GETTING THE DEAL THROUGH

Dispute Resolution

in 38 jurisdictions worldwide

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This chapter provides a general discussion of dispute resolution in Canada. Most aspects of Canadian dispute resolution are governed by laws and rules at the provincial level, with federal laws and rules playing only a secondary role. Ontario serves as the basis for most of the information provided. Laws, rules and practice may vary, sometimes significantly, between the various jurisdictions. Advice should be taken from local counsel before engaging in any dispute resolution technique.

LITIGATION

1 Court system

What is the structure of the civil court system?

Responsibility for the administration of justice in the civil courts is divided between the federal and provincial jurisdictions. Primary responsibility lies with the provinces. Each province has a superior court with first instance jurisdiction over most civil claims. Each province also has an appellate court which hears appeals from the superior courts in the province. Appeals from the provincial appellate courts lie, with leave, to the federally constituted Supreme Court of Canada. There is no appeal from the Supreme Court of Canada.

There is also a federally constituted Federal Court. Unlike the provincial superior courts, it does not have plenary jurisdiction but only has limited statutory jurisdiction with respect to certain areas of federal constitutional competence such as admiralty, intellectual property and taxation. Some aspects of the Federal Court's jurisdiction are shared with the provincial superior courts. Appeals from the Federal Court lie to the Federal Court of Appeal and from there, with leave, to the Supreme Court of Canada.

2 Judges and juries

What is the role of the judge and, where applicable, the jury in civil proceedings?

Canadian civil proceedings operate on the adversarial model. The parties are expected to present all of the evidence and argument in support of their positions. While the judge controls the process in court and is entitled to pose questions to both witnesses and counsel, the judge is not entitled to take an investigative or inquisitorial role. The decision maker must rely on the facts presented by the parties in evidence. While permitted, civil juries are relatively rare in commercial cases. If there is a jury, it is the trier of fact, and performs this role by responding to specific questions posed by the judge. The judge is the trier of law and, when there is no jury, the trier of fact as well.

3 Limitation issues

What are the time limits for bringing civil claims?

There are time limits for bringing all civil claims. These limits are prescribed by provincial or federal statutes and vary according to the subject matter and/or target of the claim. Most limitation periods are between two and six years from the date the plaintiff discovered, or ought to have discovered, the cause of action. Some shorter periods apply in specific circumstances. In some jurisdictions, it is possible for the parties to agree to suspend or 'toll' the operation of the limitation period. Where proposed class actions are commenced, the limitation period for individual class members is usually tolled until the certification motion is dismissed or the class member opts out.

4 Pre-action behaviour

Are there any pre-action considerations the parties should take into account?

Parties are not usually required to complete any pre-action step before starting civil litigation. However, there are some exceptions for claims against specific kinds of defendants and for specific kinds of claims. For example, a form of pre-litigation notice may be required for cases against certain government or municipal bodies and a libel notice may be required prior to beginning a defamation action.

5 Starting proceedings

How are civil proceedings commenced?

Civil proceedings are commenced by way of originating process issued by the court. There are several kinds of originating process. Actions may be commenced by a Writ of Summons (eg in British Columbia) or a Statement of Claim (eg in Ontario). A Notice of Action may be substituted for a Statement of Claim as the originating document if there is not time to prepare a full Statement of Claim. Applications may be commenced by a Notice of Application. Other special forms of originating process are used in specific situations. Related proceedings may also be commenced by use of additional documents. For example, counterclaims adding new parties or third party claims are additional forms of originating process.

6 Timetable

What is the typical procedure and timetable for a civil claim?

The general steps to be followed in a civil claim are more or less the same across Canada (except in Quebec), but there are significant differences in how and when those steps are taken in different jurisdictions, as a matter of both formal rules and local

practice. A straightforward two-party action in Ontario might include the following steps and be conducted on approximately the following schedule (which reflects a 'real-life' approach to scheduling and is slower than what would result from a strict application of the rules):

