Euler Hermes

Collection Profile **Canada**

Collecting in Canada

- Although the payment behavior of domestic companies is good, the law provides no standard payment terms and does not facilitate the debt collection process meaning late payment conditions (delays, interest rates, collection costs) are left for the parties to consider contractually.
- Canada offers an efficient judiciary system despite being complex insofar as different federal and local rules are applicable. Contractual ownership protection mechanisms commonly admitted in many countries are not recognized by Canadian courts.
- Insolvency law provides sophisticated mechanisms, but their efficiency in recovering unsecured debt is very limited, therefore pre-legal action should be considered as the best debt collection opportunity.

Collection complexity

Notable — High — Very High — **Severe**

Complexity relating to

	Notable → Severe
Payments	$ $ **$** $
Court proceedings	⚖ ⚖ **⚖** ⚖
Insolvency proceedings	↘ ↘ ↘ **↘**

EULER HERMES
Our knowledge serving your success

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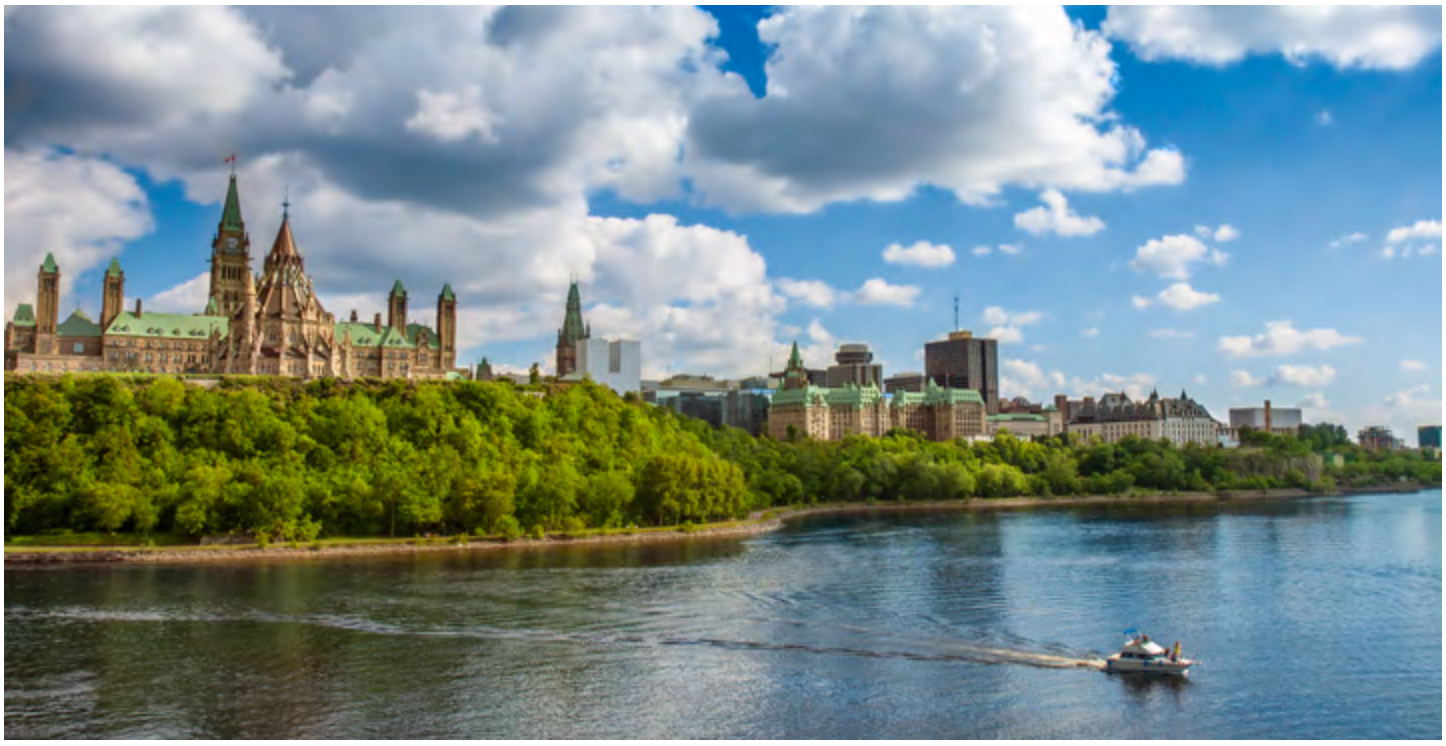


