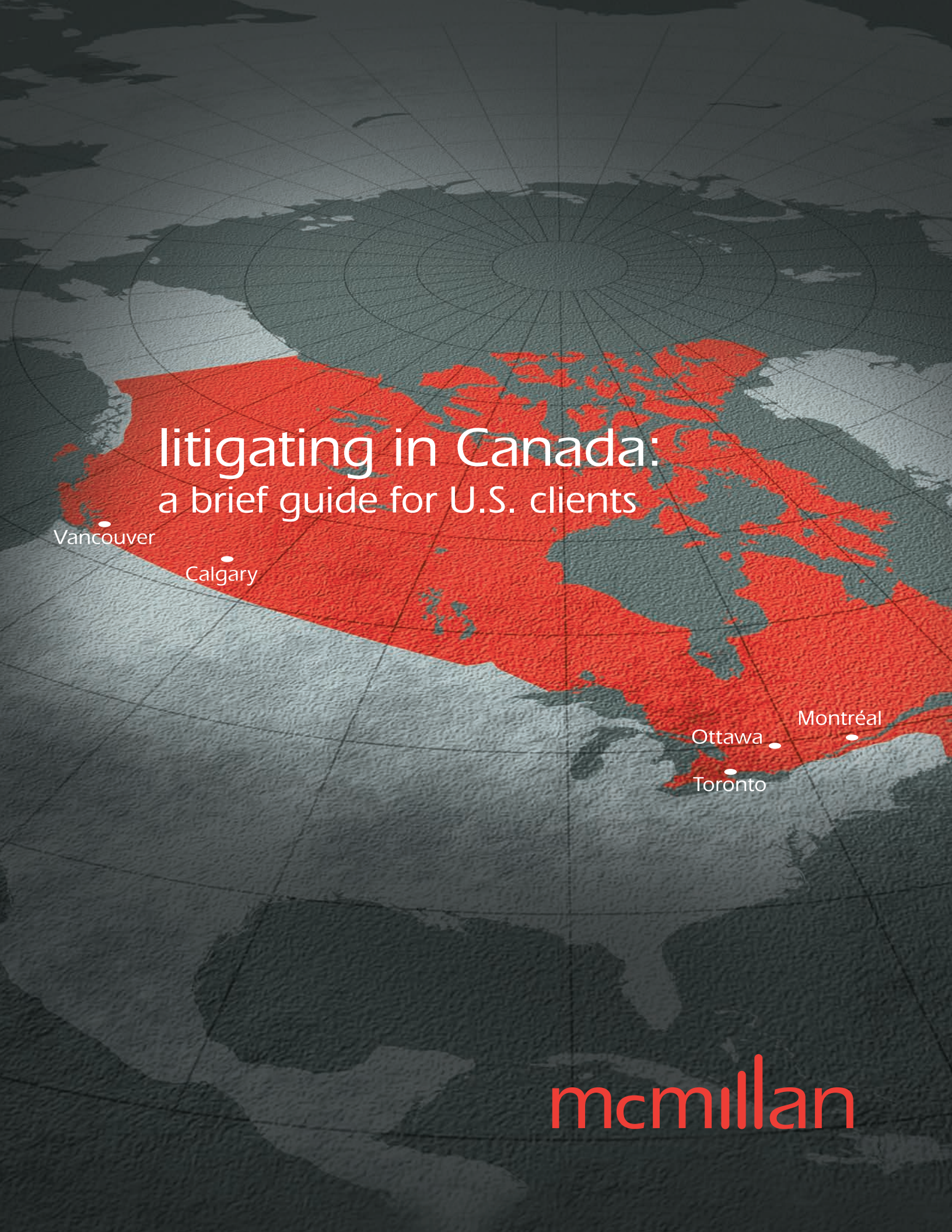
litigating in Canada:
a brief guide for U.S. clients
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executive summary

Despite the great deal the United States and Canada share in common, in many important respects, Canada's legal system can be dramatically different from the U.S. The article below highlights some of the distinctions that make litigating in Canada unlike the U.S. – distinctions that require unique approaches to strategy and that can lead to surprising results.

Among the significant differences with respect to litigating in Canada is the way cases are administered. Rather than being assigned to one judge who handles the matter from beginning to end, as is common in the U.S., in Canada, cases are typically not assigned to a particular judge. As a result, each event in a proceeding – motions, case conferences, and trial – is normally handled by a different judge and the parties by and large set their own timetables, rather than have one imposed by the court.

