CANADA

Global litigation guide

About

Welcome to The Global Litigation Guide (the **"Guide"**) which has been prepared by DLA Piper's civil litigation experts around the world for the purpose of presenting key aspects of civil litigation in jurisdictions in which DLA Piper operates.

For each country, the Guide focuses on the following aspects:

- Overview of court system
- Limitation
- Procedural steps and timing
- Disclosure and discovery
- Default judgment
- Appeals
- Interim relief proceedings
- Prejudgment attachments and freezing
- Costs
- Class actions

This global Guide provides practitioners, in-house counsel and clients with a comparative source of reference that covers some of the intricacies of civil litigation in 30 jurisdictions worldwide. DLA Piper has prepared separate guides that deal with matters that are closely related to civil litigation, such as DLA Piper's guide to Legal Professional Privilege and (coming soon) DLA Piper's guide to Third Party Funding. Criminal or administrative litigation (as well as litigation relating to other specialist areas of law that require different procedures such as tax and employment) are outside the scope of the Guide.

The Guide is not a substitute for legal advice. Should you have a civil claim, or if you would like further information, please contact any of the individuals listed in the Guide.

About DLA Piper

DLA Piper is a global law firm with lawyers located in more than 40 countries throughout the Americas, Europe, the Middle East, Africa and Asia Pacific, positioning us to help clients with their legal needs around the world.

For further information visit www.dlapiper.com.

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Canada

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Overview of court system

This overview describes the judicial system and practices in the Federal Court of Canada as well as most provincial/territorial courts. Variations from the prevailing approach are identified for the province of Quebec, which has a legal system distinct from those of all other Canadian jurisdictions.

Canada has a federal system of government where legislative power is divided between the federal Parliament on the one hand, and the ten provincial and three territorial Legislatures on the other.

For the purpose of this summary on dispute resolution in Canada, the provinces and territories will simply be referred to as the provinces. Further, while this summary is intended to provide a general overview of litigation in Canada, each jurisdiction has its own procedural rules and practices that may differ slightly from the general information provided herein.

The provinces each have a superior court. Superior courts are courts of inherent jurisdiction, which is to say that they hear cases on any matter except where a statute or rule specifically confers jurisdiction on some other court or tribunal. In addition to the provincial superior courts, there is also the Federal Court. The Federal Court does not have inherent jurisdiction but, rather, has a statutory jurisdiction over cases related to matters within the legislative jurisdiction of Parliament (e.g. intellectual property, aviation, competition (anti-trust), admiralty, immigration, etc.). The Supreme Court of Canada is the highest court in Canada and it is not possible to appeal its decisions.

Canadian jurisdictions have adopted the common law system, with one exception: the province of Quebec, which has adopted the civil law system. Specifically, Quebec has adopted the Civil Code of Quebec that is largely based on the Napoleonic Code of 1804. Unlike the common law, which has been described as judge-made law insofar as decisions are based on precedents, civil law – including civil law in Quebec – applies primarily the principles and rules codified in the jurisdiction's civil code.

In Quebec and in the federal court system, civil matters are tried by the judge alone. In the common law Canadian provinces, civil proceedings can be tried by a judge alone, or by a jury. However, jury trials are the exception in civil proceedings and are rare in commercial disputes. Of note, there is no constitutional right to a jury in a civil case. Further, Canadian courts have discretion to direct that a matter be tried by a judge alone. The court is likely to exercise this discretion where the case is of moderate or greater complexity. Civil jury trials are more common in personal injury claims and in some employment law cases.

A monetary judgment obtained in a provincial superior court cannot be enforced outside of the province in question. However, all provinces (other than Quebec) have enacted legislation that provides a shortcut to the enforcement of extra-provincial judgments (with the exception of judgments obtained in Quebec).

Limitation

Though there is some variance among the Canadian jurisdictions, a civil claim must typically be commenced within the two-year anniversary of the date on which the underlying cause of action arose. The limitation period will be extended if the claim could only be

reasonably discovered at some point later than the date on which the cause of action arose (as might be the case where, for example, a fraud perpetrated on the plaintiff or a latent defect in a consumer product could only reasonably be discovered at some later point in time).

