



Civil Litigation in Ontario



Wilson Walker LLP



Wilson Walker LLP

CIVIL LITIGATION IN ONTARIO

INTRODUCTION

The following materials provide an overview of the civil litigation process in Ontario.

This information will be of primary interest to United States attorneys considering litigation in Ontario or already managing ongoing claims in Ontario. These materials are not intended to provide specific legal advice but only general information about the manner in which claims proceed through the Courts in Ontario. This booklet summarizes some of the pertinent provisions of Ontario domestic law and the Federal laws of Canada which apply in Ontario as of January 1, 2002.

In addition to court proceedings our litigation lawyers are experienced in alternate dispute resolution procedures including mediation and arbitration hearings. Our technology permits us to provide legal service in a timely, cost-efficient manner.

We represent individuals in their personal and business concerns, trusts and estates, publicly traded and multinational companies, and many start-up, small and medium sized businesses.

Established in 1852, Miller Canfield has grown to a legal staff of over 350 attorneys and legal assistants. Our Windsor, Ontario office traces its history to 1919. Our lawyers have diverse backgrounds with varying business and practical experiences and personal and professional interests. They publish articles on legal issues, act as instructors and speakers at law schools and colleges, as well as participate at seminars and contributing legal education programs.

**If you have any questions or comments regarding the materials, please contact
Myron W. Shulgan Q.C. (direct) (519) 561-7415, email: shulgan@millercanfield.com
or James H. Cooke (direct) (519) 561-7404, email: cooke@millercanfield.com**



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ARTICLE 1
THE COURTS

Section 1.1 Courts of Ontario

1.1.1 Trial Division

Civil actions in Ontario are prosecuted in the Court of Ontario. The Court of Ontario is composed of two divisions: the Superior Court of Justice is the superior court of record having primary civil trial jurisdiction involving claims of more than \$10,000.00. The Ontario Court of Justice deals with non-divorce family law matters and some criminal offences.

1.1.2 Federal Court of Canada

The Federal Court of Canada -Trial Division has concurrent original jurisdiction with the Superior Court of Justice when relief is claimed against the Federal Government. It has exclusive jurisdiction to hear applications for review of decisions made by Federal boards and commissions with a few limited exceptions.

1.1.3 Appellate Courts

1.1.3.1 Divisional Court

The Divisional Court is composed of Superior Court Judges. It usually sits as a panel of 3 judges and hears appeals from judgments of \$25,000.00 or less and appeals from interlocutory orders made by a Judge of the Superior Court if leave to appeal is granted by a Judge of the Superior Court.

1.1.3.2 Court of Appeal for Ontario

An appeal lies to the Court of Appeal from judgments exceeding \$25,000.00 and orders of the Divisional Court on questions that do not involve a question of fact alone.

1.1.3.3 Federal Court of Appeal

Appeals from the Federal Court's trial division are heard by the Federal Court of Appeal. The Federal Court of Appeal also hears

appeals from the Tax Court of Canada and has original jurisdiction with respect to judicial review of certain Federal boards and tribunals.

1.1.3.4 Supreme Court of Canada

The Supreme Court is Canada's final appellate court and only hears appeals with leave. Leave may be granted where the appeal, in the opinion of the court, involves matters of national importance.

ARTICLE 2
CIVIL PROCEDURE IN
THE SUPERIOR COURT
OF JUSTICE

Section 2.1 Legislation

Civil litigation in Ontario is governed by a comprehensive code entitled the "Rules of Civil Procedure" and by the Ontario Courts of Justice Act. Proceedings in the Ontario Court of Justice and the Federal Court are governed by separate but similar Rules.

Section 2.2 Commencement of Proceedings

Proceedings in the Superior Court may be commenced by action or application. Generally, an application is used to determine a question of law where there are no material facts in dispute. A trial does not take place and oral testimony is normally not heard.

Section 2.3 Pleadings

2.3.1 Statement of Claim

An action is commenced by issuing a Statement of Claim out of the local court office. The Statement of Claim specifies the relief sought in the proceeding and the basic facts on which the claim is based. If there is

insufficient time to issue a Statement of Claim, for example, before the expiration of a limitation period, a Plaintiff may issue a Notice of Action and deliver a Statement of Claim within 30 days of the issuance of the Notice of Action.

2.3.2 Statement of Defence

A Defendant must serve and file a Statement of Defence within 20 days if served in Ontario, 40 days if served in Canada or the U.S. or 60 days if served elsewhere. Case managed jurisdictions may have different time periods within which to deliver a defence. The Statement of Defence will specify the grounds on which the Defendant opposes the Plaintiff's claim.

