FTR Nexus

Setting up Shop in Canada? What U.S. Employers Need to Know About Canadian Litigation Law [Video]

Date: January 30, 2019

In this video, Frank Cesario discusses five of the key differentiating factors about Canadian litigation that U.S. organizations should be aware of including: damages, document production and discovery, costs, mandatory mediation and differences in court structure.

For more information on litigation law in Canada, please visit our dedicated FTR Nexus topic page and/or our Litigation practice group page where you can contact any of our seasoned litigators who have come to the firm with a wide array of experiences and expertise.

Transcript

Hi, I'm Frank Cesario, a litigation lawyer in Hicks Morley's Toronto office.

Today I'm going to talk about five of the key differences in Canadian litigation that U.S. organizations should be aware of when buying, selling or operating a business in Canada.

1. Damages

As mentioned in another segment, there is no "at will" employment in Canada. Employees are generally entitled to notice of termination, or pay in lieu of notice.

Those Damages in lieu of reasonable notice can be significant, unless an employment contract lawfully limits an employee's entitlement on termination to payments under minimum standards legislation (or some other contracted amount).

Also, where an employer has acted in bad faith (which means unfair, untruthful, misleading or unduly/insensitive conduct) in the manner of termination, Canadian courts have, in some cases, awarded significant punitive damages (even up to $500,000) and can also award so-called "moral" or "bad faith" damages.

2. Document Production and Discovery

The discovery process includes both document production and examinations for discovery.

Parties to litigation in Canada are required to pro-actively review and produce all documents that are relevant to any matter at issue in the proceeding, 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 after production, which is the equivalent of a deposition. Examination of more than one representative is not common and typically requires the parties' consent or leave of the court.The discovery representative has to take reasonable steps to prepare by informing him/herself and to answer questions to the best of his/her knowledge, information and belief.

If a proper question is asked for information or production not available on discovery, the discovery representative (through

their lawyer) can give an undertaking (or promise) to make the appropriate inquiries and later provide the response in writing.

3. Costs

Canada generally has a “loser pays” system in which courts have broad discretion to award costs to the successful party in litigation.

Costs can be awarded on a “partial indemnity” scale, meaning that only a portion of the costs will be recovered (typically approximately 60%), or, in exceptional cases where there has been egregious conduct by a party to the litigation, on a “substantial indemnity” basis which is closer to full indemnification.

The amount of costs may also be influenced by whether a party rejected a settlement offer prior to the hearing. 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 the court, the plaintiff may have to pay a portion of the defendant’s costs (even though the plaintiff was successful in the action).

These rules are designed to encourage parties to make, and accept, reasonable pre-trial offers.

4. Mandatory Mediation

Some Canadian jurisdictions provide for mandatory mediation to encourage parties to reach a settlement with the assistance of a third party mediator prior to trial.

The procedures differ but generally a mediator is chosen by the parties, or assigned, relatively early in the process and all parties are required to participate and discuss the disputed issues, with a view to at least attempting an early resolution.

Where no settlement is reached, the litigation proceeds through the court process.

Given the high settlement rate of employment cases, they can be required to be mediated earlier in the litigation process.

5. Differences in Court Structure

1. Canadian judges are appointed by the federal government, not elected.
2. Case files are assigned to a particular courthouse (e.g. in a geographic region), and generally not to a particular judge. This means that where there are many pre-trial motions and/or proceedings, it is possible (and in most cases likely) that a different judge will hear each different step in the proceeding.
3. Civil jury trials are very rare in Canada, and in some cases are prohibited outright. They are most commonly used in personal injury matters.
4. 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 (such as immigration, taxation, aviation, and telecommunications etc.).

Most matters are dealt with and decided in the provincial courts and each province also has its own Court of Appeal. The highest court in Canada is the Supreme Court of Canada, which hears appeals from both the federal and the provincial courts of appeal.

I hope this discussion has helped highlight some of the more “uniquely Canadian” aspects of litigation here north of the border. Please reach out if you have any questions or comments on this video and thanks for listening.