- plaintiff prepares a Statement of Claim, which the court issues and the plaintiff serves;
- defendant serves and files Statement of Defence, 30–60 days later;
- plaintiff serves and files Reply (optional), 14 days later;
- both parties serve Affidavits of Documents, which list all documents in their power, possession or control, relating to any matter at issue and (usually) also deliver copies of all of the non-privileged documents listed in the affidavit, 2–6 months after close of pleadings;
- each party conducts an oral examination for discovery of a representative of the other, 1–3 months after exchange of documents;
- each party delivers written responses to any undertakings provided by its representative on his or her examination for discovery, 1–3 months after discovery;
- either party sets case down for trial, whenever party is ready for trial;
- pre-trial conference, after case set down;
- trial, 2–12 months after pre-trial conference;
- court delivers judgment, most trial judgments are reserved rather than given immediately upon end of trial;
- unsuccessful party delivers Notice of Appeal, 30 days after judgment;
- motions may occur at any time.

7 Case management

Can the parties control the procedure and the timetable?

The parties' control of procedure and timetable varies widely by jurisdiction and by region within jurisdictions. Generally, the parties can largely dictate the procedure and timetable they will follow for civil claims. In some areas, case management has been imposed on some or all cases. In those situations, the case management judges or masters may curtail the parties' ability to fashion their own process. The Federal Court rules more strictly impose time limits. Parties are generally entitled to consensually extend any given time limit only once, and a court order is required for any further extensions.

8 Evidence

What is the extent of pre-trial exchange of evidence? Is there a duty to preserve documents and other evidence pending trial? How is evidence presented at trial?

The pre-trial exchange of evidence occurs by way of discovery. This involves two components. First, documentary discovery involves the exchange by the parties of all non-privileged documents within their power, possession or control that relate to any matter in issue in the litigation. The parties have an obligation to preserve all relevant documents once they become aware of the potential for a dispute. Second, oral discovery involves the examination under oath by each party of one or more representatives of the other parties who are opposite in interest. While exceptional, non-parties may also be examined by court order. Parties who are being examined for discovery often give undertakings to make further inquiries and to provide additional information or documents. These undertakings are usually answered in writing. The parties are under a positive obligation to update or augment their documentary disclosure and discovery answers if they later find additional relevant documents or determine that their original answers were inaccurate or incomplete.

Evidence at trial is normally presented through the examination and cross-examination of witnesses by counsel for the parties. Either party may also 'read in' part or all of the transcript of the examination for discovery of the opposite party. Expert evidence is normally preceded by an expert's report. In exceptional cases, the transcript (and videotape) of a witness's out-of-court examination may be admitted in lieu of live evidence. Documentary evidence must be adduced through witnesses. Witnesses may also be entitled to use demonstrative evidence and aids of various kinds.

9 Interim remedies

What interim remedies are available?

Many interim remedies are available, including interim and interlocutory injunctions, preservation orders, and *Anton Piller* orders (which operate as private search warrants). In some jurisdictions, it may be possible to obtain pre-judgment garnishment. *Mareva* injunctions, which prevent defendants from moving or disposing of their assets, may be available to support both domestic and foreign litigation.

10 Remedies

What substantive remedies are available?

A wide range of substantive remedies is available. The most common remedy is compensatory money damages, although aggravated or punitive damages are occasionally awarded on a relatively modest scale. Courts may also require a form of disgorgement to force the defendant to give up its improper gains. There is also a wide range of behavioural remedies, including permanent injunctions and specific performance. Finally, the courts may grant declaratory relief, for example as to the parties' rights or the invalidity of an unconstitutional law.

11 Enforcement

What means of enforcement are available?

The procedural rules in each jurisdiction provide for a number of techniques to enforce judgments. For example, the judgment creditor may examine a representative of the judgment debtor under oath to determine the nature and whereabouts of its assets, and may issue garnishment notices to the judgment debtor's debtors. The judgment creditor may also be entitled to the seizure and sale of the judgment debtor's property to satisfy the judgment. Contempt proceedings are available to enforce non-monetary judgments and to ensure that the judgment debtor complies with its obligations in respect of the judgment creditor's attempt to enforce the judgment.

12 Inter partes costs

Does the court have power to order costs?

