

Dispute Resolution

Canada

I. INTRODUCTION TO CANADIAN LAW**I.1 LEGAL SYSTEM**

Two legal systems coexist in Canada. Civil law is practiced in the province of Quebec, whereas the remainder of the country practices according to a Common law system.

The legal profession in Canada is divided into two branches: lawyers and notaries.

Lawyers give legal consultations, defend cases in front of the courts and insure the protection of their clients' interests.

The notary writes and receives acts and contracts for which parties must or wish to attribute a character of authenticity thus linking the acts with the public authority and ensuring the date. The notary also delivers legal opinions, and acts before non-contentious tribunals.

I.2 SOURCES OF LAW**I.2.1 Common Law**

The common law comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs.

I.2.2 Statute Law

Statutory law is created by the enactment of legislatures, in contrast to constitutional law and law generated by decisions of courts and administrative bodies.

I.3 LIMITATION PERIOD

Limitation (prescription) under Quebec law is governed by the *Civil code of Quebec*, book eight. By the way of the time, the prescription makes loose to the creditor the right to be provided in justice to claim his due.

The court may not, of its own motion, supply the plea of prescription. However, it shall, of its own motion, declare the remedy forfeited where so provided by law. Such forfeiture is never presumed, it is affected only where it is expressly stated in the text.

An action to enforce a personal right or movable real right is prescribed by three years, if the prescriptive period is not otherwise established. On the other hand, actions to enforce immovable real rights are prescribed by ten years.

2. ADMINISTRATION OF JUSTICE AND JUDICIAL FUNCTION

2.1 JURISDICTION

2.1.1 Quebec Courts

The Quebec courts have jurisdiction, in absence of any special provision, when the defendant is domiciled in Quebec. Even though a Quebec authority has jurisdiction to hear the dispute, it may exceptionally and on an application by a party, decline jurisdiction if it considers that the authorities of another country are in better position to decide.

2.1.2 Rest of the World

Even though a Quebec authority has no jurisdiction to hear a dispute, it may hear it, if the dispute has a sufficient connection with Quebec, where proceedings cannot possibly be instituted outside Quebec or where the institution of such proceedings outside Quebec cannot reasonably be required.

3. LEGAL PROCEEDINGS

3.1 COURT SYSTEM

3.1.1 PROVINCIAL COURT

At the bottom of the hierarchy, there are the courts typically described as provincial courts. These courts are generally divided within each province into various divisions defined according to their respective jurisdictions subject matters; hence, one usually finds a Traffic Division, a Small Claims Division, a Family Division, a Criminal Division, and so on.

3.1.2 SUPERIOR COURTS

The Superior Courts are the initial authority courts for every province. These courts have various names, depending on the province or territory: Superior Court, Supreme Court, Court of Queen's Bench.

They have very broad capacities and hear all civil actions, except for those for which the Federal Court has an exclusive jurisdiction. Superior courts are also competent to hear criminal cases, except those that fall within the Provincial Courts exclusive jurisdiction.

3.1.3 PROVINCIAL COURT OF APPEAL

The Court of Appeal is the highest Court of every province. This court only hears appeals from provincial and superior courts. Any appeal of a provincial Court of Appeal decision must be lodge with the Supreme Court of Canada.

3.1.4 FEDERAL COURT

The Federal Court is Canada's national trial court. It hears and renders decisions upon legal disputes arising from Federal jurisdiction, including claims against the Government of Canada,

civil suits in federally regulated areas and challenging Federal Tribunal decisions.

3.1.5 FEDERAL COURT OF APPEAL

Appeals from the Federal Court are heard by the Federal Court of Appeal. The Federal Court and Federal Court of Appeal also review decisions, orders and other administrative actions of federal boards, commissions and tribunals. The Court is readily accessible owing to its national and itinerant nature. The Court is itinerant in that it sits and hears cases anywhere in Canada, in order to be as close as possible to the parties. It is a bilingual tribunal that provides its services in both of Canada's official languages. The Court is also bijural, because it administers the two legal systems of the common law and the civil law.

