



# PRAEVENTIO

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## TABLE OF CONTENTS

|   |   |
|---|---|
| The <i>Praeventio</i> Bulletin Celebrates Its 20th Anniversary!           | 1 |
| Clarifications to the Insurance Policy as of April 1, 2020                | 1 |
| Reduced Insurance Premium   | 3 |
| The Insurance Fund's New Website is Now Online                            | 4 |
| The Conciliation and Summary Hearing Pilot Project and the Duty to Advise | 4 |
| Has Your Client Notified Their Insurer?                                   | 5 |
| Thinking of Representing a Client Before the Régie du Logement?           | 6 |

*A small effort to prepare avoids a large effort to repair*

**Michaël Aguilar**

## THE PRAEVENTIO BULLETIN CELEBRATES ITS 20TH ANNIVERSARY!

Originally called the *Bulletin de prévention*, it was in 2006 that it adopted its current form and was renamed *Praeventio*. Despite the passing years, its objectives have remained the same. The purpose of this information bulletin, which is sent to all insureds, is to inform them about various subjects and/or questions of law, including legislative amendments and recent case law. But that's not all ... The bulletin continues its mission to raise awareness of the various behaviours that give rise to malpractice claims or proceedings.

This anniversary coincides with the arrival of new prevention tools. Be sure to visit [Maitres@droits](mailto:Maitres@droits) on the Insurance Fund's new website on the first and fifteenth working day of each month to discover our articles and videos. Our calendar of training activities is also available on the website and is updated on a regular basis.

Long live *Praeventio* and *Maitres@droits*! ☂

## CLARIFICATIONS TO THE INSURANCE POLICY AS OF APRIL 1, 2020

By M<sup>e</sup> Maria De Michele,  
Executive Director

For the insurance period starting on April 1, 2020, the Professional Liability Insurance Fund of the Barreau du Québec has clarified the insurance policy with regard to the professional services that are covered under the policy.

The current policy already provides that services that are covered are those that have or should have been rendered solely in the capacity as a lawyer. The Insurance Fund never intended to cover investment, foreign exchange or real estate brokerage services. Such services are not services rendered solely in the capacity as a lawyer.

In order to properly reflect this intention, the insurance policy has been clarified as follows:

- The definition of "Professional Services" specifies that Investment Services or Real Estate Brokerage services, among others, are not services that are covered by the Fund;
- The expression "Investment Services" is defined;

■ Exclusion 2.04 g) pertaining to Claims arising from Real Estate Brokerage is clarified;


■ Exclusion 2.04 j) pertaining to Claims arising from Investment Services is clarified.

Thus, the text is clarified as follows:

| Provision of the policy | Existing policy expiring March 31, 2020   | Policy as of April 1, 2020  |
|-------------------------|---|---|
| 1.04                    | <p><b>PROFESSIONAL SERVICES:</b></p> <p>a) When the named Insured is entered on the Roll without holding a Special permit and is not admitted as a Solicitor:</p> <p>All services, which have or should have been rendered by the named Insured, directly or indirectly, solely in his capacity as a lawyer and as a member in good standing of the Barreau du Québec, while he was not exempt from the obligation to subscribe to the <b>Fonds d'assurance</b>;</p> <p>b) When the named Insured is entered on the Roll while holding a Special permit or is admitted as Solicitor and is not exempt from the obligation to subscribe to the <b>Fonds d'assurance</b>:</p> <p>Only services authorized in accordance with the permit or as such, which have or should have been rendered in Québec by the named Insured.</p> | <p>Addition of a paragraph to the definition of <b>Professional Services</b>:</p> <p>c) Such services do not include, <u>namely, but not limited to</u>:</p> <p>i) <b>Investment Services</b>; and</p> <p>ii) <b>Real Estate Brokerage</b>.</p>   |
| 1.05                    | <p><b>REAL ESTATE BROKERAGE:</b> Acting as intermediary between two or more parties in a real estate transaction for the purpose of earning a commission on the amount of the transaction.</p>  |   |
| 1.14                    |   | <p>Addition of the definition of:</p> <p><b>INVESTMENT SERVICES:</b></p> <p><u>Any advice, opinion, service or recommendation in matters of placements, investments or foreign exchange operations, namely with respect to, but not limited to, the performance or return of such placements, investments or foreign exchange operations.</u></p> |
| 2.04                    | <p><b>EXCLUSIONS:</b> This policy does not apply to a <b>Claim</b> or part of a <b>Claim</b>:</p> <p>g) arising from <b>Real Estate Brokerage</b>. However, this exclusion does not apply to other <b>Professional Services</b> rendered in connection with such transaction;</p>   | <p><b>EXCLUSIONS:</b> This policy does not apply to a <b>Claim</b> or part of a <b>Claim</b>:</p> <p>g) arising from <b>Real Estate Brokerage</b>, <u>irrespective of whether <b>Professional Services</b> resulted therefrom or preceeded thereto</u>;</p>   |
| 2.04                    | <p><b>EXCLUSIONS:</b> This policy does not apply to a <b>Claim</b> or part of a <b>Claim</b>:</p> <p>j) arising from any advice, opinion or services in matters of placements, of investment or of foreign exchange operations; however, this exclusion does not apply to other <b>Professional Services</b> rendered in connection with such distribution, investment or foreign exchange operations;</p>  | <p><b>EXCLUSIONS:</b> This policy does not apply to a <b>Claim</b> or part of a <b>Claim</b>:</p> <p>j) arising from <b>Investment Services</b>, <u>irrespective of whether <b>Professional Services</b> resulted therefrom or preceeded thereto</u>;</p>   |

