COZEN O'CONNOR

CANADA

INTERNATIONAL LAW DIGEST

Continent – N. America | **Region** - Canada | **Population** – 33,739,900 | **Size** – 9,984,670 km²
Language - English, French | **Monetary Unit** - Canadian Dollar | **Geography** – widely varied: Boreal forests throughout the country, ice is prominent in northerly Arctic regions and through the Rocky Mountains, with relatively flat Canadian Prairies in the southwest.
Religion – 42% Roman Catholic, 23% Protestant, remainder other or no religion.

A. LIMITATION PERIODS IN GENERAL

Canada has its own limitation periods for each jurisdiction for different categories of claims. In addition some provinces have a maximum time period, called an "ultimate limitation period," after which time the claim will be barred, even if the person did not ever become aware of the circumstances giving rise to the claim (this may be particularly significant in claims where a defendant's wrongful conduct is not discovered for a long time, such as those arising out of faulty construction or environmental contamination). The following is intended as an educational overview of some of the general limitation periods that will apply in claims for property losses in Canada. Local counsel should always be consulted. Cozen O'Connor has a Canadian office.

Alberta

- General Limitation Period **– 2 years** commencing when the cause of action is discovered.
  Limitations Act, R.S.A. 2000, c. L-12, s. 3(1)(a)
- Ultimate Limitation Period – **10 years** commencing when the cause of action arises.
  Limitations Act, R.S.A. 2000, c. L-12, ss. 3(1)(b)

British Columbia

- General Limitation Period – **2 years** commencing when the cause of action is discovered.
  Limitation Act, R.S.B.C. 1996, c. 266, ss. 3(2), 6
- Ultimate Limitation Period – **30 years** commencing when the cause of action arises.
  Limitation Act, R.S.B.C. 1996, c.266, s. 8(1)

Manitoba

- General Limitation Period – **2 years** commencing when the cause of action arises.
  Limitation of Actions Act, C.C.S.M. c. L150, s. 2(1)(g)
  Note, a court can grant leave to continue or begin an action if not more than 12 months have elapsed between the date the action was "discovered" and the date of application for leave, subject to ultimate limitation period.
  Limitation of Actions Act, C.C.S.M. c. L150, s. 14(1)
- Ultimate Limitation Period – **30 years** commencing when the cause of action arises.
  Limitation of Actions Act, C.C.S.M. c. L150, s.14(4)

New Brunswick

- General Limitation Period – **2 years** commencing when the cause of action arises.
- Ultimate limitation Period – **15 years**.
  Limitation of Actions Act, S.N.B. 2009, c. L-8.5

Nfld & Labrador

- General Limitation Period – **2 years** commencing when the cause of action is discovered.
  Limitations Act, S.N.L. 1995, c. L-16.1, ss. 5(b); 13; 14
- Ultimate Limitation Period – **10 years** commencing when the cause of action arises.
  Limitations Act, S.N.L. 1995, c. L-16.1, s. 14 (3)

N.W.T.

- General Limitation Period – **6 years** commencing when the cause of action arises.
  Limitation of Actions Act, R.S.N.W.T. 1988, c. L-8, s. 2(e)

Nova Scotia

- General Limitation Period – **6 years** commencing when the cause of action arises.
  Limitation of Actions Act, R.S.N.S. 1989, c.258, s. 2(1)(e). However, within **4 years** of the expiration of the general limitation period, court may disallow the limitation period, having regard to circumstances of the case – Listed are enumerated factors to consider including date of "discovery" of claim,
  Limitation of Actions Act, R.S.N.S. 1989, c.258,s. 3
- **Note: A 2009 version of this Act has received royal assent but has not yet been proclaimed in force.**

Nunavut

- General Limitation Period – **6 years** commencing when the cause of action arises.
  Limitation of Actions Act, R.S.N.W.T. 1988, c.L-8, s. 2(e)

Ontario

- General Limitation Period – **2 years** commencing when the cause of action is discovered.
  Limitations Act, 2002, S.O. 2004, c. 31, ss. 4,5
- Ultimate Limitation Period – **15 years** (commencing from 2004 or when the cause of action arises, whichever is later).
  Limitations Act, 2002, S.O. 2004, c. 31, s. 15

P.E.I.

- General Limitation Period – **6 years** commencing when the cause of action arises.
  Statute of Limitations, R.S.P.E.I. 1988, c. S-7, s. 2(1)(g)

Quebec

- General Limitation Period – **3 years** from time the right of action arises.
  Civil Code of Quebec, S.Q. 1991, c. 64, art. 2925

Saskatchewan

- General Limitation Period – **2 years** commencing when the cause of action arises.
  Limitations Act, S.S. 2004, c. L-16.1
- (**NOTE:** In an action against a city, there is a **1 year** limitation period to both file and serve the claim).
- Ultimate Limitation Period – **15 years**.