General information

Availability of financial information

Relevant financial information on publicly traded domestic companies may be obtained through official registries and specialized providers, but private companies have no obligation to publish their financials and the information available is often outdated. Euler Hermes allocates each company a grade reflecting its financial health and how it conducts business. Grades represent a core of our knowledge and analyses,
and help clients identify and avoid risk. Data is continuously monitored to offer the most up-to-date information to support management decisions.

Main corporate structures

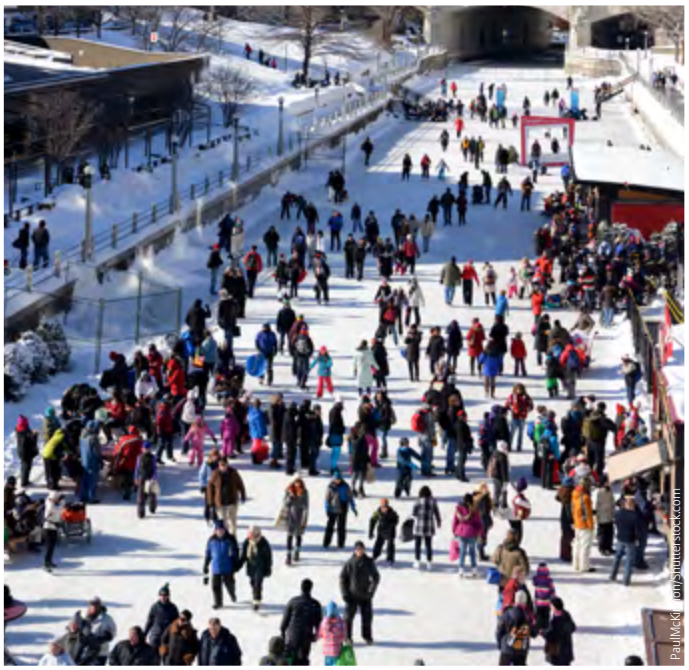
Liability for business debts is determined by legal structures, which are described as follows:

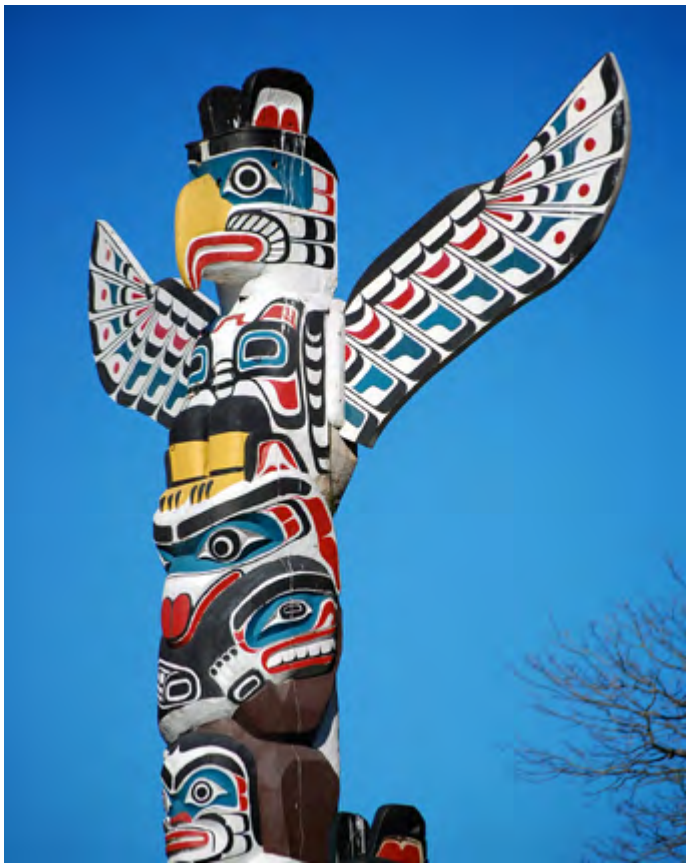
- Sole Proprietorship is commonly relied upon for small scale operations since it is based on the qualities of the sole proprietor who personally owns the business assets. As a result, the proprietor is fully liable for the business' activities and debts.
- Partnership is another way of doing business without incorporation: partners combine their resources and share profits, but they are also fully liable for the partnership's debts. Alternatively, Limited Partnerships allow reducing liability where a partner is not willing to manage the business.
- Finally, Incorporation creates a legal entity that is separate from the owners and shareholders, who cannot be held liable for the business' actions and debts unless fraud or negligence events occur. In addition, if the corporation fails to remain in good standing, the corporate status is set aside and the company becomes a sole proprietorship, thus giving the creditor a possibility to go after the shareholders directly.

