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LITIGATING IN CANADA

McMILLAN BINCH LLP

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THE CIVIL JUSTICE SYSTEM

In Canada, the federal and provincial governments share the power to make law. The administration of justice in the civil courts, as well as most aspects of private law, lies within the exclusive jurisdiction of the provincial governments. The structure of the provincial court system is fairly consistent throughout the country; most provinces have a superior court of original jurisdiction and an appellate court of unlimited jurisdiction. However, each of the ten provinces has enacted a distinct set of procedural rules governing practice within the provincial courts. Cases may be appealed from the provincial appellate courts to the Supreme Court of Canada, the nation's general and highest court of appeal. Canada also has a separate federal court system with its own trial and appellate divisions. Jurisdiction of the Federal Court of Canada is restricted to matters arising under specific federal laws and actions against the government.

INITIATING AN ACTION

The Pleadings

The plaintiff commences action by filing a document called the *originating process*. The originating process may take the form of a Writ of Summons, Notice of Action, or Statement of Claim.

The Statement of Claim describes the nature of the plaintiff's claim and the relief sought. The defendant responds by filing the Statement of Defence, which provides the defendant's version of the facts. The Statement of Defence may also include a counterclaim, raising an independent or related claim of the defendant against the plaintiff. Should the Statement of Defence raise new matters, not already addressed in the Statement of Claim, the plaintiff may file a Reply in response.

Where the plaintiff has sued multiple defendants, one defendant may make a claim against one or more co-defendants through a Crossclaim. A defendant also has the option of adding new parties to the action by filing a Third Party Claim. The third party may then defend the third party claim, the plaintiff's original claim against the defendant, or both.

Scope and Style of Pleadings

Canadian pleadings are confined to a concise statement of the material facts of the case. Parties must refrain from arguing their case, and should plead neither conclusions of law nor the evidence that proves the material facts. It is unlikely that a pleading riddled with argument and hyperbole will be well received by the typical Canadian judge.



A pleading must provide the opposing party with sufficient detail to allow for a full response. If a pleading fails to adequately define the material facts or issues in controversy, the opposing party may demand *particulars*. The party who receives a demand for particulars must then supply further information regarding the underlying facts of the claim or defence. However, the court will not make an order for particulars unless the requesting party can establish that further information, not already within that party's knowledge, is necessary to enable a response.

DISCOVERY OF DOCUMENTS

Scope and Timing

Each party to an action must disclose to every other party all relevant documents that are or had been in the party's possession, power or control. Although a party may object to producing a document as privileged, the existence of that document must still be disclosed. In most jurisdictions, the obligation to disclose documents is automatically triggered by the close of pleadings, and requires no demand by the opposing party.

To meet this obligation, a party generally submits an itemized list describing the nature of each relevant document. In some jurisdictions, the disclosing party's sworn affidavit must accompany the submission. Unless a valid claim of privilege is made, all documents disclosed must later be produced for inspection and copying on request of another party.

To ensure full disclosure of all relevant documents, the rules impose a continuing obligation to disclose. Consequently, parties must reveal in a supplementary list any relevant documents acquired after the initial list has been delivered.

The automatic disclosure rule applies only to parties to the action, and does not extend to strangers to the suit. However, this does not mean that disclosure from non-parties is precluded. The party seeking such disclosure must obtain leave of court, which is granted only in exceptional circumstances. Notably, the courts show greater willingness to grant such leave where a subsidiary or affiliate of a party possesses the desired documents.

The Claim of Privilege

Canadian courts recognize three categories of privilege. First, the legal profession privilege protects communications between lawyer and client made for the purpose of giving or receiving legal advice. Next, the litigation privilege shields any document created for the dominant purpose of assisting the party in preparation for litigation. Finally, all communications made by a party in an effort to settle the case are protected by the settlement privilege. An otherwise privileged communication may lose its protected status if revealed to a third party having no common interest in the litigation.