2.3.3 Counterclaim

A Defendant may assert, by way of Counterclaim, any claim the Defendant may have against the Plaintiff and may add other non-parties as Defendants in the Counterclaim. The court, however, may order that the claims proceed separately in appropriate cases.

2.3.4 Reply

The Plaintiff may deliver a Reply to the Statement of Defence within 10 days of the delivery of the Statement of Defence. Where the Defendant Counterclaims, the Plaintiff must deliver a Reply and Defence to Counterclaim within 20 days. The Reply will specify the Plaintiff's response to any new issues raised in the Statement of Defence.

2.3.5 Cross-claims

One Defendant may cross-claim against another for contribution toward the Plaintiff's damages or for an independent cause of action arising out of the transactions or occurrences involved in the main action or related to the main action.

2.3.6 Third Party Claim

A Defendant may commence a Third Party

Claim against a non-party in circumstances where a Cross-claim could have been made against the non-party if that party was a Defendant.

2.3.7 Amendment of Pleadings

Pleadings can be amended at any time although leave is required if all pleadings have been exchanged. The Court must grant leave to amend a pleading unless a party will suffer a prejudice which cannot be compensated by costs or an adjournment. In practice, amendments almost always proceed by way of consent unless the amendment would greatly prejudice the conduct of the action or has no basis in law.

Section 2.4 Service

2.4.1 Personal Service in Ontario

A Statement of Claim and Notice of Application must be personally served. The method of personal service upon persons, partnerships, corporations, government and others is prescribed.

Provision has been made for alternatives to personal service, substituted service and, in rare cases, dispensing with service entirely.

2.4.2 Personal Service outside Ontario

Service outside Canada must be made in accordance with the provisions of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial matters. For non-signatory nations, service may be effected using any method permitted in Ontario or in accordance with the domestic law of the jurisdiction in which the process is being served.

Service outside Ontario is only permitted in limited circumstances enumerated in the Rules of Civil Procedure or with leave of the court. Typically, some substantive connection to Ontario is required under the Rule or before

leave will be granted.

Provision is made to set aside service outside Ontario where service was not permitted by the Rules or leave was not obtained or should not have been granted.

The Ontario proceedings may also be stayed where Ontario is not a convenient forum for the hearing of the proceeding.

A Defendant appearing for the limited purpose of challenging jurisdiction may do so without being deemed to have submitted to the jurisdiction of Ontario provided no Statement of Defence, Notice of Intent to Defend or Notice of Appearance is delivered.

Section 2.5 Practice

2.5.1 Disposition without a Trial

2.5.1.1 Default Judgment

Default Judgment may be obtained against any Defendant who has failed to deliver a Statement of Defence, either on motion to the court (if unliquidated damages have been claimed) or upon requisition to the Court Registrar (for liquidated claims).

There is provision in the Rules to set aside Default Judgment. Default Judgment will be set aside if the motion to do so is brought as soon as possible, the Defendant's default can be explained and there is a meritorious defence to the action.

2.5.1.2 Summary Judgment

After receipt of the Statement of Defence, either party may bring a Motion for Summary Judgment where there is no genuine issue for trial.

On a Motion for Summary Judgment the Court can make findings of fact based on evidence set out in affidavits filed in support and

in response to the Motion. However, the Court cannot determine issues of credibility to resolve conflicts in the evidence.

In practice, Summary Judgment will not be granted where there is any evidence that, if believed, would raise a triable issue.

If the only genuine issue is the amount in dispute, the Court may grant judgment with a reference or order a trial on the issue of damages to determine the amount due under the judgment.

If the only genuine issue is a question of law, a judge may decide the question and grant judgment accordingly.

If Summary Judgment is not granted, the court has wide powers to: (a) limit the issues for trial; (b) order a speedy trial; or (c) require a party to post security for costs or pay into court all or part of the claim.

2.5.1.3 Determination of an Issue before Trial

The Rules of Civil Procedure provide for the determination of a question of law before trial without evidence if the determination will dispose of all or part of the action, substantially shorten the trial or result in a substantial savings of costs. In addition, a pleading can be struck if it discloses no reasonable cause of action or defence.

Actions may be stayed, on motion, where: (a) the court has no jurisdiction; (b) the Plaintiff or Defendant has no legal capacity to sue or be sued; (c) another proceeding for the same relief is pending in Ontario or another jurisdiction; or (d) the action is frivolous, vexatious or an abuse of process.

2.5.1.4 Special Cases

The parties may agree to state a question of law for the opinion of the court. The parties must agree on all material facts and documents.

In rare cases, leave may be obtained from the Court of Appeal to have the question determined by that court in the first instance.

