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Exam Preparation Manual for the Life Licence Qualification Program (LLQP)

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Foreword

This manual is an exam preparation tool for future representatives registered in the Life Licence Qualification Program (LLQP). Its content will help candidates achieve the learning objective of the ethics and professional practice (Québec) module forming part of the LLQP Curriculum: *Develop an ethical professional practice, in compliance with the rules governing the insurance of persons sector*.[1]

Chapter overview page

The first page of each Chapter presents the competency components and sub-components of the module that will be covered. The evaluation objectives identified for each Chapter are intended to allow candidates to target the contents that are essential for achieving those objectives.

We therefore recommend that candidates review these competency components and sub-components on a regular basis so as to contextualize and assimilate them as they read the Chapter. This will facilitate their understanding of the nature and scope of the competency being evaluated. Candidates must master the knowledge, strategies and skills discussed in each Chapter in order to pass the corresponding module in the LLQP licensing exam.

In this text, the masculine form is used to refer to both men and women.

1. In the context of the ethics and professional practice (Québec) module, the term « insurance of persons » is used to refer broadly to all categories of individual and group insurance of persons, namely: life insurance, accident and sickness insurance (living benefits), annuity contracts (segregated funds, GIAs and immediate annuities) supplemental pension plans.

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LIST OF ABBREVIATIONS

Access Act	*An Act respecting access to documents held by public bodies and the protection of personal information*
AIA	*Automobile Insurance Act*
AIAOD	*An Act respecting industrial accidents and occupational diseases*
AMF	*Autorité des marchés financiers*
APPIPS	*Act respecting the protection of personal information in the private sector*
art.	Article
ASO plan	Administrative services only plan (uninsured employee benefit plan)
C	Chapter
CAPSA	Canadian Association of Pension Supervisory Authorities
CCIR	Canadian Council of Insurance Regulators
C.C.Q.	*Civil Code of Québec*
CDIC	Canada Deposit Insurance Corporation
CECSF	*Code of ethics of the Chambre de la sécurité financière*
CISRO	Canadian Insurance Services Regulatory Organizations
CLSC	*Centre local de services communautaires* (Local community service centre)
C.L.U.	Chartered life underwriter
CLHIA	Canadian Life and Health Insurance Association
CPP	Canada Pension Plan
CQLR	Compilation of Québec Laws and Regulations
CRA	Canada Revenue Agency
CRTC	Canadian Radio-Television and Telecommunications Commission
CSA	Canadian Securities Administrators
CSF	*Chambre de la sécurité financière*
CSST	*Commission de la santé et de la sécurité du travail*
CVCA	*Crime Victims Compensation Act*
DB	Defined benefit
DBPP	Defined benefit pension plan
DC	Defined contribution
DCPP	Defined contribution pension plan
Distribution Act	*An Act respecting the distribution of financial products and services*
DPSP	Deferred profit sharing plan

EI	Employment insurance
EPSP	Employee profit sharing plan
FATCA	*Foreign Account Tax Compliance Act*
Fin. Pl.	Financial planner
FINTRAC	Financial Transactions and Reports Analysis Centre of Canada
GIA	Guaranteed interest account
GIC	Guaranteed investment certificate
GIS	Guaranteed Income Supplement
GP	General partnership
GST	Goods and services tax
IIROC	Investment Industry Regulatory Organization of Canada
IVAC	Crime victims compensation
IVIC	Individual variable insurance contract
Joint Forum	Joint Forum of Financial Market Regulators
LIF	Life income fund
LIRA	Locked-in retirement account
LP	Limited partnership
MPE	Maximum pensionable earnings
National DNCL	National Do Not Call List
OAS	Old Age Security
OLHI	OmbudService for Life & Health Insurance
OSFI	Office of the Superintendent of Financial Institutions
p.	Page
PA	Pension adjustment
para.	Paragraph
PIPEDA	*Personal Information Protection and Electronic Documents Act*
PRPP	Pooled registered pension plan
QPIP	Québec Parental Insurance Plan
QST	Québec sales tax
r.	Regulation
RARI	*Regulation under the Act respecting insurance*
R.L.U.	Registered life underwriter
RAMQ	*Régie de l'assurance maladie du Québec*

RESP	Registered education savings plan
RPP	Registered pension plan
RRIF	Registered retirement income fund
RRSP	Registered retirement savings plan
s.	Section
SME	Small business
S.Q.	Statutes of Québec
SAAQ	*Société de l'assurance automobile du Québec*
SPP	Simplified pension plan
SPPA	*Supplemental Pension Plans Act*
TFSA	Tax-free savings account
v.	Versus
VRSP	Voluntary retirement savings plan

CHAPTER 1

SOURCES OF LAW GOVERNING INSURANCE OF PERSONS

Competency components

- Understand the legal framework governing insurance of persons.

Competency sub-components

- Define the provisions of the *Civil Code of Québec* applicable to insurance of persons;
- Define the other sources of law applicable to insurance of persons.

In order to round out their studies, readers should consult the collection of texts entitled *An Act Respecting the Distribution of Financial Products and Services*, its Regulations and Codes of Ethics (A100-T1).

1
SOURCES OF LAW GOVERNING INSURANCE OF PERSONS

In Québec, legal rules stem from several sources, in particular, the Canadian Constitution, legislation, case law and doctrine.

The Canadian Constitution takes precedence over all other rules of law, including Canadian (federal) and Québec laws. In practical terms, this means the laws and regulations enacted by Parliament and by the legislatures of each province must comply with the Canadian Constitution.

The Canadian Constitution includes rules on the division of legislative powers between Parliament and the provincial legislatures (stemming from the *Constitution Act, 1867*, at the time the British Parliament created the Canadian Confederation) and the *Canadian Charter of Rights and Freedoms* (included in the *Constitution Act, 1982* when the Canadian Constitution was repatriated in 1982).

The other sources of law include legislation (laws), regulatory instruments (regulations), case law (all court decisions) and doctrine (texts in which their authors explain and interpret the law). There are also other sources of law, such as treaties, custom and usage. This manual will deal primarily with laws and regulations applicable to the activities of insurance of persons representatives.

It should be noted that pursuant to the division of powers arising under the Canadian Constitution, insurance contracts, annuity contracts and the distribution of insurance products fall under the exclusive jurisdiction of the provincial legislatures.[2] The organization of federally chartered insurance companies and the monitoring of their solvency fall under the jurisdiction of Parliament, while the provincial legislatures are in charge of these matters for provincially chartered insurance companies.

This Chapter provides an overview of the principal laws and plans affecting the activities of insurance of persons representatives. This chapter therefore aims to familiarize future insurance representatives with such legal framework and present notions that are useful from a practical standpoint.

Evidently, an insurance representative cannot give advice or legal opinions to a client. Accordingly, the representative must encourage its client to consult a lawyer or a notary if it realizes that its client is looking for legal advice. Also, if the representative realizes that his or her client is looking for advice of an accounting or fiscal nature, he or she should suggest to its client to consult an accountant or a fiscalist.

2. *Canadian Western Bank* v. *Alberta*, [2007] 2 S.C.R. 3.

1.1 *Civil Code of Québec (C.C.Q.)*

Importance of the *Civil Code of Québec* (*C.C.Q.*)

The *Civil Code of Québec* (*C.C.Q.*) is the principal source of law in Québec. It has been in force since January 1, 1994, replacing the Civil Code of Lower Canada[3] (which came into force on August 1, 1866). One of its Chapters deals with insurance. In addition to the *C.C.Q.*, there are specific statutes with provisions applicable to insurance of persons. Article 2414 of the Civil Code states that any clause in an insurance contract which grants the client, the insured, the beneficiary or the policyholder fewer rights than is granted by the provisions of the Chapter of the *C.C.Q.* relating to insurance is null.

Québec civil law

Québec civil law is based on French law. Québec is the only province with a civil code. The other Canadian provinces have a legal system based on British law (common law).

Content of the *Civil Code of Québec* (*C.C.Q.*)

The Civil Code came into force on January 1, 1994, while its predecessor, the *Civil Code of Lower Canada,* came into force in 1866.

The *C.C.Q.* consists of 10 Books (namely: “Persons,” “The Family,” “Successions,” “Property,” “Obligations,” “Prior Claims and Hypothecs,” “Evidence,” “Prescription,” “Publication of Rights,” and “Private International Law”), each of which is divided into Titles, Chapters, Divisions and so on.

The following sections deal with certain topics found in the *C.C.Q.*, due to their effects on the professional practice of insurance of persons representatives.

1.1.1 Elements of law relating to capacity and status of persons

1.1.1.1 Natural persons, partnerships and legal persons (corporations)

Natural persons

Every human being is a natural person who possesses juridical personality, has the full enjoyment of civil rights and has a patrimony, and can therefore exercise rights and perform obligations.

Legal persons

The term legal person refers to a type of business or entity with a personality independent of that of the individuals who make up the legal person. Generally, a legal person is defined as a

3. S. Prov. C., 1865 (29 Vict.), c. 41.

"business for which the law recognizes a separate existence from that of its members."[4] Legal persons are also called "corporations" or "companies." Pursuant to *An Act respecting the legal publicity of sole proprietorships, partnerships and legal persons*, the official name of a legal person usually includes the abbreviation "Inc." for "incorporated" or "Ltd." for "limited." It is important not to confuse the legal name of a corporation with its trademark(s) or business name(s). [translation]

Rights and obligations of a legal person

Like a natural person, a legal person is endowed with juridical personality. This means that it can exercise rights and perform obligations (arts. 298, 301 and 303 *C.C.Q.)*, that, in order to exercise and perform them, it uses the name chosen when it was constituted (art. 305 *C.C.Q.*), that it has its domicile at the place and address of its head office (art. 307 *C.C.Q.*), that it exists in perpetuity unless otherwise provided by law or its constituting act (art. 314 *C.C.Q.*), that a legal person set up as a company or corporation owns property and is liable for its debts (it has a patrimony separate from that of its shareholders) and that it acts pursuant to the resolutions or by-laws adopted by its board of directors and by the general meeting of its members or shareholders (art. 311 *C.C.Q.*).

Representation of a legal person

A legal person is represented by its senior officers and directors, whose authority is limited by law, its constituting act and its by-laws with respect to its operation, the administration of its patrimony and its activities (arts. 310 and 312 *C.C.Q.*).

Insurance firms and insurers are legal persons.

