



Friendly yet Foreign: Litigating in Ontario, Canada

By Douglas Harrison – December 22, 2011

Sitting on the north side of the Great Lakes, Ontario is Canada's largest province by population. Its capital, Toronto, is the country's largest city, and the center of its financial and business communities. As with most of Canada, Ontario's legal system is based on the common law, passed down from when the province was an outpost within the British Empire. (Quebec, the only exception, is a civil-law jurisdiction.) In many ways, U.S. attorneys would find practice in the courts of Ontario comfortably familiar. The current Ontario Rules of Civil Procedure were modeled after the U.S. federal court rules. However, there are a number of significant distinctions, principally due to constitutional or other historical differences. Canada has had a constitutional Charter of Rights and Freedoms only since 1982, and courts have been reluctant to use it to overturn long-standing common-law principles. And, as Canada is a member of the Commonwealth, courts frequently consider and adopt legal principles developed in jurisdictions such as England, Australia, and New Zealand.

The Courts

In Canada, the provincial superior courts have inherent jurisdiction in matters of law and equity and are the superior level of trial courts. In Ontario, the court is called the Superior Court of Justice. In contrast to the status of the U.S. federal courts, the Federal Court of Canada is a statutory court whose jurisdiction is limited by the empowering statute, primarily to matters involving the federal government, appeals from various federal administrative tribunals, admiralty matters, appeals from the Tax Court of Canada, and intellectual property disputes.

There is very little overlap in the jurisdiction between the provincial superior trial courts and the Federal Court of Canada, and there is no concept of "removal" of cases from provincial courts to the Federal Court.

Toronto has a well-respected and efficient Commercial Court that operates as a division of the Superior Court of Justice, adjudicating matters involving insolvency, corporate governance, creditors' priorities, windings-up, and so on. [See Practice Direction Concerning the Commercial List, Toronto](#), Ontario Courts. Commercial Court cases tend to proceed on a fairly strict time schedule, and it is not unknown for a case to go to trial within a year of the commencement of the proceeding. This contrasts with the usual two- to three-year wait in the regular court.

In addition, Ontario has modern arbitration and mediation laws, as well as a tradition of strong judicial deference to arbitration agreements. Canada is a signatory to the New York Convention of 1958, and Ontario has adopted the United Nations Commission on International Trade Law "UNCITRAL" Model Laws on international commercial arbitration and conciliation.

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Contingency Fees

While contingency fees have been a mainstay in U.S. civil litigation since the 19th century, they are a relatively recent phenomenon in Ontario. Historically, Ontario lawyers were not permitted to make contingency-fee arrangements with clients, except in class actions (introduced in 1992), and then only with the permission of the court. In September 2002, however, the Court of Appeal for Ontario held that contingency-fee arrangements were neither illegal nor unenforceable, even though such fees are still subject to court review. Despite the availability of contingency fees and without caps to the rates that a lawyer can charge, the risks of negative costs awards, discussed below, deter spurious litigation in Ontario.

Discovery

After pleadings are completed in an action in the Ontario Superior Court (generally, pleadings consist of a statement of claim, a statement of defence, and a reply), the parties are required to prepare a written discovery plan that sets out the scope of documentary discovery, the discovery schedule, and the names of discovery witnesses. The [Ontario Rules of Civil Procedure](#) state that parties must apply the Sedona Canada Principles Addressing Electronic Discovery to ensure that the discovery plan is proportionate to the dispute.

The usual first step in a discovery plan is the exchange of affidavits of documents. The affiant swears that he or she has made a diligent search of his or her own records, or the records of the affiant's corporation, and has listed in the affidavit all documents that are in the party's possession, control, or power that are relevant to the matters in issue and producible for inspection. Documents that were once in the possession of the party but no longer are, must also be listed. In addition, documents for which privilege is claimed must be listed, although copies of those documents do not have to be produced. Documents are defined very broadly under the rules to include things such as tape recordings, video tapes, film, and any data recorded or stored on a computer.

There is an ongoing obligation of production. Any documents that come into a party's possession, control, or power after delivering the affidavit of documents must be disclosed. There is also the ability to obtain, in certain circumstances, an order compelling the production of documents from non-parties.

The Ontario rules also provide for oral examinations for discovery, known as depositions in the United States. A party adverse in interest to another party must submit to an oral examination prior to trial upon request. When a party is a corporation, the examining party may examine any officer, director, or employee on behalf of the corporation, but, in any event, only one individual on behalf of the corporation. The individual being examined on behalf of the corporation is obliged to inform himself or herself of all of the relevant evidence in the corporation's possession prior to the examination by reviewing the documents, talking to others in the company, and so on. An examining party may seek leave of the court to examine additional

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witnesses, but such leave is rarely given. Answers given by a corporate witness at an examination for discovery are binding on the corporation.

