Civil Litigation Procedures in Ontario, Canada[1]

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On the occasion of the 2012 Annual Conference of the INBLF (International Network of Boutique Law firms – www.INBLF.com) which takes place in Rancho Palos Verde, October 12-14, 2012, we submit the following summary of civil litigation procedures in Canada, with emphasis on the province of Ontario, where 35% of Canada's population resides. The law and procedure are similar in all the common provinces and territories of Canada but differs in Quebec which has the Quebec Civil Code.

This summary is not exhaustive of all situations and is not intended as legal advice. It contains information to assist the reader's understanding of the civil court system and judgment enforcement in Ontario, Canada. For additional information about business litigation and arbitration cases, shareholder disputes and appeals, please consult other articles posted on this website or on www.ellynlaw.com. For legal advice, please contact the author or another lawyer who knowledgeable in these matters.

1. What is necessary to determine jurisdiction?

a) *Domestic*

1 Jurisdiction of the Ontario Superior Court of Justice ("SCJ") is governed by the *Courts of Justice Act ("CJA")* and by the Rules of Civil Procedure. The SCJ has jurisdiction over all civil matters over $25,000.00 in law and equity, as well as inherent "*parens patriae*" jurisdiction.

2 In Toronto, there are several divisions of the court which have specific subject-matter jurisdiction: Commercial List (for complex commercial matters), Estates Court, Bankruptcy Division, and Family Law Division. There are also designated Masters who hear Construction Lien matters. SCJ also has sittings in seven other judicial districts around Ontario with resident judges in each.

3 Monetary claims under $25,000 are made to the Small Claims Court, which is presided over by provincially-appointed judges. There are Small Claims Courts in every judicial district. The Small Claims Court has no equitable remedy jurisdiction.

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[1] Canada is federal state. There is a federal government, 10 provincial governments (Newfoundland & Labrador, New Brunswick, Nova Scotia, Quebec, Ontario, Manitoba, Saskatchewan, Alberta, and British Columbia) and 3 territorial (Yukon, Northwest Territories and Nunavut) governments. Each province and territory is responsible for its own court procedure.

[2] See further information about the author at the end of the paper. The author gratefully acknowledges the assistance of Belinda Schubert, an associate at Ellyn Law LLP, in editing this paper. Belinda Schubert's profile is online at http://www.ellynlaw.com/biobschubert.html.

4 Appeals from SCJ are to the Divisional Court on some matters and to the Ontario Court of Appeal on others.

5 The Federal Court of Canada's ("FCC") jurisdiction is prescribed by the *Federal Courts Act*.[3] It hears claims against the federal government, and involving admiralty, intellectual property and certain immigration and refugee cases. The Court has offices and sittings in Ottawa, Toronto, Montreal and Vancouver. Procedural and case management issues are dealt with by prothonotaries. Appeals from the Federal Court are to the Federal Court of Appeal, which also has jurisdiction to hear appeals from federal administrative tribunals, such as the Immigration Appeal Board, the Copyright Board, and the Canada Human Rights Tribunal.

6 The court of last resort in Canada is the Supreme Court of Canada ("SCC") which sits only in Ottawa. Its jurisdiction is governed by the federal *Supreme Court Act* and by the Supreme Court Rules of Procedure. The SCC hears appeals only with leave of the Court, which is sought in writing and determined by a panel of three judges. Leave is granted only on legal and constitutional questions on matters of national importance where clarification of the law is desirable. In civil matters, less than 20% of appeals are granted leave.

7 The SCC also has jurisdiction to provide non-binding opinions to the federal government on matters of constitutional importance by responding to specific questions posed by the federal government. Such references were held in the last 15 years on the secession of Quebec,[4] same sex marriage[5] and the validity of a national securities regulator.[6]

8 In Ontario, numerous administrative tribunals have exclusive jurisdiction over some civil matters, including but not limited to the Workplace Safety Insurance Board, the Human Rights Tribunal of Ontario, the Ontario Labour Relations Board, the Licence Appeal Tribunal, the Health Professions Appeal and Review Board, the Criminal Injuries Compensation Tribunal and Ontario Landlord and Tenant Board (for residential tenancies only). The regulated professions (doctors, lawyers, accountants, engineers, etc.) have their own disciplinary tribunals. There are also federal administrative tribunals dealing with, *inter alia,* immigration, telecommunications, energy, and national transportation.