Consequently, cases tend to move along much more slowly than is often the case in the U.S. Indeed, setting a case for trial can be a long and time-consuming process. In addition, jury trials in civil cases are relatively rare in Canada. As such, getting a case to trial and trying a case in Canada can be very different from the typical experience in the U.S.

Moreover, there is significantly less pre-trial discovery in Canada than is normally the case in the U.S. The scope of what is discoverable is much narrower, there is very little, if any, discovery permitted of non-parties or experts, and the parties generally only have the right to conduct one deposition of the party adverse in interest.

Another difference with respect to litigating in Canada is that attorney's fees are generally recoverable in every action. In addition to the right to recover attorney's fees at trial, the party that prevails on a motion is normally awarded some portion of their fees expended on preparing or responding to the motion. As a result, because the losing party faces a potential adverse cost award, litigants in Canada tend to be much more conservative with respect to whether to file a lawsuit, what causes of action to plead, and whether to file a motion. In other words, Canada's cost-shifting regime has a significant impact on litigation strategy and often results in Canadian litigants taking an approach that U.S. litigants might find surprising.

In many respects, the structure of Canada's civil justice system is similar to the United States. However, there are some important, fundamental differences that can have an impact on trial strategy and the resolution of a dispute. This guide is intended to provide some general information about key aspects of litigating in Canada[1] that U.S. clients might find important.

Canada's Civil Justice System is quite different from the U.S.

lawsuits are normally resolved in provincial courts

Like the United States, Canada has a federal system of government with a discrete separation of powers, where the federal government and the ten provinces have certain enumerated powers. The administration of the civil justice system falls within the exclusive domain of the provincial governments. Similar to state courts in the U.S., provincial courts in Canada have trial courts of general jurisdiction, as well as courts of limited jurisdiction, such as small claims court, municipal courts, family courts, juvenile courts, and criminal courts. Each province also has a court of appeal of last resort. There are no provincial intermediate courts of appeal.

Although there is a federal court system, the jurisdiction of federal courts is much more limited than U.S. federal courts. Generally speaking, federal courts in Canada only have authority to hear matters involving the Canadian federal government and certain federal statutory matters.[2] However, unlike in the U.S., although bankruptcy and insolvency matters are governed by federal legislation, they are resolved in provincial courts. Similarly, criminal matters are tried in provincial courts only – never in federal courts. In addition, there is no such thing as "diversity jurisdiction" for federal courts in the Canadian system.

cases are administered by a "court" and not by individual judges

In most jurisdictions in the U.S, law suits are typically assigned to a specific judge who will handle the case through trial and conclusion of the matter. As a result, given that judges often have an interest in keeping their dockets free from backlogs, moving the case along in an efficient, expeditious, and consistent matter is relatively straightforward. In addition, relatively minute or simple matters often can be addressed by a judge in a fairly short period of time.

In Canada, however, once suit is filed, the action is generally assigned to the courthouse where it was filed and the physical file is kept in the registrar's office. At each step in the proceeding, any judge or master of the court could be assigned to handle the particular matter before the court. Moreover, when a party brings a motion, only the materials filed by the parties that relate specifically to that matter will be presented to the judge assigned to hear that matter. As a result, each step in a proceeding is often handled by a different judge who most likely will have no knowledge of anything else that has happened in the case that does not relate directly to the particular matter before the judge at that moment.

1 Because of its unique history, the law of Quebec is based on the French Civil Code. Therefor e, any generalizations about the Canadian legal system may not be applicable to Quebec.

2 Such as immigration and refugee matters, elections, privacy, environmental impact assessment, national defence, aeronautics and transportation, oceans and fisheries, First Nations and intellectual property rights.

the Supreme Court of Canada plays a very different role

The Supreme Court of Canada is Canada's highest court. Similar to the U.S. Supreme Court, the Supreme Court of Canada has discretionary authority to hear an appeal and exercises that discretion in only a small percentage of cases. However, unlike the U.S. Supreme Court, the Supreme Court of Canada is not restricted to hearing matters of federal law. Rather, the Supreme Court of Canada can hear any matter of national importance, including any matter relating to the general common law of the provinces and provincial statutory law. Indeed, one of the roles of the Supreme Court of Canada is to assure that the common law applies throughout the country in a uniform manner.

attorneys' fees are generally recoverable in every action in Canada

Unlike in the U.S., where attorneys' fees generally are not recoverable unless specifically permitted by statute or contract, in Canada attorneys' fees (or "costs") are awarded to the prevailing party in almost every action. In other words, the prevailing party at trial or on appeal can expect the opposing party to be ordered to pay anywhere from forty to eighty percent of the prevailing party's actual legal costs.

