Canadian & U.S. Litigation Differences

When considering whether to litigate in Canada, it is important our U.S. clients understand the differences between litigating in the two countries. The most significant of these differences relates to the various rules that govern pretrial discovery and legal costs. 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. Additionally, the cost of litigation in Canada is considerably less than in the United States due to the differences in the rules of procedure that govern litigation.

From our office in Toronto, Canada, Dickinson Wright offers a creative and highly effective team of litigators to serve the litigation needs of clients involved in cross-border commerce or with business interests in Canada. Backed by over 150 years of experience, our Canadian litigation team provides litigation risk analysis and experienced advocacy for clients considering or responding to litigation in Canada.

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:

- Examinations for discovery (or what is 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 individual per party. Examinations of multiple witnesses are only available with leave of the Court, and such leave is not regularly granted;
- Examinations for discovery of each party are not to exceed seven (7) hours unless the parties agree otherwise or the Court so orders an extended examination. In cases involving claims of $100,000.00 or less, no party is permitted to exceed a total of two (2) hours of examination time regardless of the number of parties or persons to be examined, and such time limitation cannot be extended by agreement or Court Order;
- 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:
    - » the time required to answer the question or to produce the document would be unreasonable;
    - » the expense with answering the question or producing the document would be unjustified;
    - » answering the question or producing the document would cause undue prejudice, or would duly interfere with the orderly progress of the action; and
    - » the requested information is readily available to the requesting party from another source.

- There is not an automatic right to secure documents or oral evidence from non-parties. To do so, leave of the Court is required and said leave would only be granted in circumstances where:
  - » the information could not otherwise be obtained from a person whom the requesting party is entitled to examine;
  - » it would be unfair to force the requesting party to proceed to trial without the evidence; and
  - » 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 inexpensive pretrial discovery process.

LEGAL COSTS

Unlike in the United States, the general rule in Canada is that the successful party is entitled to be compensated for at least some of its legal costs (fees and disbursements) by the losing party. This rule applies to virtually all Canadian court proceedings, whether it be in respect of an interlocutory motion, 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 (approximately 30%-50% of actual legal costs) or substantial indemnity (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

Lower Damage Awards

Another significant difference that clients might wish to consider before pursuing litigation in Canada is 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.

Jury Trials Are Rare

Civil jury trials are rare in Canada as there is no such constitutional right. While a party may request a trial by jury, 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. Civil juries are most often seen in Canada in the context of personal injury cases and are rarely if ever seen in commercial litigation cases.

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 related 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.

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 where 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) in Court to be held by the accountant of the Court pending determination of the proceeding.

The preceding are just some of the differences U.S. clients will want to consider when deciding if and how to commence or defend litigation in Canada.