2.5.2 Preservation of Rights Pending Trial

2.5.2.1 Injunctions

Injunctive relief is available on an interlocutory basis. Although an interim injunction lasting not more than 10 days may be obtained without notice to the other party, the common practice is to move with notice to avoid the possibility of having the order set aside on the basis of failing to make full and fair disclosure of all material facts.

There is a three-part test for granting interlocutory injunctions:

- (a) is there a serious issue to be tried;
- (b) will the applicant suffer irreparable harm in that damages would not be an adequate remedy if the injunction is not granted; and
- (c) which party will suffer the greater harm from granting or refusing the injunction pending a decision on the merits.

The party requesting an injunction must normally give an undertaking respecting payment of any damages that may be suffered by the opposite party as a result of the granting of the injunction.

A number of specialized injunctions have evolved over the years. A "Mareva" injunction may be obtained to restrain the disposition of property before trial where there is a genuine risk of the disappearance of assets. An "Anton Pillar" order may be obtained to preserve and protect evidence where there is a serious possibility evidence may be destroyed by an adverse party before trial.

2.5.2.2 Appointment of a Receiver

A Receiver or Receiver-Manager may be

appointed by the court on motion by a creditor or another party having an interest in property in another's possession. In the absence of a security agreement permitting the appointment of a Receiver, a party normally has to establish that its rights are in serious jeopardy as a result of the conduct of the other before a Receiver will be appointed to take control of assets in the possession of the opposite party.

2.5.2.3 Certificate of Pending Litigation

Where an interest in land is in dispute a party may obtain a Certificate of Pending Litigation for registration against title to the land. The registration of the Certificate is notice to all that title to the land may be subject to the claim of another party.

A Certificate of Pending Litigation will only be issued by the court on motion. It may be discharged where: (a) damages are claimed in lieu of the interest in land; (b) where there is not a reasonable claim to the interest sought to be acquired; (c) the action is not prosecuted with reasonable diligence; (d) where there is other adequate security; (e) or upon any other ground considered just.

2.5.2.4 Interpleader

Where a third party is holding property which is subject to adverse claims of other parties and has no interest in the outcome of the issue in dispute, the third party may apply to court for direction respecting the disposition of the property.

2.5.2.5 Replevin

If there is no applicable legislation, a party may apply to the Court for an Order for interim recovery of personal property. The court may grant an order for the interim recovery of personal property where a party can establish substantial grounds for its claim that the property is being unlawfully detained and the balance of convenience favours the Plaintiff.

The Plaintiff is usually required to post a bond amounting to twice the value of the property sought to be recovered. Once an order for recovery has been made, the Sheriff will recover the personal property and deliver it to the Plaintiff.

2.5.3 Motions

Interlocutory matters are dealt with by way of Motions to the court.

Evidence in support of a motion is normally by way of Affidavit and transcripts of cross-examinations on affidavits. On rare occasions, oral testimony can be used.

2.5.4 Discovery of Parties

An Examination for Discovery may be either oral or by written questions but not both. In practice, written questions are rarely used.

Only parties to the action may be examined. Each party has the right to examine the opposing party. There is, typically, one witness for each party.

The scope of examination is limited to matters of relevancy. Any party examined has a continuing obligation to correct answers and provide updated information in respect of matters reviewed on Discovery.

Non-parties may be examined only with leave of the court. Generally, leave will only be granted where a request for information has been made of a party and that party has been unable to obtain the information.

2.5.5 Discovery of Documents

Each party to a lawsuit has an obligation to disclose and produce all documents under the party's control that relate to issues in dispute in the proceeding. Disclosure is made in an Affidavit of Documents. The failure to disclose relevant documents can result in severe sanctions.

Provision is also made for the inspection of property and for conducting medical examinations of parties if their medical condition is in issue.

2.5.6 Trial

2.5.6.1 Judges

Superior Court judges are appointed by the federal government. There are no elected judges in Canada. Even with the advent of case management a specific judge is not normally assigned to a specific case for its duration. Matters are assigned on an ad hoc basis.

2.5.6.2 Juries

Any party may elect a trial by jury. Civil juries are composed of six persons. In practice, most civil cases are tried without a jury. The court has jurisdiction to strike out a Jury Notice where a statute requires trial without a jury, where the Jury Notice was not delivered in time or where the court is of the opinion that the action ought to be tried without a jury.

2.5.6.3 Evidence

Civil actions are governed by the Ontario Evidence Act. Common law rules of evidence are also applicable.

