Litigating Outside of Toronto: A Discussion on its Advantages and Disadvantages

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Introduction

In today's dynamic business environment, an effective dispute resolution system must be efficient. In order for the civil trial to continue as a viable method of dispute resolution, litigants must be able to quickly progress to a trial. It is trite to say that Toronto is an extremely busy court office. The voluminous caseload combined with limited resources bogs matters down in procedural hurdles and scheduling conflicts, unnecessarily increasing legal costs.

While overarching changes to make the court system more efficient are necessary, techniques exist in the present system that lawyers can utilize to progress a case quickly towards trial. One technique is to avoid the issues with a busy court system altogether. In that vein, judicial districts outside of Toronto could be a viable option for a more efficient dispute resolution process, especially for cases where the perceived benefits of litigating in Toronto (such as specialized courts, discussed below) may not be as important a factor.

This paper will canvass some of the advantages and disadvantages of litigating outside of Toronto based on a survey of the experiences of seasoned litigators with considerable litigation experience inside and outside of Toronto (the "**Unscientific Survey**").

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The paper concludes that in certain circumstances, it may be beneficial to a client's interests to commence an action outside of Toronto. Practitioners should consciously consider the nature of their case and decide whether Toronto (and its case load) is in fact the appropriate forum.

Part 1: Advantages

a. Where can a proceeding be brought?

According to Rule 13.1.01 of the *Rules of Civil Procedure* [4] (the "**Rules**"), a proceeding may be commenced in any court office named in the originating process,[5] unless a statute or rule requires a proceeding to be commenced in a particular county.[6] For example, a bankruptcy application under the *Bankruptcy and Insolvency Act* requires proceedings be brought in the locality of the debtor.[7]

Counsel often fails to recognize that the selection of jurisdiction is entirely a matter of plaintiff's discretion. To use an extreme example, a Toronto dispute could conceivably be commenced and prosecuted in North Bay; a Sudbury action could be started in Belleville. Apart from Rule 13.1.01(1), there are no restrictions in the Rules to where an action can be commenced. There is no requirement that the underlying facts of the case bear any connection to the jurisdiction where the action is commenced.

However, where an action is not rationally connected with a far-flung and inconvenient jurisdiction, a party may bring a motion to transfer a proceeding to another county.[8] Whether it should be transferred depends on the unlikelihood of a fair hearing in

[4] RRO 1990, Reg 194
[5] Rule 13.1.01(2)
[6] Rule 13.1.01(1)
[7] Section 43(5), *Bankruptcy and Insolvency Act*, RSC 1985, c B-3
[8] Rule 13.1.02

the county where the proceeding was commenced, or if it is desirable in the interests of justice to transfer the proceeding.[9] The *Rules* provide a non-exhaustive list of factors that inform the "interests of justice" test, including:

(a) where the events giving rise to the claim occurred;

(b) where the damages were sustained;

(c) where the subject-matter of the proceeding is located;

(d) local community interests;

(e) convenience of the parties and location of witnesses and court office; and

(f) whether there are any counterclaims, cross claims or third party claims.[10]

A plain reading of Rule 13.1.01 shows that plaintiffs have reasonably broad discretion to bring an action in the court office where he or she desires. This right is curbed by the opposing party's ability to transfer a case to a different location pursuant to Rule 13.1.02(2)[11]. In certain circumstances the location of proceedings will be statutorily mandated to a specified locality. However, in the circumstances where a plaintiff is free to decide where to commence a proceeding, commencing the action outside of Toronto may be appropriate and could yield the practitioner dividends in terms of efficiency and procedural hurdles.

The next section describes a few of the key benefits to proceeding outside of Toronto.

b. Speed Because Of Fewer Steps

With so many matters to be heard on Toronto's docket, scheduling is a significant factor contributing to the delays experienced in the civil court system. In order to cope

[9] Rule 13.1.02(2)
[10] *Ibid.*
[11] A judge may transfer a proceeding to the appropriate jurisdiction under Rule 13.1.02(1) where the action was commenced in a location contrary where a statute requires proceedings to be commenced.

with the volume of cases, Toronto-specific procedures have been put in place – either by the *Rules* or through Practice Direction – to which each case brought in Toronto must adhere.