Regulatory environment

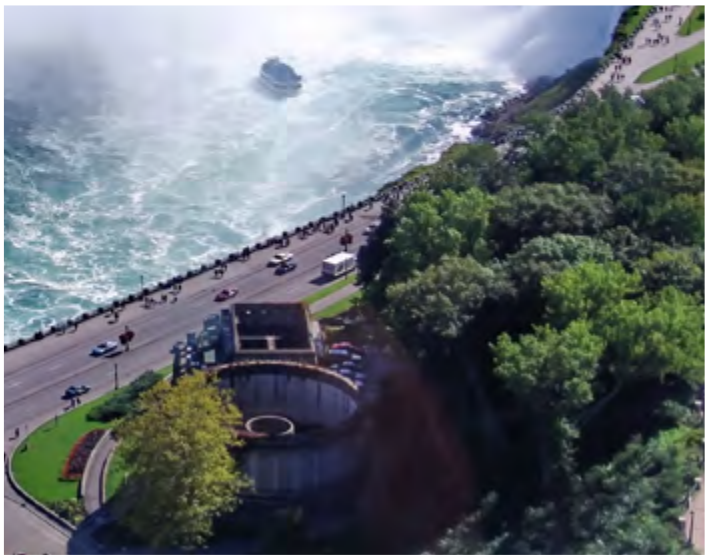
Canada offers an efficient and reliable judiciary system, despite being complex insofar as different rules are applicable in the ten provinces and three territories of which the country is composed: as a general rule, Civil Law applies in Quebec under de Civil Code of 1994, but Common Law is otherwise applied.
Under the Constitution Act of 1867 (as amended in 1982), the judicial authority is divided at the federal and provincial levels. Federal Courts have priority in dealing with federal claims, administrative litigation, intellectual property, insolvency or maritime law. Each province is responsible for justice administration and commercial litigation is dealt with as a matter of general jurisdiction before Provincial Courts (small claims up to CAD 25,000) or Superior Courts depending on the amounts at stake. The Court of Quebec is made of several divisions, competent on various subject matters.

Days Sales Outstanding (DSO): Payments take place within 30 days on average whilst delays are short (5 to 10 days) and uncommon.





Late payment interest:
Late payment interest cannot be charged unilaterally to the debtor, and the law provides no legal interest rate when payment is not received in time.



Getting Paid

Days Sales Outstanding (DSO)

The payment culture in Canada is excellent and, even though the law does not provide standard payment terms, payments take place within 30 days on average, while delays are short (5 to 10 days) and uncommon. For listed companies, the DSO is slightly higher at 55 days.

Late payment Interest

Late payment interest cannot be charged unilaterally to the debtor, and the law provides no legal interest rate when payment is not received in time. It is necessary, therefore, that contractual terms contain a provision specifically allowing for late payment interest and collection costs to be added to the outstanding debt. In practice, these costs would tend to be levied as a tool to prompt the debtors to pay sooner rather than later.

Debt collection costs

See above.

Ownership protection

Retention of Title (RoT) provisions aiming at retaining ownership over traded goods as long as the debt has not been fully paid are not recognized in Canada, where failure to pay the bill is only considered as a contract breach. Some Common Law provinces may nonetheless recognize certain ownership preservation agreements provided that (under the Personal Property Security Acts) these are officially registered as 'security interests' prior to dispatch and within a certain timeframe known as PMSI (Personal Money Security Interest). In Quebec, however, the Civil Code provides no 'presumption of hypothec' so RoT agreements are not considered as a security interest.

