NAVIGATING SUBROGATION IN QUEBEC

Over the past several years, Senior Associate Marie-Pier Nadeau has handled subrogated claims across Canada. The province of Quebec is by far the jurisdiction which attracts the most questions from clients, likely due to its unique civil law system. This article aims to answer frequently asked questions and to also identify key aspects of Quebec civil law which makes it one of the most plaintiff-friendly jurisdictions for subrogated insurers.

Frequently Asked Questions

1. Why is the subrogated insurer a named plaintiff?

Answer: Because the insurer is not allowed to sue in the name of its insured.

In common law provinces, a subrogated claim is brought solely in the name of the insured. However, this is not allowed in Quebec law, as no one can plead on behalf of others.[1] Once an insurer makes a payment under the insurance policy, the insurer is automatically subrogated to the rights of the insured pursuant to s. 2474 CCQ:[2]

> ***2474.*** *The insurer is subrogated to the rights of the insured against the author of the injury, up to the amount of indemnity paid. (…)*

Because of this legal right of subrogation, the insurer acquires legal standing to bring a subrogated claim in its own name once payment is made. There are quite a few practical consequences to that rule:

- The insurer is the named plaintiff for the subrogated claim, and the insured is the named plaintiff for the uninsured loss, including the deductible. The insurer and the insured can commence separate actions, or can elect to commence an action together, in which case they would both be named as co-plaintiffs.

- While it is common for the insurer to invite the insured to join the subrogated action, the insurer is under no obligation to protect the uninsured loss.

- On multi-subscription policies, if only some of the insurers decide to pursue subrogation, the defendant will notice that the rest of the market chose to abandon subrogation. This is so because each insurer participating in the subrogated action is a named plaintiff in the action[3] and the policy must be disclosed.

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[1] The rule was notably enforced in *Trépanier* c *Plamondon*, 1985 CanLII 2994 (QC CA), in which an insurer was denied the right to bring a subrogated claim under the name of its insured. See also *Model Furs Ltd* c *H Lapalme transport ltée*, 1995 CanLII 4622 (QC CA).
[2] CCQ stands for *Civil Code of Quebec*, CQRL c CCQ-1991.
[3] Except for the Lloyd's underwriters, which are collectively designated under that name. See *Insurers Act*, CQLR c A-32.1, s. 25.

2. When does subrogation operate?

Answer: When a payment is validly made under the policy.

While subrogation is automatic under s. 2474 CCQ, subrogation operates only for payments that are validly made under the policy.[4] If a payment is made where there is no coverage, then legal subrogation does not operate under s. 2474 CCQ. Practically speaking, this means that the payment must be made to a person or corporation insured under the policy, for losses covered under the policy and which are not subject to any exclusions. Coverage, however, is not always black or white. There are countless court decisions regarding various coverage issues, for property and liability policies alike. Although the subrogated insurer may have accepted coverage, the defendants may seek to challenge coverage in order to defeat the subrogated claim. As a result, it is a common practice for the defendants to request a copy of the insurance policy and to scrutinize the extent of coverage and exclusions. The defendants may argue that the insurer was not subrogated to the insured's rights, in which case the insurer's claim could be dismissed.[5] Absent subrogation, the right to sue remains with the insured.[6]

It should be possible for the insurer to benefit from a conventional subrogation, provided that certain provisions of public order are respected.[7] For example, s. 2474 CCQ provides that the insurer may never be subrogated against members of the insured's household. This rule would preclude both legal and conventional subrogation in such cases.

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[4] *Clouâtre* c *Factory Mutual Insurance Company*, 2011 QCCA 1690 at paras 18 and 20; *ABB inc* c *Domtar inc*, 2005 QCCA 733 at paras 150-154, affirmed, 2007 CSC 50 at para 113.
[5] See for example *Clouâtre* c *Factory Mutual Insurance Company*, 2011 QCCA 1690, at paras 17-27, in which this argument was attempted.
[6] *ABB inc* v *Domtar inc*, 2005 QCCA 733 at paras 154 and 158; affirmed, 2007 CSC 50 at para 113. Though this means that the insured would be indemnified twice, this is allowed under Quebec civil law. Indeed, s. 1608 CCQ provides that the obligation of the debtor to pay damages to the creditor is not reduced by the fact that the creditor receives a benefit from a third person (which can include an insurer), except so far as the third person is subrogated to the rights of the creditor.
[7] *Souveraine (La), compagnie d'assurances générales* c *County Line Trucking Ltd*, 2013 QCCS 5089 at para 24, affirmed, 2015 QCCA 1370.

When coverage may be questionable, it is prudent for the insurer to obtain a subrogation receipt from the insured. A subrogation receipt must be express, in writing and imperatively signed at the time the payment is made (s. 1652, 1653 and 1654 CCQ).

It was successfully argued that a proof of loss, signed only a few days after payment was made, constitutes a valid conventional subrogation in favour of the insurer.[8] Indeed, the standard IBC proof of loss provides that "all rights to recovery from any other person are hereby transferred to the insurer (…)."[9] It would be prudent for the insurer to always request that the insured signs a proof of loss (either interim or final) every single time a payment is made under the policy.

