

The Process of a Typical Commercial Case

Canada (Québec)

Litigation Guide

IBA Litigation Committee

Christopher Richter

crichter@woods.qc.ca

Eric Bédard

ebedard@woods.qc.ca

Woods LLP

2000 McGill College Avenue

Suite 1700

Montreal QC H3A 3H3

Canada

www.litigationboutique.com

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THE PROCESS OF A TYPICAL COMMERCIAL CASE

We provide below an overview of the process of a typical commercial case in the jurisdiction of Québec, such as for non-payment for goods sold and delivered with an agreed price equivalent to US\$100,000 (Typical Case).

The courts of general jurisdiction are the Superior Court and the Court of Québec. One judge of the Superior Court hears in first instance every suit that is not assigned exclusively by a specific provision of law to another court such as the Court of Québec or the Federal Court of Canada.

In the Typical Case, the Superior Court would have jurisdiction to hear the dispute. The Québec Code of Civil Procedure (CCP) applies in the Superior Court and is complemented by the Rules of Practice of the Superior Court of Québec in Civil Matters (RCP).

1. Limitation issues

Under the Civil Code of Québec (CCQ), the general limitation period for a civil action is three (3) years from the date the cause of action arises. For the Typical Case, the limitation period will ordinarily run from the date the debtor is in default of making payment when the payment is due.

The parties may not suspend these periods by agreement, but the debtor may renounce the benefit of any time already passed.

2. Pre-litigation requirements

Before filing a civil action, the Plaintiff or the Plaintiff's attorney should place the debtor in default by writing a formal demand requiring the debtor to perform his or her obligation within a certain time period. If, after being put in default, the debtor still does not perform, the Plaintiff may file an action. In some cases, the debtor can be in default by the sole operation of the law, which means that the Plaintiff can file an action without a formal demand.

There is a limited procedure available for conservation of proof before proceedings are commenced, and the court can authorise seizure before judgment of property or evidence in certain circumstances.

3. Starting proceedings

Civil actions are commenced by filing a motion to institute proceedings. This motion sets out the facts on which the action is based and the conclusions sought. It is served on each Defendant by a bailiff. The Defendant has 10 days from service of the notice to appear.

Claimants from outside Québec are commonly required to provide security for the defendant's judicial costs.

IBA GUIDE : Litigation Committee

THE PROCESS OF A TYPICAL COMMERCIAL CASE

4. Timetable and Case management

The motion to institute proceedings is presented before the court at a specified date no less than 30 days after service. However, it is possible for the parties to agree on different periods and, in urgent situations, for the court to decide on a different date.

Before the presentation of the motion, the parties must negotiate an agreement regarding the conduct of the proceedings. They must agree on specific arrangements and a timetable to comply with the 180-day peremptory time limit for inscribing the case for proof and hearing. However, the parties can file a motion to extend this deadline.

Parties generally have control of their case with respect to the choice of procedure and the time limits prescribed. The agreement regarding the conduct of the proceedings covers, among other things, preliminary exceptions and safeguard measures, procedure and time limits for the communication of exhibits, the number and length of examinations on discovery, expert appraisals, any planned or foreseeable incidental proceedings, the oral or written form of the defence and, in the case of a written defence, the time limit for its filing as well as the time limit for filing an answer. The court may intervene to facilitate the progress of the proceedings and to ensure proper management of the case, particularly if the parties are unable to agree upon the timetable or seek an extension of the 180-day limit to inscribe the case. When the case is inscribed, the parties must declare that they are ready for trial and disclose their lists of witnesses and exhibits.

5. Disclosure of Evidence

All exhibits to which a party intends to refer at the hearing must be communicated to all parties. Exhibits directly supporting the allegations in a written proceeding must be disclosed in a notice attached to the motion. The procedure and the time limits for communicating exhibits are determined by the parties in the timetable. Absent such an agreement, exhibits which do not directly support the written proceeding must be communicated by the Plaintiff(s) at the time of the inscription of the case for proof and hearing or, by the other parties, within 30 days thereafter. Documents that a party does not intend to invoke at trial need not be disclosed to the adverse party unless requested during discovery.

There are rules against spoliation of evidence pending trial.

A party cannot obtain the communication of documents that are privileged. For example, communications between a lawyer and his client for the purposes of obtaining legal advice are generally privileged. Other communications may be privileged such as documents concerning negotiations of out-of-court settlements, documents prepared principally in contemplation of litigation, and legal advice from an in-house lawyer.