Procedural steps and timing

The sequence of a legal proceeding is similar across Canadian jurisdictions. A plaintiff initiates a proceeding by drafting a claim and then having the claim issued by the court. The plaintiff must then take steps to personally serve the issued claim on all defendants in the action. Any defendant who wishes to then defend the proceeding must serve a defense. While there are variations among jurisdictions, a defendant's defense is generally due within 20 days after service of the plaintiff's claim, provided that the defendant was served within the territorial jurisdiction of the court that issued the claim. If the defendant was not served within the territorial jurisdiction of the court that issued the claim, the defendant is permitted more time in which to serve a defense. In the province of Ontario, for example, a defendant served outside Ontario but in Canada or the US has 40 days to serve a defense, while a defendant served outside of Canada and the US has 60 days. It is not uncommon for the parties to agree to extend the time by which a defendant must serve a defense where the defendant can point to extenuating circumstances (e.g. the complexity of the case, difficulty in retaining counsel, etc.).

In addition to defending the plaintiff's proceeding, defendants may also bring:

- a counterclaim against the plaintiff (i.e. where the defendant has an independent cause of action against the plaintiff, or seeks some relief in the proceeding other than the mere dismissal of the action, such as a declaration as to the parties' rights and obligations);
- a crossclaim against another defendant (i.e. a claim for contribution and indemnity against another defendant in the event that the cross-claiming defendant is found liable to the plaintiff); or
- a third-party claim (i.e. a claim in which a defendant seeks contribution and indemnity from a party that is not yet a party to the litigation).

The plaintiff's claim and the defendants' defenses, counterclaims, crossclaims, and third-party claims are known as the pleadings. The pleadings define the scope of the dispute among the parties.

The length of a proceeding will be, among other things, a function of the complexity of the case, the number of parties involved, the volume of documents and the conduct of the parties (e.g. whether a plaintiff advances a case with diligence and/or whether a defendant seeks to delay proceedings). That said, a general timeline for a legal proceeding of moderate complexity is as follows:

- service of claim: (D);
- delivery of pleadings: d + 2 months to 4 months; (* See note below)
- exchange of documents: D + 8 months to 12 months;
- completions of examinations for discovery: D + 15 months to 24 months;
- motions regarding discoveries: D + 24 months to 30 months;
- mediation (if required/applicable): D + 30 months to 36 months; and
- completion of trial: D + 36 months to 48 months.

Generally, individuals may, as of right, represent themselves in legal proceedings. Exceptions to this general rule include individuals who are minors, who are representative parties in a class action proceeding, or who lack mental capacity. A corporation typically must be represented by a lawyer (which includes an in-house lawyer) unless the corporation obtains leave of the court to represent itself (e.g. to be represented by an officer, director, or shareholder of the corporation).

*** Note:** For example, if the claim were served on January 1 ("D") of any given year, all subsequent pleadings would typically be delivered between March 1 (i.e. D + 2 months) and May 1 (i.e. D + 4 months) of that same year.

Disclosure and discovery

For proceedings that are defended, parties will enter the discovery phase once the exchange of pleadings is complete. Discovery in Canada includes the production of relevant documents and oral examinations for discovery.

The scope of discovery is defined by the pleadings insofar as the pleadings set out the relevant issues in the litigation. Thus, if a document is relevant to an issue identified in the pleadings, it should be produced (subject to certain exceptions, such as any privilege that might attach to the document) even if the document might be unhelpful to the party producing it. Quebec has a different starting point for discovery. Specifically, a party to a Quebec proceeding need only disclose those documents on which it intends to rely at trial, unless the opposing party specifically requests further production.

If a party refuses to produce a document that another party believes is relevant to the issues in the proceeding, the latter party may bring a motion for production of the document. A court will order such production where the relevant documents are not protected by privilege and where the request for production is "proportional." As an example of the principle of proportionality, a court could refuse to order a party to spend considerable time and resources to produce a large volume of documents where such documents are only marginally relevant to the issues in the proceeding.

In addition to producing relevant documents, the parties will participate in oral examinations for discovery. During such oral examinations, each party puts forth a witness to be questioned under oath by the other parties (or the other parties' respective lawyers where such parties have lawyers) about the matters that are relevant in the litigation. Examinations for discovery, among other things, allow the parties to:

- learn about the other parties' cases;
- obtain helpful admissions; and
- assess the credibility and the demeanor of the witnesses giving evidence on discovery.

Where a party to be examined for discovery is an individual, the witness on such examination will be the individual.

Where the party to be examined for discovery is a corporation, the corporation's witness (typically, but not always, an employee of the corporation) should be the person with the greatest knowledge of the matters that are relevant in the litigation.

