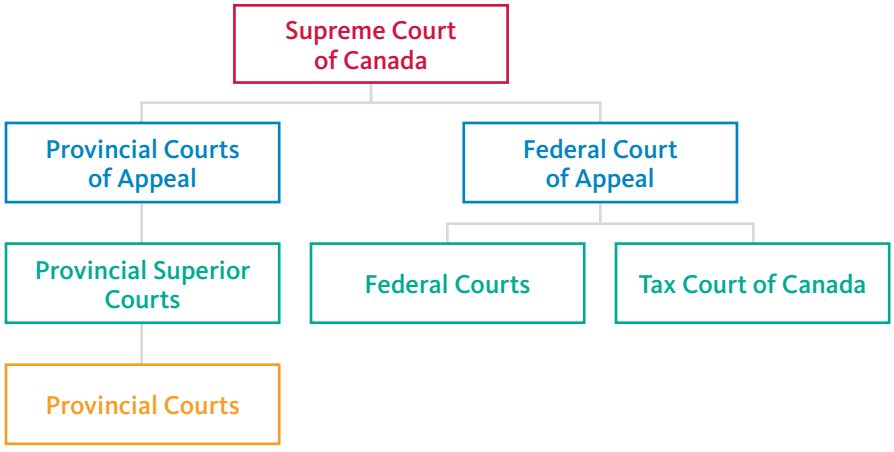
Canadian court system

Canada has an elected parliamentary system of government, divided among a federal government, 10 provincial governments[1] and three territorial governments[2]. Legislative authority and the ability to make laws are divided between various levels of government, including the Parliament of Canada, the legislatures of Canada's provinces and territories, and various local governments or municipalities. Court systems have similarly been established at both the federal and provincial (or territorial) levels.

Reflecting its diverse background, the Canadian legal system contains both the common and civil law traditions. The Province of Québec has a civil code descended from the French civil law system, while the other provinces and territories follow the English common law tradition. The Supreme Court of Canada and the federal courts adjudicate matters in both civil and common law.

Canada has two court systems where a civil claim may be brought: the Federal Court, and the 13 provincial or territorial courts. A simplified outline of Canada's court system is set out below:



1 Canada's 10 provinces (West to East): British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland

2 Canada's three territories (West to East): Yukon, Northwest Territories, Nunavut

The federal court system in Canada consists of courts that are appointed and administered by the federal government. The federal courts have limited jurisdiction, and hear claims in federally regulated areas such as maritime law, immigration and refugee matters, and most intellectual property cases. The federal courts may also review decisions made by federally regulated tribunals. The specialized Tax Court of Canada also falls under federal jurisdiction, with matters appealed to the Federal Court of Appeal.

Similar to the judicial system in the U.S., there is a separate judicial system in each Canadian province. Within each province there is a provincial court which handles civil matters below a certain monetary threshold (i.e. Small Claims Court), a provincial superior court (also called a Supreme Court or Court of Queen's Bench in certain jurisdictions) with broad inherent jurisdiction, and an appellate court. Depending on the province, there may also be other provincial courts with specialized jurisdiction (e.g., family, commercial list, and estates). There are also a number of specialized boards and tribunals in Canada such as securities commissions, labour relations boards, and human rights tribunals that can be reviewed by provincial courts. Most commercial cases and criminal trials in Canada are conducted before provincial superior courts.

The provincial superior courts have three qualities that distinguish them from U.S. state courts. First, the provincial superior courts are a hybrid federal creation, since judges are appointed by the federal government but the courts are administered by the provincial government. Second, the provincial superior courts have general jurisdiction over matters of both provincial and federal law. Third, provincial superior courts are subject to appeals to the Canadian court of final resort, the Supreme Court of Canada. In contrast to the U.S., a provincial appellate court is not the final arbiter of provincial law in Canada; the Supreme Court of Canada has full authority to decide matters of provincial and federal law.