If the insurer and the insured commence an action together under the terms of a joint litigation and proration agreement (discussed below under section 4), this may alleviate any issues regarding the insurer's subrogated rights. If the defendants raise that the insurer cannot claim certain amounts because of the lack of subrogated rights, then these amounts could instead be claimed by the insured. As between the insurer and the insured, the allocation of damages would ultimately not matter to them if they previously agreed to share any recovery on a prorated basis.

It is important to note that only insurers, and not reinsurers, can acquire subrogation rights.[10] As such, it is of paramount importance for a reinsurer to obtain an assignment of rights or a subrogation receipt when payment is made under the reinsurance contract. Otherwise, the reinsurer will have no standing to bring a claim against tortfeasors to recover the amounts paid under the reinsurance contract.

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[8] *Promutuel Verchères, Société mutuelle d'assurances générales* c *Claude Joyal inc*, 2015 QCCS 1973, at paras 131-132, 143-146; affirmed, *CNH Industrial Canada Ltd* c *Promutuel Verchères, société mutuelle d'assurances générales*, 2017 QCCA 154, at paras 40-43.
[9] Available here: Fire Proof of Loss; Proof of Loss (Other than Fire).
[10] As per s. 2397 CCQ and as held by the Quebec Court of Appeal in *Boiler Inspection and Insurance Company of Canada* c *H.A. Simons Ltd*, 2011 QCCA 1194 at paras 8-10.

3. Would the subrogated insurer be bound by a release signed by the insured?

Answer: It depends when the release was signed.

- A release signed by the insured before subrogation operates may be opposed to the insurer. The insurer cannot have more rights than the insured (s. 1651 CCQ). If the insured's rights have been released, then the insurer is subrogated to released rights. The insurer may be released from his obligation towards the insured where, owing to an act or omission of the insured, the insurer cannot be subrogated (s. 2474 CCQ). Signing a release would constitute such an act or omission on the insured's part.[11]

- A release signed by the insured after a payment was made by the insurer under the policy will not bar the subrogated claim. Once subrogation operates, the insured loses the right to release the subrogated claim.[12] As such, a release signed by the insured will only apply to the uninsured loss. The situation may be different in common law, especially if the defendant had no prior notice of the insurer's right of subrogation at the time the release was signed.[13]

[11] *Rassemblement des employés techniciens ambulanciers du Québec métropolitain (RETAQM) (Confédération des syndicats nationaux)* c *Royal & SunAlliance*, compagnie d'assurances, 2008 QCCA 885 at paras 4-5.
[12] *L'Union canadienne, cie d'assurances* c *Immeubles Alre inc*, 2014 QCCA 2133 at paras 26-27.
[13] *Stairs* v *CFM Corporation et al*, 2017 NBCA 8 at para 32.

4. Assuming both the insurer and the insured commence an action, how is the recovery allocated between them?

Answer: The insured has a right to be paid in preference to its insurer unless it agrees to enter into a joint litigation and proration agreement after the loss.

Many commercial property policies contain a subrogation clause which purports to determine how recovered amounts are to be shared between the insurer and the insured. Consider for example the following clause:

> *SUBROGATION*
>
> *(a) The Insurer, upon making any payment or assuming liability therefor under this Policy shall be subrogated to all rights of recovery of the Insured against any person, and may bring action in the name of the Insured to enforce such rights;*
>
> *(b) Where the net amount recovered after deducting the costs of recovery is not sufficient to provide a complete indemnity for the loss or damage suffered, that amount shall be divided between the Insurer and the Insured in the proportion in which the loss or damage has been borne by them respectively.*

The above subrogation clause does not apply in Quebec. The subrogated insurer cannot bring a claim in the name of the insured in Quebec. Rather, both the subrogated insurer and the insured have their own separate right of action, which they must bring in their own name. As such, a subrogation clause such as the one above is incompatible with Quebec civil law.

What happens, then, when both the insurer and the insured commence a claim for the same loss? The insured has a right to be paid in preference to its subrogated insurer. As a result, if the defendant does not have enough money or policy limits to cover the entire loss, the insured must be paid first (s. 1658 CCQ).[14]

[14] *Lombard General Insurance Company of Canada* c *Factory Mutual Insurance Company*, 2013 QCCA 446 at paras 56-61.

The insured may waive its right to be paid in preference, once the loss has occurred, by entering into a joint litigation and proration agreement. For example, the insurer could offer to front the litigation expenses and in exchange, the insured would agree to share any net recovery on a prorated basis. The terms of a joint litigation and proration agreement may vary based on the circumstances. In cases where there are insufficient liability insurance limits to respond to the entire claim, or in cases where liability is limited by contract or otherwise, the insured may not be willing to entirely waive its right to be paid in preference. Conversely, when the uninsured loss largely exceeds the amount of the subrogated claim, the insurer may not be willing to front all the litigation expenses. If the parties do not agree on the terms of a joint litigation and proration agreement and issue their own separate actions, s. 1658 CCQ will then govern.

5. Is it necessary to obtain judgment against the defendant prior to suing its liability insurer?

Answer: No. The defendant's liability insurer may be sued from the outset.