Absent agreement of the parties or a court order, each party only produces a single witness that is examined for discovery by the other parties. Quebec is the exception to this general rule: under its Civil Code of Procedure, a party may examine more than one witness for each opposing party. As a matter of practice, parties in Quebec will attempt, among other things, to determine the number and identity of witnesses to be examined in the course of negotiating a case protocol. If the parties cannot agree to the terms of a case protocol, they may seek the court's intervention.

More often than not, the witness produced by a party for examination for discovery will also be a witness for that party at trial.

Where a witness being examined does not know the answer to a relevant question, they may be asked to give an undertaking to seek out the answer. Similarly, a witness being examined may be asked to undertake to produce any relevant documents that have not yet been produced.

Unlike some other jurisdictions, witnesses being examined for discovery in a Canadian proceeding may refuse to answer a question on the bases, among others, of relevance (i.e. the question does not relate to any of the issues raised in the pleadings) or privilege. If the witness refuses to answer an arguably proper question, the examining party may bring a motion to compel the witness to do so. Likewise, if the witness refuses to provide an undertaking to produce additional relevant documents, the examining party may bring a motion to compel such production.

Parties to a Canadian proceeding require leave of the court to examine a non-party for discovery.

Default judgment

Where a defendant does not file a defense within the specified time in which to do so, a plaintiff may obtain judgment in the defendant's absence (default judgment). The first step in this process is for the plaintiff to note the defendant in default for having failed to file a defense. Where a defendant is noted in default, the defendant is deemed to admit to all of the facts as out in the plaintiff's claim, and the defendant is precluded from taking any further steps in the litigation (other than asking the court to set aside the noting in default).

If the claim is uncomplicated and seeks payment of a specific and readily-quantifiable amount (as would be the case in a claim for non-payment of an invoice), then non-judicial court staff may grant default judgment.

Where the claim is more complicated and/or where damages need to be assessed, the plaintiff will be required to bring a motion for default judgment. For the purpose of such a motion, and as mentioned above, the facts in the plaintiff's claim are assumed to be true. Despite this, the plaintiff must still establish that the facts entitle the plaintiff to judgment (e.g. that the facts are sufficient to satisfy the appropriate legal test), and the plaintiff may be required to lead evidence to establish the quantum of damages.

A defendant against whom default judgment has been ordered may seek to set aside the default judgment. To be successful on a motion to set aside default judgment, the defendant must:

- bring the motion without delay after learning of the default judgment;
- explain the circumstances for failing to defend the claim within the time for doing so; and
- show an arguable defense to the claim.

Appeals

A judgment in a civil matter made by a provincial superior court can be appealed to an appellate court within the province. The highest appeal court in each province is known as the Court of Appeal. Judgments made by the Federal Court can be appealed to the Federal Court of Appeal which, likewise, is the highest appeal court in the Federal Court system. The Supreme Court of Canada hears appeals from provincial Courts of Appeal and the Federal Court of Appeal. An appeal to the Supreme Court of Canada typically requires leave by the Supreme Court of Canada itself. Where this is the case, leave is only granted where the appeal raises issues of public importance. As mentioned, there is no further appeal of a decision of the Supreme Court of Canada.

An appeal of a judgment made by a provincial superior court or the Federal Court must typically be commenced within 30 days of the date of the judgment. Such appeals are normally heard within a year from the date of the judgment. The appeal court in question may issue a decision at the hearing of the appeal itself or may issue its decision some months later (although, generally, no more than 12 months later).

Leave to appeal a decision to the Supreme Court of Canada must be commenced within 60 days of the appeal court decision that is being appealed. On average, the Supreme Court of Canada will decide a leave motion within six months, oral argument of the appeal on its merits will then occur within a further six months to a year, and a decision on the appeal will typically be delivered within an additional six months.

Interim relief proceedings

Canadian courts have discretion to grant interim relief to parties to a proceeding.

Such relief can take the form of an injunction (an order requiring a party or a non-party to refrain doing certain acts) or a mandatory order (an order requiring a party or a non-party to perform some particular act).

Injunctions and mandatory orders can be granted either as interim relief (i.e. before the issues in the proceeding have been finally determined) or as an ultimate remedy. For example, a court could order an interim injunction preventing a defendant from using the plaintiff's confidential information until the matter is ultimately decided by the court, and then, following the trial of the matter, the court could order a permanent injunction preventing a defendant from ever using the plaintiff's confidential information. When injunctions and mandatory orders are sought as interim relief, they can be sought after a proceeding is commenced and up until judgment in the proceeding is rendered.