A witness cannot be excused from answering questions on the grounds that the answer may incriminate the witness or expose the witness to the risk of civil liability. If a witness does object, the answers cannot be used in subsequent civil proceedings. There is a constitutional right not to have any answers used to incriminate the witness in criminal proceedings except in a prosecution for perjury.

With leave of the court, witnesses may be examined out of court prior to trial. Typically, leave is granted where the witness is ill, or unlikely to be available for trial. The parties may also consent to evidence being taken out of court.

Where the examination is to take place outside Ontario, the court may order that Letters Rogatory be issued where the assistance of a foreign court may be necessary to compel the attendance of a witness.

Ontario Courts will also render assistance to foreign courts issuing Letters Rogatory.

All other witnesses may be compelled to attend by service of a Summons to Witness together with the court prescribed travel and attendance fees.

2.5.6.4 Costs

A successful litigant is usually entitled to the costs of the proceeding. Costs are normally awarded on a "partial indemnity" scale in accordance with the prescribed Tariffs. Partial indemnity costs typically amount to approximately 50% to 75% of the actual costs incurred by the successful litigant.

In certain circumstances, costs on a "substantial indemnity" scale may be ordered. Costs on a substantial indemnity scale are intended to provide almost complete indemnity for the legal costs actually incurred by a successful litigant. Substantial indemnity costs are most often awarded where a successful litigant has made a written Offer to Settle and has received a higher amount at trial.

A successful litigant can be deprived of costs most often when a Defendant has made an Offer to Settle and an amount less than the Offer is awarded at trial.

2.5.6.5 Appeals

Generally, an Appeal will automatically stay enforcement of a monetary judgment. The Appellate Court may, however, lift the automatic stay in appropriate cases.

Appeals of decisions granting equitable remedies may not stay enforcement unless the trial court grants the same.

An Appellate Court will only interfere with facts found by a trial judge, or jury, where there has been a palpable and overriding error which affected the assessment of facts.

In practice, appellate review is confined to questions of law or mixed fact and law only. The scope of appellate review is, therefore, narrow.

Appeals are normally heard by a panel of three judges. The Court of Appeal sits only in Toronto, while the Divisional Court sits in judicial centres across Ontario.

Section 2.6 Limitation of Actions

Certain causes of action are subject to specific statutory limitation periods. For example, malpractice cases (one year), motor vehicle accidents (two years), actions by family members for death or injury (two years), actions against public authorities (six months) and actions against municipalities for non-repair of highways (three months, with a seven days notice requirement).

Actions not limited by specific statutes are governed by the Ontario Limitations Act. The most common limitation periods in the Act are: assault & battery (four years), breach of contract, trespass, negligence and an action on a foreign judgment (six years), an action for rent or possession of land (ten years), and an action on a bond or domestic judgment (20 years).

Foreign causes of action must generally be commenced within the limitations applicable in Ontario and in many cases, within the time periods established by the foreign jurisdiction as well.

The expiry of a limitation period may be avoided if the Plaintiff is under a disability owing to infancy, insanity, etc., or if the

Defendant is absent from the jurisdiction.

Section 2.7 Particular Proceedings

Certain proceedings, such as estate, partition, mortgage and Family Law matters, are governed by separate rules and procedures. Mortgage actions, in particular, are governed by onerous procedural requirements. Failure to comply with some of the Rules may result in the action being effectively nullified.

A Simplified Procedure is applicable to all proceedings involving property or claims worth \$50,000.00 or less. The procedure eliminates Examinations for Discovery, provides for an optional summary trial and broader availability of summary judgment. A Plaintiff can be deprived of costs where recovery is less than \$50,000.00 and the Plaintiff did not proceed under the Simplified Procedure.

Section 2.8 Recognition of Foreign Judgments

Persons seeking to enforce a foreign judgment must usually commence an action in Ontario for the damages to which they were found entitled by the foreign court. However, there are some instances in which the foreign judgment can simply be registered with the Ontario Court. For example, some judgments issued by the courts of other Canadian Provinces can be registered under the provisions of the Reciprocal Enforcement of Judgments Act. In some instances judgments from foreign countries can be registered in Ontario if Canada has entered into a convention with the foreign country to recognize its judgments.

Once the foreign judgment is registered it can be enforced in the same manner as an Ontario judgment. The application to register the judgment must be made within six years.

At this time, statutory registration of U.S. judgments is not possible in Ontario.

In a common law action, the foreign judgment will be enforced where the Ontario Court recognizes the foreign court's jurisdiction over the proceeding. The circumstances under which a foreign court will be recognized to have jurisdiction are as follows:

- (a) the Defendant was ordinarily resident or had a permanent place of business in the foreign jurisdiction;
- (b) the Defendant voluntarily submitted or agreed to submit to the jurisdiction; or
- (c) there was a real and substantial connection between the foreign court and the subject matter of the action.