The main role of liability insurance is to protect the liability of the insured. However, under Quebec civil law, great emphasis is placed on the protection of the injured person.[15] The injured person is granted significant rights and protections against the liability insurer which do not exist in common law. These protections are of directive (absolute) public order, such that they cannot be excluded in the liability insurance policy.[16]

First, an injured person may bring an action directly against the insured or against the liability insurer, or both (s. 2501 CCQ). Since the insured and its liability insurer are jointly and severally liable,[17] commencing an action against one of them will automatically toll the limitation period against the other (s. 2900 CCQ). In most cases, the liability insurer will be involved even if the insurer is not named as a defendant, given its duty to defend its insured. However, there are some cases in which the right to sue the liability insurer directly becomes particularly useful, for example when the defendant is no longer in business or when the defendant has filed for bankruptcy. In common law provinces, the plaintiff must first obtain judgment prior to commencing an action against the liability insurer,[18] such that any hurdles in the ability to sue the defendant may hinder the chances of recovery. Additionally, if the defendant's insurer denies coverage, the plaintiff may elect to sue the liability insurer and to dispute coverage. Overall, the right to directly sue the

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[15] See on that point the Court of Appeal's comprehensive summary of the protections granted to injured persons under Quebec civil law in *SNC-Lavalin inc (Terratech inc et SNC-Lavalin Environnement inc)* c *Deguise*, 2020 QCCA 495 at section 12.5.2.1, paras 1131-1157.

[16] S. 2414 CCQ: "(…) Any stipulation which derogates from the rules on insurable interest or, in liability insurance, from those protecting the rights of injured third persons is also null." The nullity of policy clauses which derogate to the rules protecting the rights of injured persons may be invoked by the insured, by an injured person or even by the court. See on point *SNC-Lavalin inc (Terratech inc et SNC-Lavalin Environnement inc)* c *Deguise*, 2020 QCCA 495 at paras 1140-1145.

[17] *CGU* c *Wawanesa, compagnie mutuelle d'assurances*, 2005 QCCA 320 at para 46; *Axa Assurances inc* c *Immeuble Saratoga inc*, 2007 QCCA 1807 at para 31.

[18] See for example Ontario *Insurance Act*, RSO 1990, c I.8, s. 132; Alberta *Insurance Act*, RSA 2000, c I-3, s. 534; British Columbia *Insurance Act*, RSBC 2012, c 1, s. 25.

liability insurer, without having to first obtain judgment against the defendant, can greatly increase the access to the defendant's liability insurance proceeds.

Second, the proceeds of the insurance are applied exclusively to the payment of injured person (s. 2500 CCQ). Legal costs and expenses, including those of the defence, and interest on the insurance proceeds are borne by the liability insurer over and above the insurance proceeds (s. 2503 CCQ). In other words, costs and legal fees incurred by the liability insurer cannot reduce the policy limits, and pre-judgment interest are owed in addition to policy limits.[19] This rule applies even if the policy has eroding limits,[20] given that s. 2500 and 2503 CCQ are of directive public order.

Third, the fact that the defendant failed to report the claim in a timely manner or refuses to cooperate with its liability insurer cannot be opposed to the injured person (s. 2502 CCQ). The liability insurer may only set up against the injured person any grounds he could have invoked against the insured at the time of the loss, such as misrepresentations regarding the risk or breach of warranty, but not grounds pertaining to facts that occurred after the loss, such as late notice or lack of cooperation.

[19] Typically, a CGL policy provides that the policy limits include pre-judgment interest, such that once policy limits are reached, the compensation to the injured person by the liability insurer is effectively capped. In Quebec, the injured person will recover pre-judgment interest in addition to policy limits. The difference can be significant, especially since the legal interest rate is higher in Quebec than in any other province. As of today, the current legal interest rate in Quebec is 5%, versus 0.5% pre-judgment and 2% post-judgment interest rates in Ontario.

[20] Eroding limits, or defense-within-limits policy, is a policy where the amounts paid by an insurer to defend a claim against an insured are considered part of the loss, and therefore reduce the limits of liability available under the policy to pay a settlement or judgment for damages.

6. The subrogated action has been commenced. What happens next?

Answer: The process is similar than in other provinces but usually, litigation moves at a faster pace in Quebec.

At the outset, the parties must agree on a case protocol (s. 148 CCP),[21] which is essentially a litigation timetable. The plaintiff must set the matter down for trial within six months of service of the statement of claim, although the parties can propose to extend the deadline in the case protocol (subject to the court's approval) (s. 173 CCP). Such extension will typically range from 3 to 9 months, and hardly compare with Ontario's five-year deadline to set the matter down for trial.

Regarding examinations for discovery, the defendants are entitled to examine a representative of the insurer, in addition to the insured (s. 221 CCP). The subrogated insurer's adjuster is sometimes examined, as the adjuster tends to have the best knowledge regarding damages. All examinations for discovery are typically held at the same time.

Parties must exchange expert reports before the matter is set down for trial. There is no set order in which the various litigation steps must be concluded. There are cases in which the parties may agree to exchange expert reports before discoveries, whereas in other cases, the parties will prefer to complete discoveries first.