A party seeking interim relief must prove that:

- there is a serious issue to be tried;
- the party would suffer irreparable harm (i.e. harm not compensable in damages) if the injunction or mandatory order were not granted; and
- the balance of convenience favors the granting of the injunction or mandatory order.

A party may obtain an interim injunction or mandatory order without notice to, or the involvement of, the other parties where the injunction or mandatory order is urgent, or where providing notice of the motion for an injunction or mandatory order would undermine the purpose of the injunction or mandatory order (as would be the case where the intended injunction seeks to prevent a party from

disposing of assets). Any injunction or mandatory order made without notice will generally have a temporal limit: it will only remain extant until such time that the parties receive notice of the injunction or mandatory order, and are given an opportunity to contest the injunction or mandatory order in court. A party seeking an interim injunction or mandatory order will ordinarily be required to give an undertaking to pay any damages suffered by the parties affected by the injunction or mandatory order where:

- the damages are directly related to the interim injunction or mandatory order; and
- the party that obtained the injunction or mandatory order is ultimately unable to prove its claim at trial.

Typical injunctions or mandatory orders granted by Canadian courts include the following:

- *Mareva* orders that prohibit a defendant from disposing of property prior to judgment (see further details in Prejudgment attachments and freezing orders);
- *Norwich* orders that compel non-parties to provide information to the party seeking the order. The information sought further to a Norwich order may help to identify potential defendants, to find and preserve evidence that may support a claim against known or potential defendants, or to identify assets;
- *Anton Piller* orders (i.e. civil search warrants) that provide the right to search premises and seize evidence;
- Labor injunctions that restrain unlawful picketing; and
- Injunctions that restrain the continued infringement of intellectual property, or the misuse of confidential information.

A motion for an injunction or mandatory order made without notice to the opposing parties can often be heard by the court within a matter of days. If the party seeking such an injunction or mandatory order is ultimately successful, such that the court issues a temporary or interim injunction or mandatory order, the opposing parties are given the opportunity to have the interim injunction or mandatory order set aside or varied further to a subsequent motion. Such subsequent motions can often be heard within a few weeks of the original interim injunction or mandatory order made without notice (or even sooner than that if the urgency of the situation so dictates).

An injunction or mandatory order that is made on notice (i.e. because it is not urgent, or because providing notice of the motion for the injunction or mandatory order would not undermine the purpose of the injunction or mandatory order itself) can often be heard within one to three months (depending on the complexity of the factual and legal issues relating to the motion for the injunction or mandatory order).

Other forms of common interim relief include the following:

- an order relaxing the rules related to the service of court documents;
- an order striking out those portions of a pleading or an affidavit that make allegations that are frivolous or vexatious;
- an order for a Certificate of Pending Litigation that is registered on title to property and therefore puts prospective purchasers, mortgagees, etc., on notice that there is an ongoing lawsuit relating to the property in question;
- an order setting a timetable for the litigation, or requiring a party to comply with a timetable;
- an order requiring a party to produce relevant documents;
- an order requiring a party to answer a question that the party refused to answer on an examination for discovery; and
- an order requiring a plaintiff to pay money into court.

An appeal of an order made on a motion for interim relief must generally be commenced within ten days of the date of the order.

Generally, individuals may, as of right, represent themselves on motions for interim relief. On a motion for interim relief, a corporation typically must be represented by a lawyer (which includes an in-house lawyer) unless the corporation obtains leave of the court to represent itself (e.g. to be represented by an officer, director, or shareholder of the corporation).

Prejudgment attachments and freezing orders

Provincial superior courts and the Federal Court can grant interim freezing orders, known as *Mareva* orders, which restrain a defendant from disposing of property prior to judgment. Canadian courts issue *Mareva* orders to prevent possible abuses of process and/or frustration of court-ordered remedies, as would be the case where a defendant is dissipating, or is likely to dissipate, assets so as to frustrate the enforcement of any potential judgment against the defendant.

Motions for a *Mareva* order are brought after a proceeding has already been commenced. That said, such motions can be brought:

- before a defendant has been served with the claim; and
- without notice to the defendant in order that the motion may achieve the objectives set out in the previous paragraph.

A *Mareva* order is an interim order that merely preserves a defendant's assets until the matter can be resolved on its merits. Accordingly, once a plaintiff obtains a *Mareva* order, it is incumbent on a plaintiff to seek to obtain judgment on the merits of the case.