In addition, attorneys' fees are typically awarded to the prevailing party on a motion. For instance, if a party brings a discovery motion or a motion for summary judgment, the losing party likely will be ordered to pay a portion of the prevailing party's legal fees. When "costs" are awarded on a motion, normally the cost award must be paid within 30 days and the party required to pay costs is prohibited from taking any further steps in the litigation until the award has been satisfied.

Awarding costs at trial, on appeal, or on a motion is a very important procedural device used by the courts to control the legal process. Therefore, judges in Canada have very broad discretion in determining what amount in costs to award. As a result, because of the significant consequences that can result from losing at trial or even being denied relief on a motion, litigants in Canada tend to be decidedly more cautious when filing pleadings or motions with the court.

These cost-shifting rules have an impact on litigation strategy in Canada, both with respect to whether suit should be filed and what claims should be asserted, and with respect to what strategies should be employed to move the action along or bring the suit to resolution.

foreign plaintiffs can be required to post security for costs

One key element of Canada's cost-shifting approach is that a plaintiff who brings an action must have sufficient assets within the jurisdiction of the court to pay a cost award in favor of the defendant in the event the plaintiff's claim fails. Therefore, foreign plaintiffs and corporate plaintiffs who lack sufficient assets located within the jurisdiction of the court to pay the costs of the defendant can be ordered to post security for costs before proceeding with the action.

The amount of security is generally equal to the attorney's fees the court is likely to award should the defendant prevail in the action. Security is posted in cash, letter of credit, or surety bond. In some cases, the plaintiff may provide security in installments that match the actual costs incurred by the defendant as the case progresses.

the Law of Personal Jurisdiction in Canada heavily favors a plaintiff's right to sue In Canada

Canadian courts take a very different approach to personal jurisdiction from the Due Process analysis familiar to U.S. litigants. There are ten provinces in Canada and, like each of the fifty states of the United States, each province is a distinct judicial jurisdiction. However, unlike in the U.S., where suit can only be brought in a state where the defendant has sufficient minimum contacts, lawsuits in Canada are to be heard in the province that has the most "real and substantial connection" to the matter in dispute. The appropriateness of filing suit in the jurisdiction of the defendant's residence or where the defendant maintains contacts depends on the forum's overall connection to the claim.

In determining whether a jurisdiction has a real and substantial connection to the dispute, courts take into account a variety of factors, including the parties' connection to the forum, where the witnesses and evidence are located, where the dispute arose, and where the substance of the dispute is located. However, Canadian courts take a considered interest in protecting the legal rights of their residents and therefore will afford an injured plaintiff generous access to courts in the plaintiff's home jurisdiction to recover its damages. Thus, if the defendant has engaged in any activity within the jurisdiction, regardless of whether the conduct relates to the plaintiff's claim, Canadian courts will be likely to assume jurisdiction over the defendant.

In this regard, Canadian courts tend to take a much more plaintiff-oriented approach to jurisdiction. For instance, because damage is an essential element of any tort, if the damages complained of were suffered in the forum, the tort is deemed to have been committed in the forum, regardless of whether the actual tortious conduct occurred somewhere else. Therefore, 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 likely would conclude it has jurisdiction over the New York driver, regardless of whether the driver had any contacts with Ontario whatsoever. Accordingly, the Canadian approach to personal jurisdiction can lead to extremely surprising results for U.S. litigants.

Canada's discovery regime is considerably different from the U.S.

there is significantly less pre-trial discovery

The rules of discovery in the Canadian legal system are much more restrictive than the rules of discovery in the U.S. Unlike in the U.S., where information is considered discoverable as long as it is reasonably calculated to lead to the discovery of admissible evidence, to be discoverable in Canada, information must be actually relevant to material facts at issue in the dispute. As a result, the volume of information exchanged between the parties quite often is significantly less than what normally would occur in the U.S.

