



# Dispute Resolution

*Doing Business In Canada*

## Canadian Courts

Canada's court system is divided into two separate jurisdictions: federal courts and provincial courts:

### Federal Courts

The federal courts consist of the Federal Court and the Federal Court of Appeal. The Federal Court is the federal trial court and hears cases arising under federal law such as admiralty, intellectual property and immigration matters. The Federal Court also hears judicial review applications from federal tribunals.

The Federal Court of Appeal hears appeals from the Federal Court and judicial review applications from certain federal tribunals, including the Canadian Radio-television and Telecommunications Commission ("CRTC") and the Copyright Board.

### Provincial Courts

Like the federal courts, the court systems in each of the provinces are divided into different levels: (i) superior courts and provincial courts; (ii) divisional courts; and (iii) courts of appeal.

The superior courts exercise plenary jurisdiction over civil matters. There are very few limits on the types of cases superior courts may hear. The names of the superior courts differ by province for historical reasons. In Ontario the superior court is called the Superior Court of Justice. In British Columbia it is called the Supreme Court.

The superior courts in most provinces also have a separate division for small claims cases. These courts hear cases where the claims at issue are below a certain threshold. In Ontario the threshold is \$25,000.

The Superior Court of Justice in Toronto also has a specialized division for commercial matters called the Commercial List. The Commercial List is a court of limited jurisdiction and hears only matters that fall into particular categories including cases involving the *Bankruptcy and Insolvency Act*; the *Bank Act* (relating to realizations and priority disputes); the *Business Corporations Act* and the *Canada Business Corporations Act*; the *Companies' Creditors' Arrangement Act*; the *Personal Property Security Act*; the *Securities Act*; and other commercial matters depending on the complexity of the case, including franchise matters and enforcement of commercial arbitrations. Generally, cases listed on the Commercial List are heard faster than those in the Superior Court of Justice, and a Commercial Judge with particular expertise remains seized of the litigation.

The provincial courts, like the Ontario Court of Justice, are administered by the province and are presided over by judges who are appointed by the province. They determine regulatory offences and family law matters that do not involve divorce.

Some provinces, including Ontario, also have a divisional court. A divisional court is an intermediate court that typically hears judicial review applications from administrative tribunals. It may also hear appeals in smaller matters and certain appeals from non-final decisions. In Ontario, the Divisional Court hears cases in panels of three judges that are chosen among judges of the Superior Court.

The courts of appeal in a province hear appeals from decisions from the superior courts. The judges generally sit in panels of three, although they sometimes will sit in panels of five when an appeal raises matters of significant importance.



## Supreme Court of Canada

The Supreme Court of Canada is a court of general appellate jurisdiction. It is based in Ottawa, Ontario and hears appeals from both the courts of appeal in the provinces and the Federal Court of Appeal. The Supreme Court is comprised of nine justices: one chief justice and eight puisne justices. Most appeals to the Supreme Court require leave from the Supreme Court itself in order to review a decision of the court of appeal. The test for leave to appeal is normally based upon whether the issue in question raises matters of national importance.

## Discovery

Discovery in Canada is limited compared to that in other countries. There is a positive onus on a party to produce all relevant documents in the party's possession, custody or control.

Similarly, examinations for discovery (depositions) are limited in number. Generally, a party may only examine one person from each party to a proceeding. If a party wants to examine additional deponents, they must either obtain the consent of the other parties or seek permission from the court.

Further, parties are not required to answer all questions in an examination. A lawyer may instruct their client not to answer a question if the lawyer believes the question is irrelevant, requests information or documentation which is protected by claims of privilege or constitutes harassment. A party may challenge the propriety of a refusal to answer a question or provide documents by motion to the court, where the court will consider whether the information or document sought is relevant and whether the request is reasonable and proportionate.

## Costs

The costs of litigation in Canada may be shifted from a successful litigant to the unsuccessful one — what is commonly called a “loser pays” rule. This means that a losing party, whether on a motion or at trial, may be responsible to pay 50–90 percent of the winning party's legal fees and the party's cost disbursements, *in addition* to their own legal fees. The decision to award costs is

usually within a judge's discretion, and he or she may consider several factors, including the complexity of the matter, whether a reasonable offer to settle was made and rejected, and whether the opposing party took steps to delay or incur unreasonable costs in the litigation.

The cost-shifting regime is meant to serve several purposes including to encourage settlement and to compensate the successful party for having to participate in the litigation process.

## Class Actions

Class actions are procedures whereby one or more representative plaintiffs commence a civil action on behalf of a larger group. The purpose of a class action is to aggregate claims that have a common legal or factual basis and which are often too costly for an individual plaintiff to litigate. Canadian class action statutes are modeled closely on the US class action rules under Rule 23 of the *Federal Rules of Civil Procedure* which governs class actions in US federal courts.

Most provinces in Canada have class action statutes. If a province doesn't have a class action statute, a plaintiff may bring an action under the general common law.

There is no aggregating mechanism for class actions in Canada that are brought in different provinces. However, courts often coordinate cases to minimize the prospect of inconsistent findings.

In all provinces, the proposed class claim must raise common issues that may be determined for the class as a whole, and the proceeding must be determined by the court to be a preferable procedure for the resolution of the claims of the representative plaintiffs and putative class members. Before a class action may proceed, the court must certify it as such.

Although Canadian class action legislation has been explicitly drafted to make certification easier than in the US, Canadian courts (with the possible exception of Québec) have interpreted the legislation in a moderate fashion.

Class actions have been commenced and certified in a range of circumstances, including investor misrepresentation, securities fraud, defective and dangerous products, franchising and standard form contracts.



## Limitation Periods

The limitation period for a particular claim depends on the province in which the claim is to be heard and the nature of the claim. In Ontario, the general limitation period is two years from the date the facts giving rise to the claim occurred, or two years from the date on which a party knew or should have been aware of the facts that gave rise to the claim.

However, there are also limitation periods that are significantly shorter. For example, now in Ontario, a party is required to serve notice of an action for libel in a newspaper or broadcast within six weeks of the publication and commence such an action within three months of becoming aware of the claim. There is other legislation which prescribes specific limitation periods for other causes of action and these must be considered carefully before commencing legal proceedings.

## Other Things You Should Know

Most commercial cases in Canada are heard by a judge and not a jury. Typically, for civil cases, only personal injury cases are heard by a jury.

The professional rules of conduct for lawyers in Canada require that lawyers are considerate to their opponents. Sharp practice is prohibited. Thus it is rare for a party to be able to take advantage of a minor procedural misstep by their opponent without first advising them of the error.

In Ontario, cases are not generally assigned to a particular judge by way of case management. However, some cases, usually complex ones, are subject to case management and will be heard by the same judge throughout the duration of the matter if a special request is made and granted by the court.



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