Blaney McMurtry
BARRISTERS & SOLICITORS LLP

EXPECT THE BEST

# GUIDE TO LITIGATION IN ONTARIO (CANADA)

2 Queen Street East
Suite 1500
Toronto, Canada M5C 3G5
416.593.1221 TEL
416.593.5437 FAX
www.blaney.com

Michael J. Penman
416.593.3966
mpenman@blaney.com

This is prepared for clients and colleagues in other jurisdictions who are considering commencing or defending a piece of litigation in Ontario. Needless to say, this is simply an introduction to the topic and does not constitute legal advice.

## COURT SYSTEM

Each of Canada's 13 provinces and territories has its own Superior Court, in which major civil and criminal matters are adjudicated. In Ontario that court is known as the Ontario Superior Court of Justice. While this paper will describe the structure and process in Ontario, you will find both the structures and processes to be similar in the other 12 jurisdictions.

While most of the litigation in Canada is conducted in the Superior Courts of the Provinces and Territories, there is also a Federal Court (Trial Division) and Federal Court of Appeal. That system is a stand-alone companion system to the provincial Superior Courts. It deals with matters involving the Federal Government and various matters falling within the constitutional jurisdiction of the Federal government. The most obvious examples are litigation involving federal tax, intellectual property and immigration matters.

In Toronto, the Superior Court of Justice has a division known as the Commercial List. It is designed to handle litigation that must be dealt with in "real time", as opposed to the slower pace of most litigation. Typically it deals with bankruptcy and insolvency matters, shareholder disputes, take-over bids etc. It has proven very successful and is expanding to other major centres in the province.

## PRE-CLAIM CORRESPONDENCE

While it is not mandatory to do so, it is customary to write the proposed defendant advising of the nature of the claim and of the plaintiff's intention to proceed to litigation if required. Needless to say, that custom does not necessarily apply in emergency matters such as injunctions.

## LIMITATION PERIODS

Although there are specific limitation periods in various statutes, the general limitation period in Ontario is two years. Needless to say, that makes it imperative to determine when the cause of action arose and by when the action must be commenced. That limitation period is shorter than in most other jurisdictions and requires prompt action on behalf of both client and lawyer.

## NOTICES

In most cases, no formal notice is required to be given prior to commencing litigation. However, in certain actions, such as against governmental authorities and in defamation matters, the cause of action may be lost, or damages limited, by failure to provide a proper and timely notice. Again, if you have a client outside of Ontario who is contemplating litigation here, please seek advice at the earliest opportunity.

## STATEMENT OF CLAIM

Typically, a piece of litigation is instituted by issuing and serving a Statement of Claim. That document is similar to what is called a Complaint or Claim in other jurisdictions. In it, the plaintiff is to plead facts and theory, but not evidence.

## STATEMENT OF DEFENCE

A Statement of Defence is then served and filed by the defendant. It too should plead facts and theory, but not evidence. There are of course time limits by which a Statement of Defence has to be delivered. Extended deadlines are provided to defendants outside Ontario. In any event, it is customary for counsel to arrange reasonable extensions of all such deadlines. Statements of Defence are often combined with Counterclaims or claims against other parties.

## REPLY

The plaintiff may then serve and file what is known as a Reply. That document is intended to respond only to issues raised in the Statement of Defence and is not to be taken as an opportunity to repeat what is in the Statement of Claim.

## JURISDICTIONAL DISPUTES

A defendant from outside Ontario, and particularly from outside Canada, must be careful not to attorn, at least unintentionally, to the jurisdiction of the Ontario courts. If a defendant wishes to dispute that jurisdiction, or assert that Ontario is not the appropriate and convenient forum in which to resolve the dispute, mechanisms are available to make those arguments without jeopardy.

## SUMMARY JUDGMENT

After a Statement of Defence has been delivered, either side can, if it wishes, bring a Motion for Summary Judgment. A Summary Judgment application is to be based on, and defended by, affidavit material. A Motion for Summary Judgment should not be confused with a Motion to strike out a Statement of Claim and dismiss the action if, standing on its own, it discloses no reasonable cause of action.

