LITIGATION

Litigating during COVID-19 and other notable litigation developments in 2020

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In March 2020, the COVID-19 pandemic forced many courts and tribunals to shut their doors. This article highlights a number of the changes and adaptations related to the conduct of litigation that were adopted as a result of the lockdowns. It also examines several other significant litigation developments during 2020, including material amendments to the Ontario class actions statute, as well as important guidance from the Supreme Court of Canada regarding litigation funding as a tool in restructurings and the test for authorizing a class proceeding in Québec.

The emergence of virtual hearings and examinations

Although shutdowns associated with the COVID-19 pandemic had a significant impact on litigation proceedings, litigation activity has largely rebounded across Canada, even as many courts continue to limit in-person attendance. Courts and tribunals have increasingly embraced virtual hearings and examinations. Indeed, many courts and tribunals have required matters to proceed virtually over the objections of the parties.

In the early stages of the pandemic, many judges indicated that litigants were expected to co-operate and use technology to advance out-of-court processes, such as examinations for discovery. One judge (and former Osler lawyer) explained that using available technology is part of the basic skillset required of civil litigators and courts. In a decision in May, he ordered that an examination proceed by videoconference, despite objections, stating:

> In my view, the simplest answer to this issue is, "It's 2020." We no longer record evidence using quill and ink. In fact, we apparently do not even teach children to use cursive writing in all schools anymore. We now have the technological ability to communicate remotely effectively. Using it is more efficient and far less costly than personal attendance. We should not be going back.

It is not merely that courts are making the best of a bad situation. The pandemic has accelerated a shift that many, including Toronto's Commercial List, had already encouraged. And as the technology has improved, and comfort using the technology has grown, many judges and tribunals appear to be increasingly skeptical of the conventional wisdom that virtual attendances are inferior. For example, some judges have found that there are advantages in hearing live testimony by videoconference because a judge can focus directly on a video of the speaker, without having to pivot between the examining lawyer and the witness box.

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Of course, there are a variety of challenges associated with virtual litigation. And, as business literature has often canvassed, long videoconferences can be exhausting. Lengthy virtual hearings can be particularly challenging for a judge who has to digest hours of online submissions. For the most part, however, judges, lawyers and parties have transitioned efficiently to virtual hearings.

Arbitration as an alternative to court proceedings

In the face of court delays relating to government-mandated shutdowns, many businesses have also come to view arbitration as an increasingly valuable alternative to court proceedings. In addition to other benefits – such as maintaining confidentiality and having the ability to select an arbitrator who has particular experience or expertise – parties can design a process and rules to efficiently address their matters. We anticipate that many parties will continue to turn to arbitration to resolve business-critical disputes as the pandemic continues.

Pandemic-related class action filings

The COVID-19 pandemic has also spawned an increase in class action filings across Canada, including dozens of actions advancing allegations relating to the pandemic. So far, these proceedings have tended to be confined to a few discrete contexts, such as actions filed on behalf of consumers seeking refunds or the return of membership fees (with many of these focusing on specific sectors of the economy like travel, post-secondary education or platforms selling tickets for entertainment or other events). Other class action filings in Canada have targeted insurers and long-term care facilities arising from the impact of the COVID-19 pandemic. Fortunately, other areas – such as securities class actions alleging misrepresentations – have not manifested in Canada to the extent that many predicted.

Some governments are considering legislation to protect businesses from liability relating to the COVID-19 pandemic. For example, on October 20, 2020, the Ontario government introduced the *Supporting Ontario's Recovery and Municipal Elections Act, 2020*. This bill, if passed, would give businesses liability protection against certain claims resulting from an individual being infected with or exposed to coronavirus. This protection is available if the business: (i) acted or made a good faith effort to act in accordance with public health guidance relating to coronavirus; and (ii) the act or omission does not constitute gross negligence. The bill explicitly excludes some claims, such as certain types of claims by employees, from the scope of its protection.

Other notable litigation developments (unrelated to the pandemic)

In addition to the direct impact of the COVID-19 pandemic on litigants, 2020 saw a number of developments unrelated to the pandemic.

CCAA proceedings and litigation funding

Third-party litigation funding has increased in recent years across a range of practice areas. In May, the Supreme Court of Canada released reasons in the "Bluberi" case *(9354-9186 Québec Inc. v. Callidus Capital Corp.),* a unanimous decision confirming that, in appropriate circumstances, third-party litigation funding may be approved as interim financing for insolvent debtors under section 11.2 of the *Companies' Creditors Arrangement Act.* This gives insolvent debtors who hold a valuable litigation asset a potential additional tool to seek to maximize creditor recoveries.

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Overhaul of Ontario's class actions statute

Ontario made extensive changes to its class actions statute. Some of the amendments add more rigour to the certification test, bringing it closer to the U.S. approach by legislating that a class proceeding cannot be certified unless common factual and legal issues "predominate" over individual issues. Other changes include amendments that are intended to increase the pace of litigation. Also included are mechanisms to help courts and defendants address the inefficiency and prejudice caused when plaintiffs file overlapping class actions in multiple provinces against the same defendants regarding the same subject matter.

These changes have led many to speculate that plaintiffs will increasingly choose to file their actions in provinces such as Québec and British Columbia instead of Ontario. It remains to be seen whether that will be the case as these changes only took effect on October 1, 2020. There is not yet a large enough sample size to begin drawing any conclusions.

Confirmation of low certification threshold for class actions in Québec

On October 30, 2020, the Supreme Court of Canada confirmed in a 6 to 3 decision that a Québec judge's role at the authorization stage (i.e., certification) is

to "filter out frivolous claims, and nothing more" (*Desjardins Financial Services Firm Inc. v. Asselin*). The Court held that a plaintiff at the authorization stage is not required to show that the claim has a sufficient basis in fact. The *Desjardins* decision sets Québec even further apart from other Canadian provinces, and in particular Ontario, considering the recent amendments it has adopted.

Expectations for 2021

Given the anticipated economic challenges, we expect that 2021 will be a busy year for litigation and that many businesses will be forced to litigate business-critical disputes. As the pandemic intensifies, the dynamics may shift and litigants may need to manage additional complexities (e.g., risks relating to the solvency of litigation opponents and other relevant businesses), in addition to the usual legal and business considerations. The dynamics could also be affected by government intervention, particularly if governments enact legislation aimed at protecting businesses in this environment.

These complexities reinforce the importance of having skilled in-house and external counsel who understand the legal and business issues at stake and can develop and implement strategies to manage the risks. The experience of 2020 has confirmed that, even if there are court closures and other shutdowns, litigation can still proceed effectively in a virtual setting to meet the needs of businesses in Canada.

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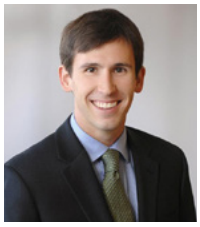

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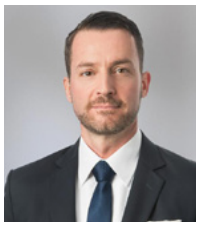

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