The courts are entitled to order costs. The general rule is that costs follow the event, meaning that the successful party will recover its costs from the unsuccessful party. Costs are often awarded according to a tariff or scale. This usually results in the recovery of one-third to one-half of the successful party's actual legal costs. Courts may also award costs designed to achieve near or full indemnity. A court may refuse to award costs in favour of the suc-

cessful party and may even award costs against the successful party. Costs are also awarded to the successful party on interlocutory motions. In Ontario, they are usually fixed on the spot in an arbitrary amount and made payable forthwith. Some courts also employ rules designed to encourage the parties to seriously make and consider offers to settle and to penalise parties who refuse to accept reasonable offers.

The plaintiff may be required to post security for the defendant's costs. This occurs most often when there is a foreign plaintiff with no assets in the jurisdiction that could be available to satisfy a cost order.

13 Fee arrangements

Are 'no win no fee' agreements or other types of contingency fee arrangements available to parties?

Contingency fee agreements are permitted across Canada. These agreements provide that the lawyer's fee will be dependent on the outcome of the litigation and paid from the amount (if any) recovered. Most contingency fees are calculated as a fixed or sliding percentage of the proceeds of litigation, although some use the 'lodestar' or fee multiple approach. Contingency fee arrangements are usually subject to rules with respect to minimum disclosure by the lawyer to the client, and court approval may be required prior to payment of the fee.

14 Appeal

On what grounds and in what circumstances can the parties appeal? Is there a right of further appeal?

An appeal is usually available without leave from a final order of a court of first instance. Appeals from final orders of the superior courts usually lie to the appeal court in each province. Appellants may assert errors of law, errors of mixed fact and law, and errors of fact, although appeal courts rarely interfere with trial courts' findings of fact unless they find a material and unambiguous mistake. Parties may also appeal interlocutory orders. Leave may be necessary, and may require conflicting decisions or good reason to doubt the correctness of the impugned decision. Appeals from interlocutory decisions may be grounded on the same basis as appeals from final orders.

Appeals from the provincial and federal appellate courts lie to the Supreme Court of Canada. Leave is necessary in civil cases, and requires an issue of national importance.

15 Foreign judgments

What procedures exist for recognition and enforcement of foreign judgments?

Although Canada has some agreements for the recognition and enforcement of foreign judgments (such as with the United Kingdom) for the most part, foreign judgments are enforced in Canada by commencing a proceeding on the judgment itself. In recent years, Canadian courts have shown increasingly high levels of deference to foreign judgments. In principle, Canadian courts will enforce a final foreign monetary judgment where the foreign court had a 'real and substantial connection' with the defendant or the subject matter of the action. Courts have found a real and substantial connection with a foreign jurisdiction where the subject matter of the action was located in the foreign state, damages were suffered in the foreign state and where a Canadian product has entered into the stream of commerce in a foreign jurisdiction and such entry into the foreign jurisdiction was foreseeable. Traditionally, only foreign money judgments have been enforceable. Recently, however, courts have suggested that foreign injunctions and mandatory orders might be enforceable in Canada as well. Judgments based on foreign penal or revenue laws are generally speaking still not enforceable in Canada although this is one area where the law may be subject to challenge given the general trend towards increasing comity towards foreign courts.

Assuming a Canadian court recognises the foreign court's jurisdiction, recognition of the foreign judgment in Canada can only be resisted if the foreign judgment was obtained by fraud, is contrary to public policy or is contrary to Canadian concepts of natural justice. All three defences are interpreted restrictively. If, for example, the fraud could have been detected with reasonable due diligence by participating in the foreign proceeding, fraud will not offer a defence. A simple violation of Canadian public policy will not automatically afford a defence against a foreign judgment. Rather, courts will balance the importance of the public policy to Canada against the importance of judicial comity. Where the importance of judicial comity outweighs the public policy, a judgment will be enforced even though it is contrary to public policy. As a practical matter, this probably translates into the degree of moral outrage behind the public policy. A contract for slavery would implicate public policy of extremely high importance while breaches of security law disclosures, which are nevertheless important enough to amount to public policy, would tend to be trumped by the importance of judicial comity. While the defence of natural justice exists in theory, it is rarely applied in practice. Natural justice requires a fundamental denial of basic fairness. A mere procedural irregularity, different rules of evidence or different procedures do not amount to a denial of natural justice. To succeed on the natural justice defence, the defendant must establish a fundamental flaw in the foreign proceeding that detrimentally affected his right to be heard fairly.

