TIPS FOR AMERICAN LAWYERS LITIGATING IN CANADA

By C.E. Rhodes and Stephen Maddex

30-SECOND SUMMARY Prudent US companies and their counsel should understand the key aspects of the Canadian legal system that could impact their litigation strategies. The employment at-will doctrine, which is common in the United States, does not apply in Canada. Under Canadian law, when employees are terminated without cause, they are entitled to severance pay or a period of notice of termination. Another difference between the two countries' legal systems is in corporate law. In Canada, oppression remedies can be applied broadly. Additionally, the rules of discovery in the Canadian legal system are much more restrictive. For information to be discoverable in Canada, it must be relevant to material facts at issue in the dispute. The right to a jury trial for litigants in civil cases in Canada is also much more restricted.

Although often overlooked by the media, Canada is by far and away the United States' single largest trading partner. Bilateral trade between Canada and the United States is almost $600 billion per year. The United States' second- and third-largest trading partners are China and Mexico, respectively. However, the combined bilateral trade between the United States and China, and the United States and Mexico, is about the same as the United States' bilateral trade with Canada. Indeed, approximately $1.6 billion in trade crosses the Canada/US border every day.

With such a pervasive trading relationship, disputes between United States and Canadian companies are inevitable. Consequently, US companies may be forced to resolve their dispute in a Canadian court. Although the United States and Canadian legal systems share much in common, they are fundamentally different in many important respects. Therefore, prudent US companies, and their counsel, should understand the key aspects of the Canadian legal system that could impact their litigation strategies. The following discussion describes some of the most important distinctions of the Canadian legal system. ★

Common law applies

With the exception of the province of Quebec (which is a civil code jurisdiction), the common law applies throughout Canada. As such, the traditional common-law principles with respect to tort, contract and property law familiar to US lawyers will generally be the same in Canada. Because there is substantially less litigation in Canada (in part because there are substantially fewer people) and, therefore, fewer legal decisions made, the state of its common law might be closer to traditional common-law principles than in some US jurisdictions where parts of the common law may have evolved or been abrogated over time.

Substantive law in Canada will not always be the same as it is in the United States. For instance, the employment at-will doctrine, which is common in the United States, does not apply in Canada. Under Canadian law, when employees are terminated without cause, they are entitled to severance pay or a period of notice of termination. In addition, unions have a large presence in Canada, and therefore, many employees enjoy expansive rights under collective bargaining agreements.

Another difference between the two countries' legal systems is in corporate law. In many US jurisdictions, courts and legislatures provide a remedy for minority shareholders in closely held corporations when majority shareholders exercise their control improperly, or otherwise "oppress" the interests of the minority shareholders by denying them an expected benefit from the company. Where such claims are recognized, a minority shareholder could be entitled to a variety of equitable remedies to relieve the oppressive conduct.

However, in Canada, federal and provincial statutes provide for broader "oppression remedies" against Canadian corporations to address a potentially unlimited array of unfair conduct. Oppression claims can be asserted by practically any stakeholder for corporate actions that infringe on the stakeholder's legitimate expectations. Because the oppression remedy is so broadly applied in Canada, Americans doing business with Canadian companies may be able to assert a claim in a wide variety of circumstances not generally available in the United States.

Attorney's fees are recoverable in almost every action

In the United States, attorney's fees are generally only recoverable if permitted by statute or provided for under the parties' contract. Conversely, in Canada (except in Quebec), attorney's fees are awarded to the prevailing party in almost every action. The prevailing party at trial or on appeal can expect the opposing party to be ordered to pay anywhere from 50 to 90 percent of the prevailing party's actual legal costs. Canadian lawyers refer to these attorney fee awards as "cost" awards.