3.1.6 TAX COURT OF CANADA

The Tax Court of Canada is a superior court to which individuals and companies may appeal to settle disagreements with the Government of Canada on matters arising under legislation over which the Court has exclusive original jurisdiction. Most of the appeals made to the Court relate to income tax, goods and services tax or employment insurance.

3.1.7 SUPREME COURT OF CANADA

The Supreme Court of Canada is Canada's highest court. It is the final general court of appeal, the last judicial resort for all litigants, whether individuals or governments. Its jurisdiction embraces both the civil law of the province of Quebec and the common law of the other provinces and territories.

3.2 CIVIL PROCEDURE

Litigation in Quebec courts is governed by the *Code of civil procedure* (C.p.c.). The C.p.c. covers all aspects of the litigation process. The rules of procedure in this Code are intended to render effective the substantive law and to ensure that it is carried out.

3.2.1 Ordinary Action

Motion to institute proceedings

Actions and applications are introduced by means of a motion. A motion to institute proceedings is a concise written statement of the facts on which the action or application is based and the conclusions sought. The motion is prepared and signed by the plaintiff or the attorney for the plaintiff, and is sent to the Court. The Court will stamp it, at which point it becomes formally issued.

Claim value

In Quebec, the general rules state that the appropriate court depends of the amount claimed:

- **Small claims** if the value of the claim does not exceed 7 000\$;
- **Cour du Québec** if the value of the claim is under 70 000\$, except suits for alimentary pension;
- **Cour supérieure** hears every suit not assigned exclusively to another court by a specific provision of law.

Procedure

Actions and application must be inscribed for proof and hearing within a peremptory time limit of 180 days after service of the motion. On the other hand, the court may extend the peremptory time limits if warranted by the complexity of the matter or special circumstances. Before the date indicated in the notice to the defendant for presentation of the action, the parties must negotiate an agreement as to the conduct of the proceeding.

Communication of exhibits

The C.p.c. rules on disclosure are very strict. A party who intends to refer at the hearing to an exhibit in his possession, whether the exhibit be real evidence or a document, including the whole or an abstract of testimony, an expert's report, must communicate it to any other party to the proceedings, in accordance with the C.p.c.

If, owing to the circumstances, a copy of an exhibit cannot reasonably be provided to a party having requested such a copy, the party in possession of the exhibit must give access thereto by other means.

A party that intends use of real evidence at the hearing must give the other parties access to the evidence.

Inscription

If the Defense is in writing, either party may, as soon as the issue is joined, inscribe the case for proof and hearing.

Trial

At the trial, each side will present the case. The party upon whom the burden of proof lies must proceed first to the examination of his witnesses. The opposite party then presents his evidence, after which the other party may adduce evidence in rebuttal.

At the conclusion of the evidence, the party upon whom the burden of proof lies addresses the court first; the opposite party follows; the other party replies, and if he raises a new point of law, his opponent may answer.

3.2.2 Corporate Litigation Procedure

There is no special procedure for corporate litigation, it is as the procedure outlined above.

3.2.3 Interim Measures

As the litigation progresses, the parties may have the need to have recourses to the Court to determine a particular issue. This is done by way of an interlocutory application. A good example of that is the application for an interlocutory injunction that is made to the court, by written motion, with a notice of the day when it will be presented. In case of urgency, a judge may nevertheless grant it provisionally even before it has been served.

3.2.4 Enforcement Proceedings

There are a number of ways in which a judgment may be enforced. When a party is condemned to deliver or to surrender a property, movable or immovable, fails to do so within the

prescribed time, the plaintiff may be placed in possession in virtue of a writ ordering that the defendant be expelled or that the property be taken from him, as the case may be. A creditor may seize and sell the movable property of his debtor which is in the possession of the latter, that in his own possession and that in the possession of third parties who consent thereto. The creditor may also seize shares of companies, salaries and wages.