Further, requests for production and written interrogatories are used for less in Canada than in the U.S. Rather, litigants in Canada generally have two avenues of discovery available to them – documents the opposing party voluntarily discloses and the oral examination of a representative of the opposing party.[3]

3 Defendants can request plaintiffs to provide more detailed facts in support of their claim before defending the action and can request copies of documents referred to in the pleadings, but these are very limited discovery tools.

Once the pleadings have "closed," an affirmative duty is automatically triggered to search for and disclose all documents relevant to the matters pleaded. The parties determine for themselves what documents they believe are relevant and must provide a list that describes each document. Aside from informally requesting the production of additional documents, if a party believes the documents disclosed by the other side does not include all relevant documents, the party could bring a motion to compel further production of documents. However, in Canada, all motions must be supported by evidence. To bring a motion for further production, the moving party would have to have evidence that the other party is in possession of relevant documents that have not been produced. Depending on the circumstances, compiling sufficient evidence in that regard to support a motion can be difficult.

In addition, obtaining documents and testimony from non-parties is much more restricted. To be entitled to examine or obtain documents from a non-party, litigants must obtain leave of court and must show a compelling need for the information. Such requests are rarely granted. Accordingly, the scope of pre-trial discovery in Canada is considerably narrower than in the U.S.

In some jurisdictions, before conducting any discovery, parties are required to "meet and confer" and agree on a written "discovery plan," a process that was loosely modeled after U.S. Federal Rule of Civil Procedure 26(f). The purpose of entering into a discovery plan is to define the scope of documents subject to discovery and to set a timetable for completing discovery and preparing the case for trial.

the "implied undertaking" strictly limits the use of information learned through discovery

In most jurisdictions in Canada, documents and information provided during discovery are protected by the "implied undertaking" rule. This principle prohibits parties from using such information for any purpose beyond the conduct of the litigation. As such, documents obtained through discovery cannot be disclosed to outside parties and the information obtained cannot be used to bring other claims against other parties in separate lawsuits. A breach of this principle is viewed as a contempt of court. However, once the information is filed with the court, used at trial, or otherwise made a matter of public record, the implied undertaking no longer applies.

As a result of the implied undertaking rule, Canadian courts might be reluctant or find it unnecessary to issue protective or confidentiality orders covering discovery documents and transcripts. In exceptional circumstances, the court may be persuaded to provide this additional protection, for example, where the documents contain trade secrets or highly proprietary and confidential information.

oral examination for discovery

After documents have been exchanged, the parties have the right depose only one representative of each adverse party. If a party is a corporation, the corporation must designate a representative to be examined on behalf of the corporation. The representative examined is required to become well informed prior to the examination regarding the corporation's information on the matters at issue. Depending on the individual's position, the representative often must prepare for the examination by talking to many others in the corporation who possess relevant information.

Employees, fact witnesses, and expert witnesses normally are not subject to examination before trial, although any fact witness can be subpoenaed to testify at trial. Because the parties are only entitled to examine one representative of the opposing party, it is not uncommon for depositions to last for several days or more. However, in Ontario, for instance, examinations are limited to seven hours, absent an agreement or court order to permit more time.

undertakings

During the course of the oral examination, there may be questions the witness is unable to answer or it may become clear there are additional relevant documents that have not been produced. To resolve this problem, the party being examined will be asked to give an undertaking, or promise, to find the answer to the question or search for and produce the additional documents. The practice of requesting and giving undertakings is a very important part of the discovery process in Canada.

discovery on a motion

Generally speaking, motions before a Canadian court must be supported by an affidavit. A response to a motion normally must also be accompanied by a responding affidavit. The parties may then depose the witness (out of court in advance of the hearing) for the limited purpose of cross-examining the witness on his or her affidavit. The cross-examination transcript can then be filed with the court and made part of the record for purposes of determining the motion. Therefore, although in the course of the normal discovery process, litigants generally only have the right to one deposition of the adverse party, depending on the circumstances, additional discovery may be available through cross-examination on affidavits sworn in support of motions.

trial practice in Canada is very different from the U.S.

jury trials in civil cases are relatively rare in Canada

The right to a jury trial for litigants in civil cases in Canada is much more restricted than the constitutional rights enjoyed by litigants in the U.S. Although, generally speaking, courts in Canada regard the right to a jury trial in civil cases as a "substantial" right, it is not absolute. For instance, in Ontario, claims for injunctive relief, the 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 not second-guess 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 appropriately 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. Because judges have the opportunity to reflect upon the evidence at their leisure, even marginally complicated cases normally will be tried without a jury in Canada. Accordingly, 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 U.S.