Challenges and Sanctions

One party may challenge another party's deficient production or improper claim of privilege by filing a motion. The judge hearing the motion might then order further production. In some cases, the court will allow the moving party to orally cross-examine the party who failed to produce sufficient material. Furthermore, the failure to disclose and produce documents can lead to various sanctions. For example, the court may strike out the offending party's pleadings, enter judgment or prohibit that party from using a favourable document at trial.

Protective Orders

In most jurisdictions, material produced or disclosed during discovery is protected by the *implied undertaking rule*. This principle prohibits parties from using such information for any purpose beyond the conduct of that action. A breach of this principle is viewed as contempt of court. Consequently, Canadian courts are somewhat reluctant to make protective or confidentiality orders over documents. In exceptional circumstances, the court may be persuaded to provide this additional protection, particularly where the documents contain trade secrets or highly proprietary and confidential information.

EXAMINATION OF DISCOVERY

Who You May Examine

A party has the right to examine every party with an adverse interest in the case. Where one or more parties is a corporation, the opposing party generally may examine only one representative of the corporation. Although the examining party usually is free to select the representative, that choice is frequently left to the corporation. In such cases, the corporation should carefully select an individual with knowledge of the matters in issue.

Individuals not party to the action may be examined only if leave of the court is first obtained. Such leave is available only in extraordinary circumstances. Similarly, expert witnesses may not be examined before trial. However, most jurisdictions do require experts to deliver a report detailing the substance of the expert's proposed testimony several days before trial.

Procedure

A party's right to examine for discovery arises only after disclosure and production of documents. In most jurisdictions, the party may choose to examine the adverse party either orally or through written interrogatories. In such jurisdictions, a party may not subject the adversary to both methods of discovery. The vast majority of examinations are conducted orally and written interrogatories are rare.



Similar to the US deposition, the oral examination typically is conducted in the presence of a reporter, who records and transcribes the proceeding. A transcript of the questions and answers is then made available to the parties. During the examination, parties may object to questions that are irrelevant, are not in the proper form, or seek privileged information.

Whether the examination is oral or through written interrogatories, the parties remain under a continuing obligation to correct inaccuracies and supplement incomplete responses. This supplementary information must be provided to the other side prior to trial.

The Scope of Examination for Discovery

Canadian jurisdictions allow a broad scope of questioning on examination for discovery. Lawyers may inquire into not only the witness's actual knowledge, but also his or her information or belief. As noted above, only one representative of a corporate party is examined. Accordingly, that representative is required to become well informed about both the corporation and the matters in issue prior to the examination. Depending on the individual's position, the representative often must prepare himself by talking to many others in the corporation who possess relevant information.

Some jurisdictions also require parties to disclose to opposing counsel the names and addresses of all witnesses, the existence and contents of any relevant insurance policies, and the findings, opinions and conclusions of experts. However, expert evidence need not be disclosed if obtained in contemplation of litigation and the expert will not testify at trial.

Undertakings

Despite much preparation and diligence, the witness examined on behalf of a corporate party may not possess sufficient information to adequately respond to every question. This problem is addressed by the practice of *giving undertakings*. The party unable to respond undertakes, or promises, to obtain and deliver the necessary information in writing. At times, the submitted written responses may in turn necessitate further oral examination.

Use of Examination Evidence

At trial, an opponent's responses on discovery may be read into the record as admissions or used to contradict or impeach that party's testimony. In limited circumstances, this evidence may even be used at trial to prove the case for an examined party who has since died, is unable to testify due to illness, or cannot be compelled to attend the trial. As with information obtained through discovery of documents, the implied undertaking rule prohibits any use of evidence obtained through examination for discovery except in connection with the litigation.



LEGAL REMEDIES WITHOUT TRIAL

Injunctions and Preservation Orders

Motions can be made to obtain an injunction, a mandatory order, or an order for preservation, inspection, or appointment of an interim receiver. In certain circumstances, such motions are made without notice to the other side.

A motion to appoint an interim receiver is filed when there is a risk that assets in controversy may not be safe. On the other hand, *Mareva* injunctions are available to prevent defendants from removing assets from the jurisdiction to thwart enforcement of a judgment. The *Anton Piller* order, similar to a civil search warrant, ensures that important documentary evidence and information will be preserved where there is a real risk of destruction or removal from the jurisdiction before trial. A plaintiff may also obtain an order requiring the defendant to return property to the plaintiff prior to trial. Finally, an order for a certificate of pending litigation, when registered against title to land, prevents a defendant from dealing with the land in any way that might defeat the plaintiff's claim.