Limitations Act, S.S. 2004, c. L-16.1

Yukon

- General Limitation Period – **6 years** commencing when cause of action arises.
  Limitation of Actions Act, R.S.Y. 2002, c. 139, s. 2(1)(e), (f)

B. FUNDING ACTIONS IN CANADA

Contingency fees (an agreement where the lawyer only receives a fee if the client wins) are permitted.

Lawyers can charge on an hourly basis and fees are not fixed by law. In addition fixed (task-based) fees as well as discounted rates are also allowed.

Commercial litigation is generally funded by the parties, although in rare circumstances other parties bear the costs of litigation.

C. PRIVILEGE

Privilege is recognized as a substantive rule, rather than an evidentiary or procedural one.

The following documents need not be disclosed:

- Documents protected by lawyer-client or legal advice privilege;
- Documents protected by litigation privilege (confidential documents where the “dominant purpose” is for actual or contemplated litigation).

Equally, privilege can apply to in-house lawyers, but only where confidential documents are for the purpose of litigation or legal advice, as opposed to ordinary business activities.

Privilege is generally the only ground on which disclosure can be refused. However, courts are able to order remedies to protect against the damage that may result from the disclosure of confidential or other protected information. Thus, occasionally one party is permitted to make disclosure of a document on the basis that the document only be disclosed to the adverse party’s solicitor, not the adverse party itself.

As in some other jurisdictions, such as England & Wales, a party is prohibited from using evidence disclosed in discovery for any purpose other than the litigation itself, without leave of the court.

D. BRINGING COURT PROCEEDINGS

(i) Pre-Action Conduct

The courts do not generally impose any rules in relation to pre-action conduct; changes have recently taken place in some provinces. Thus:

In Ontario, certain actions are subject to mandatory mediation within 180 days after the filing of the first defense. While these mediations are treated as without prejudice settlement discussions, failure to attend can result in severe consequences, including the case being struck out or the action dismissed.

In Alberta, all parties must participate in a mandatory dispute resolution process before a trial date can be obtained (although this requirement can be waived by the court).

Notwithstanding the general lack of court-imposed rules, most lawyers attempt pre-action conduct/the early exchange of information. This is because many provincial law societies' have rules of professional conduct that address the pretrial conduct of lawyers (and where failure to comply may result in professional misconduct). For example, the ethics rules of the Nova Scotia Barristers' Society require lawyers to (i) encourage the client to compromise or settle whenever it is reasonably possible; and (ii) consider the use of ADR for every dispute.

(ii) Are Court Proceedings Public or Confidential?

Generally, all civil cases must be heard in open court. Documents filed with the court will form part of the public record. In some cases, it may be possible to obtain a "sealing order" with respect to part of the court file (for example, documents that involve sensitive commercial interests such as trade secrets), however such orders are not issued lightly. Canadian courts will not grant such an order unless (1) it is necessary to prevent a serious risk to an important interest (which may include a commercial interest); (2) there are no reasonable alternatives to the order; and (3) the order will produce more benefit than harm.

In addition, where the applicant seeks protection of a commercial interest, the applicant must prove that the information has three characteristics: (1) it must have been treated at all relevant times as confidential; (2) on a balance of probabilities the company's proprietary, commercial and scientific interests could reasonably be harmed by its disclosure of the information; and (3) it must have been accumulated with a reasonable expectation of it being kept confidential.

Amongst other things, a Canadian court may also require that notice of a request for a sealing order be given to potentially interested media agencies (TV/news) so that they may have an opportunity to contest the order.

Where confidentiality is of paramount concern to parties involved in a dispute, arbitration should be considered as an alternative to commencing a civil action.

(iii) Starting the Claim

In the common law jurisdictions, depending on the court rules, a claim may be commenced by issuing a summons, a statement of claim, a notice of action, or a notice of application stating the claim. The claim must then be served on the defendant within a certain time (for example, in British Columbia it must be within one year, whereas in Ontario it must be within six months).

Costs are requested to be paid for the issuing of any claim (or application and/or the filing and/or service of documentation), which can vary depending on a range of factors including the status of the court, amount of the claim and the relief sought. Whilst the fees for starting an action or application in Canada tend to be minimal (the fees vary slightly by province but often fall in the range of approximately CA$200), Cozen O'Connor or local lawyers should be contacted if you require further information.

Generally, a defendant is given notice of the claim by being served personally. The defendant must deliver the defense within a prescribed period of time (unless there is a challenge to the court's jurisdiction or a need to bring another procedural application whereby the challenge must be made before the defense is served or any other step that could be construed as binding it to the jurisdiction). Like the time-limits for service of the claim, the defendant's time to serve the defense also varies (for example, in Ontario a defendant has 20 days).

Extensions of the time limits can be agreed (or approved by the court) if no prejudice is caused.