On the other hand, court dockets in smaller districts have less stringent procedures. For example, an action commenced outside of Toronto typically requires fewer mandatory procedural steps between commencement of an action and trial. In addition, the procedures for scheduling short motions in court offices outside of Toronto can assist in streamlining a case.

i. No Mandatory Mediation Outside of Toronto

The *Rules* require that all disputes brought in the City of Toronto are subject to mandatory mediation.[12] The purpose of mandatory mediation is to reduce costs and delay in litigation to facilitate early and fair resolutions of disputes.[13] Rule 24.1.04 also applies to actions commenced in the City of Ottawa, the County of Essex,[14] and to actions that are transferred into these counties.

There are exceptions to this rule. Mandatory mediation does not apply to matters to which the following statutes and rules apply: (i) Rule 75.1; (ii) section 258.6 of the *Insurance Act*[15]; (iii) matters placed on the Commercial List; (iv) mortgage actions under Rule 64; (v) actions under the *Construction Lien Act*; and (vi) actions under the

[12] Rule 24.1.04
[13] Rule 24.1.01
[14] *Ibid.*
[15] If mediation was conducted less than one year before the delivery of the first defence in the action.

Bankruptcy and Insolvency Act.[16] Actions certified as class proceedings under the *Class Proceedings Act, 1992* also do not require mandatory mediation.[17]

A party may also bring a motion for an order exempting a case from mandatory mediation.[18] The test for whether a case can be exempt from mandatory mediation is beyond the scope of this paper.

In Toronto, mandatory mediation must take place within 180 days after the first defence has been filed, unless a consent under Rule 24.1.09(3) has been filed or the court orders otherwise.[19] In addition, a trial record cannot be filed unless the party setting the matter down for trial files certifies, in essence, that mandatory mediation has either been concluded or a court has ordered the matter exempt from mandatory mediation.[20] On the other hand, a matter can be set down for trial after any time after the close of pleadings in judicial districts that are not subject to mandatory mediation.[21]

It perhaps goes without saying that mandatory mediation may be beneficial in many disputes, in particular commercial disputes. However, in some disputes it may be an unnecessary expenditure of legal costs. This is ultimately based on the specific circumstances of a case. Practitioners should consider if settlement is a likely possibility. Where it is not, mandatory mediation can be avoided by bringing an action outside of Toronto.[22] This saves costs, and the time associated with scheduling mediation in an

[16] Rule 24.1.04(2)
[17] Rule 24.1.04(2.1)
[18] Rule 24.1.05
[19] Practice Direction for Civil Applications, Motions and other Matters in the Toronto Region (date revised: January 30, 2012) ("**Toronto Practice Direction**"), para 35
[20] Toronto Practice Direction, para 36
[21] Rule 48.05
[22] The *Rules* also provide that mandatory mediation must occur in the City of Ottawa and the County of Essex. The Practice Direction for the Southwest Regional District provides "…all actions governed by Rule 76 (Simplified Procedure) in the County of Essex are assigned to mandatory mediation…"

environment where it may not add value to the process. It should also be noted that, where there is benefit to proceeding with mediation, the parties are free to make such arrangements on their own volition. The mediation option is not foreclosed simply by proceeding outside of Toronto, Ottawa or Essex – rather, it is optional, and not a requirement to set an action down for trial.

ii. Convenient Scheduling Procedures – Short Motions

A litigation matter may typically have multiple short motions during its course. Scheduling these motions can often be a contributing factor to the delays experienced in the civil litigation process. In the view of the Unscientific Survey, the scheduling procedure for courts outside of Toronto is considerably less cumbersome. In Toronto, scheduling a short motion requires that court time first be requested.[23] Parties are required to fill out a requisition and submit it to the court staff for scheduling, provided time is available. Whereas in Brampton court, for example, the moving party effectively decides the date for a short motion (hopefully after consulting with counsel) and serves and files with the court office their court materials, returnable on the date the moving party has selected. The court office then adds the matter to that day's list.

While the procedure for scheduling short motions outside of Toronto has convenient pros, it does have potential cons. First, there is a possibility a court date could be over-scheduled. This can either result in significant wait times on the day (*i.e.*, costs) of having a matter heard, or in the worst case, not have the matter heard at all on its scheduled day resulting in a subsequent appearance.