The parties and their attorneys have the right to conduct examinations on discovery of the adverse parties, their representatives or, with the permission of the court, of any other person. Prior to or during the examination, the attorneys may ask for the communication of relevant documents relating to the issues. In order for an expert to

IBA GUIDE : Litigation Committee

THE PROCESS OF A TYPICAL COMMERCIAL CASE

testify, his or her report must be communicated to the other party prior to the matter being set down for trial. Experts generally are not discoverable prior to trial.

6. Administration of Evidence

Proof is admitted according to the rules of evidence at a trial presided over by a single judge. There are no jury trials in civil matters in Quebec. Both ordinary and expert witnesses provide oral testimony at trial. However, a written statement may be accepted as testimony by the courts subject to certain conditions. When this latter situation occurs, other parties may demand that the party having communicated the statement summon the witness to the hearing. Except with leave of the court, the communication and filing of the expert's report are necessary before an expert witness will be permitted to testify. Parties have a right to cross-examine witnesses called by parties adverse in interest.

7. Remedies

Courts have the power to order specific performance and to award monetary damages such as compensatory, additional and punitive damages and to make appropriate orders to deal with cases for which no specific remedy is provided by law. Specific performance is a primary remedy under the CCQ and the court may issue mandatory orders, injunctions or reprimands, suppress writings or declare them libellous, etc.

In general, a money judgment bears interest from the date of default. The interest may be charged at the rate stipulated in the contract, or if no rate is stipulated, at the legal rate together with an additional indemnity.

The CCQ authorises the Plaintiff to seize before judgment the property of the Defendant with leave of the court. This measure will be permitted by the court if there is reason to fear that without this remedy the recovery of the debt may be put in jeopardy. A Plaintiff may also seize before judgment, without leave, moveable property over which he or she has specific rights set out by law (generally ownership or a right of retention). Seized property is put in the hands of a guardian named by the court pending final judgment.

In addition, courts may issue interlocutory injunctions. An interlocutory injunction will be granted if 'the applicant appears to be entitled to it and it is necessary in order to avoid serious or irreparable injury to him, or to avoid a factual or legal situation of such a nature as to render the final judgment ineffectual.' Both Anton Piller and Mareva injunctions are also available in Québec.

These remedies may be available in support of foreign proceedings.

8. Enforcement

Once the decision is enforceable, the judgment creditor has to follow the procedure for compulsory execution. A judgment must be executed by a sheriff or a bailiff pursuant to a writ, who will seize the debtor's property in the name of the judgment creditor. The

IBA GUIDE : Litigation Committee

THE PROCESS OF A TYPICAL COMMERCIAL CASE

procedure will vary depending on the type of property being seized (e.g. real or personal property, wages, securities). In the case of a real action, procedures exist to allow the judgment creditor to take possession of the immovable or moveable property of which he or she has been declared owner, and to be registered as owner.

A party who disobeys any process or order of the court may be found guilty of contempt of court. This person is liable to a maximum fine of CA\$5,000 per day or to imprisonment for a maximum period of one year, in addition to any damages.

9. Appeal

A final judgment of the Superior Court or the Court of Québec is appealable to the Québec Court of Appeal.

Leave to appeal will be required where:

- the value of the object of the dispute is less than CA\$50,000;
- the judgment or order rendered concerns a non-contentious matter;
- the judgment or order is rendered on an issue of execution; or
- the judgment or order rendered concerns judicial review.

A judge of the Québec Court of Appeal will grant leave to appeal if the matter at issue is a question of principle, a new issue or a question of law that gives rise to conflicting judicial precedents.

An interlocutory order may be appealed only with leave when it decides in part the merits of the case, orders the doing of anything that cannot be remedied by the final judgment, or when it unnecessarily delays the trial of the suit. However, an appeal from an interlocutory judgment dismissing an objection to evidence based on disclosure of privileged information is appealable as of right.

The appeal must generally be brought within 30 days of the date of the judgment at first instance.

A judgment of the Québec Court of Appeal in a civil matter may be reviewed by the Supreme Court of Canada only with leave to appeal given in cases involving a question of public importance or raising an important issue.

10. Costs

The losing party must pay judicial costs, which are fixed according to a tariff. However, the court has discretion to reduce or refuse to make such an award of costs.

In addition to the modest fees fixed by the tariff, recoverable costs include the disbursements that were paid to file certain written pleadings with the clerk of the court, to indemnify witnesses and expert witnesses for the preparation of their reports and their attendance at trial, and to pay the expenses for stenography or the recording of the

IBA GUIDE : Litigation Committee

THE PROCESS OF A TYPICAL COMMERCIAL CASE

hearing. In general, the recoverable costs do not include extrajudicial expenses or fees such as attorney's fees.