Attorney's fees, or costs, can also be awarded to the prevailing party on a motion. For instance, if a defendant brings a motion for summary judgment and the court denies the motion, the defendant can be ordered to pay a portion of the plaintiff's legal fees incurred in responding to the motion. Similarly, if a plaintiff brings a motion to compel discovery responses and the motion is granted, the defendant would be ordered to pay a portion of the plaintiff's legal fees incurred in bringing the motion. Because of the increased costs associated with motion practice for the losing party, there is generally significantly less motion practice in Canada.

Canadian courts have broad discretion in determining whether to award costs. Some courts may be reluctant to award attorney's fees against a sympathetic plaintiff, even if the plaintiff's claim lacked merit. Further, claims for misrepresentations or fraud that are not proved at trial can attract significant adverse cost awards. As a result, Canadian lawyers are often quite reluctant to assert a fraud claim unless there is very strong evidence to support it. In any event, these cost-shifting rules have a tremendous impact on litigation strategy in Canada, both with respect to whether suit should be filed and what claims should be asserted.

Because Canadian courts view the right of the prevailing party to recover costs as an important deterrent against plaintiffs bringing unmeritorious claims, foreign plaintiffs that do not have assets located within the jurisdiction to pay an adverse cost award can be compelled to post bond or "security for costs," in an amount sufficient to pay the defendant's costs in the event the plaintiff's claim fails. The amount of security to be posted is based on a reasonable estimate of the actual fees to be incurred by the defendant in responding to the claim. Depending on the complexity of the case, the amount of security to be

US Operations & Compliance Counsel **C.E. Rhodes** is responsible for the day-to-day legal issues that arise out of Baker Hughes Incorporated's US operations. He also serves on the company's US Region Leadership team, helping to formulate the strategic business goals for the organization. *ce.rhodes@bakerhughes.com*

Stephen Maddex is an associate and senior commercial litigator with Meritas member firm Brazeau Seller LLP in Ontario. With extensive litigation experience in the United States and Canada, Maddex is uniquely situated to advise his clients on their cross-border litigation needs. *smaddex@brazeauseller.com*

provided can be significant. It comes as no surprise that the threat of being required to post "security for costs" is often an impediment to foreign plaintiffs taking legal action against a local defendant.

Personal jurisdiction determined by the forum's connection to the claim

The law of personal jurisdiction in Canada is evolving and is not entirely settled. There are 10 provinces in Canada, each with a distinct judicial jurisdiction. Unlike in the United States, where suit can only be brought in a state where the defendant has established sufficient minimum contacts, lawsuits in Canada are proper in the jurisdiction that has the most "real and substantial connection" to the matter in dispute. How courts determine whether a "real and substantial connection" exists is not entirely clear.

Until fairly recently, in analyzing the connection between the jurisdiction and the claim, courts considered a variety of factors, including each party's connection to the forum — where the witnesses are located, where the dispute arose and where the substance of the dispute is located — and whether it would be unfair to compel a local plaintiff to sue in a foreign jurisdiction. Traditionally, Canadian courts have often taken a considerable interest in protecting the legal rights of their residents and, therefore, have leaned heavily toward affording injured plaintiffs generous access to courts in the plaintiff's home jurisdiction to recover their damages. As long as there is some connection between the jurisdiction and the claim, even if the defendant has no connection to the jurisdiction, Canadian courts have been more likely to assume jurisdiction over a foreign defendant.

For example, if the damages complained of occurred in the forum, then the court could decide that the tort as a whole occurred in the forum, regardless of whether the actual tortious conduct occurred elsewhere. For example, if an Ontario resident were injured in a car accident in New York with a New York driver and then returned to Ontario where she incurred pain and suffering and received medical treatment for her injuries, an Ontario court could conclude the tort occurred in Ontario, and thus be entitled to assert jurisdiction over the New York driver, who may not have any contacts with Ontario whatsoever. This approach has surprised many American defendants.

Given that, as mentioned above, the losing party on a motion to dismiss for lack of personal jurisdiction may be ordered to pay the prevailing party's costs on the motion, foreign defendants sued in Canada are faced with a very difficult decision: Bring a motion to dismiss the case for lack of personal jurisdiction and face the likelihood of being ordered to pay the plaintiff tens of thousands of dollars in an adverse cost award; or save their money and submit to the jurisdiction of the court.

