



## Insurance Law

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## CODE OF CIVIL PROCEDURE: new rules for insurers

### 1. Transitional provisions: immediate implementation

Important changes affecting all proceedings, whether in the case of a defense, a subrogation action, or in the performance of the duty to defend require immediate attention.

The new *Code of civil procedure* (the “**NCCP**”)<sup>1</sup>, which came into force on January 1, 2016, applies to all disputes. However, pending disputes and litigations as at that date will still be governed by the dates set in the agreement as to the conduct of proceedings<sup>2</sup> (now called the “**case protocol**”)<sup>3</sup>.

As you know, a motion to institute proceedings (now called a “**judicial demand**”)<sup>4</sup> had to be presented within 30 days of its service<sup>5</sup>. This deadline continues to apply to proceedings commenced in 2015<sup>6</sup>.

### 2. Prejudicial stage: negotiation between the parties

The new rules will drastically change currently established practices. In effect, courts will now pay attention to the behaviour of the parties even before the dispute has commenced.

The first article of the NCCP provides that the parties have an obligation to consider private prevention and resolution processes before referring their dispute to the courts<sup>7</sup>. A closer relationship with mediators and arbitrators is therefore handy in light of such a change.

The obligation to pursue a settlement prior to commencing a claim may seem trivial for an insurer who has, for weeks or months, already been negotiating with its insured in an effort to reach a settlement and thus avoid a costly litigation.

However, this new obligation presents an important challenge where the insured advises its insurer of an imminent liability lawsuit or where the insurer is contemplating a subrogation action: in such cases, the insurer now has to enter into prejudicial negotiations which were never legally required before.

This preliminary step is vital as it must be mentioned in the case protocol<sup>8</sup>, if the matter reaches litigation. It is interesting to note, however, that a plaintiff's failure to comply with the obligation to enter into prejudicial negotiations will likely not result in the dismissal of the action<sup>9</sup>, but an author suggests that the party who does not conform may be called to bear alone the court costs<sup>10</sup>.

### 3. The choice of forum

A dispute based on an insurance policy and against an insurer could be instituted before the court of the domicile of the insured or, in the case of damage insurance, before the court of the place where the loss occurred<sup>11</sup>.

The NCCP adds to this existing rule by providing that regardless of whether a claim is instituted against the insurer or the insured, the court of the domicile or residence of the insured or, in the case of property insurance, the court of the place where the loss occurred, has jurisdiction to hear an action<sup>12</sup>. It is important to note that the Superior Court had, in 2012<sup>13</sup>, made reference to this new rule to-be in order to allow beneficiaries of a survivor pension to rely on article 69 CCP.

The Court of Quebec now has jurisdiction for cases where the property or the amount in litigation is lower than \$85,000<sup>14</sup>. Since January 1, 2015, the small claims

\* A training activity approved by the ChAD can be given on this subject, upon request.

division has jurisdiction to hear cases involving amounts up to \$15,000<sup>15</sup>. As such, it can be expected that there will be an increase in the volume of cases heard in these forums. However, the pending cases will not be affected by the new thresholds<sup>16</sup>.

#### 4. More stringent deadlines

The main goal of the new rules is to improve access to justice by simplifying the procedure and reducing the deadlines and costs<sup>17</sup>. The deadlines have therefore been considerably diminished and the procedure has been effectively streamlined. The following provides a brief overview:

- In defense, when you receive a judicial demand, you must respond within 15 days by way of notification, which is less costly than having to appear in court in order to file a notice of appearance<sup>18</sup>;
- In lieu of the minimal deadline of 30 days to file an agreement as to the conduct of proceedings, there is now a maximum delay of 45 days to file a case protocol<sup>19</sup>;
- In the case protocol, you must explain to the judge why the parties do not intend to rely on a joint expert opinion<sup>20</sup>. As cases often imply contradictory expertise reports that play an important role in the case, it is now important to prepare convincing arguments in anticipation of this step;
- Rather than having a strict deadline of 180 days from the date of service of the motion to institute proceedings in order to inscribe for proof and hearing, a similar deadline of 6 months exists, but commencing from the date on which the case protocol is accepted or determined by the court<sup>21</sup>;
  - ❖ Some authors suggest, however, that an extension of the deadline may now be considered to be an exception<sup>22</sup>. This is a significant change that may influence your strategy in lengthy litigations in which the courts have traditionally demonstrated caution before denying such requests<sup>23</sup>.