In addition, in order to comply with the requirements of the new legislative provisions applicable to professional liability insurance funds of professional orders as of April 1, 2020, the procedure for the processing of insurance claims is more fully described in ss. 3.01 to 3.02.4 of the policy.

| Provision of the policy | Existing policy expiring March 31, 2020  | Policy as of April 1, 2020   |
|-------------------------|--|--|
| 3.02                    | <p><b>FORM OF NOTICE:</b> Any notice by the <b>Insured</b> to the <b>Insurer</b> shall be sent in writing to the address indicated in Item 6 of the Declarations or, if applicable, to any other address of which the <b>Insured</b> has been notified in writing.</p> <p>Any notice given by the <b>Insurer</b> to the named Insured shall be sent in writing to the last address indicated on the “Tableau de l’Ordre” or to any other address of which the <b>Insurer</b> has been notified in writing.</p> |  |
| 3.02.1                  |  | <b>OPENING OF FILE:</b> The <b>Insurer</b> opens a file upon receipt of a written notice of a <b>Claim</b> or of a written notice of facts or circumstances that may give rise to a <b>Claim</b> .                                 |
| 3.02.2                  |  | <b>ACKNOWLEDGMENT OF RECEIPT:</b> The <b>Insurer</b> acknowledges receipt to the <b>Insured</b> or a third-party claimant, as the case may be, within ten (10) days of the date of receipt of a written notice of a <b>Claim</b> . |
| 3.02.3                  |  | <b>ANALYSIS:</b> As soon as possible, the <b>Insurer</b> analyzes the <b>Claim</b> made.   |
| 3.02.4                  |  | <b>COMMUNICATION OF THE INSURER’S POSITION:</b> The <b>Insurer</b> informs the <b>Insured</b> or the third-party claimant, as the case may be, of its position with respect to the <b>Claim</b> made.                              |

The full text of the insurance policy is available on the Insurance Fund’s website at <https://www.assurance-barreau.com/>. 

## REDUCED INSURANCE PREMIUM


By *M<sup>e</sup> Maria De Michele*,  
Executive Director

We are pleased to announce a new reduction in the insurance premium as of April 1, 2020.

The Board of Directors of the Barreau du Québec has accepted the recommendations of the Insurance Fund and the Council of Regional Bars to reduce the premium to **\$800** per insured for the period from April 1, 2020 to April 1, 2021. This represents a \$50 reduction per insured over last year’s premium.

The Insurance Fund thus continues to offer lawyers practising in Quebec insurance coverage of \$10 million without a deductible in return for a lower premium than that of all our colleagues in the other Canadian provinces and territories.

Indeed, elsewhere in Canada, premiums range from \$926 to \$3,792 for coverage of \$1 million and, with the exception of one other province, insureds must assume a \$5,000 deductible.

It is with pride that the Insurance Fund continues its mission to provide long-term, not-for-profit, professional liability insurance to the members of the Barreau du Québec. 

## THE INSURANCE FUND'S NEW WEBSITE IS NOW ONLINE

In our previous bulletin, we informed you of the upcoming launch of the Fund's new website. Well, it's finally here! You will easily find information on all the subjects likely to be of interest to you: the coverage offered by the Fund's policy, information regarding the obligation to subscribe and the available exemptions, as well as the notice to the Insurance Fund.

New prevention resources have been added, including *Mâitres@droits*, which will contain various articles and video clips. You'll also find a list of the training activities offered by the Fund.

Moreover, in the section entitled *Guides et outils pratiques*, you'll find updates to the *Guide de prévention en responsabilité professionnelle* and to the prescription table found in *Prescriptions extinctives et autres délais*, which dates from March 2019. This section also includes checklists that give you access to risk prevention and management information.

Go to [www.assurance-barreau.com](http://www.assurance-barreau.com) and click on the menu in the top left corner. Then choose "pour les avocats".