Partnerships

A partnership is formed by a contract entered into between two or more persons for the purpose of carrying out civil or commercial activities. A partnership is not a legal person (unlike a corporation, which is not a partnership). The most common partnerships are general partnerships (GPs) and limited partnerships (LPs).

A general partnership is a group of persons, referred to as "partners," who have come together to operate a commercial undertaking and earn a profit from it which they will share.

A general partnership is created by a contract entered into between all the partners. The future partners must choose a name for their partnership and comply with *An Act respecting the legal publicity of enterprises* (CQLR, C P-44.1). Under this statute, a partnership must register with the Enterprise Registrar.[5] A partnership must also obtain all permits necessary to carry on business.

All the partners of a general partnership participate in the management of the enterprise, unless they have designated a person from among them to fulfil that role. Each partner is a mandatary of

4. Marie-Éva De VILLERS, *Multidictionnaire de la langue française,* Montréal, Québec Amérique, 2006, p. 1091.
5. For more information, see http://www.registreentreprises.gouv.qc.ca/en/default.aspx.

the partnership in respect of contracts entered into by the partnership with third persons and binds the partnership for every act performed in its name in the ordinary course of its business (art. 2219 *C.C.Q.*). Partners are jointly and solidarily liable for the debts and obligations contracted for the operation of the partnership's business (art. 2221 *C.C.Q.*).

"Independent partnerships"[6] in insurance of persons are partnerships and can become registrants with the *Autorité des marchés financiers* (AMF).

1.1.1.2 Capacity: marriage, marriage contracts, civil union and civil union contracts

Marriage

Marriage is the legal union of two persons. Since July 20, 2005, same-sex persons can get married in Canada.

A marriage is dissolved by (art. 516 *C.C.Q.*):

- The death of one of the spouses;
- Divorce.

Separation from bed and board does not break the bond of marriage (art. 507 *C.C.Q.*).

A marriage may also be declared null under certain circumstances (art. 380 *C.C.Q.*).

Civil union

Civil union was introduced into the *Civil Code of Québec* on June 24, 2002 (arts. 521.1 to 521.19 *C.C.Q.*) pursuant to *An Act Instituting Civil Unions and Establishing New Rules of Filiation* (SQ 2002, c 6) in order to allow everyone (but, in practice, mainly with a view to allow same-sex spouses) to enjoy the same effects as marriage as regards the family patrimony, the direction of the family, the exercise of parental authority, the contribution towards expenses, the family residence, the compensatory allowance, the right to establish the desired regime by way of civil union contract and the power to inherit in the same capacity as married spouses in the absence of a will.

Indeed, given that, under the Canadian Constitution, the Québec legislature did not have the possibility to enact legislation stating that "marriage" could occur between two persons of the same sex, it created a similar institution (the "civil union") for their benefit, allowing them to enjoy the same rights and obligations under civil law as married spouses (husband and wife).

On July 20, 2005, Parliament enacted the *Civil Marriage Act* (S.C. 2005, c 33), which came into force that same day. Since then, same-sex spouses have had the right to marry in Canada, which was previously impossible. This statute resulted from a decision rendered by the Supreme Court of Canada on December 9, 2004 (*Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698).

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6. See section 128 (2) of *An Act respecting the distribution of financial products and services*, CQLR, c D-9.2. Independent partnerships will be further discussed in Chapter 4.

Consequently, since July 20, 2005, very few same-sex spouses have taken advantage of civil union under the *C.C.Q.,* preferring to get married. Thus, in actual fact, civil union will have had practical value only for the period from June 24, 2002 to July 20, 2005. It should be noted that opposite-sex spouses can also choose to be united or be in a civil union.

It is very important to remember that civil union under the Civil Code must not be confused with the notion of *de facto* spouses (or common-law spouses), that is, spouses who are not in a civil union or not married. Spouses in a civil union and *de facto* spouses (or common-law spouses) fall into two very different categories.

Individuals who are joined in a civil union are required to live together, and they owe each other respect, fidelity, succour and assistance. In practical terms, with respect to rights and obligations, a civil union is the equivalent of marriage, because the spouses enjoy the same rights and obligations as a married couple, particularly with respect to the constitution of the family patrimony.

Future civil union spouses may choose one of the matrimonial regimes which exist in Québec. Those who do not make a choice are governed by the legal regime of partnership of acquests. The couple may also create their own civil union regime by deciding that only part of the property will be recognized as acquests and the rest of the property will be governed by the rules of separation as to property.

A civil union is dissolved when:

- One of the spouses dies;
- A court orders the dissolution; or
- The spouses make a joint declaration before a notary stating that their will to live together has been irretrievably undermined.

Matrimonial regimes

Firstly, the term “matrimonial regime” is defined as all provisions relating to property belonging to married or civil union spouses.

There are currently three types of matrimonial regimes in Québec, each one with its own rules governing property depending on whether or not it forms part of the family patrimony. They are:

- Community of property (art. 492 *C.C.Q.*);
- Separation as to property (arts. 485 to 491 *C.C.Q.*); and
- Partnership of acquests (arts. 448 to 484 *C.C.Q.*).

Community of property

This former legal regime applied to spouses married in Québec before July 1, 1970 without a marriage contract. The words “without a marriage contract” are important, because a couple could choose to be married without signing a contract before a notary. Such a couple was governed by

the matrimonial regime in force, set out in the *Civil Code of Lower Canada*, at the time of the marriage.

What is unique about community of property is that a sole administrator – the husband – manages a common patrimony.

Upon the dissolution of the marriage, the property acquired by the spouses during the marriage is partitioned equally. On July 1, 1970, community of property was replaced by partnership of acquests as the default legal regime. Until 1981, new spouses could nonetheless choose community of property by referring to the provisions of the *C.C.Q.* in their contract. Although this option is no longer possible, community of property still exists in Québec, because many couples married before July 1, 1970 without a marriage contract or those who opted for this regime (through a notarized marriage contract) until 1981 are still subject to it.

Separation as to property

The regime of separation as to property is very popular in Québec. In order for it to apply, the spouses must enter into a notarized marriage contract.

The most distinctive aspect of separation as to property is its simplicity. Each spouse is responsible for the administration, enjoyment and free disposition of all his property. There is no partition of property when the marriage ends or in the event of separation from bed and board.

However, the rules governing family patrimony adopted in 1989 modified the effects of this regime, unless the spouses signed a notarized document before January 1, 1991, indicating their wish to waive the application of the division of the patrimony by agreement. If both spouses agreed, they may also have waived it at the time of their divorce or at the dissolution of their civil union.

Partnership of acquests

Partnership of acquests is the current legal regime for couples married after June 30, 1970 without a marriage contract and for couples joined in a civil union since June 24, 2002 without civil union contract.

Property acquired during the marriage from the proceeds of work and other sources of income are acquests (art. 449 *C.C.Q.*), and thus may be partitioned upon the dissolution of the marriage or civil union. Other property is “private” or “private subject to compensation” (arts. 450 to 459 *C.C.Q.*), or, exceptionally, property held in undivided co-ownership (art. 460 *C.C.Q.*).

The main characteristic of this regime is that all property owned by a spouse prior to the marriage or civil union is considered private property (i.e. property belonging to that spouse alone). Similarly, property a spouse inherits or receives as a gift during the marriage or civil union is considered to be private property.

Each spouse keeps the property belonging to him and can accept or waive the partition of the acquests upon the dissolution of the marriage or civil union.

The private property of each spouse consists of the rights or benefits devolved to that spouse as a subrogated holder or as a specified beneficiary under a contract or plan of retirement, an annuity or insurance of persons (art. 450, para. 4 *C.C.Q.*).[7]

1.1.1.3 Family patrimony

The concept of family patrimony is quite recent, given that *An Act to favour economic equality between spouses,*[8] commonly called the *Family Patrimony Act* (Québec), only came into force on July 1, 1989. Since this regime is of public order, married or civil union spouses cannot renounce their rights in the family patrimony, whether by a marriage contract or otherwise (art. 423 *C.C.Q.*). Although couples married prior to July 1, 1989, had until December 31, 1990, to waive these provisions in writing before a notary, no one married after June 30, 1989, can avoid the application of these rules.

Marriage and civil union both involve the constitution of a family patrimony consisting of certain property of the spouses regardless of which of them holds a right of ownership in that property (art. 414 *C.C.Q.*). Thus, in the event of nullity of the marriage, divorce or separation from bed and board, this property must be partitioned between the ex-spouses, or, upon the death of one of the spouses, it must be partitioned between the surviving spouse and the estate of the deceased spouse.

List of property included under the family patrimony

The provisions of the *Family Patrimony Act* are included in the Civil Code (arts. 414 to 426 *C.C.Q.*) and provide for the partition of the following property between couples who are married or in a civil union:

- The principal and secondary residences of the family;
- The movable property located therein and which serves for the use of the household;
- The motor vehicles used for family travel;
- The benefits accrued during the marriage or civil union under a government pension plan such as the Québec Pension Plan;
- The benefits accrued during the marriage or civil union under pension plans offered by employers;

7. However, see articles 451 and 453 *C.C.Q.*
8. The exact title of the statute is: *An Act to amend the Civil Code of Québec and other legislation in order to favour economic equality between spouses*, S.Q. 1989, c 55.

- The benefits accrued during the marriage or civil union under a registered retirement savings plan, such as registered retirement savings plans (RRSPs), registered retirement income funds (RRIF), locked-in retirement accounts (LIRAs) and life income funds (LIFs); and
- Benefits accrued during the marriage or civil union under any other retirement-savings instrument, including an annuity contract, into which sums from any such plans have been transferred.

Thus, the following, among other things, do not form part of the family patrimony:

- Cash and money kept in bank accounts;
- Insurance contracts (including the cash surrender value[9]);
- Investments, shares, bonds and annuity contracts[10] not included in an RRSP, a RRIF, a LIRA, a LIF or a pension plan; and Deferred profit-sharing plans,[11] retirement superannuation plans(DPSP),[12] tax-free savings accounts (TFSA) and businesses.

Exclusion of certain property

The following property is excluded from the family patrimony:

- The earnings registered in the name of each party during the marriage pursuant to *An Act respecting the Québec Pension Plan*, if the dissolution of the marriage or civil union results from death (art. 415, para. 3 *C.C.Q.*);
- Benefits accrued under a retirement plan which grants a right to death benefits to the surviving spouse, if the dissolution of the marriage or civil union results from death (art. 415, para. 2 *C.C.Q.*); and
- Property received by one of the spouses as an inheritance or gift, before or during the marriage or civil union (art. 415, para. 4 *C.C.Q.*). However, movable property (and even the undivided half of the principal residence) given in a marriage contract by a married or civil union spouse to the other spouse forms part of the family patrimony.

