Blakes
CANADIAN LAWYERS

The Top 10 Differences When

LITIGATING IN CANADA VS. THE UNITED STATES

American clients are often interested in the broad features of the Canadian litigation process since those features may differ from litigation in the United States. While litigation procedures vary across the Canadian provinces and territories, it is possible to summarize some of the main aspects of litigating in Canada, a number of which will differ from the usual U.S. experience.

1. Forum Shopping

Most cases in Canada are heard in our provincial courts. Our federal courts have narrow jurisdiction and are limited to cases within the exclusive jurisdiction of the federal government under the Canadian Constitution, including those involving federal income tax, certain competition law claims, immigration, aeronautics and telecommunications. Additionally, as most civil litigation in Canada falls within provincial jurisdiction, there is no procedure for referring related actions commenced in different provinces to a single court, as may happen in the U.S. federal courts in a referral from the Judicial Panel on Multidistrict Litigation.

2. Appointed Judges

In Canada, no judges are elected, as is the practice in many U.S. states, though not in the U.S. federal courts. All judges are appointed by the government after review and approval by a panel of senior lawyers appointed by the bar but without review by Parliament. As a result, the political and related influences on judges are not usually a major consideration.

3. Jury Trials

Except for certain limited types of litigation, for example, libel or personal injury, it is extremely rare for there to be jury trials in Canadian civil matters.

4. Contingency Fees

While Canada allows contingency fees, the practice is not as widespread as in the U.S. and, generally speaking, the contingency payments are not as large.

5. Nature of Pleadings

Pleadings in Canada tend to be less oratorical than their U.S. counterparts. The Canadian equivalents of the Complaint and Answer, for example, are generally limited to a more neutral recitation of the facts and the legal arguments. At the appropriate time later in the proceeding, written submissions often include more oratorical components.

6. Limited Depositions/Broader Disclosure

The use of depositions, referred to as examinations for discovery, is much more limited in Canada than in the U.S. For example, if a party to litigation is a corporation, it is entitled to nominate the appropriate officer or director for discovery, who must be properly informed to answer, and it is highly unusual for the opposing party to be able to require that a second director or officer also be discovered. Non-parties to the case with relevant information can be examined as well, but only with leave of the court. However, Canadian documentary disclosure requirements are broader than U.S. requirements. Canadian civil litigation involves the self-initiated review of a client's records for any relevant material, followed by the mandatory production of any such materials to the adverse party relatively early in the proceeding, subject to withholding of certain documents on the basis of privilege. This differs significantly from the typically modest initial disclosure requirements in U.S. federal courts.

7. Mandatory Mediation

Most provinces require pre-trial mediation in some form, which the parties often elect to hold in front of a mediator or judge, who will not be the judge hearing the case at trial. This tends to encourage pre-trial settlement.

8. Punitive Damages

There is a very limited role for punitive damages in Canadian litigation. Even if the conduct of the losing party is egregious, large awards of punitive damages are extremely rare.

9. Security for Costs

Non-Canadian (foreign) parties to litigation may be required to post security for costs that could be awarded against them.

10. Loser Pays

Subject to certain conditions, the winning side in litigation is awarded costs, including attorney's fees, against the losing side. Generally speaking, the award will cover about one-third of the costs that the winning side actually incurs. Refusing to accept a reasonable pre-trial settlement offer, when followed by failure at trial, will typically increase the size of awarded costs in Canada, which is not a common practice in U.S. federal courts.

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