Enjoy your visit! ☂

## THE CONCILIATION AND SUMMARY HEARING PILOT PROJECT AND THE DUTY TO ADVISE

Since September 1, 2019, litigants in the **district of Quebec** have had access to the Superior Court's conciliation and summary hearing pilot project. The aim of this project is to allow parties to

settle disputes quickly and, if the settlement talks fail, for the matter to be heard promptly and a judgment rendered. This initiative could eventually be extended to the entire province. Here are its broad strokes:

- The process is voluntary and confidential, with the exception of the final decision, which is filed in the court record;
- The request for conciliation and summary hearing must be filed within 90 days of the commencement of the action;
- The parties must sign a conciliation and summary hearing agreement, a sample of which can be found on the website of the Superior Court – Quebec Division;
- Subsequently, a judge will contact the parties to establish the conduct of the conciliation;
- At least ten (10) days before the date of the conciliation, each party must prepare, communicate and file in the court record a statement of its allegations. The statement must be no longer than two (2) pages, with 1½ line spacing, and must be accompanied by the exhibits, excerpts from examinations, affidavits and any other evidence necessary for the judge to assess the merits of the case. No testimony is heard at the hearing;
- The conciliation session begins at 9:00 a.m. and ends at 12:30 p.m. If there is no settlement, a summary hearing takes place on the same day, starting at 2:00 p.m. and ending at 4:30 p.m.;
- There are no separate meetings permitted between clients and their lawyer during conciliation;

- The conciliation and summary hearing recordings remain sealed;
- Following the conciliation session, the judge may refuse to move on to the next step;
- The judgment must be rendered within ten (10) days of the hearing;
- Each party pays its own legal costs unless the court decides otherwise;
- The court's decision is not subject to appeal;
- The parties cannot opt out of the process once the agreement has been signed;
- The judge enjoys full immunity.

### Preventive measures

Considering the time constraints and the parameters of the pilot project, there is no room for improvisation. In such a context, the quality of the advice provided and careful preparation before the session will be your best assets to avoid giving rise to your liability. Here are some suggestions on conduct that may decrease the risk of malpractice proceedings:

### Before the conciliation session and summary hearing:

- Meet with your client and explain the process and the ramifications of participating in this pilot project. Despite the advantages of a more expeditious process, the client must be aware that he will be waiving the possibility of appealing the judgment and will not be able to withdraw from the process once the agreement has been signed. Indeed, we suggest that you have the client sign an acknowledgement that these constraints have been explained to him. You should



at all times use plain language devoid of legal jargon;

■ Some clients want at all costs that their case end with a court judgment. In such a situation, the pilot project is undoubtedly not the avenue to consider, particularly since such clients are likely to be disappointed if a settlement occurs during conciliation. Thus, we cannot overstate the importance of clarifying your client's expectations and objectives regarding costs, deadlines and the amount for which the file can be settled. In this regard, it is important to be realistic and transparent with your client regarding what can be accomplished and within what time frame;

■ Tell your client exactly what the chances of a successful outcome are or the defences that may be raised. While it is not an easy task, resist the temptation to lessen the impact of bad news. In doing so, your client will be in a position to make informed decisions about what to do with his case. Moreover, the client will not be taken by surprise when he hears the arguments of the opposing party during the conciliation session. Don't forget to confirm your opinion, advice and recommendations in writing;

■ Before filing the statement of allegations and the documents put into evidence, review each of these documents with your client and make sure that the client has not failed to provide you with important evidence. Also take the opportunity to review your strategy and get written instructions as to the authority

you have to settle and the flexibility you have. Later on, it will be too late to do so! It is important to remember that there are no separate meetings permitted between you and your client during the conciliation session, so there is no opportunity to readjust your strategy if necessary;

■ Finally, take advantage of this meeting to review the strengths and weaknesses of the case. This will allow your client to clearly present his theory of the case and put forward the arguments in support thereof during conciliation.

#### During the conciliation session:

■ In order to properly document your file, take notes on the arguments put forward by the opposing party and the offers made by both parties;

■ Remember the importance of having draft settlement documents on hand in the event the case ends up being settled. Finalize the transaction documents and have them signed by the parties and the lawyers that same day.

#### The day after the conciliation session and summary hearing:

■ Remain available to answer all of your client's questions in order to manage any concerns, anxiety and doubts your client may have, which could ultimately lead to a complaint against you.

