



TIPS FOR PROSECUTING AND DEFENDING CLAIMS THROUGH THE COURT AND ARBITRATION PROCESSES

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Today we will cover:

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| 1 | Introduction and Legislative Updates |
| 2 | Employment Disputes – Litigation versus Arbitration |
| 3 | Collective Agreement Arbitration |
| 4 | Arbitration Clauses to Avoid Class Actions |
| 5 | Insurance Coverage – Everything you need to know |
| 6 | Discussion – Preparing for steps in Dispute – Pleadings, Discovery, Settlement, Trial/Hearing |
| 7 | Questions |





INTRODUCTION & LEGISLATIVE UPDATES

Legislative Update - Federal



Temporary Foreign Worker Limitations – September 18, 2024:
Changes to Low Wage Stream (Maximum 1 year; Caps on %; Barring
in city where unemployment rate above 6%)

Legislative Update - BC



Labour Relations Code Report – August 31, 2024 – Completed and delivered to the government




WorkSafeBC: September 1, 2024 – App-Based Ride-Hailing and Delivery Workers Eligible to receive benefits for work-related injuries and illness

Legislative Update - Ontario



Digital Platform Worker Rights – In force from July 1, 2025



**EMPLOYMENT DISPUTES – LITIGATION
VERSUS ARBITRATION**

Litigation: Pros



Formal Process: Litigation follows a structured, formal process with established rules and procedures. This can provide a sense of predictability and clarity about the process.



Public Record: Court decisions are typically a matter of public record, which can provide transparency and accountability.



Appeal Process: If a party is dissatisfied with the outcome, they generally have the right to appeal to a higher court.



Judicial Oversight: Judges and courts have the authority to enforce rules and ensure fairness in the process.



Costs: costs awards will likely be limited in accordance with court tariffs.

Litigation: Cons



Costly: Litigation can be expensive due to court fees, attorney fees, and other associated costs.



Time-Consuming: Court cases can take years to resolve, leading to lengthy delays.



Public Exposure: The proceedings and outcomes are often public, which can lead to unwanted publicity or damage to reputation.



Rigid Procedures: The formal rules and procedures can be complex and inflexible, which might not always suit the needs of the parties involved.



Generalists: Court judges are typically generalists and may not be well versed in particular areas of law.

Arbitration: Pros



Speed: Arbitration is generally faster than litigation, leading to quicker resolution of disputes.



Cost-Effective: It can be less expensive than litigation due to streamlined procedures and shorter timelines.



Confidentiality: Arbitration proceedings are private, and the results are typically not made public, which can protect the parties' confidentiality.



Flexibility: The arbitration process can be more flexible, with parties often having more control over aspects like the choice of arbitrator and procedural rules. Under the new Arbitration Act, arbitrators now have enhanced jurisdiction to grant equitable and injunctive relief.



Expertise: parties can select arbitrators with expertise well-suited to the applicable area of law.



Finality: Under the new Arbitration Act, parties can now contract out of the ability appeal an arbitration award.

Arbitration: Cons



Limited Appeal Options: there is a limited right to appeal on questions of law.



Enforcement Steps: there are additional procedures and costs in order to enforce arbitration awards.



Less Formal Oversight: Arbitration lacks the formal oversight and procedural safeguards of the court system, which might affect the fairness of the process.



Exposure to Costs: In general, costs awards in arbitration are made on a full indemnity basis. If unsuccessful, a party will be ordered to pay 100% of the other party's costs and fees. In addition, parties will be required to pay arbitrator fees, which are not required in litigation.

Litigation or Arbitration?

- Choosing between arbitration and litigation involves evaluating several factors to determine which method best suits the needs of the parties involved:
- There may not be an ability to choose if the parties have signed a contract with an arbitration clause.

Presence of an Arbitration Agreement?