Payments

The most common payment methods are as follows:
Swift, EFT or ACH bank transfers are among the most popular payment methods as they are fast, secured, and supported by an increasingly developed banking network internationally and domestically. Export transactions are usually guaranteed through Standby Letters of Credit (a bank guarantees the debtor's credit quality and repayment abilities) which constitute reliable guarantees to be interpreted as a sign of good faith since they can be triggered as a 'payment of last resort' if the client fails to fulfil a contractual commitment. Alternatively, Documentary Letters of Credit (a debtor guarantees that a certain amount of money is made available to a beneficiary through a bank once certain terms specifically agreed by the parties have been met) may be considered.
Down payments may be obtained in the manufacturing industry, depending on the amount at stake. Open terms remain the most common terms in order to encourage buyers to purchase the products and increase sales for the sellers.

Collecting overdues

Amicable action

Negotiating

Canadian courts are reliable but amicable settlement opportunities should nonetheless be considered as an alternative to formal proceedings.

Before starting legal proceedings against a debtor, assessment of assets is important as it allows verification as to whether the company is still active and whether recovery chances are at best. In addition, it is essential to be aware of the debtor's solvency status: if insolvency proceedings have been initiated, it indeed becomes impossible to enforce a debt (see below).

Legal action

Ordinary proceedings

Fast track proceedings (in their European shape) do not exist in Canada, but 'small claims' proceedings are available, provided that the dispute is certain and undisputed. Different thresholds apply but most provinces are at CAD 25,000 or lower (Saskatchewan is CAD 20,000, New Brunswick is CAD 12,500, Prince Edward Island is CAD 8,000, Manitoba CAD 10,000 and Quebec at CAD 15,000). Rules as to whether an attorney must assist the parties would also vary from one region to another.

If these attempts do not succeed, ordinary legal action would usually commence once the debtor has been served with a Writ of Summons (bref d'assignation) summarizing the claim and placing the debtor in default. If the debtor does not attend or fails to bring a defence (appearance) within 14 days, the court may consider the claim trustworthy and render a default judgment without trial, but this default of appearance judgment may be reversed if the debtor provides sufficient evidence that a counterclaim is legitimate. The court would otherwise set up a conciliation phase (amicable settlement conference/conférence de règlement à l'amiable) prior to conducting an Examination for Discovery (interrogatoire préalable) phase to consider the evidence and hear the parties (together with their witnesses) before taking a decision.

Canadian courts normally order remedies in the form of monetary damages, specific performance, declaratory relief and punitive damages.

Necessary documents

All documents relevant to the action (such as credit application, purchase orders, invoices, proof of deliveries, notices of default, statement of account, and all possible document to establish the terms of the contract and default) must be provided prior to commencing any action. Euler Hermes, at minimum, requires a statement of account and supporting invoices before any collection can start.

Time limitations

Prescription periods differ from one province to another, but claims must normally be brought to court within two years starting when the cause for action arose (three years in Quebec). Courts are increasingly strict in this regard and failing to observe statutory limitations could prevent legal action. Certain events can extend or move this date forward, although proof of admission of a debt and/or intent to pay is usually sufficient to move/extend the limitation period.

Provisional measures

Various provisional measures may help preserve the creditor's interests pending a final and enforceable judgment. Indeed, a motion for pre-action interim measures may be filed ex parte (without the presence of both parties) to avoid irreparable damage (preservation of the status quo, protection of rights). In order to protect evidence, the creditor may also request freezing orders (Mareva injunctions) and search orders (Anton Piller orders). The parties may also bring motions for security on costs, motions to strike pleadings, motions requesting documents or responses to questions, and motions for summary judgment. This form of action is only adapted to extreme circumstances since it is hard to prove and rather costly. Thus, it would only be triggered if there is evidence that the debtor may abscond and/or move the goods.