9 Canadian courts show a strong deference to the parties' selection of the forum to resolve the dispute. If the parties have selected binding arbitration to resolve the dispute, SCJ will refer the matter to arbitration within the scope of the arbitration clause unless the dispute is not arbitrable. The "kompetenz-kompetenz" principle applies: Arbitrators have jurisdiction to determine the scope of their jurisdiction but there is supervision by the Court under the *Arbitration Act*.

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3 Federal Courts Act, RSC 1985, c F-7, <http://canlii.ca/t/51w3g>

4 Reference re Secession of Quebec, 1998 CanLII 793 (SCC), http://canlii.ca/t/1fqr3. The SCC's opinion was codified by *The Clarity Act. 2000* http://canlii.ca/t/j0tj

5 Reference re Same-Sex Marriage, 2004 SCC 79 (CanLII), http://canlii.ca/t/1jdhv

6 Reference re Securities Act, 2011 SCC 66 (CanLII), http://canlii.ca/t/fpdwb

b) *International*

10 The presumptive test for assumption of jurisdiction over a foreign defendant turns on whether: i) the defendant is domiciled or resident in the province; ii) the defendant carries on business in the province; iii) the tort was committed in the province; or iv) a contract connected with the dispute was made in the province. This is not an exhaustive list. New connecting factors in the private international law of other legal systems with a shared commitment to order, fairness and comity may be taken into account in Canada.

11 These presumptions are rebuttable by evidence that Ontario should not assume jurisdiction. Jurisdiction over foreign defendants was recently clarified by the SCC in *Club Resorts Ltd. v. Van Breda.*[7] The parties' agreement as to choice of law and forum will be considered by the court. The Court considers *forum non conveniens* factors which favour trial in another jurisdiction.

12 The *UNCITRAL Model Arbitration Law*[8] and the *1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards*[9] are in effect in Canada. These provisions apply to an arbitration where one of the parties is not resident in Canada or where an arbitration award made in another co-operating jurisdiction is sought to be enforced in Ontario.

2. What is the procedure for starting a claim - are there any pre-action protocols to follow?

13 An action is commenced by filing a Statement of Claim in any of the offices of the SCJ. Where a claim must be filed quickly, the plaintiff may file a Notice of Action and submit the Statement of Claim within 30 days. The Notice of Action is a brief summary of the claim without details. It is used where a limitation period is about to expire. If a Statement of Claim is not submitted within 30 days, the Notice of Action expires. An action in the Federal Court must be filed in one of the Court's offices.

14 There are no pre-action protocols mandated by Canadian law or procedure unless there is a specific agreement between the parties requiring mediation before the commencement of an action. Such an agreement typically exists where the parties have also agreed to an arbitration clause.

15 In some cases, where specifically authorized by a statute or the Rules of Civil Procedure, a proceeding may be originated by Notice of Application and Affidavit. The Court has jurisdiction to convert the application into an action if a trial with viva voce evidence is required.

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7 2012 SCC 17 See http://scc.lexum.org/en/2012/2012scc17/2012scc17.html

8 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html

9 http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention_status.html

3. What are the rules on service in and out of the jurisdiction?

16 Canada is a signatory to the *1965 Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters*. ("The Hague Service Convention")[10] Service out of jurisdiction is permitted without a court order where the case has a connection with Ontario.[11]

17 Service of court and arbitration documents in Ontario is done directly by private process server without intervention of any diplomatic or consular authority.[12]

18 Service must be personal but there are alternative modes of service such as by leaving the claim with an adult person at the defendant's place of residence. Service on a corporation is made by serving an officer or director of the corporation or a person in charge at an office of the corporation. If personal or alternate service cannot be effected, an order must be obtained from the court for substituted service by mail or other appropriate means. There have been some cases which have permitted substituted service through Facebook or newspaper publication.