A party who applies for an injunction or mandatory order, with or without notice, must provide the court with an undertaking designed to protect the rights of the opposing party. The applicant undertakes to compensate the other party for any loss sustained because of the injunction or order in the event that the applicant does not ultimately prevail at full hearing or trial.

Final Disposition Without Trial

Several mechanisms permit the court to dispose of a matter before trial. The plaintiff may initiate default proceedings against a defendant who does not deliver a defence. A motion to strike a pleading can be filed when the opposing party's pleading fails to disclose a cause of action or defence. A party may also move for determination of a point of law before trial or for summary judgment. Summary judgment has become increasingly common as courts are eager to expeditiously dispose of matters that do not raise a serious issue for trial.

CIVIL TRIALS IN CANADA

Trial by Judge or by Jury

Although civil litigants in Canada may elect trial by jury, most Canadian civil matters are tried before a judge alone. Certain claims, such as those for injunctive, declaratory or equitable relief, are expressly precluded from trial by jury. Substantial case law also suggests that jury trials are not appropriate in any case involving complex questions of fact or law.



Trial Procedure

Canadian court proceedings are formal and restrained and are characterized by courteous and respectful dealings among counsel and between counsel and the bench.

Canadian trial procedure typically does not include motions *in limine*. Except in a few narrow circumstances, all competent witnesses can be compelled to testify. As noted above, few witnesses are subject to examination for discovery before the trial. Therefore, cross-examination must be well planned and conducted carefully.

Most courts apply the rules of evidence with considerable latitude. Even so, Canadian lawyers use demonstrative evidence far less frequently than their American counterparts. In both the opening and closing statement, counsel seek to logically and succinctly present the party's legal position and evidentiary support. Grandstanding and emotional appeals are neither effective nor welcomed by judges.

CIVIL DAMAGE AWARDS

Amount of Recovery

The plaintiff who successfully establishes a claim for breach of contract is entitled to be placed in the same economic position it would have achieved had the contract been completed. This measure of damages is of course subject to the plaintiff's duty to mitigate. By contrast, damages in a breach of trust case are measured by either the loss actually suffered by the trust or the profit reaped by the trustee as a result of the wrongdoing.

The measure of damages in tort is similar to that in contract. Tort damages for pure economic loss may be recovered, but the courts have not categorized the situations where such recovery is available. Punitive damages are also permitted, however Canadian courts are traditionally cautious and conservative in this respect. Most punitive damages awards fall below Cdn\$50,000.

In personal injury cases, a variety of damages are available, including recovery for pecuniary loss (such as pre-trial and future income and cost of future care) and non-pecuniary loss (such as pain and suffering). In 1978, the Supreme Court of Canada placed a ceiling on all awards for non-pecuniary loss. Adjusted for inflation, the cap on such awards currently stands at approximately Cdn\$260,000. Some jurisdictions also allow the injured party's family members to claim compensation for loss of companionship, care and guidance. Again, awards for these losses tend to be quite conservative.

Interest

Most provincial legislation permits an award of both pre- and post-judgment interest on money judgments. The interest rate is largely governed by the Canadian bank rate, although courts have discretion to vary the rate in appropriate circumstances.



COSTS

Basic Approach

In virtually every case, the Canadian court has the power to make an award regarding the parties' legal costs. The basic principle is that the losing party must pay the winning party's costs. When a case concludes, the court may either fix costs or refer them to an assessment officer. In interlocutory motions, costs are either fixed by the presiding judicial officer or left for the trial judge's later consideration. At times, costs of the motion are made contingent upon the winner on the motion also succeeding at trial.