Lodging an appeal

Appeal against decisions rendered in first instance by Superior Courts may usually be brought to Intermediate Appellate Courts. Further appeal may then be brought to the Supreme Court of Canada, however it is then necessary to request a leave for appeal. Appeal proceedings are normally time consuming, unpredictable and costly.

Appeals against arbitral awards are possible in certain, although limited, circumstances.

Collection @ Euler Hermes

It is always advised to attempt collection prior to any legal action in order to maximize chances of successful recovery and avoid legal costs and delays. Our key principle is to collect in close proximity to the debtor, using a series of letters, emails and phone calls in the local debtor language. Our World Collection Network of Euler Hermes offices and external providers are experts in professional trade debt collection and negotiation, ensuring positive outcomes while retaining important client relationships. Euler Hermes can handle the complete collections process from amicable, pre-legal action through to judgement and enforcement.

Enforcing court decisions

A judgment is enforceable as soon as it becomes final (i.e. when all appeal venues have been exhausted). Enforcement of final decisions in Canada is efficient and fairly quick, while locating the debtor's assets may be the most difficult task. The courts would normally issue Writs of seizure and sale, Writs of sequestration and garnishment orders when the debtor has failed to execute the decision. If necessary, examinations in aid of execution may also help identify a debtor's assets. Judgments must be enforced within ten years following the decision as strict statutes of limitations apply.

How long could legal action take?

Default and summary judgments may be obtained within 90 to 120 days on average, but an undefended action would normally take one year in order to be considered final. Defended actions can require three years.

Domestic courts would not differentiate between cases involving a foreign party and cases involving domestic parties only but, depending on translation needs and complexity, proceedings would often require more time than strictly domestic claims.

How much could this cost?

As a general rule, the successful party may demand payment of court fees by the defeated party, as well as partial indemnity to compensate for its legal costs (usually one third to one half of the costs). This is however a discretionary matter to be strictly decided by the courts. In practice, legal fees are rarely compensated for in commercial disputes and the plaintiff would normally bear the highest cost factors (filing of the motion, bailiffs, subsequent documents, serving and so on).

Providing an estimate of costs is difficult as it would depend on the complexity of the action and on whether the case is defended, but costs starting from CAD 1,000 and rising to 30% of the claim may be expected on average.

Conditional arrangements, whereby attorneys are not paid upfront but rather receive a fixed sum upon success, and contingent fees, whereby the legal professionals are entitled to receiving a percentage on the final award, are common.

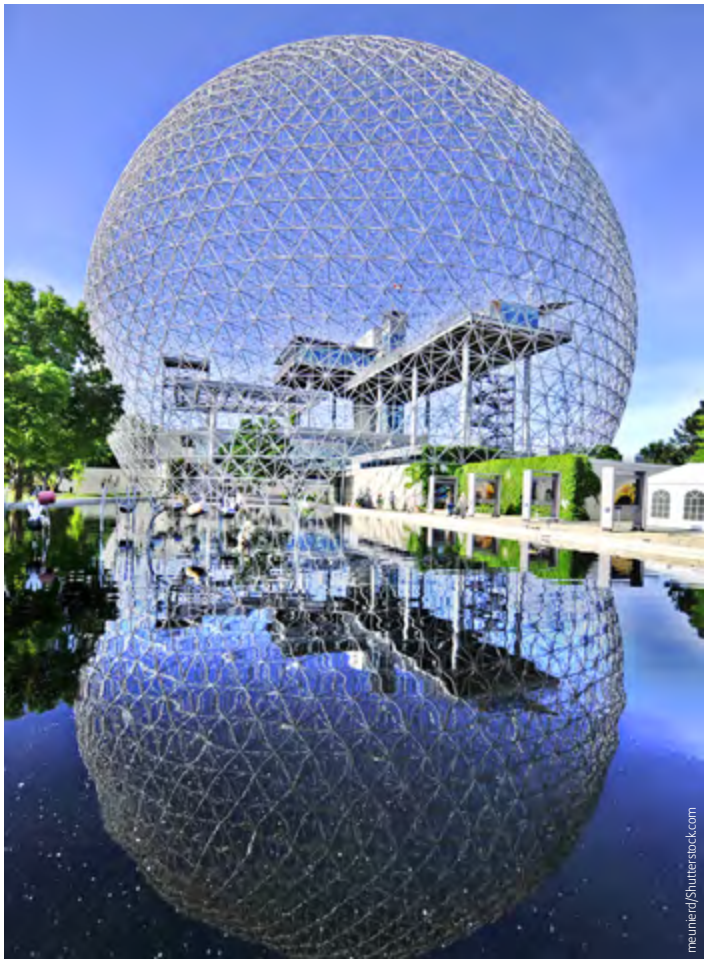
Alternatives to legal action

Alternative Dispute Resolution methods (ADR)

