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# Setting up Shop in Canada? What U.S. Employers Need to Know About Litigating in Canada

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While Canada and the United States are alike in many respects, there are a few key differences in litigation law that U.S. organizations should be aware of if you are considering buying, selling or operating a business in Canada.

## Article Five: Five Key Differences in Litigation

1. **Damages**

As mentioned in an earlier article, there is no "at will" employment in Canada. As a result, damages in lieu of reasonable notice of termination can be significant unless an employment contract lawfully limits an employee's entitlement on termination of employment to payments under minimum standards legislation. Canadian courts have a developed body of case law on when such limitations will be lawful, and that is a topic unto itself! Notably, U.S. employers are often shocked at the amounts they have to pay an employee whose employment is terminated after a year or less.

Where an employer has acted egregiously in the *manner* of termination, Canadian courts have in some cases awarded significant punitive damages against that employer (even up to $500,000) and in some cases, have also awarded so-called "moral" or "bad faith" damages.

2. **Document Production and Discovery**

Parties to litigation in Canada are required by the applicable rules of civil procedure to pro-actively review documentation relevant to the proceedings and to produce those documents, without a request for production being made by the other side.

An employer will usually only be required to produce one representative to be examined for discovery (the equivalent of a deposition). Examination of more than one representative typically requires consent or leave of the court, and is not common. Where, for example, a corporate employer is named in the litigation, the plaintiff can request a corporate representative to be examined at discovery. Where necessary, that representative must inform him- or herself as to the requisite facts and answer questions to the best of his or her knowledge, information and belief. If a proper question is asked for information or production on discovery, the corporate representative (through counsel) can give an undertaking to make the appropriate inquiries and later provide the response in writing.

3. **Costs**

In the United States, parties to litigation usually pay for their own costs, although courts in some employment litigation such as civil rights or wage claims allow for the recovery of costs/fees for a successful plaintiff.

Canada generally has a "loser pays" system in which courts have broad discretion with respect to awarding costs. Costs can be awarded on a "partial indemnity" scale, meaning that only a portion of the costs expended will be recovered (typically in the range of approximately 60%), or, in cases where there has been egregious conduct by a party to the litigation, on a "substantial indemnity" basis which provides an amount closer to full indemnification. Courts may also review "bills of costs" submitted by the parties and make various amendments, taking into account the reasonableness of the costs incurred.

The amount of costs may be influenced by whether a party rejected a settlement offer prior to the proceeding. For example, where a plaintiff rejects a settlement offer from a defendant which was as good as or better than the ultimate amount awarded by a court, the plaintiff may have to pay a portion of the defendant's costs (even though the plaintiff was successful in the action). The costs rules are designed to encourage parties to make, and accept, reasonable pre-trial offers.

4. **Mandatory Mediation**

Some jurisdictions in Canada provide for mandatory mediation to encourage parties to reach a settlement with the assistance of a third party mediator prior to the court proceedings. The procedures differ but generally a mediator will be assigned early in the process. All parties to the litigation are required to participate and discuss the disputed issues, with a view to attempting an early resolution. The net effect in these cases is a savings of time and cost for all parties involved, including the justice system. Where no settlement is reached, the litigation proceeds through the judicial process.

It should be noted that given the particularly high settlement rate of employment cases, those cases are required to be mediated sooner than others in jurisdictions where mandatory mediation applies.

5. **Differences in Process**

**Judges:** Canadian judges are appointed by the federal government, not elected. In addition, case files are assigned to a particular courthouse (e.g. in a particular geographic region), not a judge. In a matter where there are many pre-trial motions and/or proceedings involved, it is possible (and in most jurisdictions likely) that a different judge will hear each different step in the proceeding.

**Civil Jury Trials**: Civil jury trials are very rare in Canada, and in some cases are prohibited outright. They are most commonly used in personal injury matters.

**Courts:** Unlike the United States, the federal courts have a much more limited role in Canada and deal with issues relating to the federally regulated sector in the country (immigration, taxation, aviation, telecommunications etc.). Most matters are dealt with and resolved in the provincial courts. Each province also has its own Court of Appeal. The highest court is the Supreme Court of Canada which will hear appeals from both the federal and provincial courts of appeal.

**Terminology:** There are certainly differences in terminology between the Canadian and U.S. litigation processes: e.g. lawyer v. attorney, discovery v. deposition (oral)/interrogatory (written), to name a few (Canadian terms are mentioned first). However, most terminology used is very similar.

**Use of Precedent**: Canadian courts will typically look to the case law in other common law jurisdictions for guidance where there is a dearth of Canadian case law on a particular issue. This can include, for example, looking to decisions from the U.K. or Australian courts. More recently, they have been looking to U.S. case law where novel or evolving issues are considered, such as e-discovery and class actions. Courts in the U.S., however, tend to consider precedents from other jurisdictions much more sparingly.

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