In light of the new deadlines, we recommend that your reminder systems be modified and your exchanges with your lawyers be intensified, especially at the beginning of the litigation phase.

#### 5. Collecting evidence: new boundaries

The NCCP also provides for more stringent rules regarding the administration of evidence, and particularly, regarding interrogations and the choice of experts.

Firstly, pre-trial examinations – a procedure which allows to obtain information on a case and to better position

yourself facing a judicial demand<sup>24</sup> – is now subject to new limitations. The effect of these new limits will be particularly noticeable in cases of liability insurance where pre-trial examinations allow you to gather essential information about a plaintiff that is sometimes absent from your investigation file.

Thus, the legislator has increased from \$25,000 to \$30,000 the monetary threshold allowing the holding of a pre-trial examination. Moreover, the maximum amount of time authorized for a pre-trial examination is now limited to 3 hours for cases wherein the value in litigation is less than \$100,000 and 5 hours when the value in litigation is higher than this threshold<sup>25</sup>.

On another note, experts will continue to play a crucial role in the litigation, whether to identify the cause of a flood, the start of a fire, the bearing capacity of soil and many other situations you encounter on a daily basis.

The significant change here is that now only one expert per area or matter is allowed, which can significantly restrict the evidence that you intend to present. According to the Minister of Justice, this rule has been included in the NCCP in order to limit the debates involving experts and to reduce their costs<sup>26</sup>.

#### 6. Conclusion

Whether it concerns alternate dispute resolution methods, establishing a more limited timetable for case management or earlier contact between the various actors in the litigation, our team is well prepared to help and assist you at every step in the application of the new rules.

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1. R.L.R.Q. c. C-25.01.
  2. Art. 833 al. 2(1) NCCP.
  3. Art. 148 NCCP.
  4. Art. 141 al. 1 NCCP.
  5. Art. 151.4 of the current Code of Civil Procedure, ("CCP") R.L.R.Q. c. C-25.
  6. Art. 833 al. 2(1) NCCP.
  7. Art. 1 al. 3 NCCP.
  8. Art. 141 al. 1 NCCP.
  9. Commentaires de la ministre de la Justice : Code de procédure civile, c. C-25.1, Montréal, Wilson & Lafleur, 2015, p. 20.
  10. Art. 341 al. 2 NCCP. interpreted by Luc CHAMBERLAND in "Le nouveau Code de procédure civile Commenté", Cowansville, Éditions Yvon Blais, 2014, p. 3.
  11. Art. 69 CCP.
  12. Art. 43 al. 2 NCCP.
  13. Pelletier c. SSQ, société d'assurance-vie inc., 2012 QCCS 3239, par. 22.
  14. Art. 35 al. 1 NCCP.
  15. Art. 953 al. 1a) CCP; See: Art. 536 al. 1 NCCP.

16. Art. 833 al. 2(2) NCCP.
17. Denis FERLAND and Benoît EMERY, *Précis de procédure civile du Québec*, vol. 1, Cowansville, Éditions Yvon Blais, 2015, par. 1-1331, p. 525.
18. Art. 145, 147 NCCP; See: Art. 110, 119, 149 CCP.
19. Art. 148 al. 2, 149 al. 2 NCCP; See: Art. 151.4 al. 2, and 151.6 CCP.
20. Art. 148 al. 2(4) NCCP.
21. Art. 173 NCCP; See: Art. 110.1 CCP.
22. FERLAND and EMERY, *supra* footnote 17, par. 1-1331, p. 525.
23. *Larivière v. Bonneau*, 2013 QCCA 1122, par. 1.
24. *Lac d'Amiante du Québec Ltée v. 2858-0702 Québec Inc.*, [2001] 2 SCR 743, par. 56-57.
25. Art. 229 NCCP; See: Art. 396.1 of the current code (\$25,000 threshold).
26. Art. 232 al. 2 N.c.p.c.; *Commentaires de la ministre de la Justice : Code de procédure civile*, c. C-25.1, *supra* note 9, p. 193.

The content of this newsletter is intended to provide general commentary only and should not be relied upon as legal advice.

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