Nature of the Dispute

Desired Outcome and Appeals

Confidentiality

Cost and Time Efficiency

Relationship Between the Parties

Enforcement and Compliance

Expertise of Decision-Maker

The Court may decide for you

Even if you decide on arbitration or litigation, a court may find otherwise:

Wiederhold v. Aspen Technology, Inc., 2024 BCSC 1731

- An arbitration clause was held to be unenforceable against former employer seeking to arbitrate in Boston, Massachusetts as the location, conflicts of laws implications, and costs were found to be unconscionable.

Clayworth v. Octaform Systems Inc., 2020 BCCA 117

- To determine whether the subject matter of litigation falls within the scope of an arbitration clause, the Court of Appeal held that a court proceeding should be stayed in favour of an arbitration.



COLLECTIVE AGREEMENT ARBITRATION

Collective Agreement Arbitration

Mandatory Arbitration for Disputes with Union – S.84(2) BC LRC



Does ‘Essential Character’ of dispute fall within the “Interpretation, Application, Administration, or Violation of the CBA”



Bylekova v. Fraser Health Authority 2022 BCSC 1663

Defamation claims arising from investigation

Comments related to capacity as employee, and made to persons involved in workplace problems

Action dismissed as court no jurisdiction

Collective Agreement – Benefits Claims

Arbitrability determined by language of CBA



Barber v. Manulife 2017 ONCA 164

CBA required ER to offer
disability insurance coverage to
EES

EE suing insurer when LTD
benefits terminated under group
policy

Action dismissed as arbitrable
under CBA

Collective Agreement – Benefits Claims (Cont'd)

Greig v. Desjardins 2019 BCSC 1758

Termination of
LTD benefits
resulting in
financial disaster
for EE and wife

Unionized EE
subject to CBA

Court no
jurisdiction Re:
Eligibility for
benefits

Court jurisdiction
for bad faith and
punitive and
aggravated
damages



ARBITRATION CLAUSES TO AVOID CLASS ACTIONS

Arbitration Clauses To Avoid Class Actions

Service agreement contains arbitration clause for disputes

Uber Technologies v. Heller 2020 SCC 16

- Driver commenced class proceeding for violations of employment standards legislation
- Application to dismiss based on arbitration clause
- Clause found unconscionable (required arbitration in Netherlands and up front \$14.5k USD)

Arbitration Clauses To Avoid Class Actions – (cont'd)

Wasylyk v. Lyft Inc. 2024 ONSC 664

- Claim by drivers for breach of employment standards
- Drivers may opt out of arbitration in terms of service within 30 days
- Arbitration of contracts (dependent contractors or employees) required



INSURANCE COVERAGE – EVERYTHING YOU NEED TO KNOW

What is an Employer Practice Liability (EPL) Claim

Employers generally have:

1. CGL
2. Property
3. D&O (and maybe specialty, like E&O)
4. EPL?

EPL Covers

1. Discrimination
2. Harassment
3. Wrongful Termination
4. Retaliation Claims

What Triggers Coverage?



Importance of reporting: **Claims made and reported (Not occurrence based)**



Expiration of policy and extended reporting period; related claims



i.e. *Precidio Design Inc. v. Great American Insurance Company*, 2013 ONSC 7148 (CanLII)



i.e. *Dynacare Company v. St. Paul Fire and Marine Insurance Company*, 2007 CanLII 29341 (ON SC)

Other Coverage Considerations for EPL Claims

Contractual Liability

Intentional Wrongdoing (i.e. *Crandall University v AIG Insurance Company of Canada*, 2024 NBKB 151 (CanLII))

Employee Injuries

Independent Contractors

Duty to defend and Insurer choice of counsel



**DISCUSSION – PREPARING FOR STEPS IN
DISPUTE: PLEADINGS, DISCOVERY, SETTLEMENT,
TRIAL/HEARING**

Typical Stages of Litigation

1. Initial
Assessment

2. Filing and
Service of
Pleadings

3. Document
Disclosure and
Discovery

4. Pre-Trial
Applications and
Resolution
Efforts

5. Trial
Preparation

6. Trial

7. Judgment
and
Enforcement

8. Appeals



 **ANY QUESTIONS?**

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