16 Foreign proceedings

Are there any procedures for obtaining oral or documentary evidence for use in civil proceedings in other jurisdictions?

The most common procedure for obtaining oral or documentary evidence for use in civil proceedings in another jurisdiction is to apply for the enforcement of foreign letters rogatory. Foreign letters rogatory will generally be enforced if they provide for the same degree of factual investigation as provincial Rules of Civil Procedure do. Foreign letters rogatory that call for greater factual investigation may nevertheless be enforced but will be examined more closely. When dealing with broader foreign letters rogatory courts will examine the following factors more closely:

- Do the letters rogatory seek evidence which is relevant (enforcement likely) or do they seek evidence that might lead to relevant evidence (enforcement less certain)?
- Is the evidence necessary for trial?
- Is the evidence otherwise not obtainable?
- Is enforcement contrary to public policy?
- Does enforcement create an undue burden on the witness?

No single one of these factors is determinative. A court will weigh them against each other to determine whether the letters rogatory should be enforced. The weighing of the various factors and the determination of enforcement of the letters rogatory will be heavily influenced by a strong public policy in favour of judicial comity.

ARBITRATION

17 UNCITRAL Model Law

Is the arbitration law based on the UNCITRAL Model Law?

The UNCITRAL Model Law is the basis for both federal, provincial and territorial arbitration statutes in Canada.

18 Arbitration agreements

What are the formal requirements for an enforceable arbitration agreement?

Pursuant to Article 7 of the Model Law, international arbitration agreements must be in writing. There is, however, no particular formality required to the arbitration agreement. Most are found in a clause in an already existing contract.

With respect to domestic arbitrations, the situation is more varied. The federal statute and the Quebec Civil Code require written agreements to arbitrate. The statutes of several common law provinces permit oral agreements (Ontario, Alberta and British Columbia for example). The provincial arbitration statutes contain no content requirements for arbitral agreements.

19 Choice of arbitrator

If the arbitration agreement and any relevant rules are silent, how many arbitrators will be appointed and how will they be appointed? Are there restrictions on the right to challenge the appointment of an arbitrator?

If the arbitration agreement does not provide for the number of arbitrators, the default provision in the major common law jurisdictions is the appointment of a single arbitrator. In Quebec, the default provision appears to be to have each party appoint one arbitrator with the two arbitrators or the court appointing a third. If for some reasons the parties do not select their own arbitrators, the court is likely to appoint a panel of three arbitrators.

Apart from specific requirements for an arbitrator described in the arbitration agreement, a party can generally only challenge the appointment of an arbitrator on the basis of independence and impartiality. The Model Law imposes a continuing obligation on an arbitrator to disclose any circumstances likely to give rise to justifiable doubts as to his or her "impartiality or independence".

20 Procedure

Does the domestic law contain substantive requirements for the procedure to be followed?

Subject to the parties' contrary agreement, arbitrators in domestic arbitrations may determine the procedure to be followed in the arbitration.

The relatively few procedures specified for international arbitrations are also generally subject to any agreement by the parties to the contrary. However, parties must submit statements outlining the relevant facts, points at issue and relief sought together with relevant documents and the arbitrator must provide the parties with sufficient advance notice of any hearing or meeting.

21 Court intervention

On what grounds can the court intervene during an arbitration?

Judicial intervention in arbitrations in Canada is very limited. Most commonly, intervention takes three forms: deciding whether to stay an arbitration, challenge an arbitrator or challenge the arbitral award.

Canadian courts demonstrate a strong tendency to enforce arbitration agreements. Ambiguities in arbitral legislation or agreements are generally resolved in favour of arbitration.

An arbitrator may be removed for 'reasonable apprehension of bias'. This test is met where an objective observer could reasonably apprehend that the arbitrator is biased. A blatant example would include communicating with one party to the exclusion of the other. Less obvious examples extend to conduct that demonstrates that the arbitrator is closed-minded or is acting as an advocate on behalf of one party.

Challenging an arbitral award is even more difficult. As a general rule international arbitral awards rendered in Canada can be challenged only if they are patently unreasonable or involve a breach of fundamental justice. These are high thresholds to meet. As a general rule, courts will show great deference to arbitral tribunals.