Alternative Dispute Resolution mechanisms (such as conciliation, arbitration and mediation) are very common in Canada for business-related disputes, but the rules may vary from one province to another.

In general, conciliation is increasingly frequent since 2003, since the Civil Procedure Code was then amended to increase out-of-court settlement opportunities (Conférence de règlement à l'amiable).

Arbitration is often viewed as being more efficient than ordinary lawsuits since it offers expeditious and confidential proceedings together with a final and binding award on the merits. In addition, arbitrators may grant interim relief. To be enforced, arbitral awards must then be recognized by the Provincial Courts through an exequatur proceeding. Typically, an award may be left aside if the



Litigation @ Euler Hermes

Should legal action be necessary Euler Hermes can provide support throughout the legal process from judgment to enforcement via our World Collection Network of Euler Hermes offices and external providers. Legal action can often be complicated and expensive, so you will be informed of all costs prior to any action and advised on which route is best to take.

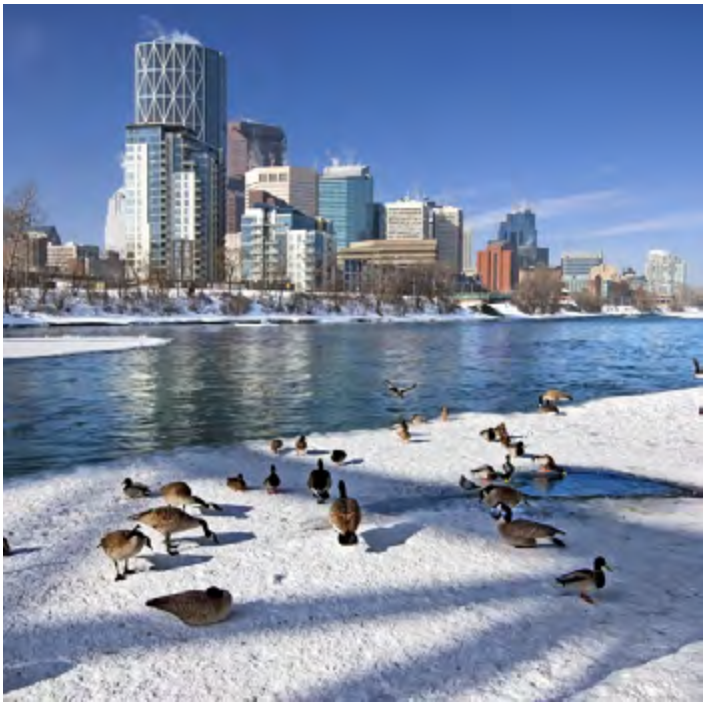
arbitration agreement is deemed invalid if the court finds that the arbitrator was partial or had no jurisdiction to deal with the dispute, if the parties have not benefited from a due process of law, or if the court considers that the award is fraudulent. Awards cannot, however, be reviewed on merits.
ADR regulations in Canada may vary from one province to another but tend to be adapted from international Model Laws such as the United National Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Conciliation. Appeals may be considered in certain conditions.