Quantum of Award

The successful litigant most often receives an award of costs on a *party and party* scale, allowing recovery of forty to sixty percent of total legal expenses. In exceptional cases, costs are awarded on a *solicitor and client* scale, usually to sanction contemptuous or fraudulent conduct. This more onerous scale provides recovery of approximately eighty percent of actual costs. In extraordinary cases of grossly improper conduct by a lawyer, the court may order the offending lawyer to personally pay some or all of the costs.

Effect of Offers to Settle

Many jurisdictions have attempted to encourage settlement of cases through procedural rules regarding costs. Such jurisdictions attach serious cost consequences to a party's pre-trial rejection of an offer equal to or greater than the result ultimately achieved at trial.

Security for Costs

Each province, except British Columbia, has empowered its courts to order plaintiffs to provide security for defendants' legal costs at trial or on appeal. The amount of security is generally equal to the costs the court is likely to award should the defendant prevail in the action. Security is posted in cash, or by letter of credit or surety bond. In some cases, the plaintiff may provide security in installments that match the actual costs incurred by the defendant as the case progresses.

CIVIL APPEALS

Scope of Appeal

Canadian appellate courts are free to substitute their judgment for that of the lower court if the appeal involves issues of law or of mixed fact and law. Conversely, when the appeal concerns only factual issues, courts are reluctant to substitute their decision in the absence of palpable and overriding error. In addition to the above principles, the Supreme Court of Canada will hear an appeal only where the case raises issues of national concern.



Appeal As of Right or With Leave

Appeals of final orders are usually permitted to the provincial appellate courts without leave. By contrast, leave of the court is required to appeal an interlocutory order. In many cases, the issue of whether an order is final or interlocutory becomes quite contentious. Fundamentally, an order is final if it definitively determines some or all of the matters in controversy between the parties.

To obtain leave to appeal, the party must establish conflicting decisions within the jurisdiction or persuade the court that there is good reason to doubt the original decision and that the case raises important issues. A civil litigant must always obtain leave to appeal to the Supreme Court of Canada. As noted above, the case must be of national interest and not of purely local or individual significance.

Stays pending appeal are not automatic in Canada. Rather, the party seeking a stay applies to the court. In exercising its discretion to grant a stay, the appellate court considers the gravity of the issue, the likelihood of reversal by the appellate court, and the risk of irreparable harm to the appellant should the stay be denied.

Appellate Advocacy

Oral argument remains the primary means of presenting appeals to Canadian courts. Although formal written submissions containing the factual and legal basis of each party's position are required, the scope and length are severely restricted. Because oral argument before the Supreme Court is much more confined, the written submissions there tend to be longer.

JURISDICTION OVER NON-RESIDENTS

The Reach of Canadian Courts

In their rules of civil procedure, most provinces specify those claims in which parties outside the jurisdiction may be served. Extra-jurisdictional service is often permitted in cases concerning land within the jurisdiction, torts committed in the jurisdiction, and contracts entered in or subject to the laws of the jurisdiction. Such service is also appropriate in actions arising from a tort or breach of contract committed outside the jurisdiction, so long as the injury was sustained within the jurisdiction. A defendant who is normally resident in the jurisdiction, or is a necessary or proper party to the case, may also be served outside the jurisdiction.

Even if the rules permit service outside the jurisdiction, the court has authority to stay proceedings in Canada if satisfied that another jurisdiction is a more suitable or convenient forum. In determining which forum is most convenient, the court considers where the witnesses are located, the relative appropriateness of and remedies available in each forum, and any obstacles or advantages the parties would face in each forum.



Choice of Law

Most of the principles respecting choice of law in Canada are found in the common law. Substantive rights, such as limitation periods and heads of damages, are governed by the law of the jurisdiction where the cause of action arose. By contrast, the law of the forum determines procedural rights, such as limitations on the measure of damages.

In tort actions, courts apply the law in force where the tort occurred. In property actions, one must consider whether the property is movable or immovable. Immovable property rights are determined with reference to the law of the jurisdiction where the property is located. With limited exceptions, the law where the property is situated at the time of transfer controls movable property rights.