there is no right to conduct *voir dire* in civil cases

The process of selecting a civil jury in Canada is quite different from what is typically the case in the U.S. Although the process of conducting voir dire of a venire panel in the U.S. can vary greatly from courtroom to courtroom, generally in Canada there is very little if any voir dire of the prospective jurors at

all. In addition, although litigants have the right to make peremptory challenges and to strike prospective jurors for cause, normally the only information available is the juror's name and occupation.

the rules of evidence are generally not codifed

The rules of evidence in Canada are generally not codified. Although some rules of evidence have been codified in federal and provincial legislation, these statutes are not comprehensive. Instead, courts in Canada generally rely on common law principles. Given that the rules of evidence in the U.S. are also based on the same common law principles, the evidentiary rules followed by Canadian courts should be generally familiar to U.S. lawyers.

setting the case for trial can be a long and time-consuming process

The process for setting a case for trial in Canada can be a much more difficult and time-consuming process than is often the case in the U.S. Courts in the U.S. often issue scheduling orders that set specific deadlines for each stage of the litigation, such as when discovery must be completed, when motions for summary judgment can be brought, when expert reports must be exchanged, and a date when the case will be placed on the court's trial docket. In Canada, however, there is a great deal less direct control over the process of the litigation and courts do not issue such firm scheduling orders. In addition, cases in Canada are generally not assigned to a specific judge who will handle all aspects of the case from the very beginning of the proceeding through trial. Instead, each event in the litigation – such as motions, pre-trial conferences, and trial – likely will be handled by different judges. As such, in most instances, the parties will not know who their trial judge will be until the case is actually called for trial.

Before a trial date can be obtained, the case must actually be ready for trial, meaning that all discovery has been completed, including all undertakings answered, mediation has been completed, and there are no other steps to be taken to prepare the case for trial. At that stage, any party can request that the court schedule a pre-trial conference, which will be held before a judge of the court. At the pre-trial conference, the judge will determine whether the case is ready for trial and will ask the parties whether the case can be settled. If the case does not settle at the pre-trial conference and it is ready for trial, a trial date will then be set. Because of the many steps that must be taken before obtaining a trial date, getting a case to trial can often take several years.

courtroom conduct tends to be much more polite

Generally speaking, courtroom proceedings in Canada tend to be somewhat more formal than what might be the case in some U.S. courts. For instance, in most circumstances, the judges, lawyers, and some court personnel all wear formal black robes and white collars. Until relatively recently, appellate court judges were addressed as "My Lord" or "My Lady." Nowadays, however, as in the U.S., judges are addressed as "Your Honor" or "Mr. or Madam Justice". It is also common practice to bow to the court when entering and leaving the courtroom when the judge is sitting.

In addition, in court, the lawyers often refer to each other as "My Friend"; rather than say, "the plaintiff argues…," a Canadian lawyer would say, "My Friend submits…." Further, when addressing the court, lawyers are expected to sit at counsel table and normally should only speak when requested to by the court.

civil appeals

Similar to the standard of review applicable in U.S. appellate courts, trial courts in Canada are given substantial deference with respect to questions of fact but questions of law are subject to de novo review. Final orders can be appealed to a province's court of appeal as a matter of right. Interlocutory orders from a trial court can be appealed with leave of court. However, the distinction between what is final and what is interlocutory can be very different from U.S. practice.

In Canada, generally speaking, an order is final if it definitively determines some matter in controversy between the parties. This is true even if the order concludes only a portion of the dispute. As such, the denial of a motion for summary judgment could be regarded as a final order if the judge concludes there is a question of fact with respect to the matter at issue that must be resolved at trial. The matter in dispute – whether there is a question of fact with respect to the matter at issue – has been conclusively and finally determined and therefore the order is regarded as final for appellate purposes.

a cautionary note

The foregoing provides a summary of aspects of Canadian law that may interest investors considering doing business in Canada. A group of McMillan lawyers prepared this information, which is accurate at the time of writing. Readers are cautioned against making decisions based on this material alone. Rather, any proposal to do business in Canada should most definitely be discussed with qualified professional advisers.

(The information in this brochure is current to September, 2013)