If a defendant fails to deliver the defense in time, the claimant can obtain a default judgment.

(iv) Next Steps

After pleadings, the parties exchange documents and conduct discovery. If required, they can engage in interlocutory applications and some form of mediation (this varies according to the province). The parties will then attend a pretrial judicial conference and a timetable is put in place for the matter to proceed to trial.

(v) The Hearing

In general, witnesses give oral evidence at trial and are subject to direct examination, cross-examination, and re-examination. In some proceedings, witnesses are permitted to give evidence by way of a witness statement, subject to a limited right of cross-examination.

E. THE ROLE OF EXPERTS

(i) Appointment Procedure

Generally speaking, experts are selected by the parties themselves, however the court can appoint an expert (either on its own initiative or at a party's request).

The expert's fees are paid by the retaining party (although these may be recoverable by the successful party as part of a costs award).

(ii) Their Role

The expert's role is to assist the court in reaching its determination. The expert must be impartial and not lose objectivity. This is a common law rule but has been recently codified in Ontario's Rules of Civil Procedure (and may, in the future, be codified in other provinces).

The report of an expert witness who will give evidence at trial must generally be delivered according to a timetable prescribed by the court (or as agreed by the parties). If time limits are not met, the leave of the trial judge is required before the expert can testify.

In Alberta, experts (by agreement or court order) can now be examined on their reports by adverse parties during the discovery process.

F. INTERIM REMEDIES

(i) Summary or Default Judgment

Claims can be struck out if they are improperly pleaded and the court can determine questions of law on a pretrial application. However, parties are sometimes permitted to amend their pleadings, rather than the draconian remedy of having their claim struck out.

Since January 2010, in Ontario, there has been a new summary judgment rule: a party can apply for judgment without a full trial if there is no genuine issue requiring a trial. The rule permits the judge to weigh evidence, evaluate credibility, and draw inferences from the evidence. British Columbia has a similar regime and other Canadian jurisdictions have begun to follow suit (thus Prince Edward Island is considering, this year, whether to incorporate the language of the Ontario rule).

(ii) Security for Costs

Provincial and territorial civil procedure rules permit the defendant to apply to the court for an order for security for costs, if one of the prescribed criteria is met.

The criteria vary according to the province, but usually comprise some/all of the following:

- The claimant is ordinarily resident outside the province. The defendant has an order against the claimant in the same or another proceeding that remains unsatisfied.
- The claimant is a corporation or nominal claimant, and there is good reason to believe that the claimant has insufficient assets to pay the defendant's costs.
- There is good reason to believe that the action is frivolous and vexatious, and that the claimant has insufficient assets in the province to pay the defendant's costs.

G. DISCLOSURE

Generally speaking, Canadian courts impose a positive obligation on parties to disclose any document in a party's possession, control or power that is relevant to any matter in issue in the case. Documentary disclosure, which is part of the discovery process, is usually done in the form of a written list or affidavit that is served on the other parties after the close of pleadings. Although all relevant documents must be disclosed, parties are not required to produce for the other side any documents over which privilege is claimed. "Documents" are defined broadly to include electronic data, as well as traditional paper documents.

Like in other jurisdictions with disclosure regimes (such as England & Wales) there are continuing disclosure obligations, such that newly acquired information and documents must be disclosed immediately. Failure to produce a relevant document can attract serious penalties, such as the parties' case being struck out.

In January 2008, the Sedona Canada Working Group (comprising lawyers, judges, in-house counsel, and government representatives from across Canada), released its final draft of the Sedona Canada Principles Addressing Electronic Discovery, a set of principles appropriate and suitable for electronic discovery in Canada (these principles were developed using the Sedona Principles from the United States). In 2009, Nova Scotia instituted the first Canadian civil procedure based on these principles addressing electronic discovery. Litigation plans similar to, or consulting the Sedona Canada Principles, are also becoming increasingly common (thus, in Ontario parties must agree to a written discovery plan; in Alberta, parties involved in complex cases must set out a litigation plan that establishes a protocol for the organisation and production of documents).

H. COSTS

(i) Loser Pays?

A successful litigant is usually entitled to receive his or her costs of the proceeding (including appeals) from the unsuccessful party **(although one rarely obtains a full indemnity).**

The calculation of costs varies by province. In some provinces, calculating the quantum of costs is simply a matter of applying a tariff. In others, it is at the court's discretion.

In British Columbia, the rules limit the costs that can be recovered on certain types of actions claiming CA$100,000 or less.

Pretrial offers to settle can play a role in costs awards in most provinces. These offers must not be disclosed to the court until after the disposition of the case on its merits. Typically, if an offer is not "beaten" the other party will be ordered to pay an increased costs award in respect of the costs incurred after the date of the offer.

(ii) Interest

Most judgments for a monetary award also include interest.