However, a recent decision by the Supreme Court of Canada in *Clubb Resorts Ltd. v. Van Breda*, 2012 SCC 17, has fundamentally changed the "real and substantial connection" analysis. In its decision, the Court recognized that the framework applied by courts throughout the country lacked uniformity and predictability, and relied too heavily on subjective, rather than objective, factors. The Court determined that courts in Canada should only assert jurisdiction over a case when there is a clear link between the forum on the one hand, and the subject matter of the case and the defendant on the other.

In light of these principles, the Court held that, in a tort case at least, a real and substantial connection is presumed to exist when:

- the defendant is a resident of the jurisdiction;
- the defendant does business in the jurisdiction;
- the tort was committed in the jurisdiction; or
- a contract was created in the jurisdiction.

Traditionally, Canadian courts have often taken a considerable interest in protecting the legal rights of their residents and, therefore, have leaned heavily toward affording injured plaintiffs generous access to courts in the plaintiff's home jurisdiction to recover their damages.

Although these factors establish a presumption that the court has jurisdiction, a defendant could attempt to rebut and show that the court should not assume jurisdiction under the circumstances of the case. In addition, the Court left open the possibility that courts could take into account other factors as well in determining that assuming jurisdiction would be proper: Even if none of the factors were present, it is possible that a court in a future case could decide to assert jurisdiction over a foreign defendant with no connection to the forum whatsoever.

There is less pre-trial discovery

The rules of discovery in the Canadian legal system are much more restrictive than the rules of discovery in the US system. Unlike in the United States, where information is considered discoverable as long as it is reasonably calculated to lead to the discovery of admissible evidence, for information to be considered discoverable in Canada, it must be actually relevant to material facts at issue in the dispute. As a result, the volume of information exchanged between the

parties in a Canadian suit is significantly less than what normally would occur in the United States.

Further, Canadian litigants have an affirmative duty to determine on their own what documents in their possession or under their control are relevant to the matters at issue. Litigants must then disclose those documents and provide an affidavit that describes each one. Unless the other side brings a motion to compel the production of additional documents, as a practical matter, the parties' own determination of what should be disclosed often stands.

Generally, each side is only entitled to one deposition of the opposing party, which usually involves taking the deposition of a designated party representative. The party representative must make an affirmative effort to compile information at its disposal for purposes of disclosing it to the other side, if requested, and must be prepared to testify regarding all relevant facts, including any expert opinions the party intends to rely on. However, retained expert witnesses are not subject to deposition. Consequently, there is less expert witness discovery before trial in Canada. Requests for admission can be used as they are in the United States, but written interrogatories are generally not available.

In addition, obtaining documents and testimony from non-parties is much more restricted. To be entitled to depose or obtain documents from a non-party witness, litigants must obtain leave of court, show a compelling need for the information and show that the information is not otherwise available. Courts in Canada will not permit litigants to depose non-parties without meeting this very high standard. Accordingly, the scope of pre-trial discovery in Canada is considerably narrower than in the United States.

Canadians have traditionally viewed the discovery process as an invasion of a person's private affairs. Accordingly, the rules of discovery prohibit disclosing information gained through the discovery process to anyone other than the litigants and their lawyers. This rule, commonly referred to as the "implied undertaking" or the "deemed undertaking," would prohibit things like providing documents to other lawyers to use in a similar case against a common opponent or proving expert reports received in a case to other lawyers handling similar files.

Motion practice: Affidavits required

The procedural rules regarding motion practice in Canada are, in many respects, quite different from what most US lawyers would expect. Unless a motion is brought on a strict point of law, where no facts could be at issue, all motions in Canada must be supported by an affidavit. In some instances, the affidavit required would simply authenticate documents necessary to prove facts brought in support of the motion. However, in most instances, a motion would require an affidavit from a party or a fact witness to prove facts that are central to the motion. If the responding party wants to present evidence to controvert the evidence relied on by the moving party, the responding party will have to file an affidavit in response to the motion.