Application of rules

The provisions of the Civil Code relating to the family patrimony apply to all married or civil union couples who live in Québec (with the exception of persons married before July 1, 1989 who, no later than December 31, 1990, renounced the family patrimony in writing before a notary). The rules relating to the family patrimony apply to civil union couples since June 24, 2002.

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9. *A.* v. *P.*, [1997] R.L. 124 (C.S.).
10. *Droit de la famille – 1398*, [1991] R.D.F. 215 (C.S.) (life annuity contract in the payout phase).
11. *Droit de la famille – 2141*, [1995] R.D.F. 131 (C.S.); *Droit de la famille – 1963*, J.E. 94-594 (C.S.); *M.D.* v. *F.De.*, SOQUIJ AZ-50171814 (C.S.), May 12, 2003; *F. (L.)* v. *M. (S.)*, C.S. Saint-François, June 19, 1991, no. 450-04-000504-893, Boily, J. However, a DPSP transferred to an RRSP forms part of the family patrimony (*Droit de la famille – 2141*, [1995] R.D.F. 131 (C.S.)).
12. *N. (L.)* v. *N. (P.)*, C.S. Québec, June 4, 1992, no. 200-12-043249-904, Philippon, J. (supplemental annuity agreement for senior employees).

Valuation date of the family patrimony

The family patrimony is partitioned upon separation from bed and board, divorce, dissolution of the civil union or the death of one of the spouses. The value of the patrimony is divided among the spouses at such time. The property is valued as of one of the following dates:

- The date of death of one of the spouses or the date of the institution of the action seeking separation from bed and board, divorce or nullity of marriage or of the dissolution or nullity of a civil union; or
- The date on which the spouses ceased living together, if it is prior to the date mentioned above.

Rules for partitioning the family patrimony

The *C.C.Q.* sets out rules for partitioning the family patrimony to avoid penalizing a spouse who, during the marriage or civil union, acquired property forming part of the family patrimony through a gift or inheritance (contribution). The *C.C.Q.* rules of partition also take into account the property forming part of the family patrimony which was fully paid for by one of the spouses before the marriage or civil union (arts. 416 to 426 *C.C.Q.*). There are also other rules dealing with property paid for in part prior to the marriage or civil union and in part during the marriage or civil union.

To partition the family patrimony, the following steps must be followed:

- Determine the market value of all the property in the family patrimony;
- Next, determine the total amount of the debts existing on the partition date that were incurred for the acquisition, improvement, maintenance and preservation of property included in the family patrimony;
- Deduct the debts from the market value, which allows the net value of the family patrimony to be determined;
- Apply the other deductions prescribed by the *C.C.Q.* relating to property forming part of the family patrimony (property acquired before the marriage, through inheritance or a gift); and
- Calculate the net value resulting from these steps and partition the family patrimony equally.

1.1.1.4 Divorce and separation from bed and board

Divorce, which is governed by the *Divorce Act*,[13] a federal statute, dissolves a marriage and results in the partition of the family patrimony and the dissolution and liquidation of the matrimonial regime. However, the *C.C.Q.* governs some of its effects (such as the partition of the family patrimony and the partition of a matrimonial regime).

13. *Divorce Act*, R.S.C. 1985, c 3 (2nd Supp.).

Separation from bed and board does not dissolve a marriage, but it releases the spouses from the obligation to live together and results in the partition of the family patrimony and the dissolution and liquidation of the matrimonial regime. Separation from bed and board and its effect are governed by the *Civil Code of Québec* (arts. 493 to 514). In certain cases, it may be advantageous for the spouses or for one of them to be released only from the obligation to live together, without the marriage being dissolved, in order to retain certain benefits arising under the law, as for example the right to inherit if the spouse dies without a will, the right of a designated beneficiary or a subrogated beneficiary of a life insurance policy or of an annuity contract is not automatically revoked nor the right of a donnee to benefit from a donation clause included in a marriage contract following the spouse's death (contractual institution).

However, a legally separated spouse does not qualify as a "surviving spouse" pursuant to *An Act Respecting the Québec Pension Plan*, CQLR c R-9 (s. 91(a), save in the case of an exception provided for in sections 91.1 and 91.2 of this act). Also, unless otherwise indicated from the participant of a supplementary plan of retirement or unless designated as the beneficiary of a pension plan, the separated spouse is not entitled to death benefits from the deceased spouse pursuant to the *Supplemental Pension Plans* Act, CQLR c R-15.1 (s. 85 and ff.).

Separation from bed and board requires a Superior Court judgment.

1.1.1.5 *De facto* spouses (or common-law spouses)

In Québec, the notion of *de facto* spouse (referred to more often outside Québec as "common-law spouse") does not exist in the Civil Code. Thus, *de facto* spouses (or common-law spouses) cannot assert any rights under the rules for the partition of the family patrimony or the dissolution and liquidation of a matrimonial regime, they do not have the right to obtain spousal support (alimony), nor do they have the right to inherit from their *de facto* spouse (or common-law spouse) if he dies without a will. This difference in treatment between *de facto* spouses (or common-law spouses) and married or civil union spouses was determined to be valid in the Supreme Court of Canada decision in *Quebec (Attorney General)* v. *A*, 2013 SCC 5 (also known as "Éric v. Lola").

However, *de facto* spouses (or common-law spouses) who fall within the appropriate definition have the same rights as married or civil union spouses under other laws, such as the *Income Tax Act* (federal) (s. 248(1) "common-law partner"), the *Taxation Act* (Québec) (s. 2.2.1), the *Supplemental Pension Plans Act* (ss. 85 and 178), the *Pension Benefits Standards Act*, 1985 (s. 2(1) "common-law partner"), *An Act respecting the Québec Pension Plan* (ss. 91 and 102.2), *An Act respecting prescription drug insurance* (ss. 18, 18.1 and 37) and the *Canada Pension Plan* (s. 2(1) "common-law partner").

It should also be noted that as regards children, it is irrelevant whether or not the spouses are married.

1.1.1.6 Successions with and without a will

Articles 613 to 702 of the Civil Code set out the rules applicable to succession rights and to legal, or intestate, successions (without a will). Articles 703 to 775 deal with wills. The liquidation and partition of a succession and the rules relating to the liquidator's rights and obligations are found in articles 776 to 907.

Definitions

There are two forms of succession: legal successions and testamentary successions. A legal succession, or intestate succession, means that the deceased did not leave a will. In contrast, a testamentary succession means that the deceased prepared a will and named his heirs.

Legal or intestate successions (without a will): devolution of property

In the case of a legal or intestate succession, the persons who inherit from the deceased are the spouse to whom the deceased was married or with whom he was in a civil union and the persons related to the deceased by blood or adoption.

The married or civil union spouse takes one third of the succession and the descendants take the other twothirds. Where there is no married or civil union spouse, the entire succession devolves to the descendants[14] (the children, otherwise the grandchildren). If there are no descendants, the Civil Code provides that the father or mother (ascendant) or the brothers and sisters may have rights.

If there are no successors, two thirds of the succession devolves to the surviving partner (spouse by marriage or civil union) and one third to the privileged ascendants (father and mother) (s. 672 *C.C.Q.*)

If there are no descendants or privileged assigns, two thirds of the succession devolves to the surviving partner (spouse by marriage or civil union) and to the privileged collaterals (brother and sister) and one third to his or her first degree descendants (children of siblings of the deceased, or nephews and nieces of the deceased) (s. 673, *C.C.Q.*)

If there are no descendants, privileged assigns or privileged collaterals, the succession devolves entirely to the surviving partner (spouse by marriage or civil union) (art. 671, *C.C.Q.*)

Moreover, all the children whose relation is established (by blood or by adoption) have the same rights in the context of a succession without a will. Therefore, a child of the deceased born from a marriage or out of wedlock or adopted by the deceased has the same rights in the succession of the deceased without a will (C.C.Q., s. 522).

In the event of death and the absence of a will, it is advisable to have a notary or lawyer prepare a "declaration of heredity" which sets out the heirs and their share of the succession. This document also identifies the liquidator of the succession.

14. *Civil Code of Québec*, arts. 666 and 667.

Exclusion: *de facto* spouse (or common-law spouse) and in-laws

Note that *de facto* spouses (or common-law spouses) and in-laws are excluded from legal successions. A "*de facto* spouse" (or "common-law spouse") is the person with whom the deceased lived without being married or joined in a civil union.

1.1.1.7 Liquidator of the succession

The liquidator of the succession (formerly called the "testamentary executor") is the person appointed to liquidate the succession, whether it be legal or testamentary. The testator generally designates a liquidator, but if he has not done so or in the case of a legal succession, the heirs perform this role together. They may appoint one or more persons from among themselves or a person who is not an heir of the deceased, in accordance with certain formalities. If the heirs cannot agree on the choice of a liquidator, the court designates one.

The liquidator must settle the succession as quickly as possible, although no specific time is prescribed.

If the liquidator is not an heir, he is entitled to remuneration (art. 789 *C.C.Q.*). A liquidator who is also an heir may be remunerated if the will so provides or, if not, if the heirs so agree. In addition, a liquidator, whether or not an heir, is entitled to the reimbursement of all expenses incurred in fulfilling his office.

The liquidator must abide by the wishes of the deceased unless it is illegal to do so. He must act with prudence and diligence and report on his administration to the heirs. All the legal formalities prescribed by the *C.C.Q.* must be fulfilled. He must also prepare the last tax returns of the deceased and ensure that the taxes are paid.

Once the heirs are identified[15] and the liquidation is completed, the succession may be partitioned. First, the family patrimony, if any, must be partitioned. After this step, the succession can be liquidated.

15. In order to carry out a will search so as to determine whether the deceased has a will or has a more recent will, the liquidator of the succession must search the *Registres des dispositions testamentaires et des mandats* of the *Chambre des notaires* (see http://www.cnq.org/fr/recherche-registres-testaments-mandats.html), and the Registers of wills and mandates of the *Barreau du Québec* (see http://www.barreau.qc.ca/en/public/testament-mandat/recherche/index.html). The *Registre des dispositions testamentaires* of the *Chambre des notaires du Québec* was created in 1961 so that a person's last notarial will could be traced, with certainty, when settling a succession. In 1991, the *Chambre des notaires du Québec* established a system for the registration of mandates in anticipation of incapacity. The *Barreau du Québec*'s Register of wills has been in place since December 1, 1979, and contains a record of wills prepared by lawyers. From September 2003 to October 15, 2013, a partnership between the *Barreau du Québec* and the *Chambre des notaires du Québec* made it possible to file a single search request for both registers. However, since October 15, 2013, a separate search request must be filed for each register.