19 A Statement of Claim must be served within six months of the date of issue unless the time for service is extended by *ex parte* order. The time for service cannot be extended beyond six months if a limitation period has expired.[13]

4. What are the rules on governing law?

20 Canadian courts are deferential to contractual freedom of the parties in respect of choice of the law governing their relationship and choice of forum. The court will apply the law and forum chosen by the parties unless there is a mandatory legal requirement to the contrary.[14] These rules also apply to arbitrations.[15]

5. Can interim relief (e.g. injunctions) be obtained?

21 The court has jurisdiction to grant an interlocutory injunction, mandatory order and other interim measures. The plaintiff must show that unless the interlocutory injunction is granted irreparable loss will be suffered and the

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10 http://www.hcch.net/index_en.php?act=conventions.text&cid=17

11 Ontario Rules of Civil Procedure, RRO 1990, Reg 194, s 17.01 http://canlii.ca/t/51v7w#sec17.01

12 See http://travel.state.gov/law/judicial/judicial_682.html for guidance provided by U.S. Dept of State about service of documents in Canada.

13 Limitation periods in Ontario are principally governed by the Limitations Act, 2002, SO 2002, c 24, Sch B, http://canlii.ca/t/kxbf. The general limitation period is two years from the date when the loss was suffered or when the claim was discovered. The onus to prove discoverability is on the plaintiff. Limitation periods are beyond the scope of this paper.

14 GreCon Dimter inc. v. J. R. Normand inc., 2005 SCC 46, http://canlii.ca/t/1l6wn; Desputeaux v. Éditions Chouette (1987) inc., 2003 SCC 17 (CanLII), http://canlii.ca/t/1g2jh

15 However, decisions made in Canada are not always supported by courts in other jurisdictions. Accentuate Ltd v Asigra Inc. [2009] EWHC 2655 (QB) www.bailii.org/ew/cases/EWHC/QB/2009/2655.html and esp. para. 96: *"… nothing in this judgment should be taken as a criticism by me of the conduct or reasoning of the arbitral Tribunal. As Mr Ellyn QC submitted, it was the duty of the Tribunal to apply the law which, according to the MRA, was designated by the parties as the law applicable to the substance of the dispute: see UNCITRAL Art 33. The passages cited from the Award in para 73 above demonstrate that the Tribunal was fully conscious of the relevant considerations. They were clearly aware that the English court might approach the matter differently for reasons which do not reflect adversely upon the Tribunal.*"

balance of convenience favours the plaintiff. The plaintiff must also undertake to the court that if it is determined at trial that the injunction should not have been granted and the defendant suffers damages, the plaintiff will pay the damages.

22 Interim injunctions can also be granted without notice in rare cases such as Mareva injunctions and Anton Piller orders.[16] When the Court grants an interim injunction without notice, the order and Claim must be served the defendant immediately. A hearing on notice is scheduled promptly to determine whether the *ex parte* order should continue.

23 The Court also has jurisdiction to order a certificate of pending litigation ("CPL") without notice in an action where the ownership of land is in question. The CPL is registered on the title to the disputed land. After service of the Claim and the CPL order, the defendant can ask the court to remove the CPL if the circumstances did not warrant it or if the plaintiff failed to make complete disclosure of the facts.

6. What is the costs regime (e.g. fixed costs, loser pays)?

a) *Costs between parties to the action*

24 Costs are in the discretion of the Court and are typically awarded to the successful party. Costs are awarded on the partial indemnity scale which reimburses about 60% of reasonable legal fees and 100% of disbursements. The Court has jurisdiction to order costs on a higher scale where the conduct of the defendant warrants it, such as where fraud has been proven or where warranted by the misconduct of a party during the litigation. Costs are also awarded for motions during the action based on success.

25 To determine the quantum of costs, the successful party submits a Bill of Costs. The judge usually disposes of costs by written decision. After a trial, the costs may be assessed by an Assessment Officer on an oral hearing.

26 A factor which affects the scale of costs is a "Rule 49 Offer to Settle" which is not disclosed to the court until all issues of liability and damages have been decided. If a party makes a written offer at least seven days before the trial and the result of the trial is better than the offer, costs are typically awarded in favour of the party who made the offer from the date of the offer to the end of the case. For example, if the defendant offers to settle for $50,000 and the plaintiff refuses and recovers only $40,000 at trial, the defendant is entitled to receive his[17] costs from the date of offer to the end of the trial. A plaintiff who does better at trial than his offer receives costs at the higher scale from the date of the offer.