Whether or not the foreign court had a real and substantial connection to the subject matter, or issues on which judgment was obtained, will be determined on review of the evidence. The whole circumstances of the subject transaction must be examined. For example, the place where the contract was made, the place of performance, choice of law and the place where damages were suffered, will all be relevant.

After it is determined that the foreign court properly took jurisdiction, very limited defences will be open to the Defendant. Judgments obtained by fraud for instance, cannot be enforced. The court, however, will not re-visit the merits of the underlying cause of action regardless of whether or not the Ontario Court would have granted judgment on the claim.

An action on a foreign judgment must be commenced within six years.

Section 2.9 Practice Points

2.9.1 Time

In the past, it could take upwards of four to six years for an action to be tried. Recent judicial efforts, as well as a reduction in the number of civil lawsuits (due to the introduction of no-fault auto insurance), have greatly reduced the waiting time for a trial. Now, a trial can be completed anywhere from 6 to 18 months after the claim has been issued.

2.9.2 Alternative Dispute Resolution

Mediation and arbitration are common in Ontario. Arbitration hearings are conducted on a consensual basis subject to the provisions of the Arbitrations Act. Awards can be enforced in the same manner as judgments of the Superior Court of Justice.

Formal and informal mediation is common. A number of full-time mediators and ad hoc mediators are available.

There is special provision in Ontario pursuant to the International Commercial Arbitration Act for the recognition of foreign arbitration awards.

Ontario, with the exception of some Toronto cases, does not mandate mediation.

There is no prescribed arbitration panel.

2.9.3 Case Management

There are several jurisdictions in Ontario subject to local Case Management Pilot Projects all of which have been or will be abandoned in favour of an Ontario wide Case Management system.

Case Management will provide time limits in each step of the litigation process and broad Case Management powers for judges and court officials. It is intended to reduce costs and delays that have been experienced in the past.

2.9.4 Bankruptcy and Insolvency

There are special Rules for the conduct of bankruptcy and insolvency matters. However, ultimate jurisdiction is given to the Superior Court of Justice, in bankruptcy.

Secured transaction legislation also provides for special Rules for enforcement which do not substantially alter the conduct of the proceeding but, nevertheless, require certain notices to be given and regulate the seizure and sale of secured property.

2.9.5 The Commercial List

Certain commercial matters, including bankruptcy matters, can proceed on a Commercial List in Toronto. The practice direction provides for a single judge to hear the entire matter. It was hoped that matters on the Commercial List would proceed more expeditiously and would be heard by a specialized panel of judges more familiar with commercial matters.

2.9.6 Class Actions

In 1992, the Province of Ontario enacted legislation enabling the prosecution of class action law suits. While the legislation did not alter the substantive law of the province, it had an impact on the court procedure for dealing with what may be characterized as wide-spread wrongs.

A class action law suit permits an individual who has suffered a wrong to commence legal action on behalf of himself as well as all other individuals who have suffered the same wrong and fit into the so-called "class". In order to prosecute a claim as a class action, the representative plaintiff must show that there is a "common issue" to be determined relative to the alleged wrong which affects all members of the proposed class.

In addition to demonstrating a common issue, a representative plaintiff must also satisfy the court that a class action is an appropri-

ate means of advancing the claim for the benefit of all prospective class members. A class action will not proceed as such unless, and until, the representative plaintiff has had the action certified as a class action by the court.

Several class actions have been prosecuted in Ontario which lend themselves to this type of litigation such as product liability cases. However, class action litigation is expanding into other areas such as native land claims and wrongful dismissal.

ARTICLE 3 CONCLUSION

In litigation matters arising in Ontario, litigants are well advised to seek the advice of U.S. attorneys and Ontario lawyers. Miller Canfield understands the needs of business litigants and is able to provide quick and expeditious solutions when litigation does arise.



Wilson Walker LLP

Please contact MYRON W. SHULGAN Q.C.

(direct) (519) 561-7415,

email: shulgan@millercanfield.com

or

JAMES H. COOKE

(direct) (519) 561-7404,

email: cooke@millercanfield.com

Suite 300, 443 Ouellette Ave., Windsor, Ontario,
Canada, N9A 6R4.
Tel. (519) 977-1555. Fax (519) 977-1566
www.millercanfield.com



Wilson Walker LLP

Suite 300, 443 Ouellette Ave., Windsor, Ontario, Canada N9A 6R4 • Tel. (519) 977-1555 • Fax (519) 977-1566
www.millercanfield.com