Services Québec – Citoyens has prepared a useful brochure that provides an overview of the government departments and agencies that must be contacted.[16]

Special right arising under a marriage contract or civil union contract: conventional appointment

Conventional appointment is a gift *mortis causa* (gift in the event of death) set out in a marriage contract or civil union contract which provides for the transfer of property to the surviving spouse; it is often referred to as the "surviving spouse" clause. The gift is revocable, unless the donor spouse has stipulated otherwise. In such a case, he cannot, without the consent of the spouse (the donee) and all other interested persons, give property gratuitously by contract or by will, with the exception of property of small value or customary presents (art. 1841 *C.C.Q.*). Divorce entails the lapse (nullity) of gifts *mortis causa* (art. 519 *C.C.Q.*). However, in the event of separation from bed and board, they remain valid, unless the Superior Court decides that they have lapsed (arts. 510 and 519 *C.C.Q.*)

1.1.1.8 Trusts

A trust results from an act whereby a person, referred to as the "settlor", transfers property from his patrimony to another patrimony constituted by him (the trust) which he appropriates to a particular purpose and which a trustee undertakes, by his acceptance, to hold and administer for the beneficiary of the trust (art. 1260 *C.C.Q.*).

A trust is established by contract, whether by onerous title or gratuitously, by will, or, in certain cases, by operation of law or by judgment (art. 1262 *C.C.Q.*).

The trust patrimony, consisting of the property transferred in trust, constitutes a patrimony by appropriation, autonomous and distinct from that of the settlor, trustee or beneficiary and in which none of them has any real right (property right) (art. 1261 *C.C.Q.*).

Just like a legal person or partnership, a trust can be the holder of an insurance contract or annuity contract. It acts through the trustee, who acts for the good of the beneficiaries of the trust, who should not be confused with the designated beneficiaries of an insurance policy or annuity contract. A trustee is an administrator of the property of others with full powers of administration.

16. Government of Québec, "What to do in the event of death, 2016-2017 edition," on-line document consulted on July 21, 2017. See http://www4.gouv.qc.ca/EN/Portail/Citoyens/Evenements/deces/Documents/guide_deces_anglais_2016_2017_web_V2.pdf.

1.1.2 Contracts – General

The provisions relating to obligations are set out in articles 1371 to 2643 of the *Civil Code of Québec*. They include those respecting contracts (contractual obligations) and civil liability (legal and extra-contractual obligations).

1.1.2.1 Conditions required for the formation of a contract

A contract is the most common source of obligations of natural persons and legal persons. The general rules governing contracts are set out in articles 1377 to 1456 of the *C.C.Q.* In insurance of persons, contracts are the fundamental source of the parties' rights and obligations.

A contract is an agreement of wills by which one or several persons obligate themselves to one or several other persons to perform an obligation. A contract is formed by the sole exchange of consents (verbal or written) between persons having the capacity to contract obligations (usually at the age of 18), unless, in addition, the law requires a particular form to be respected as a necessary condition of its formation (for example, a contract signed between the parties or a notarial act), or unless the parties themselves establish a particular form in order for the contract to take effect. A contract must also have a cause and an object.

Types of contracts

The Civil Code lists the different types of contracts. According to the second paragraph of article 1378, they are:

- Contracts of adhesion and contracts by mutual agreement;
- Synallagmatic (bilateral) and unilateral contracts;
- Onerous and gratuitous contracts;
- Commutative and aleatory contracts;
- Contracts of instantaneous performance or of successive performance; and
- Consumer contracts.

Table 1.1 illustrates the different types of contracts and their characteristics, as well as one or more examples of each type of contract.

TABLE 1.1

Classification of contracts in the Civil Code

TYPES OF CONTRACTS	CHARACTERISTICS	EXAMPLES
Contracts of adhesion and contracts by mutual agreement (art. 1379 *C.C.Q.*)	The terms are imposed by one of the parties.	A contract to lease an automobile
	The terms are negotiated freely.	A contract for the sale of a used automobile between individuals
Synallagmatic (bilateral) and unilateral contracts (art. 1380 *C.C.Q.*)	Both parties obligate themselves.	A contract for the sale of a house
	Only one of the parties obligates itself.	The gift of a boat to one's brother
Onerous and gratuitous contracts (art. 1381 *C.C.Q.*)	Each party receives an advantage in return for his obligation (money, property).	The sale of a house
	One of the parties obligates itself to the other for the benefit of the other without obtaining any advantage in return.	A gift
Commutative and aleatory contracts (art. 1382 *C.C.Q.*)	The extent of the obligations is certain and determinate at the time the contract is formed.	The purchase of an automobile
	The scope of the obligations is uncertain at the time the contract is formed.	The purchase, in advance, of a farmer's harvest
Contracts of instantaneous performance or of successive performance (art. 1383 *C.C.Q.*)	The parties perform their obligations at one single moment.	A contract for the sale of a house
	The obligations are performed at several different times and without interruption.	A contract to rent an apartment
Consumer contracts (art. 1384 *C.C.Q.*)	The contract is governed by consumer protection legislation. The contract is entered into between a natural person and a person who carries on a business.	The purchase of a television by a consumer in a store

“Nominate” and “innominate” contracts

A distinction must also be made between “nominate” and “innominate” contracts.

Nominate contracts, of which there are eighteen (18), are each dealt with in separate Chapters in the Book on “Obligations” in the Civil Code. The following is a list of these contracts:

- Contracts of sale (arts. 1708 to 1805);
- Contracts of gift (arts. 1806 to 1841);
- Leasing contracts (arts. 1842 to 1850);
- Lease agreements (arts. 1851 to 2000);
- Affreightment contracts (arts. 2001 to 2029);
- Contracts of carriage (arts. 2030 to 2084);
- Contracts of employment (arts. 2085 to 2097);
- Contracts of enterprise or for services (arts. 2098 to 2129);
- Contracts of mandate (arts. 2130 to 2185);
- Contracts of association or partnership (arts. 2186 to 2279);
- Contracts of deposit (arts. 2280 to 2311);
- Contracts of loan (arts. 2312 to 2332);
- Suretyship contracts (arts. 2333 to 2366);
- Annuity contracts (arts. 2367 to 2388);
- Insurance contracts (arts. 2089 to 2628);
- Gaming and wagering contracts (arts. 2629 and 2630);
- Contracts of transaction (arts. 2631 to 2637); and
- Arbitration agreements (arts. 2638 to 2643).

With regard to these contracts, the specific *C.C.Q.* rules that apply to them prevail over the general rules applicable to contracts and obligations, which are suppletive.

The other types of contracts which are not dealt with in a specific Chapter of the *C.C.Q.* are referred to as “innominate” contracts. The following are some examples:

- Consignment contracts;
- Franchise agreements;
- Distribution agreements; and
- Joint venture contracts.

These types of contracts are governed by the *C.C.Q.*'s general rules for contracts.[17]

1.1.2.2 Administration of the property of others and mandate (power of attorney and mandate in case of incapacity)

Administration of the property of others

Any person charged with the administration of property or a patrimony that is not his own assumes the office of the administrator of the property of others (art. 1299 *C.C.Q.*).

A person charged with simple administration (e.g., a legal tutor) must perform all the acts necessary for the preservation of the property or useful for the maintenance of the use for which the property is ordinarily destined (art. 1301 *C.C.Q.*). A person charged with full administration (e.g., a trustee) must preserve the property and make it productive or increase the patrimony (art. 1306 *C.C.Q.*), but also has the right to dispose of or alienate the property.

The administrator of the property of others charged with simple administration must invest the sums in "presumed sound investments." These investments are listed in article 1339 of the *Civil Code of Québec*.

The administrator of the property of others must not mingle (mix) the administered property with his own property (art. 1313 *C.C.Q.*).

Mandate and power of attorney

Mandate is a specific type of contract whose general rules are set out in the *Civil Code of Québec* (arts. 2130 to 2185). Mandate will be examined in greater detail in Chapter 4 of this manual, which deals with the role of insurance of persons representatives.

Mandate is a contract by which a person, the mandator, empowers another person, the mandatary, to represent him in the performance of a juridical act. This power and the document itself are also referred to as a "power of attorney" (art. 2130 *C.C.Q.*).

A mandatary is an administrator of the property of others, governed firstly by the rules of the *Civil Code of Québec* respecting mandate (arts. 2130 to 2185), and secondly by the rules respecting the administration of the property of others (arts. 1299 to 1370 *C.C.Q.*).

When the mandator becomes incapable and his incapacity is ascertained by a judgment appointing a tutor or curator, or by the homologation of a mandate in case of incapacity, the mandatary's mandate or power of attorney ends. If the mandatary notices that his mandator has

17. Pascal Fréchette, "La qualification des contrats : aspects pratiques", in Les Cahiers de droit, Volume 51(2)C-D, page 375, 2010. See Schedule (Contrats innommés reconnus par la jurisprudence québécoise).

become incapable, he must cease to act, because his actions may be challenged on the basis of nullity.[18]

Mandate in case of incapacity

A mandate given by a person of full age in anticipation of his incapacity to take care of himself or to administer his property must be made by a notarial act or in the presence of witnesses. It is therefore subject to specific formalities. The performance of the mandate is subordinate to the occurrence of the incapacity and to homologation by the court,[19] at the request of the mandatary designated in the act (art. 2166 *C.C.Q.*). Thus, before the occurrence of the incapacity and the court's homologation of the mandate in case of incapacity, the mandate does not confer any powers on the mandatary.

1.1.3 Insurance of persons contracts and damage insurance contracts

The principal rules governing insurance contracts are found in Chapter XV of the *Civil Code of Québec* (arts. 2389 to 2628).

This Chapter distinguishes between non-marine insurance, which includes insurance of persons and damage insurance, and marine insurance (arts. 2505 to 2628). Marine insurance covers risks relating to marine adventure.

The general provisions applicable to non-marine insurance are found in articles 2389 to 2414 of the *Civil Code of Québec*. Insurance of persons is governed by the specific provisions found in articles 2415 to 2462. The provisions relating to damage insurance are found in articles 2463 to 2504. Only the rules relating to insurance of persons, including the general provisions applicable to non-marine insurance, will be covered in this manual. These provisions will be discussed in detail in Chapter 2, which deals with insurance of persons contracts.