The courts offer a free and voluntarily settlement conference service (s. 381-382 CCP), which has a high rate of success. The parties can request a settlement conference at any time, but in most cases, it is not held until after the matter has been set down for trial.

[21] CCP stands for *Code of Civil Procedure*, CQLR c 25-01.

7. What are some procedural differences in Quebec?

Answer: Notably, there are no boilerplate pleadings, no affidavits of documents exchanged, no formal offer mechanism, and no extensive evidentiary motions for summary judgment available.

In common law provinces, pleadings often contain numerous boilerplate allegations. In Quebec, such is not the practice. A pleading must state the facts on which it is based, and the conclusions sought. The statements it contains must be clear, precise, and concise (s. 99 CCP).

There is no such thing as affidavits of documents in Quebec. In the provinces where affidavits of documents are required, each party to the action must provide a complete list of all the documents it has under its possession or control, and which are relevant to the litigation.[22] Additionally, unless some privilege applies, any relevant document must be produced. In Quebec, a party needs only to produce the documents on which it intends to rely upon at trial, or the documents that are requested by the other parties (s. 248-249 CCP) (subject to privilege). As a result, the burden is on each party to ensure to make broad requests for documents, by way of requests for particulars, pre-undertakings and undertakings. Otherwise, a document which is unfavourable to a party may remain undisclosed, simply because it was never requested.

There is no formal offer mechanism by which a party would be able to recover more costs unlike, for example, Rule 49 offers in Ontario[23] or formal offers in Alberta.[24] In fact, there are no cost consequences in Quebec. Each party bears its own legal costs. The only recoverable costs are litigation disbursements, such as court fees, process server fees and stenographer fees, as well as expert fees. Legal fees are not recoverable, absent any abuse of process (s. 54 CCP).

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[22] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 30; *Alberta Rules of Court*, AR 124/2010, Rule 5.5; *Supreme Court Civil Rules*, BC Reg 168/2009, Rule 7.1.
[23] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 49.
[24] *Alberta Rules of Court*, AR 124/2010, Rule 4.24.

Motions tend to be more frequent in Quebec, perhaps because there are no cost consequences. A party has nothing to lose in bringing a motion, other than having to pay its own legal fees. Motions, especially short ones, can be easily and quickly brought in Quebec. The notice of motion is typically only a few pages long, often supported by a half-page affidavit signed by the lawyer bringing the motion. Motion records and factums are not exchanged. In most cases, the lawyer will provide with the motion judge with a book of authorities and a concise outline of the argument on the day of the hearing.

There is no equivalent to the motions for summary judgment as we know them in Ontario.[25] In Quebec, a motion to dismiss will typically succeed only in the clearest cases. A motion to dismiss may be sought either under s. 168 CCP or s. 51 CCP. The moving party must establish one of the following when moving under s. 168 CCP:

1) That there is *lis pendens* or *res judicata*;

2) That the other party is incapable or does not have the necessary capacity to act;

3) That the other party clearly has no interest;

4) That the claim or defence is unfounded in law, even if the facts alleged are true;

5) That the claim or defence has no reasonable chances of success.

No evidence is allowed on a motion under s. 168 CCP. The motion judge must determine if, when taking as proven the allegations of the statement of claim, they can give rise to the conclusions sought. The aim is to avoid a trial when the claim has no legal basis, even if the facts supporting it were true.[26] A motion to dismiss will only be granted if the legal

[25] *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 20.
[26] *3952851 Canada inc* c *Groupe Montoni (1995) division construction inc*, 2017 QCCA 620 at para 33.

situation is clear and there is no ambiguity. Factual or mixed questions must be left to the trial judge's discretion rather than being decided on a motion to dismiss.[27]

A party may also seek to strike the claim or any other pleading under s. 51 CCP because it is abusive, i.e., clearly unfounded, frivolous or intended to delay or in conduct that is vexatious or quarrelsome. The moving party must summarily establish that the pleading is abusive. The court may consider the pleadings, exhibits and discovery transcripts (s. 52 CCP). If the evidence required is exhaustive and detailed, a motion under s. 51 CCP will fail.[28] Such an analysis will instead be deferred to the trial judge.

[27] *3952851 Canada inc* c *Groupe Montoni (1995) division construction inc*, 2017 QCCA 620 at para 34.
[28] *Pyrioux inc* c *9251-7796 Québec inc*, 2016 QCCA 651 at para 34; *Murphy* c *Grid Solutions Canada*, 2019 QCCS 563 at para 23.

8. What is the applicable limitation period in Quebec?

Answer: The limitation period is generally three years.

An action to enforce a personal right or movable real right is prescribed by three years. It is prudent to calculate the limitation period from the date of loss, although the limitation period effectively starts running on the day on which the right of action arises. This is the date on which the plaintiff knew or ought to have known all the elements of the claim.

It should be noted that the limitation period against cities and municipalities for property damage is much shorter. The action must be commenced within six months after the day on which the accident happened or the right of action accrued.[29] Additionally, notice must be given to the city or municipality, within 15 days[30] or 60 days[31] of the loss respectively, failing which the claim will be barred.

