



## Marsh Specialty

# A new day is dawning

Changes to legislation brighten the  
D&O insurance horizon

April 2022







The availability and cost of Directors and Officers (D&O) insurance prompted legislators to revisit the Civil Code of Quebec (CCQ) and adopt changes to facilitate procurement of D&O insurance.

April 20th, 2022 was a historic day for Quebec-domiciled corporations, with the official publication of the new regulation.

The Regulation outlines the civil liability insurance contracts and classes of insureds that may derogate from the CCQ requirement, which provides for the uncapped duty of liability to pay the defence costs over and above the policy limit. The Regulation allowing for the derogation from the rules of articles 2500 and 2503 of the CCQ came into effect on May 5th 2022. This is a welcome change for both the impacted Quebec-domiciled corporations and insurers, as it may help bring insurance capacity back into the market and may allow policyholders some contractual freedom.

### Impact on D&O insurance

The insurance community is carefully evaluating the long-awaited regulation with an optimistic lens. The overall impact to program structure, premium and appetite is being rigorously assessed. Although the Regulation appears to be a defence outside the limit opt out provision, it remains to be seen if this will be the only option presented to corporations. As we assess and analyze the Regulation, we are encouraging clients to consider limit adequacy as part of their evaluation.

### Quebec civil law

Quebec is the only Canadian province governed by civil law, as embodied in the Civil Code of Quebec. The CCQ is the cornerstone of Quebec's legal system and includes insurance law. There are articles within the CCQ that impact the way in which a liability insurance policy responds in the event of a claim. Although the applicable articles are not new, a changing legal landscape, increasingly complex claims which require significant legal expense and adverse market conditions, have drastically impacted the appetite of insurers to provide Directors' & Officers' Liability Insurance to Quebec-domiciled companies.

### Bill 82

May 27, 2021, the Quebec legislature passed Bill 82 titled: *An Act respecting mainly the implementation of certain provisions of the Budget Speech of 10 March 2020.*

The Bill, among other things, allows for government regulation to exempt certain "categories of insurance contracts" and "classes of insureds" from the Civil Code of Quebec requirement which provides for the uncapped duty of liability insurers to pay the defence costs over and above the policy limit.



Prior to the enactment of Bill 82, CCQ provided that insurance policy limits must be solely dedicated to the settlement of third party claims and that any additional cost, most importantly defense cost and interest on any judgment, were to be the sole responsibility of the insurers in addition to the policy limits. Insurers were therefore unable to quantify their financial exposure, creating uncertainty, with potential adverse impacts on their balance sheets, contractual restraints with their reinsurers, and pose an unacceptable risk to their shareholders.

### Amendment to the Civil Code

The Bill amends Article 2503 of the Civil Code by allowing the Government, by regulation, to stipulate exemptions to the defence outside the limit provisions. The newly amended Article reads as follows:

2503. The insurer is bound to take up the interest of any person entitled to the benefit of the insurance and assume his defence in any action brought against him.

Legal costs and expenses resulting from actions against the insured, including those of the defence, and interest on the proceeds of the insurance are borne by the insurer over and above the proceeds of the insurance.

*However, the Government may, by regulation, determine categories of insurance contracts that may depart from those rules and from the rule set out in Article 2500, as well as classes of insureds that may be covered by such contracts. The Government may also prescribe any standard applicable to those contracts.*

### The Regulation

**Categories of Insurance Contracts and Classes of Insureds that may derogate from the rules of Articles 2500 and 2503 including, but not limited to, the following:**

In any civil liability insurance contract, an Insured that meets one of the following conditions at the time of subscription may be covered by a contract that departs from the rules set out in article 2500 and the first and second paragraphs of article 2503 of the Civil Code where the total coverage under all the civil liability insurance contracts subscribed by that Insured is at least \$5,000,000 and meets one of the following conditions:

1. The Insured is a large business in respect to the Act respecting the Quebec sales tax (chapter T-0.1)
2. Securities exchanges reporting issuer within the meaning of the Securities Act (chapter V-1.1)
3. The Insured is a foreign business corporation within the meaning of the Taxation Act (chapter I-3) or the Income Tax Act (R.S.C. 1985, c1 (5th Suppl.))
4. Insured is a director, officer or trustee to any entity per above

The Regulation also states that the maximum duration of an exempted Insurance contract is one year. Upon renewal of the contract, the insured must meet the conditions of the Regulation.



## What is Marsh doing to help clients?

Marsh FINPRO is at the forefront of delivering creative solutions for our Quebec-domiciled clients. We continue to work with our insurer partners to align expectations and assess the implications stemming from the new Regulation. Our proactive approach includes the following:

- Facilitating meetings with insurer partners to evaluate the impact to current programs, including assessing viable alternative program structures and wordings for clients.
- Renewed consultation with insurers that previously were reticent about Quebec-domiciled risks and to encourage new market entrants in the province.
- Applying technical expertise to review the impact on insurer wordings for Quebec-domiciled insureds.
- Assisting clients evaluate limits adequacy in light of defence costs potentially eroding limits.

## Navigating the renewal

Marsh recommends the following strategies for the best renewal outcome:

- Secure the right advice — Engage an experienced risk advisor with dedicated D&O expertise who demonstrates risk comprehension, market innovation and has a proven record of accomplishment in developing successful placement strategies.
- Start early — In an effort to avoid surprises given the market remains volatile.
- Meet face to face with underwriters to differentiate your risk, the positive drivers and strategy. No one tells your story as you do. Transparency translates in to trust.
- Access the global market — Including North America, the United Kingdom, Europe, Bermuda, and Asia.
- Evaluate the design of your D&O program in conjunction with coverage priorities — Consideration of alternative structures may be appropriate in certain situations.
- Negotiate — Leverage broader relationships with insurers. Utilize risk advisor's influence in the global D&O insurance market.





## About Marsh FINPRO

Marsh's dedicated FINPRO Practice specializes in addressing a variety of financial risks facing an organization and its Directors and Officers, offering actionable insights and developing innovative solutions. FINPRO specialists continually monitor ever-changing global trends and tailor products specifically designed to address client exposures based on its global footprint and operations.

The FINPRO Practice is a global team of professionals of more than 1,100 coverage and claims advocacy experts worldwide advising on financial and professional insurance lines for more than 4,000 clients.

Across all industries and segments, the team delivers technical expertise, knowledge of legal and regulatory trends, specialized claims advocacy services, and unrivaled access to market leading insurers to help our client's implement a risk management program tailored to address their key risk issues.

For more information, please contact the Marsh Canada FINPRO team or your Marsh Canada representative.

## About Marsh

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