## DOCUMENTARY DISCOVERY

All parties are required to produce any and all documents that may be relevant to the issues in the action. Importantly, a party is required to produce not only documents that are in its favour, but also those that damage its case. Those documents are to be exchanged prior to oral discovery. Both the client and the lawyer must execute and endorse an Affidavit of Documents, confirming that the lawyer has explained to the client its responsibilities and that the client has produced all required documents. The test of relevancy is stricter than it is in most U.S. States. Finally, production is subject to "proportionality", especially in "e-discovery" cases.

## ORAL DISCOVERY

In Ontario, oral discovery is done by what are called Examinations for Discovery. They resemble depositions in American litigation, but there are some important distinctions.

First, each party is required to produce only one witness on its behalf. To have more than one witness produced on behalf of a party, a court order must be obtained. If the witness is representing a corporation, he or she is expected to become informed of the evidence of the corporation, whether it lies within that witness' knowledge or that of other employees. Not only does that require the witness to make various inquiries, it also means that the witness will, of necessity, be giving hearsay information of which he has no first-hand knowledge but of which he has been informed by other people in the corporation.

Since no witness can ever anticipate all the information that will be required, it is common for "undertakings" to be given at the Examination for Discovery. Undertakings, given by the lawyer and not by the client, are exactly that: an undertaking to search for and if possible, provide the requested document or information.

Naturally, a transcript of the Examination is prepared. At trial the general rule is that only the party asking the questions may introduce the witness' answers onto the record. Therefore, even if a witness is brilliant at his examination for

discovery, his counsel cannot rely on that and must lead his evidence again at trial - and the usual hearsay rules apply.

## EXPERTS

There are specific rules as to the preparation and disclosure of experts' reports, but the fundamental requirement is that an expert cannot present an opinion unless his formal report has been given to the opposing parties well prior to trial.

## TRIALS

Trials proceed in much the same fashion as they would in many jurisdictions. However, jury trials are very much the exception in Ontario and the vast majority of cases are tried by a Judge alone. For those who care about such matters, both counsel and Judge wear gowns (the Judge's gown being far fancier) but neither wears a wig.

## COSTS

In what is a relatively successful attempt to discourage irresponsible litigation, the awarding of costs is an important feature of litigation in Ontario. At the conclusion of a case (or even if the matter settles before trial) the losing party can be ordered, and usually is ordered, to reimburse the successful parties for a portion of their legal expenses. In most cases that comes to 50 or 60% of the actual costs! Thus a losing litigant pays 100% of his own legal fees and at least half of the other side's legal fees. In some circumstances, the Court has the authority to award costs at a scale approaching full indemnity.

## APPEALS

As a general rule, a decision of the Ontario Superior Court of Justice is appealed to the Ontario Court of Appeal. While some cases require leave to pursue such an appeal, most do not. An appeal from the Ontario Court of Appeal goes to the Supreme Court of Canada. However, with very few exceptions, leave must be granted.

## CLASS ACTIONS

Class actions are a fairly recent addition to Ontario's litigation system. As a result the theory and practice are evolving. For example, it was only recently determined that an unsuccessful representative plaintiff could be personally liable to reimburse, in whole or in part, the costs of the defendants. Since a class action must be "certified" before it can proceed, many class actions come to an end at that point.

## ALTERNATIVE DISPUTE RESOLUTION

As in most jurisdictions, alternative dispute resolution has become a major force in Ontario. Such resolution, usually by way of mediation or arbitration, can occur both within and outside the formal court system. Until recently, every case in Ontario had to go to mediation at some point before going to trial. It was found that the burden was not worth the benefit and, while parties can always seek mediation or the Court can order it, it is no longer universal.

As noted above, this is merely an introductory guide to litigation in Ontario. It may help you understand and explain to your clients how litigation is carried out in Ontario. That will hopefully be of benefit to both you and your clients.