There is no ultimate limitation period[32] in Quebec.

The limitation period in Quebec cannot be varied. Indeed, no prescriptive period other than that provided by law may be agreed upon (s. 2884 CCQ). This does not preclude the parties, however, from entering into a tolling agreement once the limitation period has begun to run, to temporarily suspend the limitation period (s. 2883 CCQ).

It is important to note that limitation periods are considered substantive law.[33] As a result, the law governing the dispute, rather than the jurisdiction in which the action is commenced, will dictate what limitation period applies. One must be cautious not to

[29] *Cities and Towns Act*, CQRL c C-19, s. 585(5); *Municipal Code gof Quebec*, CQRL c C-27.1, s. 1112.1.
[30] *Cities and Towns Act*, CQRL c C-19, s. 585(2)(3).
[31] *Municipal Code of Quebec*, CQRL c C-27.1, s. 1112.1.
[32] An ultimate limitation period starts to run from the day the act or omission on which the claim is based took place. No proceeding can be commenced once the ultimate limitation period has concluded, irrespective of when the claim was discovered. Ultimate limitation periods are commonly found in common law provinces. For example, Ontario, Alberta and British Columbia have ultimate limitation periods ranging from 10 to 15 years. See Ontario *Limitations Act*, 2002, SO 2002, c 24, Sched B, s. 15; Alberta *Limitations Act*, RSA 2000 c L-12, s. 3(b); British Columbia *Limitation Act*, SBC 2012, c 13, s 21.
[33] *Tolofson* v *Jensen*; *Lucas (Litigation Guardian of)* v *Gagnon*, 1994 CanLII 44 (SCC), [1994] 3 SCR 1022.

assume that because a loss occurred in Quebec, the dispute will be governed by Quebec law. There are two notable situations in which another law may govern the dispute:

- The parties entered into a contract which provides that any dispute will be governed by the law of another state or province; and,

- If the tortfeasor and the victim are both domiciled in the same state/province, other than Quebec, then the law of that state/province will govern (s. 3126 CCQ). For example, if both the tortfeasor and the victim are domiciled in Ontario, but were somehow involved into an accident in Quebec, the dispute will be governed by the law of Ontario.[34]

The limitation period in many other provinces is two years[35] and in some cases, it is even possible for parties to contractually vary the limitation period in business agreements.[36] Caution must therefore be exercised to ensure that the proper limitation period is identified from the start.

Lastly, there are some other noteworthy differences between Quebec civil law and other common law provinces with respect to other limitation periods:

- First, a claim issued by the insured will only toll the limitation period in favour of its property insurer if the insured's claim was issued before the insurer was subrogated. In such case, the insurer will benefit from the interruption of the limitation period. The insurer may join the insured's action by continuing the proceeding (s. 196 CCP).

- If however subrogation operates before an action is commenced by the insured, then the insurer must ensure to commence its subrogated action within

[34] The rule will not apply if the tortfeasor and the victim are domiciled in different states/provinces. See *Giesbrecht* c *Succession de Nadeau*, 2017 QCCA 386 at paras 17 and 30.
[35] See for example Ontario *Limitations Act*, 2002, SO 2002, c 24, Sched B, s. 4; Alberta *Limitations Act*, RSA 2000 c L-12, s. 3; British Columbia *Limitation Act*, SBC 2012, c 13, s 6.
[36] See for example *Limitations Act*, 2002, SO 2002, c 24, Sched B, in which parties to a business agreement (other than a consumer contract) may shorten, extend or suspend the limitation period.

the applicable limitation period. An action subsequently commenced by the insured has no impact on the subrogated insurer's rights.[37]

- The limitation period to commence a third-party claim for contribution and indemnity begins to run from the date of judgment.[38] Therefore, a defendant may commence a third party claim within three years of either settling the claim or being ordered to pay the claim.

- A defendant may be able to commence a counterclaim against the plaintiff even if the limitation period would otherwise be expired. Pursuant to s. 2896 CCQ, a defendant may benefit from the interruption of prescription caused by a plaintiff against him.[39]

- If an action is dismissed because of a procedural defect, the plaintiff can issue a new claim within three months of the judgment, even though the limitation period is expired (s. 2895 CCQ). This may be a saving grace to a plaintiff who sued before the wrong tribunal or court, or who commenced the claim by way of arbitration when it should have been brought before the courts instead.[40]

- There is no specific deadline for service in Quebec. The claim must however be served within 60 days of the expiry of the limitation period, or it will otherwise be considered out of time (s. 2892 CCQ). It is uncommon in Quebec to issue a claim without immediately serving it after.

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[37] *Restorec inc* et al v *9151-5726 Quebec inc* et al, Superior Court, district of Terrebone, 700-17-016197-195, decision of Hon. Justice Élise Poisson dated November 26, 2020, unreported.