3.2.5 Enforcement of Foreign Decisions

A Quebec authority recognizes and, where applicable, declares enforceable any decision rendered outside Quebec except in the following cases:

- the authority of the country where the decision was rendered had no jurisdiction under the provisions of the Civil Code of Quebec;
- the decision is subject to ordinary remedy or is not final or enforceable at the place where it was rendered;
- the decision was rendered in contravention of the fundamental principles of procedure;
- a dispute between the same parties, based on the same facts and having the same object has given rise to a decision rendered in Quebec, whether it has acquired the authority of a final judgment or not, or is pending before a Quebec authority, in first instance, or has been decided in a third country and the decision meets the necessary conditions for recognition in Quebec;
- the outcome of a foreign decision is manifestly inconsistent with public order as understood in international relations;
- the decision enforces obligations arising from the taxation laws of a foreign country.

An application for recognition and enforcement of a decision rendered outside Quebec is made by way of a motion to institute proceedings. A party seeking recognition or enforcement of a foreign decision attaches to his application a copy of the decision and an attestation emanating from a competent foreign public officer stating that the decision is no longer, in the State in which it was rendered, subject to ordinary remedy and that it is final or enforceable.

4. ARBITRATION

4.1 ARBITRATION IN CANADA

Alternative dispute resolutions are contractual, extra-judicial and non-contentious methods that allow resolving disagreements that have already arisen or that will arise, with the assistance of a neutral third party.

Mediation is an alternative dispute resolution process in which a mediator tries to help the parties to reach a negotiated settlement. The mediator's powers are limited to those given by the contracting parties.

Arbitration is another alternative dispute resolution, according to which the parties, by mutual agreement or by a judge's order, entrust solving their litigation to a third party.

There is *ad hoc* arbitration, which means that arbitration clause will be written by the parties. If a matter for litigation arises, the parties apply the clause, choose the arbitrator and manage the arbitration process.

There is also institutional arbitration. That means that an institution is in charge of selecting the arbitrator and managing the arbitration according to the institute's regulations, as included in the parties' contract. In Canada, there are different independent arbitration organizations, as the Canadian Commercial Arbitration Centre (CACC) and the British Columbia International Arbitration Centre (BCICAC).

4.1.1 Canadian Commercial Arbitration Centre (CACC)

What was formerly known as the CACNIQ (Centre d'arbitrage commercial national et international du Québec), is now called the Canadian Commercial Arbitration Centre. It is a private but non-profit organization which has the mission to resolve business disputes outside the traditional framework offered by courts of law, by various alternate dispute resolution methods, as arbitration and mediation. Its head office is in Montreal.

The center serves different customers in all the economic branches of industry, such as construction, high technologies, transferable securities, consumers and car manufacturing litigation, franchisers and franchisee matters, high performance amateur sports, and many more.

CACC's experts manage both common law and civil law, and draft files in French, English and Spanish. According to the Centres' regulation, parties choose the arbitration's place, which law system will apply, the number of arbitrators and the procedure's language.

The Centre is a founding member of the Commercial Arbitration and Mediation Centre for the Americas (CAMCA). It was created following the signing in 1995 of a cooperation agreement between CCAC, the American Arbitration Association (AAA), the Mexico City National Chamber of Commerce and the British Columbia International Commercial Arbitration Centre. Lastly, CCAC is a member of the International Federation of Commercial Arbitration Institutions.

4.1.2 BRITISH COLUMBIA INTERNATIONAL ARBITRATION CENTRE (BCICAC)

Established in 1986, the British Columbia International Arbitration Centre is an organization committed to offering businesses alternatives to litigation. The Centre is available to provide information and assist in the smooth conduct of the arbitration or mediation. Parties can request that the Centre administer mediation or arbitration, and the Centre helps select and appoint an appropriate and qualified mediator or arbitrator. The Centre's services include rules of procedure, assistance in determine where and when proceedings are held, and providing guidelines and resources.

The Centre's rules for international commercial arbitrations are based on those adopted by the United Nations.

4.2 PROCEDURE

4.2.1 ARBITRATION UNDER THE TERMS OF THE CODE OF CIVIL PROCEDURE

Arbitration procedure is decided by the parties' will. But, in the province of Quebec, if the parties have not planned the arbitration's procedure, articles 940 to 951.2 of the *Code of civil procedure* will apply. There are, however, some rules from which it is impossible to deviate. Thus, these rules will have to be imperatively respected; *audi alteram partem* principles and contradictory procedure, provisions limiting the cases of opposability to the execution of the sentence or its annulment, and the absence of appeal.