Where a witness being examined does not know the answer to a particular question or advises that there may be other relevant documents, the practice is to provide an undertaking to make inquiries and to provide the answer or to produce the document at a subsequent date. Provision exists for a party to refuse to answer a question or produce additional documents on the basis that the request is irrelevant or improper (being designed to elicit privileged information, for example). Following the conclusion of the examination, the examining party may bring a motion to seek a court order that the question was proper and must be answered. The rules impose a requirement of proportionality in discovery and direct the court to consider a number of factors in that regard when deciding whether a particular document should be produced or a particular question should be answered. Typically, answers to undertakings and questions ordered to be answered are given in writing, and the witness may be called again to be asked questions that arise from those written answers or from any additional documents that may have been produced.

Answers given on an examination for discovery may be corrected by a party after the examination and before trial, provided the correction does not amount to the withdrawal of an admission.

The Ontario rules provide for written interrogatories, but one cannot request them and also conduct an examination for discovery. When the rules were enacted, this provision was included to avoid the U.S. practice of two waves of discovery. Accordingly, written interrogatories are rarely made in Ontario.

Expert witnesses are not examined for discovery in Ontario. However, an examining party may obtain disclosure of an expert's findings and opinion unless the party being examined undertakes not to call that expert as a witness at trial. Expert reports must be delivered no later than 90 days prior to the pretrial conference, and any responding expert report must be delivered no later than 60 days prior to the pretrial.

Importantly, the Ontario rules state that information disclosed in the course of discovery may not be used by the party receiving the information for any purpose other than the prosecution of the proceeding in which the evidence was obtained. This rule is known as the implied undertaking, and it obviates the need for protective orders. A breach of the implied undertaking rule may amount to contempt of court, resulting in fines or imprisonment.

Juries

While juries are seemingly the norm in U.S. civil cases, in Ontario they are rare. The only areas where civil juries are still seen with any frequency are defamation and personal injury cases.

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Moreover, the [Ontario Courts of Justice Act](#) specifically prohibits juries in cases involving an injunction, the sale of real property, mortgage foreclosures, liens, trusts, rectification of an agreement, specific performance of a contract, declaratory relief, and any claim made against a municipality or the Ontario provincial government. In any trial, the trial judge can order that the case proceed without a jury. This is generally the case where the judge feels that the case involves matters of fact too complex for a jury to deal with, such as medical malpractice. There is no constitutional right to a jury trial in Canada.

Damages

As a general observation, damage awards in Canada are considerably more modest compared to those in the United States. For example, in a Canadian tort action, compensatory damages for loss of income, pain and suffering, and cost of future care would commonly form an award of damages but rarely move into the hundreds of thousands or millions of dollars except in cases of catastrophic injury or other exceptional circumstances. An individual's expenses for cost of care are considerably less in Canada than in the U.S. because of Canada's socialized healthcare system, which absorbs a lot of those costs. However, plaintiffs in tort actions are obliged to pursue recovery on behalf of and to reimburse the provincial health insurer for the cost of the plaintiff's care.

To succeed in a claim for punitive damages in Canada, the plaintiff needs to show that the defendant acted with "high-handed, malicious, arbitrary or highly reprehensible misconduct," according to the Supreme Court of Canada in [Whiten v. Pilot Insurance Co.](#) [PDF], File 27229, 2002 S.C.C. 018 (Feb. 22, 2002). Punitive damages are seen as exceptional, and even a modest award of punitive damages is viewed judicially to carry sufficient stigma to reach its objective of deterrence.

Where punitive damages are awarded, there are no established rules to guide Canadian courts in quantifying them. However, courts have indicated that the amount of an award should be in relation to the gravity of the defendant's misconduct. In contrast to U.S. courts, the trend in Canada has been to award modest punitive damage claims. The largest awards, in the rare cases that award punitive damages at all, rarely exceed C\$1 million.

Costs

In most U.S. jurisdictions, litigants are expected to pay their own way, and losing parties are not generally required to pay more than a nominal amount of the winning party's legal costs. In Ontario, the general rule is that the loser pays the winner's costs. In the United States, this is often referred to as the "English rule" on costs. This does not mean that the winning party will receive a complete indemnification from the losing party. In a normal case, the court will order the losing party to reimburse the winning party for between 30 percent and 60 percent of the winning party's attorney fees plus a substantial portion of the winning party's disbursements (for expert reports, court filing fees, photocopying, and so on)—this is called "costs on a partial



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indemnity basis.” In certain instances, the court will award costs on a substantial indemnity basis, which requires the losing party to pay a large majority of the winning party’s legal costs. Substantial indemnity costs can be awarded in situations where the losing party’s position is considered to have been frivolous or vexatious or the losing party has instructed its lawyer to engage in behaviour that the court is not prepared to condone, such as using sharp tactics or acting abusively. In extreme cases, the losing party’s lawyer is required to pay costs personally.

There is also provision in the Ontario rules to shift the burden of costs depending on pretrial settlement offers and trial outcomes; the same applies to interlocutory motions. If, for instance, a plaintiff wins at trial but achieves a result that is not as good as the offer the defendant made prior to trial, the court can order the winning plaintiff to pay the losing defendant’s legal costs incurred after the date of the offer on a partial indemnity basis. Similarly, if the winning plaintiff achieves a result in excess of its final settlement offer, the losing defendant may be ordered to pay the plaintiff’s legal costs incurred after the date of the offer on a substantial indemnity basis. In all instances, the decision to award costs is a matter of discretion for the judge.

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