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16 A Mareva injunction is an order to prevent a defendant from removing assets from the jurisdiction pending the termination of the litigation. See Farah v. Sauvageau Holdings Inc., 2011 ONSC 1819, http://canlii.ca/t/fkp0k. An Anton Piller order is an order permitting a search of the defendant's premises and vehicles for evidence and documents pending trial, to avoid their destruction. See Bell ExpressVu Limited Partnership v. Corkery, 2009 ONCA 85 http://canlii.ca/t/2297w.

17 References to "his" in this paper are intended to refer to "her" or "its" where appropriate.

27 There is a costs penalty for suing in the wrong court. If a plaintiff sues in the Superior Court but recovers less than $25,000, i.e., a Small Claims Court amount, the plaintiff typically is not awarded any costs of the action.

b) *Security for Costs*

28 Security for the costs of the defendant may be ordered against i) a foreign plaintiff; ii) a plaintiff corporation without assets; iii) a party who has an unpaid order for costs outstanding in Ontario; and iv) a vexatious litigant who has a frivolous case. Fulfilment of the security for costs order is a condition of proceeding with the action. The order for security for costs is on a "pay as you go" basis. An estimate of costs up to a certain point will be directed and a further order may be made at a later stage on the defendant's request. Security for costs can be satisfied by irrevocable letter of credit rather than cash and if counsel agree, it can be held in escrow by the lawyers rather than paid into court. If costs are not payable by the plaintiff at the end of the case or if a settlement is reached, the security is returned to plaintiff by order of the court or agreement of counsel.

29 If the plaintiff's case is dismissed, costs are typically awarded in favour of the defendant using the same scale criteria. However, if the plaintiff has alleged fraud but has not proven it, the Court typically awards costs on the higher scale.

7. Are risk sharing and litigation funding arrangements allowed?

30 Yes, lawyers can agree to take cases on a contingency basis. This is typical in personal injury cases but also occurs in other kinds of litigation. It is not permitted in matrimonial cases. The typical percentage is 25 to 33% of the fees. Sometimes, fee arrangements are more creative and involve reduced hourly rates, success bonuses or capping.

31 Lawyers for class action plaintiffs also enter into risk sharing and litigation funding arrangements but these must be approved by the court before the class action is settled. Professional litigation funders also exist for the funding of class actions. In some public interest and class action litigation, the Law Foundation of Ontario, a charitable arm of the Law Society of Upper Canada (Ontario) provides financial assistance for the litigation.

8. How long does the average case take to get to trial and at what cost?

32 In Toronto, a civil case takes about two years to reach trial. To reduce the time, the Court makes case management scheduling available but schedules can be amended if the circumstances require. The timing also depends on the number of motions, the volume of documents, the number of parties and whether some parties are out of the jurisdiction.

33 Not all cases are disposed of by trial. Where either party believes that there are no genuine issues requiring a trial with *viva voce* evidence, a motion for summary judgment may be made. If the case is disposed of by summary judgment, the time for disposition could be reduced to about 12 months.

34 The cost of taking an action to trial has too many variables to make a useful estimate. It depends on the complexity, the number of parties, the number of documents, the number of motions and other intervening factors.

9. Is mediation/ADR mandatory?

35 Pursuant Rule 24.1 of the Ontario Rules of Civil Procedure, mediation is mandatory in the Toronto, Ottawa and Windsor regions. It must be conducted before the pre-trial conference. The parties are responsible for selecting a mediator. There are so-called "roster mediators" who are available at relatively low cost but in more serious cases, counsel will select a senior mediator who will charge $500 to $800 per hour.

36 After the action is set down for trial, the Court schedules a pre-trial conference attended by both counsel and parties. Sometimes the pre-trial conference is just an opportunity to inform the court that the case is ready for trial. Some judges have sophisticated mediation training. In some cases, senior judges will spend time to assist the parties in reaching a settlement but the practice is not uniform.[18] If there is no settlement, the case will be tried by another judge.

10. What are the procedures for enforcing (a) overseas judgments and (b) domestic judgments?

a) *Non-Canadian judgments*

37 Foreign judgments are enforced in Canada by commencing an action within two years of the date the judgment became final. The action to enforce must show that i) the foreign claim was properly served on the defendant; ii) there was no fraud, bias or other unfairness in obtaining the judgment; iii) the Court which granted the judgment had a substantial connection with the subject-matter or with the defendant; and iv) that all rights of appeal have been exhausted.[19]

38 The defendant can raise only procedural objections to the judgment, if any exist. The merits of the case cannot be retried.

b) *Canadian Common Law Provinces and United Kingdom*

39 A more streamlined reciprocal enforcement system is prescribed by statute for judgments from other Canadian common law provinces and from the United Kingdom. Some Canadian provinces have reciprocal arrangements with neighbouring U.S. states.