1.1.4 Annuity contracts

Articles 2367 to 2388 of the *Civil Code of Québec* deal with annuity contracts. A contract for the constitution of an annuity is a contract by which a person, the debtor, undertakes, gratuitously or in exchange for the alienation of capital for his benefit, to make periodical payments to another person, the annuitant, for a certain time. Annuity contracts are discussed in detail in Chapter 3.

In theory, anyone can enter into an annuity contract.

It is important to note that pursuant to article 2393 of the *Civil Code of Québec* and section 13 of the *Regulation under the Act respecting insurance,* annuity contracts (life and fixed-term) entered

18. *Civil Code of Québec*, arts. 1420, 284 and 290. Third parties acting in good faith are protected (art. 2162), but not third parties who are aware of the mandator's incapacity (art. 2158).
19. *Code of Civil Procedure*, CQLR, c C-25, s. 302 to 305 and 403. The new *Code of Civil Procedure* came into force on January 1, 2016.

into with an insurer are included under life insurance. Therefore, annuity contracts issued by insurers are life insurance products.

1.1.5 Civil liability

Civil liability is a major source of obligations. The rules governing civil liability are set out in articles 1457 to 1481 of the *Civil Code of Québec*. There are two separate civil liability regimes: contractual liability and extracontractual liability.

General principles

In civil law, liability means that a person is responsible for the consequences of his actions in his dealings with others. Civil liability is the obligation to repair the injury caused when certain conditions are met.[20]

Note that civil liability is not intended to punish a person for wrongful conduct, but rather, to compensate the victim for the harm suffered.

Liability is contractual when the victim and the author of the damage are bound by contract and the fault occurs while the contract is being performed.

Civil liability is extra-contractual when a person, through his fault, causes harm to another.

Every person is liable for the injury caused by his own fault, but also, in certain cases, by the act or fault of another person, such as his children, or by the act of things in his custody.

The rules of civil liability are discussed again in Chapter 4.

1.1.6 Forfeiture of the right to claim and prescription

Extinctive prescription

Extinctive prescription is a means of being released from an obligation by the lapse of time and according to the conditions fixed by law (art. 2875 *C.C.Q.*).

For example, when a person fails to assert his rights in a timely manner, he may lose his rights and recourse. A mere claim or even a formal notice does not interrupt the prescription. Only the filing of a judicial application may interrupt prescriptions.[21]

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20. Pierre Deschamps, “Les conditions générales de la responsabilité civile du fait personnel,” in *Collection de droit 2013-2014*, *Responsabilité,* Vol. 4, Cowansville, Éditions Yvon Blais, 2013, 15-40, p. 15.
21. *Civil Code of Québec*, art. 2892. However, the acknowledgment of a right by the debtor also interrupts the prescription (art. 2898).

The day on which the right of action arises fixes the beginning of the period of extinctive prescription. An action to enforce a personal right is prescribed by three years, if the prescriptive period is not otherwise established (art. 2925 *C.C.Q.*). Where the right of action arises from moral, corporal or material damage appearing progressively or tardily, the period runs from the day the damage appears for the first time (art. 2926 *C.C.Q.*).

A person can also renounce (but not in advance) prescription which has been acquired or the benefit of any time elapsed (art. 2883 *C.C.Q.*).

Time limit whose expiry entails forfeiture

Sometimes, the law requires that a prior notice be given before a right can be exercised and if the notice is not given within a prescribed time limit, the recourse is forfeited, even if it is not yet prescribed. This is the case, for example, in matters of accident and sickness insurance pursuant to article 2435 of the *Civil Code of Québec*. This is discussed in Chapter 2 of this manual.

1.2 Public insurance and pension (or retirement) plans

Public insurance and pension plans are set up by the federal, provincial and territorial governments to guarantee citizens minimum social and financial security.

Contrary to private plans, which are contractual, public plans are legislative and regulatory. They are financed through the assessments payable when obtaining or renewing one's driver's licence (Québec Public Automobile Insurance Plan from the SAAQ), for example, through income and other taxes (GST, QST, etc.) in certain cases (old age security, social welfare, Public Prescription Drug Insurance Plan (RAMQ)), and through contributions by employers and employees in other cases (CNESST, employment insurance, Québec Pension Plan from Retraite Québec, Canada Pension Plan and Québec Parental Insurance Plan).

1.2.1 Federal public plans

This section begins with an overview of Canada's main public plans, i.e., insurance plans and pension plans falling under federal legislation. Next, it examines the main public insurance plans and pension plans in Québec. The characteristics we will analyze are eligibility for benefits and the co-ordination and reduction of benefits between the various public and private plans.

The purpose of this Chapter is not to cover all the characteristics of public plans. However, it is important to understand how public and private insurance plans complement each other. This means that a payment priority is established between the various plans and that there is coordination and reduction of benefits under these plans in order to avoid the enrichment of a person entitled to benefits (for example, the duplicate payment of an indemnity) and reduce the cost of premiums.

1.2.1.1 Employment insurance (EI)

Administered by Service Canada on behalf of the Department of Employment and Social Development, the employment insurance program under the *Employment Insurance Act* provides various types of benefits to employees who have contributed to the program and who meet its eligibility requirements. Employers contribute to it as well. Contributions are deducted from an employee's pay. Self-employed workers are not considered employees, except under certain conditions. The employment insurance program is generally the last payer when other public plans apply.

Employment insurance provides temporary financial assistance to unemployed Canadians who have lost their job through no fault of their own, while they look for work or upgrade their skills. Employment insurance also assists workers who are sick, pregnant, or caring for a newborn or adopted child, as well as those who must care for a family member who is seriously ill with a significant risk of death or who must provide care or support to their critically ill or injured child.[22]

Eligibility requirements

To be entitled for regular benefits (lack of work, seasonal work, etc.) or special benefits (sickness, maternity or parental leave, etc.), the employee must:

- Have been out of work and without pay for at least seven consecutive days; and
- Have held insurable employment for a specific number of hours during the qualifying period (from 420 to 700 hours, depending on the type of benefits and the regional unemployment rate).

The qualifying period is the 52 weeks which immediately precede the start of benefits or the period since the start of the previous benefit period, if it began during that 52-week period.

Premium rate and benefits payable

For insurable employment, the employer deducts the employment insurance premiums from the employee's salary or wages. These premiums go into the employment insurance fund. There is no minimum or maximum age for paying employment insurance premiums.

Premiums apply to all eligible earnings until the yearly earnings reach the prescribed maximum. In 2017, the maximum insurable earnings amount is $51 300. After the premiums have been collected on this maximum amount, any additional earnings are exempt from employment insurance premiums. Therefore, the maximum premiums payable for an employee in 2017

22. *Employment Insurance Regulations,* SOR/96-332. See https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/payroll/payroll-deductions-contributions/employment-insurance-ei/ei-premium-rates-maximums.html
See also https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/payroll/payroll-deductions-contributions/employment-insurance-ei.html.

amounted to $836.19 for the Federal withholding and $651.51 for the Provincial. The Employer contributes at a rate equal to 1.4 times the value of the employee contribution (however such rate is lower when the employer offers his employee a plan which provides short-term disability insurance).

Most people receiving employment insurance are entitled to 55% of their average weekly insurable earnings. In 2017, the maximum benefits were $543 per week. Note that these benefits are taxable. These are benefits subject to a one-week waiting period and are payable for a maximum of 14 to 45 weeks.

If the net family income of the eligible worker is $25,921 annually or less, that he has children and that he or his spouse receives the Child Tax Benefit, such worker will be considered a low-income family member. He will therefore be eligible to the Employment Insurance Family Supplement.[23]

The payments (benefits) made under Employment insurance are taxable income.

1.2.1.2 Old Age Security (OAS), Guaranteed Income Supplement (GIS), Allowance and Allowance for the Survivor

Role of the plans

The *Old Age Security Act*[24] is administered by the Department of Employment and Social Development. Different types of benefits are provided. These programs are financed out of the federal government's general tax revenue, not premiums. A person need not be retired to be entitled to benefits. However, high-income retirees must repay all or part of the benefits received when filing their tax return.

In 2017, the maximum annual income (the income level at which an individual cannot receive the Old Age Security pension or benefits) was $121,279 (at that income level, the entire OAS pension must be reimbursed). Since July 2017, starting at an annual income threshold of $73,756, the monthly OAS pension will be reduced in order to repay the amount owed before being subject to repayment of the benefits through the federal tax return.[25]

23. See http://www.esdc.gc.ca/en/ei/regular_benefit/benefit_amount.page?&_ga=1.106761859.1024786420.1472232197
See also EI Premium Reduction Program – For employers:
http://www.esdc.gc.ca/en/ei/employers_premium_reduction_program.page
24. *Old Age Security Act*, R.S.C. 1985, C O-9.
25. See https://www.canada.ca/en/services/benefits/publicpensions/cpp/old-age-security/recovery-tax.html.

Types of benefits

The income security programs are made up of four benefit plans:[26]

- The basic Old Age Security (OAS) pension;
- The Guaranteed Income Supplement (GIS) for OAS pensioners;
- The Allowance for 60 to 64 year-old spouses or common-law partners of GIS recipients; and
- The Survivor Allowance for 60 to 64 year-old widowed spouses and common-law partners.

The basic pension (OAS) is determined based on the number of years during which a person lived in Canada after the age of 18. The pension is considered taxable income and may be subject to a recovery tax if the person's annual income exceeds the net world income threshold set for the year.

The amount of Old Age Security benefits (GIS, Allowance and Allowance for the Survivor) is calculated based on a person's marital status and income. These benefits are not considered taxable income.

Eligibility requirements for the Old Age Security (OAS) pension

To be eligible, the person must:

- Be 65 years of age or over;
- Be a Canadian citizen or a legal resident at the time the Old Age Security pension application is approved; and
- Have resided in Canada for at least 10 years after turning 18.

For a person living abroad, the person must:

- Be 65 years of age or over;
- Have been a Canadian citizen or a legal resident of Canada on the day before they left Canada; and
- Have resided in Canada for at least 20 years after turning 18.

As of July 1, 2017, the maximum monthly pension was $583.74.

26. Government of Canada, "Old Age Security payment amounts," on-line document modified on October 3, 2016, consulted on July 21, 2017. See https://www.canada.ca/en/services/benefits/publicpensions/cpp/old-age-security/payments.html.