[38] *Germain* c *Banque Nationale du Canada*, 1985 CanLII 3014 (QC CA) at paras 10-13; *Caisse populaire de Saint-Casimir* c *Therrien*, 1991 CanLII 3539 (QC CA); *D'Astous* c *Bélanger*, 2012 QCCS 2120 at paras 28-31. The situation is very different in Ontario, for example, in which case the limitation period to issue a third party claim for contribution and indemnity begins to run from the date of service of the claim on the defendant. See *Limitations Act*, 2002, SO 2002, c 24, Sched B, s. 18.

[39] S. 2896 CCQ provides that an interruption resulting from a judicial application has effect with regard to all the parties with respect to any right arising from the same source. The interruption can even apply between co-defendants: see *Jumbo Motors Express Ltd* v *François Nolin Ltée*, [1985] 1 SCR 423 at para 23. See also *Ciment du Saint-Laurent inc* c *Barrette*, 2008 CSC 64 at paras 99-106 on the interpretation of the expression "same source".

[40] *Société canadienne des postes* c *Rippeur*, 2013 QCCA 1893 at paras 33-39; *Commission des normes, de l'équité, de la santé et de la sécurité du travail* c *7956517 Canada inc*, 2020 QCCA 1541 at para 14.

9. What makes Quebec a plaintiff-friendly jurisdiction?

Answer: Quebec civil law contains many presumptions of fault or liability which make the burden of proof much easier in many cases. Additionally, there are cases where a defendant could limit or exclude its liability at common law but will not be allowed to do so under Quebec civil law. Coupled with the rights and protections granted to the plaintiff against the liability insurer, this makes Quebec a plaintiff friendly jurisdiction.

Notably, the applicable law in Quebec is particularly favourable to buyers in product liability cases, in which there are strong presumptions that apply against sellers, distributors and manufacturers. The plaintiff does not have to prove the existence of a defect, but only that the product failed prematurely compared to other similar products. The product is then presumed to have failed because of a manufacturing defect, and the burden then shifts to the seller, distributor, or manufacturer to prove that the failure is attributable to improper use or maintenance by the buyer (1729 CCQ). If the product fails prematurely, the claim will succeed even if the cause of the failure is not established.[41] It is also important to note that professional sellers, distributors, and manufacturers may never limit or exclude their liability by contract (1733 CCQ).[42]

Liability for bodily or moral injury may never be limited or excluded in any manner. Regarding material damages, liability for intentional or gross negligence may never be limited or excluded (1474 CCQ).

A non-exhaustive list of presumptions of fault or liability, as well as situations in which a defendant may be precluded to limit or exclude liability, is included in the table below.

[41] See for example *CNH Industrial Canada ltée* c *Claude Joyal inc*, 2019 QCCA 1151, in which a feller buncher was destroyed in a fire. None of the parties were able to establish the cause of the fire. Regardless, the manufacturer was held liable, since it was unable to prove that the fire was caused by improper use or maintenance.

[42] The leading case on product liability in Quebec remains *ABB Inc* v *Domtar*, 2007 SCC 50.

SECTION(S)	DESCRIPTION AND COMMENTS
1077 CCQ Liability of condominium corporation	A condominium corporation is liable for damage caused to the co-owners or third persons by faulty design, construction defects or lack of maintenance of the common elements. For example, if the building's sprinkler system is defective and causes a flood, the condominium corporation will be found liable for the damages caused to the co-owners and tenants.
1437 CCQ Fundamental Breach	It is not possible to limit or exclude liability for a fundamental breach of the contract.[43] For example, in the case of a contract for an alarm system and monitoring, the security company cannot escape liability if it fails to respond to an alarm, even if its contract states otherwise.
1465 CCQ Extracontractual Liability	The custodian of a thing is bound to make reparation for injury resulting from the autonomous act of the thing, unless the custodian proves that he is not at fault. This rule has a very broad range of application. It is regularly invoked against municipalities and cities for water main breaks or sewer backups. It may also be invoked, for example, when a fire is caused by an electric device, or when a loss is caused by the failure of a water tank. It has also been applied to losses caused by ice falling from a roof or losses caused by tree branches or roots. In fire cases, for the presumption of fault to apply, the probable cause of the loss must first be established. It is not sufficient to prove that two things, both owned by the same person, are the only two possible causes for the loss.[44] Note also that s. 1465 CCQ does not apply when there is a leasing agreement between the parties.[45] The CCQ provisions under "Chapter IV – Lease" will apply instead.

[43] *Samen Investments Inc. c. Monit Management Ltd.*, 2014 QCCA 826 at paras 120-121; *6362222 Canada inc. c. Prelco inc.*, 2019 QCCA 1457 at paras 39-41.
[44] *RCA Limitée c. Lumbermen's Mutual Insurance Company*, 1984 CanLII 2795 (QC CA); *Liberty Mutual Insurance Co. c. Sanborn's Motor Express (Québec)* Inc., 1991 CanLII 3670 (QC CA); *American Home Insurance Company* c *Michael Rossy ltée*, 2009 QCCA 1541.
[45] *Promutuel Verchères – Les Forges, société mutuelle d'assurances générales* c *Giroux*, 2016 QCCA 1562 at para 3. This results from the application of s. 1458 CCQ, pursuant to which parties to a contract cannot avoid the rules governing contractual liability by opting for rules that would be more favourable to them. Parties to a contract cannot therefore rely upon rules of extracontractual liability, including s. 1459-1469 CCQ.