40 When the Ontario Court makes an order enforcing the judgment, it becomes an order of the Court and can be enforced as if it were a domestic judgment

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18 One experienced Toronto judge is known for requiring parties and their counsel to continue with the pre-trial conference until they work out a settlement however long that may take (within reason). There are stories of parties still being at the court house at midnight. The settlement rate is very high.

19 Beals v. Saldanha, 2003 SCC 72. http://scc.lexum.org/en/2003/2003scc72/2003scc72.html. The foreign judgment enforcement procedure is explained in an article by I. Ellyn & E. Perez, Developments in the Enforcement of Foreign Judgments in Canada – 2009, http://goo.gl/zDZ96. See also, Enforcement of Money Judgments, http://goo.gl/mFOHi.

c) *Domestic judgments*

41 Once the judgment is ordered by the Court, the plaintiff submits a writ of execution to the Sheriff of the judicial districts where the defendant is believed to have assets. Ontario has 43 judicial districts but there is no central registry for writs of execution. Creditors may submit writs of execution wherever they believe the debtor has assets. The effect of the writ of execution is that it creates a charge against the debtor's land with other writs of execution filed with the Sheriff in that judicial district.

42 All enforcement steps are initiated by the judgment creditor's lawyer. The Sheriff does nothing unless instructed. The creditor has the right to summons the debtor to appear before a stenographer to answer questions about his financial circumstances or if a corporation is the debtor, an officer of the corporation may be summonsed. Debtors are required to respond and to provide documents but there is a lot of "foot-dragging". A debtor's failure to co-operate in providing information or documents can eventually be punished by contempt of court but the process is cumbersome and must be proved beyond a reasonable doubt. It is therefore not frequently implemented except where the amount of the judgment is large and the debtor is particularly evasive.

43 Once the creditor has information about the debtor's assets, numerous procedures are available to enforce payment, including but not limited to:

i) Instructing the Sheriff to seize the debtor's bank accounts;

ii) Instructing the Sheriff to sell the equity of the debtor's lands by public auction (but this can be initiated only six months after the writ of execution has been filed);

iii) Garnishment proceedings to seize a portion of the debtor's wages;

iv) Garnishment proceedings to seize any other accounts receivable of the debtor;

v) Instructing the Sheriff to seize goods belonging to the debtor;

vi) Applying to the Court to appoint an equitable receiver to assist in liquidating the debtor's assets. This is used, for example, in a case where the debtor owns shares in a private corporation. A receiver may be necessary to liquidate the shares or to vote the shares so that dividends are paid to satisfy the judgment debt.

vii) An action for oppression under the *Business Corporations Act* against the shareholder of a debtor corporation who has operated the business of the corporation in a manner which prevents the payment of the judgment. A creditor has standing in these circumstances. There is also a remedy against debtors who shield their assets by incurring debts in one corporation but receiving assets in another.[20]

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[20] See Downtown Eatery (1993) Ltd. v. Ontario, 2001 CanLII 8538 (ON CA), http://canlii.ca/t/1fbtm

viii) An action under the *Fraudulent Conveyances Act* where the debtor has transferred an interest in land or other identifiable property to another party for nominal consideration with the intention of defeating or hindering the claims of his creditors.

ix) An action under the *Assignments and Preferences Act* where the debtor has given an unfair advantage to one of his creditors by paying one debt in preference to others in circumstances where the debtor is unable to satisfy all of his creditors.

44 These enforcement procedures presume that there is no bankruptcy. This matter is complicated in Canada because the enforcement of a judgment is governed by provincial law but bankruptcy is a matter of federal jurisdiction. If the debtor makes an assignment in bankruptcy or is petitioned into bankruptcy by a creditor, all actions and judgment enforcement are stayed under the federal *Bankruptcy and Insolvency Act*. Thereafter, the right to enforce amounts due to creditors belongs exclusively to the Trustee of the bankrupt estate except in circumstances which are beyond the scope of this summary.

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