1.2.1.3 Eligibility requirements for the Guaranteed Income Supplement (GIS)

To be eligible for this benefit:

- The applicant must be receiving the basic OAS; and
- The annual income of the applicant or couple must be low or non-existent; it cannot exceed a certain limit.

The following was the maximum annual income eligible for GIS benefits as of July 1, 2017:

- Single person: $17,688;
- A person whose spouse also receives the basic OAS pension: $23,376 (combined income), and $41,472 (combined income) if the spouse does not receive the OAS pension;
- A person whose spouse is under 60 years of age (not retired): $42,384;
- A person whose spouse receives the Allowance: $42,384, depending on the monthly pension.[27]

Eligibility requirements for the Allowance and the Allowance for the Survivor

The spouse of a pensioner who is receiving the OAS and GIS, and who is between 60 and 64 years old, may be eligible for a benefit if his or her income, combined with the spouse's income, does not exceed the $32,736 permitted maximum on July 1, 2017. The maximum monthly benefit was $1,108.59 on July 1, 2017.

To be entitled to the Allowance for the Survivor, a person whose spouse is deceased must be 60 to 64 years of age and not be the spouse of another person. On July 1, 2017, the maximum annual income to qualify for the Allowance for the Survivor was $23,832 (individual income), and the maximum monthly benefit payable was $1,321.46.

1.2.1.4 Canada Pension Plan (CPP)

Role of the plan

The Canada Pension Plan (CPP)[28] is a federal plan applied in nine Canadian provinces and three territories. A province or territory can opt out if it offers a similar program. Only Québec has chosen to set up its own plan, the Québec Pension Plan. The CPP provides different types of benefits to those who contribute to it as well as to their dependants. All workers 18 years of age or over must contribute to the CPP when they hold a job in a Canadian province or territory other than Québec.

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27. See https://www.canada.ca/en/services/benefits/publicpensions/cpp/old-age-security/payments.html.
28. *Canada Pension Plan*, R.S.C. 1985, c C-8. See https://www.canada.ca/en/services/benefits/publicpensions/cpp/cpp-benefit/amount.html.

Types of benefits

The CPP provides four types of benefits:

▪ Retirement pensions	Married couples and *de facto* spouses (or common-law spouses) can voluntarily share their CPP pension. Moreover, CPP contributions made while spouses were living together can be equally divided after a divorce or separation.
▪ Disability benefits	Benefits are paid to disabled contributors and their dependent children under 18 years of age or 18 to 25 years of age if they are attending a recognized educational institution full-time.
▪ Survivor benefits	Survivor benefits include the lump sum death benefit, the monthly benefits to the surviving spouse and the monthly benefits to children under 18 years of age or 18 to 25 years of age if they are attending a recognized educational institution full-time.
▪ Post-retirement benefits	The CPP contributions of a person who continues to work while receiving the CPP retirement pension will go towards post-retirement benefits, which will increase that person's income.

1.2.1.5 Other federal public plan

The *Canada Health Act*[29] provides coverage for certain health care.

1.2.2 Québec public plans

This section discusses the eligibility requirements for the Québec public plans as well as the co-ordination or reduction of benefits. These insurance and pension plans fall under the following statutes:

- *Individual and Family Assistance Act*;[30]
- *An Act respecting the Québec Pension Plan*;[31]
- *An Act respecting industrial accidents and occupational diseases* (AIAOD);[32]
- *Crime Victims Compensation Act* (CVCA);[33]
- *Automobile Insurance Act* (AIA);[34]

29. R.S.C. 1985, c C-6.
30. CQLR, c A-13.1.1.
31. CQLR, c R-9.
32. CQLR, c A-3.001.
33. CQLR, c I-6.
34. CQLR, c A-25.

- *Health Insurance Act*;[35]
- *Hospital Insurance Act*;[36]
- *An Act respecting prescription drug insurance*;[37] and
- *An Act respecting parental insurance*.[38]

Certain programs stemming from these statutes are analyzed in the following sub-sections.

1.2.2.1 *Société de l'assurance automobile du Québec* (SAAQ)

The *Société de l'assurance automobile du Québec* (SAAQ) compensates all Quebeckers who suffer bodily harm due to a road accident, regardless of liability, both in Québec and elsewhere. Various benefits are payable in the case of death and for the purpose of income replacement.

1.2.2.2 *Commission des normes, de l'équité, de la santé et de la sécurité du travail* (CNESST)

The purpose of the Act respecting Industrial Accidents And Occupational Diseases (AIAOD) is to provide compensation to workers for employment injuries and the consequences they entail, and to provide for the collection, from employers, of the amounts needed to fund the plan. The CNESST is the agency charged with administering the AIAOD.

The CNESST pays various types of benefits in the event of an industrial accident or occupational disease.

Income replacement indemnity

A worker who becomes unable to carry on his employment by reason of an employment injury is entitled to an income replacement benefit. He is entitled to the income replacement benefit for as long as he requires rehabilitation to become able to carry on his employment again or, if that is not possible, to be able to carry on a suitable full-time employment.

For the work day during which the worker becomes unable to carry on his employment by reason of his employment injury, the employer must pay him 100% of his net salary. For the first 14 days of absence, the employer must pay the worker 90% of his net salary for the periods during which he would normally have worked. As of the 15th day of absence, the CSST must pay the worker a

35. CQLR, c A-29.
36. CQLR, c A-28.
37. CQLR, c A-29.01.
38. CQLR, c A-29.011.

benefit equal to 90% of his net salary (up to the maximum insurable earnings determined on the date of the occurrence[39]).

Compensation for bodily injury

A worker can also receive compensation for bodily injury if he sustains physical or mental impairment as a result of the employment injury. The compensation is paid as a lump sum, based on his age and the degree of impairment.

Death benefit

The spouse and dependants of a worker who has died as a result of an employment injury are entitled to a death benefit. If the worker has no spouse or dependants at the time of his death, his parents will be entitled to the death benefit. If both parents are deceased, the death benefit will be paid to the worker's succession. The amount of the death benefit is determined on the basis of specific rules if the person entitled to it is disabled.

The funeral expenses are reimbursed to the person who paid them, up to the maximum amount provided by law, and the cost of transporting the body is paid on the basis of the actual cost incurred.

A lump sum indemnity is paid to the spouse or, failing same, to the other dependants, so they can deal with unexpected expenses caused by the worker's death.

Rehabilitation

When a worker sustains permanent physical or mental impairment as a result of an employment injury, he is entitled to the rehabilitation required by his condition. This may include a physical rehabilitation program (physiotherapy treatments, adaptation to a prosthesis, etc.), a social rehabilitation program (personal home assistance, psycho-social services, etc.) or a professional rehabilitation program (evaluation of vocational potential, adaptation of a workstation, etc.).

1.2.2.3 *Régie de l'assurance maladie du Québec* (RAMQ)

The *Régie de l'assurance maladie du Québec* (RAMQ), which falls under the authority of the Minister of Health and Social Services, administers Québec's Health Insurance Plan.

Since November 1, 1970, coverage under the Health Insurance Plan has been compulsory for every resident or temporary resident of Québec who fulfils the conditions provided for by law.

The Health Insurance Plan includes the following services:

39. *Commission des normes, de l'équité, de la santé et de la sécurité du travail*, "If you have a work-related accident or contract an occupational disease... here's what you need to know!," on-line document modified in December 2014, consulted on July 21, 2017.
See http://www.csst.qc.ca/en/publications/Documents/DC_100_1503_7A_web.pdf.

- **Medical services** — The medical services program is a universal program, which means that anyone covered by the health insurance plan is eligible. To benefit from this program, individuals need only to present their valid health insurance card. The medical services covered by the Health Insurance Plan are those that are medically necessary and rendered by a general practitioner (also called a "family doctor") or a medical specialist.
- **Dental services** — They cover most dental services for children under age 10, certain services for all persons 10 years of age or older, and most services for recipients of last-resort financial assistance and their dependants.
- **Optometric services** — They cover most optometric services for persons under age 18, persons 65 years of age or older, visually impaired persons and people receiving last-resort financial assistance and their dependants.
- **Other services** — In certain cases, certain other services are covered, such as devices and prostheses.

Pursuant to section 15 of the *Health Insurance Act* (save for certain listed exceptions) and section 11 of the *Hospital Insurance Act*, no private insurer may enter into or maintain an insurance contract that includes coverage for the cost of an insured service furnished by the RAMQ to a resident, except for the excess cost of insured services rendered outside Québec.[40]

1.2.2.4 Québec Prescription Drug Insurance Plan

A universal Prescription Drug Insurance Plan administered by the RAMQ was set up on March 1, 1997. Prescription drug insurance is mandatory in Québec. Persons who have access to group insurance or are covered through their spouse, or through their father or mother if they are 18 years of age or under (25 years of age or under for a student), must subscribe to that plan. Persons who do not have access to such a plan are insured through the RAMQ and must pay their contribution when filing their provincial tax return. This topic is covered in Chapter 2.

1.2.2.5 Québec Parental Insurance Plan (QPIP)

The Québec Parental Insurance Plan (QPIP) came into force on January 1, 2006. It is designed to financially support new parents, encourage them in their desire to have children and support them as they devote more time to their children in their first months of life.

40. See, however: *Chaoulli* v. *Quebec (Attorney General)*, [2005] 1 S.C.R. 791.

The plan offers four types of benefits:

- Maternity benefits;
- Paternity benefits;
- Parental benefits; and
- Adoption benefits.

This plan is financed through contributions from employers, salaried workers and self-employed workers. Revenu Québec is in charge of collecting the contributions to the Québec Parental Insurance Plan.

Eligibility requirements

To be eligible, a person must:

- Have contributed to the QPIP;
- Be the parent of a child born or adopted on or after January 1, 2006;
- Be a wage earner residing in Québec at the start of the benefit period or reside in Québec at the start of the benefit period and have resided in Québec on December 31 of the year preceding the start of the benefit period;
- Have experienced a reduction of at least 40% in his usual weekly employment income or in the time spent on his business activities;
- Be a wage earner with at least $2,000 of insurable earnings during the qualifying period, which is usually the 52 most recent weeks;
- Be a self-employed worker with at least $2,000 of insurable earnings during the qualifying period, which is usually the 52 most recent weeks.

1.2.2.6 Québec Pension Plan (administered by *Retraite Québec*)

Role of the Act

The *Act respecting the Québec Pension Plan* is administered by *Retraite Québec*, formerly known as the *Régie des rentes du Québec*.[41] All workers must contribute to it if they earn over $3,500 per year and do not receive disability benefits. Employers must also contribute to this plan.

