LITIGATING IN ONTARIO

by W. Eric Kay and Mark S. Shapiro

As cross-border commerce has become commonplace for so many of our clients and with it the prospect of their finding themselves initiating or responding to litigation in Canada, there is a need to understand the differences between litigating in Canada and elsewhere, particularly the United States.

Perhaps the most significant difference is that the costs of litigation in Canada are considerably less than in the United States. This disparity in legal costs is primarily a function of the differences in the rules of procedure that govern litigation in each jurisdiction. The most significant of these differences relate to the various rules which govern pretrial discovery and recovery of legal costs.

Most of the comments about litigating in Ontario are generally applicable to the other provinces and territories of Canada. The exception is the Province of Quebec, where litigation is based on the Civil Code.

COURT SYSTEM

In Ontario, there are four levels of provincial courts: the Small Claims Court (jurisdiction up to $35,000), Superior Court of Justice, Divisional Court (for certain levels of appeal and judicial review of administrative action), and Court of Appeal (for other levels of appeal).

There are also two levels of federal courts: the Federal Court and the Federal Court of Appeal, which deal with certain specific matters under federal jurisdiction and claims against the federal government.

There are also a multitude of agencies at the municipal, provincial, and federal levels that deal with specific subject-matter or specific industries, all of which are subject to judicial review and usually limited to mixed error of fact and law or error of law.

PRETRIAL DISCOVERY

Unlike in the United States where litigants are afforded broad powers to elicit and obtain oral and documentary evidence, the pretrial discovery process in most Canadian jurisdictions is far more restricted. In Ontario, for instance, discovery is limited as follows:

1. Examinations for Discovery (or what are commonly referred to in the United States as Depositions) are generally limited to one person on behalf of each party to the litigation. Unlike in the United States, there is not an automatic right to examine more than one representative per party. Examinations of multiple witnesses are only available with leave of the Court, and such leave is not regularly granted.
2. Examinations for Discovery of each party are not to exceed seven hours unless the parties agree otherwise or the Court so orders an extended examination. In cases involving claims of $200,000.00 or less, no party is permitted to exceed a total of three hours of examination time regardless of the number of parties or persons to be examined, and such time limitation cannot be extended even by agreement or with leave of the Court.
3. Oral and documentary production is required to be proportional. Thus, in determining whether a party must answer a question on discovery or produce a document, the Court will consider whether:

   a. the time required to answer the question or to produce the document would be unreasonable;
   b. the expense with answering the question or producing the document would be unjustified;
   c. answering the question or producing the document would cause undue prejudice, or would unduly interfere with the orderly progress of the action; and
   d. the requested information is readily available to the requesting party from another source.

4. There is not an automatic right to secure documents or oral evidence from non-parties. In order to do so, leave of the Court is required and such leave will only be granted in circumstances where:

   a. the information could not otherwise be obtained from a person whom the requesting party is entitled to examine;
   b. it would be unfair to force the requesting party to proceed to trial without the evidence; and
   c. the examination will not unduly delay the commencement of the trial, entail unreasonable expense or be unfair to the non-party.

Therefore, while very significant time and expense are often incurred by litigants in the United States as both sides seek and secure evidence, the restrictions placed on Canadian litigants often result in a more expeditious and less expensive pretrial discovery process.

MEDIATION

In Ontario, a form of mediation is mandatory in many civil cases. In the civil division of the Provincial Court, a settlement conference before a Deputy Judge is mandatory. In cases before the Superior Court of Justice in the areas of Toronto. Ottawa and Windsor, a mediation of up to three hours is mandatory. The mediation is conducted before a neutral chosen by the parties or from a list of neutrals approved by the Court. In other areas, a Judge will conduct a pretrial conference which is in part a settlement conference.

LEGAL COSTS

The general rule in Canada is that the successful party is entitled to be compensated for at least some of its legal costs (i.e. fees and disbursements) by the losing party. This rule applies to virtually all proceedings in Canadian Courts whether it be in respect of an action, motion, an application, a trial, or an appeal. Depending upon the circumstances involved, the Court generally awards the successful party its legal costs on one of two scales: partial indemnity (i.e. approximately 50%–65% of actual legal costs), or substantial indemnity

(i.e. approximately 65%–80% of actual legal costs). In making such orders for the payment of legal costs to the successful party, the Courts in Canada discourage frivolous proceedings and encourage litigants to make and to consider reasonable offers to settle.

OTHER SIGNIFICANT DIFFERENCES

(i) Lower damage awards

Another significant difference that clients might wish to consider prior to deciding to pursue litigation in Canada includes the fact that general damage awards are far lower in Canada. For instance, the Supreme Court of Canada has capped the general damages to which a party could reasonably expect to obtain on account of pain and suffering in a personal injury action to an amount less than CDN $300,000 (indexed to inflation). Similarly, the types of punitive damage awards that are often made in the United States are virtually unheard of in Canada.

(ii) Jury trials are rare

Civil jury trials are rare in Ontario as there is no constitutional right as in the United States. While a party may request a trial by jury in actions for less than $200,000, the Canadian courts have a broad discretion to refuse a party's request for trial by jury where it is felt that the issues are too complex or the other party might be prejudiced or if equitable relief is sought. Civil juries are most often seen in the context of personal injury cases and are rarely if ever seen in commercial litigation cases.

(iii) Commercial List

While litigants in Canada can expect most litigation to be decided in the absence of a jury by a non-elected and federally appointed Judge, a somewhat special feature of commercial litigation in Ontario is the existence of the Commercial List. The Commercial List is a division of the Ontario Superior Court of Justice which was established to hear certain proceedings involving issues of commercial law. The types of cases permitted to be listed on the Commercial List are applications, motions, or actions which relate to commercial disputes such as those involving such matters as bankruptcy and insolvency, secured transactions, shareholders' rights and remedies, partnership law, personal property security, and receivership applications.

To a large extent, the Judges of the Commercial List govern their own process. The primary benefit of the Commercial List is that it allows for "real-time" litigation administered by judges who have developed a specialty in the types of cases heard on the Commercial List. The results are often more expeditious dispositions of cases.

(iv) Security for costs

Foreign clients seeking to commence litigation in Canada should be aware of the fact that because successful litigants in Canada have a right to recover a portion of their legal costs, a foreign litigant without assets in the Canadian jurisdiction in which the litigation has been commenced might be ordered by the Court to post security for the other party's costs of defending the proceeding. When ordered, the security is often posted by way of bond or payment (by lump sum or installments) into Court to be held by the Accountant of the Court pending determination of the proceeding.

ARBITRATION

Most provinces in Canada have an Arbitration Act which governs domestic arbitrations contractually agreed by parties. Domestic arbitral awards can be enforced through the provincial court system.

Ontario also has an International Commercial Arbitration Act which expressly adopts the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. International arbitral awards can be enforced within two years through the provincial court system.

The federal Commercial Arbitration Act governs commercial arbitrations where at least one of the parties is the federal government, a federal department or agency, or a federal Crown Corporation.

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