The criteria for the issuance of a *Mareva* order are similar to the criteria for the issuance of other forms of interim relief. Specifically, to obtain a *Mareva* order, the moving party must demonstrate the following:

- a strong *prima facie* case (i.e. a strong case at first glance);
- that the defendant has assets in the jurisdiction; and
- that there is a serious risk that the defendant will remove property or dissipate assets before judgment.

Plaintiffs can be held liable for any damages caused to the defendant by the *Mareva* order. In addition to satisfying the above test, a plaintiff seeking a *Mareva* order must undertake to the court that it will compensate a defendant affected by the *Mareva* order in circumstances where:

- the defendant suffers damages as a result of the *Mareva* order, and
- the court later finds that the *Mareva* order should be set aside or should not have been granted in the first place.

The reach of a *Mareva* order is broad: it can apply to personal effects, bank accounts, real estate, shares, and income streams, among other things.

Costs

Where a party to a Canadian proceeding is successful in obtaining relief in the proceeding (or in some interlocutory step in the proceeding, such as on a motion), the court will generally require any parties that opposed the relief to pay a portion of the successful party's costs, namely, legal fees and disbursements (e.g. photocopying expenses, process server fees, experts' fees, etc.).

Where the parties have had partial success in the proceeding (or some step in the proceeding), courts may award costs having regard to the parties' relative success. Though it happens rarely, courts may decline to award a successful party its costs where the court finds that the successful party's conduct was objectionable.

It is unusual that a successful party will recover all of its costs from the opposing parties. By default, a successful party is entitled to costs on a partial indemnity or party-and-party basis. While there are variations among jurisdictions and across levels of court, costs on a partial indemnity basis are typically 25-50% of the successful party's actual legal costs. In rare circumstances, parties may recover costs on a substantial indemnity or solicitor-and-client basis. Where this is the case, the successful party may be awarded 60-75% of its actual legal costs. Substantial indemnity costs may be awarded where the conduct of the unsuccessful party was reprehensible (as might be the case where an unsuccessful plaintiff's accusations of fraud were found to be completely devoid of merit, or where the conduct of an unsuccessful party unnecessarily increased the time and expense of the proceedings).

Where a party rejects an offer to settle, and then obtains a result at trial that is equal to or less favorable than the rejected offer, adverse costs consequences will normally accrue to the party. The rationale behind this approach is that the party rejecting the offer did not obtain a better result at trial and unnecessarily caused all parties to incur the additional expense of trial.

Court fees (i.e. fees paid directly to the court for such steps as commencing a lawsuit, defending a lawsuit, or bringing a motion) are generally not more than CAD400 per procedural step. A party that succeeds in its lawsuit (or on some smaller step in the lawsuit, such as a motion) is generally able to recover its court fees from the unsuccessful parties.

Class actions

In all Canadian jurisdictions, a representative or class proceeding may be commenced by a person as a representative of numerous persons who have a similar interest in the proceeding. A similar interest does not need to arise out of the same action or transaction, but requires a shared interest in the determination of some question of law or fact.

The action does not proceed as a class action unless and until it is certified on a certification motion (or, in Quebec, an authorization motion). On such a motion, the issue is not whether the class action is likely to succeed on the merits but, rather, whether a class action is an appropriate manner of proceeding. The following are some of the requirements for certification of an action as a class action:

- there is an identifiable class of two or more persons;
- the claims of the class members raise common questions of law or fact;
- a class proceeding is the preferable procedure for the just and efficient resolution of the common questions of law or fact; and
- there is a representative plaintiff who is well suited to represent the interests of the class.

In Canadian jurisdictions other than Quebec, parties to a certification motion often file voluminous evidentiary records that may include experts' reports. Where this is the case, the certification motion may stretch out over several days. In an authorization motion in Quebec, however, the facts alleged by the plaintiff are taken to be true, the motion may only be contested orally, and the defendants require leave of the court to file evidence. For this reason, Quebec is often seen as being a friendly jurisdiction for the institution of a class proceeding.

A certification motion may proceed in two stages. At the first stage, the court will consider the above factors to determine the threshold issue as to whether the proceeding is appropriate to proceed procedurally as a class action. At the second stage of the certification motion, the court may determine the description of the class and define the common issues.

If the court certifies the proceeding as a class action it will provide direction as to how class members are to receive notice of the class action. Once they receive notice, class members can choose to opt out of the class action. A class member who opts out of the class will not share in any award or settlement in the class action, and will not be bound by any order made in the class action. Having opted out, they may pursue their claims on an individual basis or simply choose not to pursue them at all.

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