Arbitration, mediation and litigation in Canada: Help for international companies

September 02, 2025

This article is part of a practical series written for international companies looking to establish, launch, operate or invest in a business Canada. Each article covers a major area of law in Canada – everything from employment laws to taxes. Access all the articles on the "Doing business in Canada: A practical guide from 'Eh' to 'Zed'" page.

Civil procedure

Civil procedure rules governing litigation in Canada allow for the exchange of pleadings followed by an exchange of documents relevant to the dispute. Examinations for discovery (similar to depositions but usually with much narrower boundaries for relevance) are permitted of single representatives of the parties only, except with leave of the court. Many cases in major urban areas are case-managed by judges or court officials who attempt to ensure that cases move forward in an orderly fashion to trial. Juries are used much less often in civil litigation in Canada than in the United States.

The Ontario Superior Court of Justice maintains a "commercial list" with jurisdiction over a range of commercial issues such as bankruptcy, creditors' rights, shareholder disputes, corporate arrangements, etc. The commercial list is well-regarded for its efficiency and the expertise of its judges.

Class proceedings

Class actions are permitted, and have become common, across Canada. All provinces have now formally adopted class proceedings statutes that set forth procedural requirements associated with class proceedings in that jurisdiction. The three Canadian territories rely on the common law for the structure of their class proceedings regime and the Federal Court has its own class action procedures enshired in its Rules of Court.

Class actions are typically case-managed by a judge in the jurisdiction where the class action is issued. The fact that a claim is advanced as a proposed class proceeding does not alter the substantive law: plaintiffs must establish the same elements of a cause of action, and defendants can raise the same defences, as in an individual action. A class

action simply permits multiple claims where there are issues common to the proposed class to be "bundled" together into a single proceeding. The plaintiffs (or, more rarely defendants), must be certified as a "class" before the action can proceed to discovery and trial. Securities, mass torts, product liability, privacy, consumer protection and employment continue to be frequent subjects in class actions litigation. Class action trends often follow litigation patterns in the United States and many Canadian proceedings are "copy cats" of US litigation. Most common law provinces in Canada have a two-year limitation period from the date the claim was discovered, Québec has a three-year limitation period. Once a claim in a class action is issued, the limitation period which would govern the claims of individual class members is suspended and generally will not resume running unless and until the certification (or, in Québec, authorization) is denied.

A unique feature of Canadian class actions law is that the courts of each province or territory have the authority to independently certify a national class action. In addition, class actions can be brought in the Federal Court, if they are against entities of the federal government, or are brought under federal statutes, such as the *Competition Act*. It is not unusual to have overlapping class proceedings in different jurisdictions at the same time. Canada does not have an equivalent to the multidistrict litigation procedure that exists in the United States. Instead, the coordination of the overlapping proceedings depends on the individual judges managing them and initiatives created by the Canadian Bar Association to promote coordination. The test for certification (authorization in the Province of Québec) varies from province to province. Most notably, while most provinces do not require plaintiffs to establish that the common issues predominate over individual cases, amendments to the Ontario legislation in 2020 and more recently class proceedings legislation in Prince Edward Island (P.E.I.) have imposed a superiority and predominance test in those provinces. Plaintiffs in all jurisdictions must show that a class action would be the preferable procedure for resolving the claim. While this requirement has not been applied rigorously, the amendments in Ontario and the newly enacted legislation in P.E.I. will require the Courts to consider this issue with the more stringent consideration of superiority and predominance.

Damages

Generally, damages awarded for tort claims are less than in the United States. Punitive, aggravated and exemplary damages are permitted, and occasionally awarded, in the civil tort area and, rarely, for breach of contract, although typically for much smaller amounts than in the United States, and most commonly in Québec. In common law jurisdictions, punitive damages can be awarded in any civil suit in which the plaintiff proves the defendant's conduct was "malicious, oppressive and high handed [such] that it offends the court's sense of decency", whereas in Québec, punitive damages are provided for in the province's civil code which permits courts to award punitive damages if they are "provided for by law" in which case they "may not exceed what is sufficient to fulfill their preventative purpose".

Because civil juries are used much less often in Canadian civil litigation than in the United States and damages for claims in Canada are often much less than in the United States, there is no "tort reform" debate in Canada, nor are jurisdictions usually labeled "plaintiff-friendly" (with the exception of perhaps Québec) or "defendant-friendly". To the extent that litigation risks may instruct corporate planning decisions, a more nuanced

analysis is required. The sophistication of the “commercial list” in Ontario is often a persuasive factor for large clients. Québec’s use of a civil code instead of the common law is often a persuasive factor for large clients to reduce potential exposure in Québec. Other factors include frequency of jury usage in civil cases, whether the province has compulsory government-owned auto insurance (such as in British Columbia, Manitoba, Saskatchewan and, with regard to personal injuries, Québec), and consumer protection laws.

Mediation

In some parts of Canada, parties are required to mediate cases prior to trial. Parties are, however, free to choose their own mediators. Apart from court-mandated mediation, parties routinely take cases to voluntary mediation. Trained and experienced mediators, respected lawyers and retired judges all serve as mediators.

Arbitration

a) Domestic arbitration

All provinces have domestic arbitration legislation. However, there are significant differences in their legislation, particularly regarding the availability of an appeal from an arbitral award to the courts and the extent to which parties can contract out of the legislation. The domestic arbitration regime in Québec is governed by specific provisions in the Civil Code of Québec.

Canadian courts generally defer to arbitral tribunals where the parties have selected arbitration. Arbitrations in the commercial context have steadily gained in popularity over recent years. Some consumer protection legislation prohibits arbitration in consumer contracts.

b) International arbitration

In 1986, Canada implemented the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (UNCITRAL). All provinces have implemented the UNCITRAL Model Law (Model Law) on International Commercial Arbitration, as has the federal government, though different jurisdictions have amended the Model Law at different times. Canada has a reputation as being an arbitration-friendly jurisdiction and this is true for international arbitrations as well as domestic arbitrations. Canadian courts have consistently expressed their approval of the principle that there are narrow grounds for judicial intervention in international commercial disputes that are subject to arbitration agreements as expressed in the Model Law. Canadian courts have expressed broad deference to the decisions of arbitral tribunals and narrowly interpreting the grounds for setting aside arbitral awards. Some provinces have explicitly accepted that international arbitral awards are akin to foreign judgments, providing parties with jurisdictional advantages and longer limitation periods for enforcing their awards. Canadian courts have consistently emphasised the mandatory nature of the enforcement provisions in the Model Law.

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