SECTION(S)	DESCRIPTION AND COMMENTS
1467 CCQ Extracontractual Liability	The owner of an immovable is bound to make reparation for injury caused by its ruin, even partial, whether the ruin has resulted from lack of repair or from a defect in construction. The word "immovable" has been interpreted broadly to include not only buildings, but also trees, balconies, chimneys, stairs, walls, doors, water mains, parking lots, roofs, roads, etc. For example, if a window falls or if a brick wall collapses, the building owner could be found liable.
1468 CCQ Product liability – Extracontractual liability	The manufacturer of a product is bound to make reparation for injury caused to a third person by reason of a safety defect in the product, even if it is incorporated with or placed in an immovable for the service or operation of the immovable. The rule also applies against suppliers, retailers, and distributors. The following defences are available under s. 1473 CCQ: - The victim knew or could have known of the defect, or could have foreseen the injury; - According to the state of knowledge at the time that the product was manufactured, distributed or supplied, the existence of the defect could not have been known, and the supplier, retailer, distributor and/or manufacturer was not neglectful of his duty to provide information when he became aware of the defect. This rule applies for extracontractual liability only, in cases where the injured person does not have a contractual relationship with the seller, distributor or manufacturer. Any owner of a product will be held to have a contractual relationship with the seller, distributor, or manufacturer, and will be allowed to rely upon s. 1726 CCQ and following, discussed further below. This is so because the legal warranty of quality that the manufacturer owes to the first purchaser is passed on to any sub-purchaser and confers upon him or her a direct contractual right against the manufacturer (1442 CCQ).[46] As a result, s. 1468 CCQ is of more limited application than the contractual rules (s. 1726 CCQ and following).

[46] As held by the Supreme Court of Canada in *General Motors Products of Canada* v *Kravitz*, 1979 CanLII 22 (CSC), [1979] 1 RCS 790. The rule was later codified in s. 1442 CCQ.

SECTION(S)	DESCRIPTION AND COMMENTS
1474 CCQ **Gross Negligence**	A person may never exclude or limit his liability for material injury caused to another through an intentional or gross fault. He may not in any way exclude or limit his liability for bodily or moral injury caused to another. S. 1474 CCQ is of public order. Courts have held that liability for gross negligence can never be directly nor indirectly excluded, for example by way of waivers of subrogation.[47]
1726-1733 CCQ **Product Liability – Contractual**	Sellers, distributors, importers, and manufacturers are presumed liable for goods that malfunctions or deteriorates prematurely. There are only three defences available: - Causal fault on the part of the buyer or a third person, which can include improper use or maintenance of the product (1729 CCQ); - Superior force (*force majeure*) (1470 CCQ); - Development risk – this defence enables the manufacturer to avoid liability if it would have been impossible to detect the defect given the state of scientific and technical knowledge at the time the good was put on the market. In such a case, only scientific or technological discoveries made after the good was put on the market will have permitted the defect to be detected.[48] Professional sellers (which include manufacturers) cannot limit or exclude their liability (1733 CCQ).[49] The rights of the first purchaser pass to sub-purchasers (1442 CCQ).[50] Any sub-purchaser has a direct contractual right of action against its own seller, but also against any other seller or distributor involved in the distribution chain, or against the manufacturer (1730 CCQ). A company which sells a finished product will be held liable for any defective components incorporated into the product, even though the components were manufactured by others.[51]

[47] *Investissements René St-Pierre inc* c *Zurich, compagnie d'assurances*, 2007 QCCA 1269, at para 42.
[48] *ABB* v *Domtar*, 2007 SCC 50 at para 72
[49] This rule is found under s. 1733 CCQ. In *ABB* v *Domtar*, 2007 SCC 50, the Supreme Court of Canada reminded that in Quebec civil law, manufacturers are considered to be the ultimate experts with respect to goods because they have control over the labour and materials used to produce them. Consequently, they are subject to the strongest presumption of knowledge and to the most exacting obligation to disclose latent defects.
[50] As held by the Supreme Court of Canada in *General Motors Products of Canada* v *Kravitz*, 1979 CanLII 22 (CSC), [1979] 1 RCS 790. The rule was later codified in s. 1442 CCQ.
[51] *Desjardins Assurances générales inc* c *Venmar Ventilation inc*, 2016 QCCA 1911, at para 8.