Canada does not have a multi-district litigation procedure to co-ordinate overlapping or multiple actions about the same subject matter. If a particular matter arises in two provinces, the Federal Court does not have jurisdiction; rather, both provinces will have jurisdiction over the matter. This apparent multiplicity of proceedings can be resolved or reconciled through the co-operation of parties and their counsel, or with the assistance of the courts.

The Federal Court reviews decisions of certain Federal Boards, Commissions and Tribunals such as:

- Decisions of the Immigration and Refugee Board, Convention Refugee Determination Division on determinations of Convention Refugee status (*Nsabimana v. Canada (Citizenship and Immigration)*, 2007 FC 645)
- Decisions of the Public Service Labour Relations Board on employment issues (*Gravelle v. Canada (Attorney General)*, 2015 FC 1175)
- Decisions of the Canadian Human Rights Commission on allegations of discrimination (*Boudreault v. Canada (Human Rights Commission)*, 1997 CanLII 5823 (FC))
- Decisions of the Civil Aviation Tribunal upholding fines imposed in accordance with the Aerodrome Security Regulations (*Labbé v. Canada (Minister of Transport)*, 1999 CanLII 9150 (FC))

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Court procedure

The procedures adopted in Canadian courts vary between the different court systems. Each province has rules of procedure that govern litigation in its courts. While each province has its own rules and procedures and certain specific practices, the rules and general practices in all of the common law provinces are fairly similar. In this guide we review the Ontario rules, procedures and practices. The federal courts and the Tax Court also have their own respective rules of procedure. In addition to these rules, courts, boards and tribunals publish practice directions that provide guidance on procedural issues on an ongoing basis. Judge-made rules are also a source of law and procedure.

A. RULES OF PROCEDURE

The Ontario *Rules of Civil Procedure* (the Rules) govern civil litigation in Ontario at the superior courts. The Rules attempt to deal with each subject matter of litigation and treat it separately and comprehensively in one place.

The Rules contemplate two different types of civil proceedings: actions and applications.[1] An action is a proceeding in which the parties exchange pleadings (i.e., Statement of Claim (similar to a U.S. Complaint), Statement of Defence (similar to a U.S. Answer), and Reply), produce documents, and conduct oral examinations for discovery (similar to a deposition in the U.S.). If it does not settle, an action usually ends in a trial before a judge, who hears oral testimony and legal arguments and decides the issues of fact and law. Every proceeding in the court is to be brought by action, except where a statute or the Rules provide otherwise.

A simplified procedure applies on a mandatory basis to any action where a plaintiff is claiming $100,000 or less (exclusive of interest and costs). It does not apply to class proceedings or construction liens or any case-managed actions. It can also be used on an optional basis where the claim exceeds $100,000 if the

1 Applications can also include applications for judicial review of a decision of a board or tribunal. The procedure on applications to a judge for judicial review is governed by the Rules but there are additional considerations applicable under the *Judicial Review Procedure Act*.

defendant does not object. In an action where a plaintiff is claiming $25,000 or less, the action may be heard in Small Claims Court, which has its own simplified rules of procedure.

An application, on the other hand, is a proceeding in which a judge alone determines questions of law or mixed questions of fact and law based on affidavit evidence, almost always without live witnesses giving oral testimony. Applications are made for specific types of relief such as interpretation of contracts, certain forms of relief under business corporations' legislation, or remedies under the *Canadian Charter of Rights and Freedoms*.

B. JURY TRIALS

Almost all civil cases in Canada are tried by judges without a jury. The right to a jury trial for civil litigants in Canada is much more restricted than the rights enjoyed by litigants in the U.S. In most provinces, a party to a civil action in Canada may request a jury, but even when the claims at issue are permitted to be tried before a jury, courts have broad discretion to strike the jury and proceed with a judge-only trial. In Québec, jury trials are not available in civil cases at all. It is generally accepted in Canada that it is not appropriate to have a jury decide cases involving complex legal or factual disputes.