22 Interim relief

Do arbitrators have powers to grant interim or conservatory relief?

In domestic arbitrations, an arbitrator generally may make interim orders for the detention, preservation or inspection of property or documents. Other interlocutory relief (eg injunctions) must be sought from the courts.

In international arbitrations, Article 17 of the Model Law permits an arbitrator to order a party to take whatever interim measures of protection are considered to be necessary in respect of the subject matter of the dispute.

The situation appears different in Quebec where interim relief is only available through motion to the court.

23 Award

When and in what form must the award be delivered?

Awards in both domestic and international arbitrations must be made in writing. Awards must be signed, dated and indicate the place where they were made. Unless the parties agree otherwise, awards must state the reasons upon which they are based. A copy of the award must be delivered to each party.

24 Appeal

On what grounds can an award be appealed to the court?

Appeals in domestic arbitrations depend on the provisions of the various provincial statutes. Some, like those of Ontario, permit appeals on questions of law with leave of the court unless the arbitration agreement provides otherwise. Leave shall be granted only if the court is satisfied that the importance to the parties of the matters at stake in the arbitration justify an appeal and the determination of the question of law at issue will significantly affect the rights of the parties. The appellate court may confirm, vary or set aside the award or may remit the award back to the tribunal in the case of an appeal on a question of law and give directions about the further conduct of the arbitration.

Awards in domestic arbitrations may also be set aside on the basis of a series of enumerated grounds dealing largely with issues of jurisdiction and procedural fairness. For example, an award may be set aside if the arbitration agreement is invalid, if the award deals with a dispute beyond the scope of the arbitration agreement, if the arbitrator was corrupt or fraudulent or if a party was not treated equally or fairly.

Awards arising from international arbitrations may not be appealed but may be set aside by the court on certain enumerated

grounds. Again, these grounds relate principally to issues of jurisdiction and process. They include, for example, the invalidity of the arbitration agreement, the arbitration of a dispute which was beyond the scope of the arbitration clause or if the arbitral procedure was not in accordance with the parties' agreement.

25 Enforcement

What procedures exist for enforcement of foreign and domestic awards?

The enforcement of foreign arbitral awards in Canada is governed by the New York Convention. The enforcement of a domestic award in a province other than in the province in which the award was issued is governed by specific reciprocal enforcement-of-judgments legislation in Canada's common law provinces. In Quebec, the New York Convention also applies to the enforcement of domestic arbitral awards from another province. Domestic awards, ie those made in Canada in respect of 'non-international' arbitrations, are enforceable by the domestic courts. The party entitled to enforcement may make an application to a Canadian court (either in the jurisdiction in which the award was made or in another Canadian jurisdiction) and the court will grant judgment enforcing the award. No such judgment will be granted when the time for appealing an award has not yet expired or an appeal has been launched or where the subject matter of an award is not capable of being the subject of arbitration under the law of the jurisdiction in which the enforcement application is made. If an award grants a remedy which the enforcing court does not have the jurisdiction to grant or would not grant in a proceeding based on similar circumstances, the court may instead grant a different remedy requested by the applicant. Once an enforcement judgment has been rendered, the enforcing party may have recourse to the same rights and remedies as any other judgment creditor.

Awards rendered in 'international' arbitrations, whether rendered in Canada or elsewhere, may also be enforced in Canadian jurisdictions by application to the domestic courts.

26 Costs

Can a successful party recover its costs?

As a general rule, costs will be awarded to the successful party in an arbitration.

ALTERNATIVE DISPUTE RESOLUTION

27 Obligatory ADR

Is there a requirement for the parties to litigation or arbitration to consider alternative dispute resolution before or during proceedings?

Although alternative dispute resolution is a growing and popular trend in Canada, its obligatory nature depends on the province and, in some cases, the city within the province in which the dispute arises. In domestic litigation, most cases will ultimately reach a pre-trial conference before a judge, one object of which is to try to determine whether the case can be settled. In some jurisdictions or venues within jurisdictions, some form of mediation before trial is also mandatory.

28 Specific features

Are there any specific features of the dispute resolution system not addressed in any of the previous questions?

No.

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