SECTION(S)	DESCRIPTION AND COMMENTS
1726-1733 CCQ Latent Defects – Real Estate	The rules regarding latent defects also apply to buildings. The seller of a building will be found liable for a latent defect which was not disclosed and which the buyer could not reasonably have discovered prior to the sale. If the property perishes by reason of a latent defect that existed at the time of the sale, the loss is borne by the seller, who is bound to restore the price (1727 CCQ).[52] The seller's liability will be limited to the cost of repairing the latent defect unless the seller knew about the existence of the latent defect and failed to disclose it. In such cases, the seller will be held liable for consequential damages as well (1728 CCQ). Non-professional sellers may exclude the warranty of quality by stipulating that the building is sold "as is" or that the buyer is purchasing the building at its own risk (1733 CCQ). Notice of the latent defect, once discovered, must be promptly given by the buyer to a non-professional seller (1739 CCQ). It is important that the buyer gives such notice prior to making any repairs.
1854 CCQ Leasing Agreement	The landlord is bound to deliver the leased property to the tenant in a good state of repair and to provide him with peaceable enjoyment of the property throughout the term of the lease. He is also bound to warrant the lessee that the property may be used for the purpose for which it was leased and to maintain the property for that purpose throughout the term of the lease. The duties imposed by s. 1854 CCQ can be varied excluded in commercial leases, as it is not of public order.[53] However, it may not be varied nor excluded in residential leases (1893 CCQ). To succeed, the tenant must prove that the loss was caused by a latent defect or a failure of the leased property.[54] For example, if a fire is caused by the permanent electrical system of the building, the landlord will be held liable, unless the landlord can prove superior force or that the loss was caused by a third party's negligence for which it is not responsible at law.

[52] *Basque* c *Alpha, compagnie d'assurances inc*, 2009 QCCA 739; *Caron* c *Alpha, compagnie d'assurances inc*, 2009 QCCA 740; *Pellerin* c *Alpha, compagnie d'assurances inc*, 2009 QCCA 744.
[53] *9192-2401 Québec inc (Fabrication Pro-Fab)* c *Villeneuve (Immeubles Jolika)*, 2018 QCCA 1143 at para 25.
[54] *9192-2401 Québec inc (Fabrication Pro-Fab)* c *Villeneuve (Immeubles Jolika)*, 2018 QCCA 1143 at paras 29-30.

SECTION(S)	DESCRIPTION AND COMMENTS
2049 CCQ Carriage	The carrier is bound to carry the property to its destination. He is bound to make reparation for injury resulting from the carriage, unless he proves that the loss was caused by superior force, an inherent defect in the property or natural shrinkage. As is the case in common law province, the carrier is presumed liable for any loss that occurs to the property during transportation.
2118 CCQ Loss of Work – Presumption of Liability	The contractor, the architect and the engineer who directed or supervised, and the subcontractor with respect to work performed by him, are solidarily liable for the loss of the work occurring within five years after the work was completed, whether the loss results from faulty design, construction or production of the work, or defects in the ground. This rule applies in situation where there is a contract of enterprise or for services, which is broadly defined at s. 2098 CCQ as follow: "2098 CCQ. A contract of enterprise or for services is a contract by which a person, the contractor or the provider of services, as the case may be, undertakes to another person, the client, to carry out physical or intellectual work or to supply a service, for a price which the client binds himself to pay to him." S. 2118 CCQ creates a strong presumption of liability when serious damage occurs to a "work" within five years from completion. It applies not only when the work collapses or is otherwise a total loss, but more generally where serious construction defects are causing significant inconvenience and compromising the intended use of the work.[55] It is sufficient for the plaintiff to prove that the loss of the work was caused by a construction defect in order for the presumption to apply.[56] The term "work" has been defined broadly. It can include buildings, water mains, sewer systems, chimneys, pools, walls, floors, roofs, elevators, heating and cooling systems, sidewalks, etc. S. 2118 CCQ is of public order, and therefore cannot be excluded in the contract.[57]

[55] *Verville* c *Poirier*, 2021 QCCA 124 at paras 30 and 33.
[56] *Verville* c *Poirier*, 2021 QCCA 124 at para 32.
[57] *Installations GMR inc* c *Pointe-Claire (Ville de)*, 2015 QCCA 1521 at paras 20-21.

SECTION(S)	DESCRIPTION AND COMMENTS
2289 CCQ Deposit	Where a deposit is by gratuitous title, the depositary is liable for the loss of the property deposited, if caused by his fault. Where a deposit is by onerous title or where it was required by the depositary, he is liable for the loss of the property, unless he proves superior force. A deposit is like bailment. If a person pays another person to store property, the deposit is onerous. In such case, the person entrusted with the property will be found liable if the property is lost or damaged, except in a case of superior force (*force majeure*). For s. 2289 CCQ to apply, deposit must be the main object of the contract, rather than an accessory to the contract. When a contract includes many obligations, it is necessary to identify which was the essential obligation, and which were accessory to it.[58] For example, when booking a room at a hotel, the contract is one for services. The fact that the car keys are left with the hotel does not create a deposit contract. Safekeeping the car simply becomes an accessory to the contract for services.[59]

For more information or if you have any questions, please contact Senior Associate, Marie-Pier Nadeau at mnadeau@weirfoulds.com.

[58] *Montréal, Maine & Atlantique Canada Cie/Montreal, Maine & Atlantic Canada Co (MMA) (Arrangement relatif à)*, 2014 QCCA 2072 at para 34.
[59] *Axa Assurances inc* c *3091-5177 Québec inc (Econolodge Aéroport)*, 2015 QCCQ 1539 at paras 17-24. This decision was appealed on other grounds (mainly coverage): 2016 QCCA 1903; 2018 SCC 43.