The starting point for choice of the applicable law in a contract case is the contract itself. As such, Canadian courts typically will honour a clause in the contract that specifies the governing law. However, the court will not allow the governing law clause to affect the rights of or obligations to non-contracting parties. If the contract is silent on choice of law, the law of the jurisdiction with the closest and most real connection to the contract governs. Although the courts consider a wide range of factors to identify the most connected jurisdiction, the courts give the greatest weight to the intended place of performance.

CLASS ACTIONS

Certification of the Class Action

Ontario, British Columbia, and Quebec are the only provinces in Canada with specific class action legislation. Under such legislation, a class action must meet five conditions to be certified. First, the pleadings must raise a cause of action. Second, the case must present an identifiable class. Third, the claims or defences in the case must raise common issues. Fourth, the party seeking certification must establish that a class proceeding is the preferable procedure for resolving those issues. Finally, there must exist a representative plaintiff or defendant who can represent the class interests fairly and adequately.

Whereas Ontario permits both plaintiffs and defendants to commence or defend class proceedings, both Quebec and British Columbia allow for only plaintiff class actions. Corporations may be members of a class in actions under Ontario and British Columbia law, but not under the law of Quebec. In all three provinces, a class may consist of as few as two people. British Columbia segregates residents from non-resident class members; residents must commence the action, and non-residents may opt into the case as a separate sub-class. Conversely, Ontario has no residency requirement, permitting commencement of a national class action with relative ease. Consequently, non-resident class members are automatically included in the Ontario action unless they opt out.



Notice and Discovery

Some class action legislation require the defendant to deliver notice of the action to the plaintiff class members, rather than placing this burden on the representative plaintiff. Absent leave of the court, all three provincial acts restrict discovery rights to the representative plaintiff. Evidence from individual claimants, if necessary, is collected through proof-of-claim forms, affidavits, or other such documentary evidence. Alternatively, sample claims may be audited.

Distribution of Awards

In a class action, it frequently is not practical to determine the identity of and damages owed to each class member. Accordingly, the court has authority to distribute an average or proportional amount to the members. The court also has flexibility in the manner of distribution. The court may require payment in “any manner that may reasonably be expected to benefit class members.” For example, the defendant may be ordered to pay the members directly or through the court. The court might also allow payment by abatement or credit.

Ontario courts return unclaimed and undistributed damages to the defendant. In British Columbia, these sums are either forfeited to the government, applied to the cost of the proceeding, or returned to the defendant. Finally, Quebec judges have complete discretion over the fate of such funds.

Costs

All three provinces permit contingency fee arrangements with court approval in class actions. Ontario courts are authorized to approve a multiplier that is then applied to a base legal fee calculated on an hourly rate. Rules concerning costs of the action differ from those applied to individual actions. In Ontario, the losing party must still pay the winner’s legal costs, however the courts have established a fund to assist unsuccessful plaintiffs in meeting this obligation. Quebec has established a similar fund. British Columbia has a completely different approach; plaintiffs do not pay the defendant’s costs when a class action is dismissed.

ALTERNATIVE DISPUTE RESOLUTION

Mandatory ADR

Several provincial governments across Canada have incorporated court-annexed Alternative Dispute Resolution (ADR) into their civil justice systems to encourage early settlement of cases. If settlement is not reached through ADR, the case continues through the usual litigation process. ADR is available through mediation, neutral evaluation, or mini trial. The cost of ADR is treated as part of the cost of the litigation. Some jurisdictions have instituted tariffs to limit the amount counsel may charge for mediation. Thus, ADR often leads to substantial cost savings for the parties if the case settles.



Private ADR

ADR has also become a popular alternative to filing suit. Parties to contracts entered in Canada increasingly include arbitration clauses in their agreements. These clauses allow the parties to resolve their disputes in a more private forum. Canadian courts will interfere with arbitration proceedings and awards only on well-settled grounds. For example, the court may intercede where the amount of the award exceeds the arbitrator's authority or where the proceedings are marred by misconduct.

A CAUTIONARY NOTE

The foregoing provides an overview of the Canadian civil court system. A group of McMillan Binch lawyers prepared the information, which is accurate at the time of writing. Readers are cautioned against making decisions based on this material alone. Rather, a qualified Canadian lawyer should be consulted.

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