4.2.2 Appointment of arbitrators

There shall be three arbitrators. Each party shall appoint an arbitrator, and the two so appointed shall appoint the third.

4.2.3 Incidental cessation of arbitrator's appointment

An arbitrator may have to disclaim competence if he does not possess the qualifications agreed upon by the parties. It is important to note that an arbitrator must declare to the parties any ground of recusation to for which he is liable.

The party proposing to the arbitrator to recuse himself shall make a written statement of his reasons. If the arbitrator does not withdraw or the other party does not accept the recusation proposal, the other arbitrators make a decision on the matter. Also, if an arbitrator is unable to perform his duties or fails to perform them in a reasonable time, a party may apply to a judge to have his appointment revoked.

4.2.4 Competence of arbitrators

Arbitrators may decide upon the matter that falls within their own competence.

4.2.5 Order of arbitration proceedings

A party intending to submit a dispute to arbitration must notify the other party of his intention. Subject to the *Code of civil procedure*, arbitrators shall proceed with arbitration according to the procedure they determine. They have all the necessary powers to exercise their jurisdiction. Proceedings are usually oral, but a party may nevertheless produce a written statement. Arbitrators must give notice of the hearing and, where such is the case, the date on which they will inspect the concerned property or visit a location.

Arbitrators shall settle the dispute according to the rules of law which they consider appropriate and determine, where applicable, an amount in damages. In all case, they shall decide according to the stipulations of the contract and consider of applicable usage.

4.2.6 Arbitration award

Arbitrators are bound to keep the award secret. If the parties settle the dispute, arbitrators shall record the agreement in an arbitration award. The arbitration award must be made in

writing by a majority of voices. It must be state the reason on which it based, be signed by all the arbitrators, and it binds the parties.

4.2.7 Homologation of the arbitration award

An arbitration award cannot be put into compulsory execution until it has been homologated. The court can refuse homologation in some very precise cases only, and cannot enquire into the merits of the dispute.

4.2.8 Annulment of the arbitration award

The only possible recourse against an arbitration award is an application for its annulment. Annulment is obtained by motion to the court within three months after reception of the arbitration award.

4.2.9 Recognition and execution of arbitration awards made outside Quebec

An arbitration award shall be recognized and executed if the matter in dispute is one that may be settled by arbitration in Quebec and if its recognition and execution are not contrary to public order. Like the annulment of the arbitration award motion, the court cannot enquire into the merits of the dispute and the arbitration reward as homologated is executory as a judgment of the court.

4.3 APPEAL

The only possible recourse against an arbitration award is an application for its annulment. Also, the interlocutory decisions of the judge are final and without right to appeal.

5. ALTERNATIVE EXTRA-JUDICIAL DISPUTE RESOLUTION

5.1 ALTERNATIVE DISPUTE RESOLUTION

Alternative Dispute Resolution is used to describe a variety of methods for resolving disputes, such as mediation, conciliation and arbitration. Conciliation is the adjustment and settlement of a dispute in a friendly manner. It is used in courts before trial with a view towards avoiding trial in labor disputes before arbitration.

5.2 MEDIATION

Mediation is another confidential method that is more flexible and less formal than arbitration. In this setting, the parties select a third party whose role is that of a facilitator seeking to assist them in defining the issues and then finding a solution. It is not the mediator's job to decide on the dispute, he is not empowered to do so. The parties are the ones who decide by mutual agreement on the outcome. If the mediation miscarries or fails in whole or in part, the parties remain free to go to arbitration or before traditional courts of law.

5.2.1 General Procedure

On the first meeting, the mediator must explain what the mediation is, and what the procedure

is going to be. There is to different facets: joint mediation sessions and individual meeting. For the joint session, all parties meet together with the mediator to put their case. Then after, the mediator meets the parties separately to listen to the views and objectives of each party and discuss a realistic solution.

5.2.2 Advantages and Disadvantages of Mediation

Mediation has numerous advantages in comparison to litigation. It is a completely voluntary process and it is quicker, less expensive, confidential, and it helps to maintain a better relationship between the parties.

Any solution that is reached (because ,it is a voluntary process) is not binding, and therefore is not enforceable.

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