41. Since January 1, 2016, the Commission administrative des régimes de retraite d'assurances (CARRA) and the Régie des rentes du Québec (RRQ) have formed one entity entitled Retraite Québec.

Retraite Québec administers various plans and offers various benefits or compensation:

- A retirement pension;
- Disability benefits, which include the disability pension (monthly maximum: $1,313.63 in 2017), the pension for a disabled person's child and the additional amount for disability; and
- Survivors' benefits (death benefit, surviving spouse's pension and orphan's pension).

Eligibility requirements for a retirement pension

The person must be:

- 65 years of age or over; or
- 60 to 64 years of age; and
  - Have contributed for at least one year;
  - It is not necessary to have stopped working.

Maximum monthly benefits

In 2017, the yearly maximum pensionable earnings threshold is $55,300. The maximum contribution for an employee is $2,797.20 ($5,594.40 for independant contractors).

The maximum monthly benefit in 2017 was $1,114.17 for a beneficiary aged 65. It increased to $1,582.12 if the pension began at age 70 and decreased to $713.07 if the pension began at age 60.[42]

Coordination or reduction of the retirement pension

The retirement pension will not be reduced to take into account any private insurance or retirement plans. However, private plans may contain a clause providing for the reduction of benefits in order to take into account the retirement pension paid by the *Retraite Québec*.

1.2.2.7 Other Québec public plans

The other Québec public plans include the crime victims compensation plan (IVAC), which stems from the *Crime Victims Compensation Act*,[43] and the last-resort financial assistance (social assistance) program, which stems from the *Individual and Family Assistance Act*. Private insurance plans cannot deduct amounts received by an insured under the last-resort financial assistance program from any disability insurance benefits to be paid under the private insurance plans.

42 See http://www.rrq.gouv.qc.ca/en/programmes/regime_rentes/rente_retraite/Pages/montant_rr.aspx.
43. For more information, see http://www.ivac.qc.ca/EN_acts.asp.

1.2.3 Coordination and integration of benefits between public plans and private insurance plans

Coordination of benefits between the various public plans

More than one public plan may apply to a given situation. There are therefore co-ordination rules so as to avoid the duplication of benefits or determine which plan will be the first payer. For example, a person who is the victim of an automobile accident while performing his work must submit his claim to the CNESST under *An Act respecting industrial accidents and occupational diseases* (AIAOD)[44] and will be compensated under this plan. Sometimes, the beneficiary must choose between one recourse or another. In other cases, there is a co-ordination of benefits, as with the disability pension paid by *Retraite Québec*, which is deducted from the income replacement benefit paid by the CNESST.

EXAMPLE 1

Jean is a trucker employed by Transport XYZ. He suffers a road accident while working and becomes disabled. Jean must claim his benefits from the CNESST, which is the first payer according to the *Automobile Insurance Act*.[45]

EXAMPLE 2

Monique arrives at the scene of a traffic accident. While attempting to help one of the victims, she is hit by a car. Monique can claim benefits under the *Automobile Insurance Act*[46] or *An Act to promote good citizenship*.[47]

Coordination of benefits paid under public plans or annuity plans and benefits paid under private insurance plans

Other than certain exceptions, there is no legislative rule of priority between public and private plans or among the various private plans. However, insurers normally include co-ordination clauses in their insurance contracts to avoid the duplication of benefits and to reduce the cost of premiums. The courts have interpreted reduction clauses as a simple method of calculating benefits.[48] These contractual provisions provide for the reduction of the benefits the insurer would normally have paid

44. André Laporte, Les différents régimes d'indemnisation à la suite d'un accident automobile, in Barreau du Québec – Service de la formation continue, Développements récents en matière d'accidents d'automobiles 2006, vol 257, Cowansville, Les Éditions Yvon Blais Inc., 2006 at p 119.
45. *Automobile Insurance Act*, CQLR, c A-25, s. 83.63.
46. *Automobile Insurance Act*, CQLR, c A-25, s. 86.64.
47. *An Act to promote good citizenship*, CQLR, c C-20.
48. *Pelletier* v. *Sun Life du Canada*, (1983) C.A. 1; *SSQ, Société d'assurance-vie inc.* v. *Thouin*, EYB 2005-82508 (C.Q.).

by taking into account the benefits the insured may receive from public plans. In all cases, one must refer to the clause in the insurance contract to determine what is covered by the co-ordination.

These clauses may also provide for the reduction of the benefits the insured is entitled to receive from another insurer.

EXAMPLE 1

Henry became disabled following a work accident. He is covered by a disability insurance contract. The benefits he will receive from his private insurance plan will be reduced by the income replacement benefit he receives from the CNESST.

EXAMPLE 2

Michelle became disabled following a critical illness. She is covered by a disability insurance contract. She is also entitled to a disability pension from *Retraite Québec*. The benefits she receives from her private insurance plan will be reduced by the disability pension she receives from*Retraite Québec*.

Types of coordination

Insurance contracts that provide salary or disability insurance benefits contain two principal types of coordination clauses:

- An integration clause (often referred to as a “reduction” or “direct integration” clause);
- A limitation clause (often referred to as a “coordination” or “indirect integration” clause).

Insurance contracts can also include both an integration clause and a limitation clause.

Integration clause

By applying this type of clause, the insurer can reduce the benefits it pays. This is often the case with respect to benefits granted by various public agencies, such as the CNESST, the SAAQ and *Retraite Québec*.

EXAMPLE 1

- Insurer’s benefits: $1,000
- *Retraite Québec*’s benefits: $400
- $1,000 – $400 = $600

The new benefits to be paid by the insurer after applying the integration clause will be $600.

EXAMPLE 2

- Insurer's benefits: $1,000
- CSST's benefits: $1,200
- $1,000 – $1,200 = - $200

The new benefits to be paid by the insurer after applying the integration clause will be $0.

Limitation clause

The application of this clause means that the total benefits received from one or more sources of income must not exceed a percentage of the salary stipulated in the contract. Any excess will be deducted from the benefits paid by the insurer.

In example 1, the insurance policy contains both an integration clause (*Retraite Québec* (disability)) and a limitation clause (*Retraite Québec* (disability)). In example 2, the insurance policy contains only a limitation clause (other disability insurance). In example 3, the insurance policy contains both an integration clause (CNESST, SAAQ, Crime victims compensation (IVAQ), *Retraite Québec* (disability)) and a limitation clause (*Retraite Québec* (disability) as well as other disability insurance (referred to in the insurer's limitation clause)).

EXAMPLE 1

(THE POLICY CONTAINS BOTH AN INTEGRATION CLAUSE AND A LIMITATION CLAUSE)

- Salary: $25,000 gross per year or $18,750 net per year
- Coverage percentage: 66.67% of the gross salary
- Limit (ceiling): 85% of the net salary
- *Retraite Québec* benefits (disability): $900

  Indemnity paid by the insurer: $25,000 × 66.67% ÷ 12 = $1,388.96 per month

  Limit: $18,750 × 85% ÷ 12 = $1,328.13

  Benefit after integration: $1,388.96 – 900 = $488.96

In practical terms, in this case, the insured will receive a total of $1,388.96 per month, or $900 from *Retraite Québec* and $428.13 from the insurer.

EXAMPLE 2

(THE POLICY CONTAINS A LIMITATION CLAUSE)

- Salary: $50,000 gross per year or $37,500 net per year
- Coverage percentage: 50% of the gross salary
- Limit (ceiling): 90% of the net salary
- Benefits from another insurer (disability): $900

Limit	$37,500 × 90% ÷ 12 = $2,812.50 per month
Indemnity paid by the insurer	$50,000 × 50% ÷ 12 = $2,083.33 per month
Calculation of the limit	$2,083.33 + $900 = $2,983.33
	$2,983.33 - $2,812.50 = $170.83
	(The insurer will deduct $170.83, because the limit is exceeded by this amount)
Amount to be paid by the insurer	$2,083.33 - $170.83 = $1,912.50

In practical terms, in this case, the insured will receive a total of $2,812.50 per month, or $900 from *Retraite Québec* and $1,912.50 from the insurer.

EXAMPLE 3

(THE POLICY CONTAINS AN INTEGRATION CLAUSE, A LIMITATION CLAUSE AND OTHER DISABILITY INSURANCE (REFERRED TO IN THE INSURER'S LIMITATION CLAUSE))

In this case, the integration clause applies to the *Retraite Québec* benefits (disability) and the limitation clause applies to the *Retraite Québec* benefits (disability) and to benefits received under any other disability insurance policy:

- Salary: $50,000 gross per year or $37,500 net per year
- Coverage percentage: 66.67% of the gross salary (benefit from the insurer: $50,000 ÷12 months × 66.67% = $2,777.92)
- Limit (ceiling): 100% of the net salary ($3,125)
- *Retraite Québec* (disability) $1,000

▪ Other disability insurance (other insurer):	$1,100
Limit (ceiling)	$37,500 × 100% ÷ 12 = $3,125.00 per month
Indemnity paid by the insurer (maximum payable by the insurer)	$50,000 × 66.67% ÷ 12 = $2,777.92 per month
Benefit after integration	$2,777.92 – $1,000 = $1,877.92
Calculation of the limit	$1,777.92 + $1,000 (*Retraite Québec* (disability)) + $1,100 (benefit from the other insurer) = $3,877.92
Amount to be paid by the insurer	Limit (ceiling) = $3,125 Total from all income sources = $2,777.92 (insurer) + $1,000 (*Retraite Québec*) + $1,100 (other insurer) = $3,877.92 Excess = $752.92 ($3,877.92 - $3,125) Amount to be paid by the insurer = $1,777.92 (benefit payable by the insurer after integration) – $752.92 (excess) = $1,025

In practical terms, in this case, the insured will receive a total of $3,125.00 per month, or $1,000 from *Retraite Québec*, $1,100 from the other insurer and $1,025 from the insurer.

1.3 Other important Québec legislation

1.3.1 Québec *Charter of Human Rights and Freedoms*

The Québec *Charter of Human Rights and Freedoms*[49] is different from the *Canadian Charter of Rights and Freedoms*, which will be discussed below. They do not have the same constitutional status or scope. First the Québec Charter is not integrated into the Canadian Constitution; it is a statute adopted by the National Assembly and can be amended according to the usual procedure. However, the Québec *Charter of Human Rights and Freedoms* has a supralegislative status, which means that the National Assembly (of Québec) cannot enact any law which would infringe a right expressly guaranteed by the Québec Charter.