C. LIMITATION PERIODS

All jurisdictions in Canada have limitation periods that restrict when a legal proceeding may be commenced. In Ontario, the *Limitations Act, 2002, S.O. 2002, c. 24, Sched. B* introduced a basic two-year limitation period for most causes of action and an ultimate limitation period of 15 years, after which a "right of action" (right to sue) will expire and be lost. Under the discoverability principle, the limitation clock only begins to run when the incident giving rise to the right of action becomes known to the potential plaintiff, or should have been known by the potential plaintiff, through reasonable diligence. Once a limitation period has expired, the right of action is "statute barred" and will be struck down unless an exception applies. The purpose of a limitation period is to provide security to potential defendants; upon expiry of the time limit, the potential defendant no longer has to preserve potential evidence or retain a lawyer and may rest knowing the risk of a lawsuit no longer exists.

D. CLASS ACTIONS

Class actions are available under statutes in most provinces and are increasingly common. An action must first be certified by the court as a class proceeding. At the certification stage, which is not a determination of the merits, the court must decide that: the claim discloses a cause of action; there is an identifiable class of plaintiffs; a class action is the preferable procedure; the representative plaintiff is appropriate; and there are common issues to be tried. Unlike in a U.S. class action, it is not necessary that the common issues predominate over the individual issues, only that they be important enough that adjudicating them will significantly advance the action. Once certified, class actions will generally proceed to have the common issues determined in a manner that is similar to standard civil litigation. Determination of any remaining individual issues may follow depending on how the common issues are decided.

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Stages of a proceeding

A. WRITTEN PLEADINGS

The first phase of a proceeding is the exchange of written pleadings in which the parties set out their positions, including the material facts on which they rely. The plaintiff will issue pleadings to be served on the defendant in the form of a Statement of Claim (Complaint), and the defendant will then respond in the form of a Statement of Defence (Answer), usually within a prescribed period of time. If the defendant does not respond, the plaintiff has the opportunity to make a motion for default judgment. In complex proceedings, a party can also counterclaim (against the plaintiff(s)), crossclaim (against a co-defendant), or third-party claim (to add a non-party to the proceedings). Should the Statement of Defence raise new facts or issues not previously raised in the Statement of Claim, the plaintiff may issue a Reply.

Speaking Canadian

Attorney	=	Lawyer
Complaint	=	Statement of Claim
Answer	=	Statement of Defence
Deposition	=	Examinations for Discovery

B. MOTIONS

A motion is a request to the court for an order in some preliminary (also called interlocutory) issue in the case and can be brought at any stage of the proceedings. Any party to a case can bring a motion. Motions are heard by Judges or Masters: both are judicial officers of the court. Common types of motions include: extending time to serve a Statement of Claim or Statement of Defence; requiring production of documents related to the case; allowing the Statement of Claim/Statement of Defence to be amended; allowing a new party to be added to the claim; dismissing an action for delay; granting an interlocutory injunction to require a party to immediately stop doing something before the actual trial; or setting aside a registrar's dismissal of an action.

In order to bring a motion, a motion record must be prepared that includes a notice of motion, a request to the court, and a sworn affidavit with the facts and evidence on which the party relies. To defend against a motion, a responding motion record must be prepared containing an affidavit setting out opposing facts and evidence. In some motions, a factum with written legal submissions is required. A successful party on a motion may ask for costs, but a costs order is within the discretion of the Judge or Master hearing the motion and may be deferred until the ultimate decision on the matter. The timelines for delivering motion records may vary for different judicial regions in Ontario.

C. DISCOVERY

Most discovery procedures are only available in actions, not applications, and are different for actions conducted under simplified procedure or before the Small Claims Court. The discovery process in Canadian civil litigation has two principal components: document exchange and oral discovery (the latter referred to as "examinations for discovery" as opposed to "depositions").

