

Insurance Law

September 10, 2021

Best Lawyers®
Canada's Law Firm
of the Year 2021 —
Insurance Law

A Draft Regulation Significantly Changes the Duty to Defend in Quebec

On September 8, 2021, the Quebec Minister of Finance published in Part 2 of the *Official Gazette of Quebec* a draft of the regulation [Draft Regulation] that specifies the categories of insurance contracts, and insured parties, that may derogate, in part, from the rules set out in articles **2500** and **2503** of the *Civil Code of Quebec* [CCQ].

Quebec has always been distinct in that the costs associated to the duty to defend are over and above the policy limits. The draft regulation will allow an insurer to deviate from this in certain circumstances.

Public order article 2500 CCQ mandates that a liability insurance policy's limits must be used solely to pay the claims of injured third-parties (i.e. the claimants). Public order article 2503 CCQ mandates that a) the liability insurer must actively take up the defense of the insured in respect of covered claims, and b) the liability insurer must pay defense expense, interest and third-party costs in addition to policy limits.

The Draft Regulation enables a wide cross section of commercial entities (and their directors, officers and trustees) to obtain insurance that derogates, in part, from arts. 2500 and 2503 CCQ.

However, that derogation is subject to a significant constraint.

Per Section 8 of the Draft Regulation, policies that derogate from art. 2500 CCQ cannot erode more than 50% of their limits via payments made for purposes other than compensating injured third-parties (i.e. defense expense). This restriction does not apply if the insured is either found not liable, or is held liable for an amount that is less than 50% of limits. A further restriction applies to entities that are required by law to have a specified minimum amount of liability insurance (e.g. members of professional orders). That amount of indemnity cannot be eroded by other payments.

The official French version of the draft Regulation can be found here:

<http://www2.publicationsduquebec.gouv.qc.ca/dynammicSearch/telecharge.php?type=1&file=75542.pdf>

IMPORTANT

Our newsletters aim to bring to your attention the contemporary legal issues which we believe are and should be of interest to the public at large and under no circumstances are they to be considered as legal opinions. The newsletters are merely intended to alert readers to interesting topics and/or new developments in law. © RSS 2021. No part of this newsletter may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, unless the source is mentioned in writing on the face of the reproduction.

An English version of the draft Regulation can be found here:

<http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=1&file=105247.pdf>

The Exemptions

The entities that benefit from the different exemptions are generally summarized below. N.B.: some of the following descriptions of exempt entities are of a general nature. The legislative definitions referenced in the Draft Regulation should be consulted in order to determine the precise scope of each type of entity that benefits from an exemption.

Section 1 Exemption

Drug manufacturers, Cooperatif Desjardins investment fund entities, FTQ investment fund entities and CSN investment fund entities. The directors, officers, and trustees of these entities can obtain derogating insurance even if the entities do not subscribe to same.

Section 2 Exemption (applicable to entities that do not benefit from Exemption 1)

If their total coverage under all liability insurance contracts is at least \$5M, the following entities can obtain policies that derogate from the requirements of articles 2500 and 2503 CCQ: entities registered as “large businesses” (companies with more than \$10M annual taxable sales, generally speaking), public issuers or their subsidiaries, entities registered as “foreign businesses”, and, finally, any otherwise non-exempt domestic companies that engage in any foreign business that generates income, but only for that foreign subset of their activities. The directors, officers, and trustees can obtain derogating insurance even if the entities do not subscribe to same.

Section 3 Exemption (applicable to entities that do not benefit from Exemptions 1 or 2)

Private seniors’ residences, providers of certain senior support services and/or certain similar services, and

operators of residential and long-term care or rehab centres (generally speaking). The directors, officers, and trustees can obtain derogating insurance even if the entities do not subscribe to same.

Pension Committee Exception To Exemptions 1, 2 and 3

Directors, officers, and trustees who benefit from Exemptions 1, 2 and 3 are not exempt for activities they perform as members of pension committees. Such activities must be insured under policies that are in conformity with articles 2500 and 2503 CCQ.

Section 6 Exemption (applicable to entities that do not benefit from Exemptions 1, 2 or 3)

If an entity and/or its directors, officers, and trustees do not fall within Exemptions 1, 2, or 3, they can obtain policies that derogate from the requirements of articles 2500 and 2503 CCQ if the entity has a *primary layer* civil liability insurance policy that is in conformity with said articles.

Other Conditions Applicable to Derogating Policies

Per Section 7 of the Draft Regulation, policies that derogate from the first sentence of art. 2503 CCQ (which provides that the insurer must actively take up the defense of the insured) must provide the insured with the option of selecting defense counsel, after consulting with the insurer. These policies shall also stipulate that the insurer, who retains the right to participate in the defence, must be informed of case developments.

Public Comments

Per the introductory provisions of the Draft Regulation, persons wishing to comment on same are requested to submit written comments within a 45-day period to the Minister of Finance.

For more information, please contact:



Nick Krnjevic, Partner, Insurance Law Practice Group
T 514 393-4027
nkrnjevic@rsslex.com

Montréal

800 du Square-Victoria Street, suite 4600
Montréal QC H4Z 1H6
T 514 878-2631 • F 514 878-1865

Saguenay

255 Racine Street East, suite 530,
Chicoutimi QC G7H 7L2
T 418 579-3113 • F 418 579-3114

Saint-Jérôme

230 De Martigny Street West, suite 7
Saint-Jérôme QC J7Y 2G3
T 450 710-0971 • F 450 710-0972

rsslex.com