[23] Toronto Practice Direction, para. 6

Second, matters that are two hours or less constitute "short motions" in Toronto court. Short motions in the other judicial districts are considered either less than one hour or less than a half hour. Motions longer than this time are considered long motions and are scheduled according to the long motion scheduling procedure. Thus, some motions that would otherwise have the benefit of a streamlined scheduling procedure may not be as such in a judicial district outside of Toronto.

The rationale for the scheduling process in place in Toronto can be understood in the context of the busy court system that is Toronto. From the perspective of the practitioner's case at hand, being able to select dates that are convenient to the parties without the court's involvement reduces a layer of complexity in the scheduling process and directs the focus of the dispute (and the legal costs) to the action's merits.

The benefits of ready access to motions courts is obvious: where there is a party inclined to delay, the availability of short motions dates on a 'serve and file' basis ensures that counsel can obtain the necessary relief in short order. For example, a dispute over undertakings or refusals can lead to a delay in Toronto of 4 – 6 months. By contrast, a refusals motion can be heard in Brampton on any Tuesday, Thursday or Friday.[24]

iii. Scheduling Long Motions – Cost Savings

In order to schedule a long motion in Toronto court, an appearance at Motions Scheduling Court is required.[25] On the other hand the costs of an attendance to schedule long motions can be avoided by bringing the action outside of Toronto. Scheduling a

[24] The utility of refusals motions themselves is an open question. Justice Brown in *1416088 Ontario Limited v. Deloitte & Touche Inc.* 2013 ONSC 7303 at para. 3 and *Caja Paraguaya v. Obregon* 2013 ONSC 7647 at para. 5 offered the parties alternatives to avoid the needless delay and expense of refusals motions.

[25] Toronto Practice Direction, para 9.

motion outside of Toronto can be accomplished by placing a phone call with the appropriate court office and booking the first available date.

iv. Summary Judgment

The Practice Direction in Toronto mandates an attendance at motions scheduling court in order to schedule a motion for summary judgment. Where counsel expects that their case is likely to be determined on a summary basis, avoiding the lengthy Toronto motions list is strongly recommended. Summary judgment motions in Toronto are currently being booked nearly 7 months out. It is difficult to justify that delay, particularly where Toronto trial dates are often more readily available than are motions dates.

Collection cases in particular make strong candidates for proceeding outside of Toronto. Most such cases are determined at a summary judgment motion, and can often be determined on a short motions date. The time from issuance of the claim to summary judgment can be as short as two to three months.

v. Scheduling Trials

Smaller jurisdictions typically do not have the same volume of case loads, so a trial can be scheduled considerably sooner than it would have been in Toronto. However, slight differences in scheduling procedure raises some cause for concern. In Toronto, parties are given a trial date. However, in many smaller jurisdictions, pending trials are placed on the trial list and a trial date is not set. As a result, litigants are effectively on standby: they are aware of the period between which they may be called for their trial, but are not sure on exactly what date the trial will take place. The trial lists routinely extend for a five week period. Counsel is required to be prepared to commence the trial

on a day's notice at any time during that period. The uncertainty can increase counsel's stress levels around the time for trial, but also adds issues related to coordinating witnesses and evidence. In addition, managing other practice obligations can be difficult during this period. For instance, booking examinations for discovery on other matters may present challenges where counsel is on stand-by to appear at trial. Best practices suggest that examinations should be booked with the understanding that they may need to be delayed if called to trial. It is important for counsel to understand the procedure for scheduling a trial in the court in which he or she intends on bringing the action and prepare accordingly.

PART 2: DISADVANTAGES

While litigating outside of Toronto does have some efficiency benefits, the Unscientific Survey suggests there are some trade-offs worthy of consideration. While the points below are probably better described as "advantages" to litigating in Toronto, below are highlights of some of the key "disadvantages" of litigating outside of Toronto as revealed by the Unscientific Survey.

i. Specialization

In court offices outside of Toronto, judges often hear matters in many different areas of law. In certain circumstances, this could hinder a practitioner's ability to effectively advocate their client's position.