In most Canadian provinces, parties have a duty to search for and disclose all documents in their possession or under their control that are relevant to the issues in the action. As such, unless the other side takes issue with the substance of the disclosure, the parties' own determination of what is relevant will stand. Unlike in the U.S., where information is considered discoverable as long as it is reasonably calculated to lead to the discovery of admissible evidence, to be discoverable in Canada, information must actually be relevant to material facts at issue in the dispute. The scope of what is relevant in a discovery is defined by the pleadings. As such, the volume of information exchanged between the parties is often significantly less in Canada than it would be in the U.S.

The scope of oral discovery in Canadian proceedings is also far more limited than that allowed in the U.S. In all Canadian jurisdictions, a party has the right to examine for discovery any opposing party. In the case of a corporation, only one representative may be examined. Additional witnesses may only be examined with leave of the court, which can be difficult to obtain. An examination for discovery may take place in person or by way of written questions and answers, but not by both, except with leave of the court. In practice, written examinations in Canada are rare. The witness in an examination for discovery (i.e. deponent) may be asked questions relevant to any matter at issue as framed by the pleadings. To that end, a witness has a duty to make efforts to inform him or herself of the facts at issue in the litigation. A witness may also be asked to disclose the names and last known contact information of persons who might reasonably be expected to have knowledge of the transactions or occurrences at issue in the proceeding.

During the examination, a witness may be required to give an "undertaking" to provide, at some later date, answers to relevant questions asked during the examination that he or she cannot personally answer, or copies of relevant records requested that have not already been produced. The role of undertakings in Canada is particularly important in complex litigation given that, absent leave, only one representative of each corporate party can be examined. If a party or its counsel seeks to object to a question, the general practice is for counsel for the party to note the objection to a question on the record, and to instruct the witness not to answer it (termed a "refusal"). Disputes are then generally resolved on a motion prior to trial, with the judge ruling on whether an answer to the question must be provided (this is generally called a "refusals motion"). In contrast to common practice in the U.S., a discovery witness in Canada is generally not required to answer any question that has been subject to an objection, unless or until there is a ruling from the court directing the witness to do so.

To be entitled to examine or obtain documents from a non-party in Canada, litigants must first obtain leave of the court and must show that a non-party's evidence is sufficiently relevant to a material issue in the action. The court must

also be satisfied that the party seeking the discovery of the non-party could not obtain the information elsewhere, that it would be unfair to require the party to proceed to trial without this information, and that the non-party discovery will not lead to undue delay or unreasonable expense. It is therefore considerably more difficult to obtain documents or testimony from non-parties in Canada than it is in the U.S.

D. MANDATORY MEDIATIONS

In certain Canadian jurisdictions, parties must attend a mandatory mediation session within a set time after the deadline for filing of the Statement of Defence. The court may extend this deadline by a court order or the parties can agree to extend the deadline. Mandatory mediation gives the parties a chance to discuss the issues in dispute outside of a formal court setting. A trained mediator helps the parties explore settlement options and helps participants reach their own agreement for resolving a dispute. Mediation may help the parties to achieve a settlement and avoid the trial process. Unlike a judge or arbitrator, a mediator has no authority to impose a solution. Any agreements reached at the mediation resolving some or all of the issues in dispute must be in writing and signed by the parties or their lawyers. Each party is required to pay an equal share of the mediator's fees for the mandatory mediation session.

E. PRE-TRIAL CONFERENCES

Pre-trial conferences are intended to shorten trials by reducing the issues and encouraging settlement. In Ontario, a pre-trial must be scheduled by the parties within 180 days of the matter being set down for trial. The judge who presides over the pre-trial conference cannot preside at the trial or hearing and everything discussed at the pre-trial conference is considered confidential. These features are intended to ensure that the parties can speak freely, negotiate openly, and consider recommendations from the pre-trial judge about the issues and merits of the case.