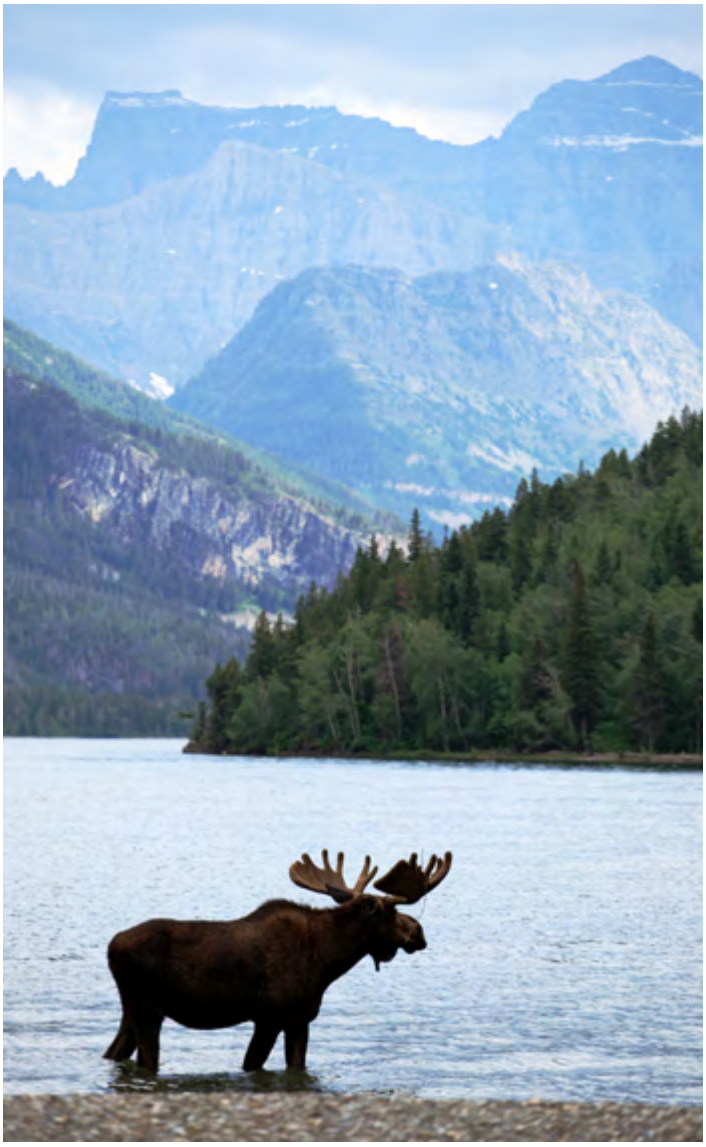
Foreign forums

Use of foreign forums is rather uncommon for debt-related disputes in Canada since domestic courts are efficient in providing timely decisions. Foreign traders may nonetheless agree to solve their business disputes in a foreign forum (i.e. under a foreign law or before a foreign court) as Canadian law provides for the enforcement of foreign jurisdiction provisions as long as enforcement has no unreasonable impact on public policy. It is essential that the agreement be characterized by an international connection (for example, one party has elected domicile in another country, or the place of execution is located abroad), and that a jurisdiction clause is specifically drafted for this purpose. It is recommended to always seek legal advice.

Enforcing foreign awards

As previously mentioned, using foreign forums in order to obtain enforceable decisions against domestic debtors is rather unusual since domestic courts are efficient. Nonetheless, foreign decisions issued against foreign debtors owning assets in Canada may be recognized and enforced by domestic courts provided that various criteria are observed. Recognition and enforcement of foreign judgments (including judgment rendered in other provinces) is mostly organized under common law principles although each province may have its own rules and requirements. In Quebec, the Civil Code governs all enforcement proceedings.
As a general rule, foreign judgments must be confirmed by Canadian courts through exequatur proceedings. In practice, these usually recognize foreign decisions and order enforcement provided that the foreign judgment is final and enforceable in the issuing country and that there is neither fraud nor incompatibility with the public order. In addition, the issuing court must have a 'real and substantial connection' to the dispute, and a certain degree of reciprocity in enforcement with the issuing country may be required. Default judgments would usually not be recognized.
Once a foreign judgment is recognized, enforcement would typically occur through the seizure and sale of the debtor's assets or through the garnishment of debts payable to the debtor.
Canada is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958. Therefore, domestic courts also ought to recognize and enforce decisions rendered through international arbitration proceedings.