A significant number of claims handled by the Insurance Fund involve a problem with the lawyer-client relationship. Good preparation and clear, quality advice—in writing, of course—will help limit criticisms such as: “My

lawyer never told me that!”, “I was never told that I couldn't appeal” or “I wasn't told that I needed an expert report”. Nonetheless, if you receive a claim, promptly inform the Insurance Fund by filling out the *Déclaration de l'assuré* found on our website at ([www.assurance-barreau.com](http://www.assurance-barreau.com)) in the section for lawyers, under *Aviser le Fonds*. ☔

By Me Marie-Eve Charbonneau-Trudel,  
Legal Department

## HAS YOUR CLIENT NOTIFIED THEIR INSURER?

After several procedures, negotiations and a 3-day trial, you finally win your client's case, and the liability proceedings that had been served on the client in September 2016 are dismissed.

Once your client has paid your fees, you close the case and file the decision in your “victory folder”, satisfied with the judgment and the work you performed.

The case, however, does not end there. Unfortunately, a few months later, you receive a formal notice from the same client.

The client explains that after having made a request for the reimbursement of his defence costs by his liability insurer, his claim was refused, particularly given the late notice, but also because it is prescribed. He blames you for not having informed him in a timely manner of the deadline for notifying his insurer.

Indeed, the claim for lawyers' fees which aims to satisfy the insurer's duty to defend<sup>1</sup> is prescribed by three years from the service of the originating application. This prescription period related to the obligation to defend is well established in the case law.<sup>2</sup>

In order to avoid being the subject of malpractice proceedings, why not make it a habit, at the start of your mandate, to check with the client whether he has civil liability insurance. If so, remind him of his obligation to promptly notify his insurer of any circumstances likely to give rise to the coverage that may be available and also remind him of the 3-year prescription period.

Finally, don't forget to keep a record of this verification and warning in your file! ☂

- 1 Not to be confused with the action on account for lawyers' fees, where the prescription is different according to the circumstances specific to each case – *Pellerin Savitz LLP v. Guindon*, 2017 SCC 29; AZ-51399232.
- 2 See, in particular, in this regard: *Développement les Terrasses de l'Île inc. c. Intact, compagnie d'assurances*, 2019 QCCA 1440, *Rosenstein c. Guarantee Company of North America*, 2015 QCCS 5672, *Allard c. Intact, compagnie d'assurances*, 2015 QCCS 5533, *Axa Boréal Assurances Inc. c. Université Laval*, 2003 CanLII 40224 (QC CA).

## THINKING OF REPRESENTING A CLIENT BEFORE THE RÉGIE DU LOGEMENT?

By Me Annie Guillemette,  
Claims Department

You should know that section 73 of the *Act respecting the Régie du logement*<sup>1</sup> prohibits representation by a lawyer in cases where “the sole object of the application is the recovery of a debt not exceeding the jurisdiction of the Court of Québec in matters of recovery of small claims”.<sup>2</sup>

The ban on representing clients for small claims before the Régie covers all aspects of a claim, from pleadings to the hearing.<sup>3</sup> Each year, several recourses are declared inadmissible because they were signed by a lawyer.

Not only will your client be very unhappy about having to start the process again or having to represent himself when he thought he could be assisted by a lawyer, but this situation could raise a prescription problem.

Some administrative judges have suggested that article 2895 C.C.Q. could apply to the situation described above, but we have not found any decisions with similar facts that has done so.

That said, article 2895 makes it possible to prevent the loss of a right “where the demand of a party is dismissed without a decision having been made on the merits of the matter and where, on the date of the judgment, the prescriptive period has expired or will expire in less than three months”.<sup>4</sup> In such a case, “the demanding party has an additional period of three months from notification of the judgment in which to assert his right”.<sup>5</sup>

This is simply a remedy to prevent the loss of a right due to a procedural error or a mistaken choice of jurisdiction. For example, in the event of a defect of form or the incompetence of the court, the plaintiff has a grace period of three months within which to file a second recourse as long as it is based on the same right. However, article 2895 C.C.Q. does not allow the revival of a recourse that has already expired on the date on which the application is filed.

In closing, remember that representation before the Régie du logement by a lawyer for the recovery of a small claim is prohibited. ☂

- 1 CQLR, c. R-8.1.
- 2 *Ibid.*
- 3 *Quirapas c. Régie du logement*, 2008 QCCS 151.
- 4 *Civil Code of Québec*, CQLR, c. CCQ-1991, art. 2895.
- 5 *Ibid.*

### Service de prévention

#### NOTICE

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Assurance  
responsabilité  
professionnelle

Barreau



This publication is an information tool which has been compiled for the purpose of minimizing the risks of legal claims for professional fault. Its content shall not be considered to be an exhaustive study of the topics covered, legal advice, nor as suggesting minimum standards of professional conduct. Where the context permits, the masculine gender includes women as well as men.

This Loss Prevention Bulletin is published by the Professional Liability Insurance Fund of the Barreau du Québec.