F. TRIAL

Civil trials begin with opening statements by counsel summarizing the case. The plaintiff then has an opportunity to present its evidence against the defendant, including calling witnesses to testify or introducing documentary evidence. It is the role of the parties to call and examine witnesses, including any expert witnesses. An examination for discovery transcript may be read into evidence at trial either by a witness or with leave of the court. Counsel has an opportunity to cross-examine all opposing witnesses. The defendant then presents its evidence, or may simply assert that the plaintiff has not proved its case. At the conclusion of the hearing, the plaintiff and defendant make closing submissions summarizing their respective cases. A judge will consider all of the evidence presented before making a decision based on what was proven on the balance of probabilities.

G. COSTS

Unlike in the U.S., Canada generally applies a "loser pays" approach to costs, meaning that the party that loses a civil proceeding or a motion usually has to pay the costs of the party that wins. This payment is called a "costs award." Costs

are generally intended to reimburse or compensate a party for the expenses paid out to have their case heard by the court. These expenses include fees payable to the court office, amounts paid to a lawyer (if any), and other disbursements, such as photocopying fees and fees paid to witnesses. However, it is very rare for a costs award to cover all legal expenses. For someone who has a lawyer, there are three different scales of costs – partial indemnity, substantial indemnity and full indemnity. The partial indemnity scale, which is the most common costs award, usually covers around half of the total costs of a lawyer. The substantial indemnity scale covers almost all of a party's legal expenses (1.5 times what would be awarded on a partial indemnity basis) and is only awarded in exceptional circumstances. Courts have the power to award full indemnity scale costs, which means all of a party's costs that have been reasonably incurred are awarded, but it is only awarded in very exceptional circumstances.

The court has broad discretion to decide whether or not to grant costs, the amount of the costs award and when costs must be paid.

FACTORS A COURT WILL EXAMINE IN MAKING A DECISION ON COSTS

- the amount claimed and the amount recovered in the proceeding;
- the relative success of each party;
- how complicated the proceeding was;
- if the proceeding raises important issues;
- the conduct of a party that unnecessarily increased or decreased the time to hear the proceeding;
- if a step in the proceeding was taken out of spite, unnecessarily, improperly, negligently, through excessive caution or by mistake;
- if a party denied or refused to admit anything that should have been admitted;
- if a party started two proceedings when one would have been sufficient or increased costs by refusing to help parties on the same side;
- the experience, rates and hours spent by the lawyer for the party entitled to costs;
- the amount that an unsuccessful party could reasonably be expected to pay; and
- any other matter relevant to the question of costs.

There can also be special cost consequences where a party fails to accept an offer to settle. The court normally will place a lot of emphasis on the result of the proceeding and any written offers to settle, although no single factor determines the costs award of the court.

H. APPEAL

In most civil cases, a decision at first instance can be appealed either by right or with leave of the higher court. The higher court may deny the appeal, affirm, reverse or amend the original decision, or order a new trial. The general rule is that an appellate court can interfere with the factual findings made at trial only if it concludes that there was a clear and palpable error. A costs order can be appealed alone without appealing the case, or can be appealed at the same time as the trial decision.

I. SETTLEMENTS

While mandatory mediation requirements exist in many jurisdictions and for many procedures in Canada, it is always open to parties to negotiate a mutual agreement to resolve a dispute at any point during the proceeding. A settlement will avoid or end a court proceeding. If there are claims against more than one party, a settlement can be reached to resolve the claim against one party even though a settlement cannot be reached with the other party. In that case, the proceeding would continue against the party who has not agreed to the settlement.

Documents prepared in an effort to settle a claim often contain the term "without prejudice." This term means that the information contained in the document cannot later be used against that party in court if the parties are not able to settle the matter. Generally speaking, negotiations to settle disputes are conducted on a without prejudice basis to encourage parties to be forthcoming and to engage in productive discussions.

In most settlements, a document called a consent order is also prepared and filed with the court. This document tells the court that the case has been settled and that the parties have agreed to have the court dismiss the claim. A consent order has the same effect as if a judge heard the case on the merits and dismissed it. There are special rules for costs in certain Canadian jurisdictions where a party has made an official offer to settle. This framework penalizes people for refusing reasonable offers to settle by ordering them to pay costs even if they win.

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