Canadians have traditionally viewed the discovery process as an invasion of a person's private affairs. Accordingly, the rules of discovery prohibit disclosing information gained through the discovery process to anyone other than the litigants and their lawyers.

ACC EXTRAS ON… Litigating in Canada

ACC Docket

Hands On: The Neutral Zone: A Practical Guide to International Arbitration (June 2006). *www.acc.com/docket/international-arb_jun06*

InfoPak℠

Arbitration Multi-jurisdictional Guide (Feb. 2013). *www.acc.com/infopak/arb-multi-juris_feb13*

Articles

A Snapshot of the Canadian Dispute Resolution System (Oct. 2011). *www.acc.com/canadian-dispute_oct11*

Records Retention: The Foundation of a Manageable Ediscovery Process (May 2011). *www.acc.com/records-retention_may11*

Top Tens

Top Ten Practice Points for Effectively Managing Multi-jurisdictional Litigation (Nov. 2012). *www.acc.com/topten/multi-juris-lit_may10*

Top Ten Tips for Litigation Management in Canada (May 2010). *www.acc.com/topten/lit-canada_may10*

ACC HAS MORE MATERIAL ON THIS SUBJECT ON OUR WEBSITE. VISIT *WWW.ACC.COM*, WHERE YOU CAN BROWSE OUR RESOURCES BY PRACTICE AREA OR SEARCH BY KEYWORD.

The right to a jury trial in civil cases in Canada is much more restricted than the constitutional rights of litigants in the United States. Although courts in Canada regard the right to a jury trial in civil cases as a "substantial" right, it is not absolute.

Once the affidavits have been filed with the court, the parties to the motion have the right to depose the witnesses who signed the opposing party's affidavits. The deposition, however, is limited to a cross-examination of the matters discussed in the individual's affidavit. The affidavits and the transcripts from the cross-examinations constitute what is referred to as the "motion record." In addition to the motion record, the parties will also file with the court a legal brief, which is referred to in Canada as a "factum." The judge who hears the motion will be restricted to considering only the evidence presented in the motion record and the arguments presented in the parties' factums.

Jury trials in civil cases are relatively rare

The right to a jury trial in civil cases in Canada is much more restricted than the constitutional rights of litigants in the United States. Although courts in Canada regard the right to a jury trial in civil cases as a "substantial" right, it is not absolute. For example, in Ontario, claims for injunctive relief, partition of real property, foreclosure of a mortgage, specific performance, declaratory judgment, and claims against municipalities are *prohibited* from being tried to a jury.

Moreover, even when the claims at issue are permitted to be tried to a jury, courts have broad discretion to strike the jury and proceed with a bench trial. The determination of whether to strike the jury is generally based on whether "justice will be better served" by proceeding with or without a jury. As long as the court's decision is not arbitrary or capricious, an appellate court will uphold the court's determination.

It is generally accepted that cases involving complex legal or factual disputes are not appropriate to be decided by a jury, but rather are more appropriate to be decided by a judge. For instance, a case that involves scientific or medical testimony, voluminous documents, multiple parties or a case that would require a lengthy trial may not be appropriate for a jury in many Canadian courts. As one judge put it, because judges have the opportunity to reflect upon the evidence at their leisure, cases that "cry out for unhurried and thoughtful consideration" normally will be tried without a jury in Canada. Given that all but the simplest of cases could be described as complex to at least some degree, the right to a jury trial in a civil case is far more elusive in Canada than is typically the case in the United States.

Close neighbors don't always mean the same rules and rights

Even though Canada and the United States are close neighbors, procedural rules and substantive rights of the two countries for litigants differ significantly. Accordingly, understanding some of the important features of the Canadian system can go a long way to developing a winning strategy for a US company that has to resolve a dispute in a Canadian court. **ACC**