Handling insolvent debtors

Insolvency in Canada is a matter of cash flow and balance sheet alike: a debtor is deemed insolvent when it is illiquid, i.e. when it is permanently unable to pay its outstanding debts or when the debtor's liquidated assets cannot satisfy all of the creditors.
The Winding-up and Restructuring Act of 1882 has now been replaced by the Bankruptcy and Insolvency Act (BIA) and the Creditors Arrangement Act (CCAA) of 1985. Proceedings would usually take place in the Superior Courts in each province.
The law provides for an opportunity to rescue viable companies in order to increase repayment chances. In practice, restructuring normally gives unsecured creditors a chance to receive some payment in the future, although returns – though higher than through liquidation – would often be very small. Overall, debt collection chances when the debtor has become insolvent would remain extremely poor and pre-legal action collection efforts remain the best opportunity to obtain payment.

Insolvency proceedings

Out-of-Court proceedings
The law provides no out-of-court proceedings.

Restructuring the debt
Under the BIA, a debtor facing temporary financial difficulties is entitled to present a restructuring proposal to the creditors.
Upon acceptance of the debtor's reorganization petition by the Superior Courts, the company directors remain in control of the normal business activity and the court orders a stay on all enforcement proceedings for a maximum period of six months. Unless each class of creditor and the court approve the proposal, the debtor has no choice but to file for bankruptcy.
A similar procedure exists under the CCAA: a monitor is appointed to oversee the debtor's restructuring and reports to the court from time to time. By contrast with the BIA procedure, failure to reach an agreement does not lead to automatic liquidation; therefore the whole process may last for years.

Winding up proceedings
Two separate proceedings aiming at realizing debts from the sale of the debtors' assets are available.
On one hand, receivership proceedings may be initiated under the BIA in order to enforce security agreements. The creditors must file claims with the trustee but no limitations periods seem to apply for doing so. Having said this, failure to file claims would prevent unknown creditors from being involved in Creditors' Meetings and from receiving part of the proceeds following the sale of the debtor's assets. A receiver is mandated by the court (Court Appointed Receivership) or by the parties (Privately Appointed Receivership) to establish a claim list, to audit the company, to realize the debtor's property and to distribute the proceeds of the realization to the creditors according to their respective entitlements.
On the other hand, a liquidation procedure may also be commenced.

Unless the debtor files for a voluntary bankruptcy with the Government Bankruptcy Office, creditors owning a debt of at least CAD 1,000 can also request a bankruptcy order to the court. A trustee is then given responsibility for selling/disposing of the estate.

Priority rules
Priority rules normally apply while distributing the proceeds to the creditors. Under the BIA, priority claims (such as government claims) are considered first, followed by preferential claims (such as administrative expenses) and unsecured creditors. There are no precise rules under the CCAA, but unsecured creditors would similarly be considered once secured and preferential creditors have been paid in full.
As previously mentioned, RoT provisions have no effect in Canada, but the creditors may request the return of unpaid goods (shipped within up to 30 days) by sending a notice to the BIA within 15 days of the bankruptcy declaration. In practice, this is difficult as the goods must have remained discernable and, as far as foreign sellers are concerned, the time requirements have often passed when they become aware of the proceedings.

Cancellation of suspect transactions (clawback)
In reorganization and liquidation proceedings alike, administrators and liquidators may order cancellation of any transaction concluded prior to the insolvency proceedings against the interests of the estate. Therefore, although there is no 'suspect period' in Canadian law, undervalued deals, transactions favoring one creditor over the others, inappropriate dividends or unfair transactions of all kinds would most likely be void.

How long could insolvency proceedings take?
Insolvency proceedings would take from one to three years for simple cases, but longer proceedings may be expected depending on the complexity of the claim.

Insolvency @ Euler Hermes
Euler Hermes works closely with debtors, creditors and lawyers to provide support during insolvency and restructuring processes. With many options available when it comes to insolvency action, we can offer advice on which option is most suitable.

Euler Hermes, a company of Allianz, leader in credit insurance solutions helping companies grow their business safely at home and abroad, provides global commercial debt collection services with true end-to-end capability. Euler Hermes offers both domestic and international trade debt collection services worldwide. Through our network, we use our experience and knowledge of local markets to ensure a professional service for our clients from pre-legal action through to legal proceedings.

Visit Euler Hermes at www.eulerhermes.com