One benefit of the litigating in Toronto is the specialized courts. On the Commercial List, for example, commercial reality plays a big role in dispute resolution and " . . . accommodation can be made extremely quickly for a determination of disputes

in real time".[26] In order to be eligible for the Commercial List, a case must involve either a specific list of commercial statutes or matters that a judge of the Commercial List may direct are "suitably complex" commercial matters under various legislation.[27] In addition, the Commercial List Practice Direction provides that only Toronto Region matters can be heard on the Commercial List, and there should be a material connection[28] to the Toronto Region over and above the location of counsel.[29] In the view of the Unscientific Survey, the speed at which a commercial matter can be resolved using the Commercial List makes it a significant benefit to litigating a commercial case in Toronto.

Not all cases, however, require specialized knowledge. If it is anticipated that the dispute relates to issues where the law is settled or the case does not present unique complexities, factors could militate in favour of efficiency. In such instances, the less busy smaller judicial districts may satisfy such efficiency concerns.

ii. Lack of Familiarity – Cause for Concern

It goes without saying that a part of effective advocacy is the ability to articulate your position to a judge or master with confidence. Confidence not only comes from understanding the facts and law affecting the case, but also from being familiar with the procedures of the court office. Unfamiliarity can "throw you off your game" and introduce unnecessary stress into the process that could get in the way of effective advocacy. Planning is the best solution.

[26] *Re Ghana Gold Corporation*, 2013 ONSC 3284, para. 87
[27] Toronto Practice Direction (June 10, 2010) – The Commercial List (the "**Commercial List Practice Direction**")
[28] Except for urgent insolvency matters
[29] Commercial List Practice Direction

When bringing an action outside of Toronto it is important (i) to review any practice directions in force for the specific court office and (ii) get an understanding of "how things work" practically. The questions below are designed to assist you in alleviating the stress of unfamiliarity by highlighting a few issues to consider:

- What is the appropriate procedure when addressing judges, masters and court staff? Some courts may approach court proceedings with more formalism than others.
- Where are the robing rooms located and how are they accessed? Is a code required? Are passkeys necessary?
- Have you completed the correct forms and followed the proper procedures to get your matter on the court's docket?
- What time do motions start at the court office? In some courts, motions begin at 9:30 a.m. not 10:00 a.m.
- Where is parking for the courthouse?
- How are the traffic conditions on the way to the courthouse?
- Are there any specific policies and procedures? Be mindful that you are a visitor in an unfamiliar environment and it is important to be courteous and deferential to local procedures and policies.

For younger counsel, in particular, it is important to emphasize that practicing in an unfamiliar jurisdiction requires due care and consideration. As an out-of-town counsel, you are a guest in that court. Opposing counsel has likely established a reputation in that forum. Out-of-town counsel will not be afforded the benefit of that pre-existing reputation. Issues of service, procedure and diligence must be properly attended to.

PART 3: THINGS TO CONSIDER

The other sections of this paper have described some of the key advantages and disadvantages to litigating an action outside of Toronto. The issues discussed in this paper are not the only pros and cons, since different experiences will give rise to unique issues. This section articulates some additional points to consider when deciding where to commence an action:

1. Where is counsel located? What are the practical issues associated with traveling outside of Toronto?
2. Where is the evidence located? How much evidence is anticipated to be required to prove the case?
3. Where are witnesses located?
4. Do any of the witnesses have language barriers or other barriers that require third party assistance? If so, consider the availability appropriate interpreters or other third party service providers in the smaller judicial districts.
5. What is the nature of the case? How complex are the issues? Does the case require specialized knowledge?
6. Will mediation be a benefit in this case? What is the likelihood of settlement?
7. How many short and long motions do you anticipate the case to have?
8. How fast does the client want the dispute resolved?
9. Any other factor that may be relevant in the circumstances.

The questions listed above are an example of some of the considerations that will assist counsel in determining whether a court office outside of Toronto is appropriate.

The authors encourage practitioners to consider the specific circumstances of their case and decide whether a dispute could be more efficiently resolved in a smaller centre.

CONCLUSION

Litigating outside of Toronto has its advantages and disadvantages. The decision spectrum balances speed at one end and specialized knowledge at the other. While Toronto may be the right choice in many cases, bringing an action outside of Toronto is a viable option, and may provide litigants with a faster resolution of their matter.