Moreover, the scope of the Québec Charter is different from that of the Canadian Charter, which applies exclusively to relationships between the State and individuals. The Québec *Charter of*

49. Québec *Charter of Human Rights and Freedoms*, CQLR, c C-12.

Human Rights and Freedoms applies both to relationships between individuals and the State and to relationships between one individual and another, including dealings between companies and their employees or clients, and it applies to all areas falling within Québec's legislative powers.

Given that insurance essentially involves private relationships and falls under provincial jurisdiction, the Québec *Charter of Human Rights and Freedoms* constitutes a significant source of law which is increasingly referred to before the courts by those who feel they have been harmed. One of the basic principles in the Québec Charter as it applies to insurance matters stems from its section 10 which provides that no one may discriminate on the basis of race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

However, section 20.1 of the Québec *Charter of Human Rights and Freedoms* provides that "[i]n an insurance or pension contract, a social benefits plan, a retirement, pension or insurance plan, or a public pension or public insurance plan, a distinction, exclusion or preference based on age, sex or civil status is deemed non-discriminatory where the use thereof is warranted and the basis therefore is a risk determination factor based on actuarial data." That section also provides that "[i]n such contracts or plans, the use of health as a risk determination factor does not constitute discrimination within the meaning of section 10."

1.3.2 *An Act respecting insurance* and *Regulation under the Act respecting insurance*

An Act respecting insurance[50] came into force on October 20, 1976. It reformed all the rules relating to insurance in Québec. The first part of this statute originally included rules relating to insurance contracts; those provisions were integrated into the *Civil Code of Lower Canada* in force at the time. The second part was integrated into *An Act respecting insurance* as it exists today. This statute sets out the rules relating to the setting up (creation) and administration of Québec-chartered insurers and governs the activities of all insurers operating in Québec. It also deals with certain powers of the AMF which, pursuant to the Act, is responsible for overseeing the activities of insurers in Québec.

Purpose of the Act

An Act respecting insurance governs the issuance of licences to insurers and sets out the rules relating to the assets, reserves, investments and record-keeping of insurers. It is complemented by the *Regulation under the Act respecting insurance*,[51] which includes certain rules relating to advertising, in order to protect the public. *An Act respecting insurance* and the regulation thereunder thus constitute an important source of law with respect to insurance of persons.

Moreover, the Québec legislature plans to review *An Act Respecting Insurance*.

50. *An Act respecting insurance*, CQLR, c A-32.
51. *An Act respecting insurance*, CQLR, c A-32, r. 1.

1.3.3 *An Act respecting the distribution of financial products and services* (Distribution Act)

An Act respecting the distribution of financial products and services[52] (Distribution Act) is an important source of law with respect to the distribution of insurance in Québec. It replaced *An Act respecting market intermediaries* as of October 1, 1999 (certain provisions have, however, come into force on August 26, 1998, and others on February 24, 1999, and others on July 19, 1999).

Regulation of types of distribution

The Distribution Act governs not only representatives and insurance firms but also the way insurance is distributed.

Regulations relating to the distribution of financial products and services

The purpose of the regulations adopted under the Distribution Act, which are also a major source of insurance law, is to specify the content of certain rules or the manner in which they are to be applied.

Regulations governing the activities of insurance representatives

The following are some of the regulations which govern the activities of insurance representatives:

- The *Regulation respecting the pursuit of activities as a representative*;
- The *Regulation respecting the registration of firms, representatives and independent partnerships*;
- The *Regulation respecting firms, independent representatives and independent partnerships*;
- The *Regulation respecting the keeping and preservation of books and registers*;
- The *Regulation respecting fees and contributions payable*;
- The *Code of ethics of the Chambre de la sécurité financière*;
- The *Regulation of the Chambre de la sécurité financière respecting compulsory professional development*;
- The *Regulation respecting information to be provided to consumers*; and
- The *Regulation respecting the issuance and renewal of representatives' certificates.*

The Distribution Act and the regulations thereunder will be discussed in detail in Chapter 4 when we review that statute and the rules relating to the activities of insurance of persons representatives.

52. *An Act respecting the distribution of financial products and services*, CQLR, c D-9.2.

Moreover, the Québec legislature plans on reviewing *An Act respecting the distribution of financial products and services*.

1.3.4 *An Act respecting the protection of personal information in the private sector* (APPIPS)

Application of the APPIPS

An Act respecting the protection of personal information in the private sector[53] came into force on January 1, 1994. It applies to every person who carries on business in Québec and has a major impact on insurance of persons.

Moreover, the Québec legislature plans to review *An Act respecting the protection of personal information in the private sector* following the tabling in the National Assembly, on September 30, 2016, of the 2016 five-year report of the *Commission d'accès à l'information.*[54]

Persons governed by the APPIPS

This statute imposes strict obligations on the operators of businesses in Québec that collect, hold, use and communicate personal information about natural persons. Accordingly, insurance firms, insurance of persons representatives, employers, unions and associations must abide by its requirements.

Information protected by the APPIPS

The APPIPS was enacted to enforce the provisions of the *Civil Code of Québec* relating to the protection of privacy (arts. 3 and 35 to 41 *C.C.Q.*). However, it is important to note that this Act applies to information allowing a natural person to be identified (name, address, including e-mail addresses, etc.). Therefore, it does not protect information relating to businesses or legal persons. Personal information held by a public body[55] is governed by another statute (*An Act respecting access to documents held by public bodies and the protection of personal information*, c A-2.1).

Rules relating to the collection of information

Any person carrying on a business may, provided there is a serious and legitimate reason, establish a file on a natural person, indicating its object (s. 4 APPIPS). When establishing such a file, a notice must be given to the natural person stating the object of the file, the use of the information, the individuals within the business who will have access to the information and the rights of access and rectification.

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53. *An Act respecting the protection of personal information in the private sector*, CQLR, c P-39.1.
54. See http://www.cai.gouv.qc.ca/le-rapport-quinquennal-2016-de-la-commission-depose-a-lassemblee-nationale/ (available only in French).
55. See also: *An Act respecting access to documents held by public bodies and the protection of personal information*, CQLR, c A-2.1.

The object of a file is the purpose for which it is established. The information requested must be necessary for the stated object of the file (s. 5 APPIPS).

Furthermore, a business collecting personal information may collect such information only from the person concerned, unless the latter consents to collection from third persons (s. 6 APPIPS).

Security measures

A business which holds personal information must take and apply the security measures necessary to ensure the personal information remains confidential (s. 10 APPIPS). This could mean:

- Locking up files;
- Ensuring the security of the premises; or
- Installing reliable computer security systems.

Rules relating to the communication of information

The person concerned must give his consent to the business communicating personal information about him to a third person or to the use of the information for purposes not relevant to the stated object. Such consent must be manifest, free and enlightened, and must be given for specific purposes.

Effect of the APPIPS on the practice of insurance

The APPIPS is a very important source of law in insurance of persons. Personal information constitutes the cornerstone of any insurance business. It is therefore not surprising that this statute has a considerable effect on the practice of this activity. However, it is not the only legislation to have such an impactas APPIPS sets out the rules relating to the distribution of financial products and services by insurance of persons representative and contains specific provisions with respect to the protection of personal information. Thus, it is in the absence of provisions in the Distribution Act that insurance of persons representatives must refer to the APPIPS which sets out the general rules in this regard.

1.3.5 *An Act respecting prescription drug insurance* (Québec)

In Québec, everyone must be covered by prescription drug insurance at all times. Two types of insurance plans offer this coverage:[56]

- The public plan; and
- Private plans.

56. For more information, see http://www.ramq.gouv.qc.ca/en/citizens/prescription-drug-insurance/Pages/description.aspx.

The public plan

The Public Prescription Drug Insurance Plan, which came into force on January 1, 1997, is administered by the RAMQ. It is intended for persons who are not eligible for a private group insurance plan covering prescription drugs, for persons aged 65 or over, and for beneficiaries of last-resort financial assistance and other holders of a claim booklet. This plan also covers children of persons registered for the plan.

Private plans

Private prescription drug insurance plans are usually available in the form of group insurance or uninsured employee benefit plans (ASO plans). Private plans are particularly common in the work place, where group insurance often forms part of the employee benefits offered by employers to their employees. Associations, professional orders and unions also offer this type of plan to their members. A person may also be eligible through their spouse or, in the case of minors or students, through their parents. Persons who are eligible for such a plan must join it and must cover their spouse and dependants.

Only those who are not eligible for a private plan may register for the public Prescription Drug Insurance Plan, except persons 65 years of age or over.

Coverage varies from one private plan to another depending on the agreement entered into between the employer or association and the insurer. However, in Québec, all private insurers offering prescription drug insurance must fulfil minimum conditions regarding the coverage they provide and the financial participation they require from Québec residents they insure. Chapter 2 and the section in this Chapter on the Québec Prescription Drug Insurance Plan deal with this topic.

1.3.6 *Supplemental Pension Plans Act*

Businesses are not required to establish a group pension plan for their employees. However, certain businesses choose to contribute financially to their employees' retirement.

They do so through a supplemental pension plan (also referred to as a "registered pension plan" or "pension fund" – a synonym for "retirement fund" – or simply "pension plan"). Excluding businesses that fall under federal jurisdiction, these plans are governed, in Québec, by the *Supplemental Pension Plans Act*[57] (the "SPPA"), except for public and parapublic sector employees.[58]

It should be noted that some employers may decide to offer group RRSPs. This type of contribution is discussed in Chapter 3. As of December 31, 2016, businesses with twenty or more

57. *Supplemental Pension Plans Act*, CQLR, c R-15.1.
58. Retirement plans of this type are mainly governed by specific laws.

employees will have to offer a pension plan under the *Voluntary Retirement Savings Plans Act*.[59] This topic is also discussed in Chapter 3.

In the case of a pension plan, the employer is required to contribute, and employees are also often required to do so. Except in the case of a simplified pension plan (SPP), all employer and employee contributions are generally locked in (i.e. the employee cannot withdraw them) for the purpose of providing retirement income.

Different types of pension plans

A pension plan can be:

- A defined contribution pension plan (DCPP);
- A defined benefit pension plan (DBPP); or
- A combined plan: defined contribution and defined benefit plan (DC/DB).

Currently, most sums invested in pension funds are in DBPPs. However, the vast majority of plans which have recently been set up are defined contribution plans. In fact, in the early 2000s, many employers closed their DBPPs and added a defined contribution component for new contributions or new employees.

Moreover, pursuant to the *Regulation respecting the exemption of certain categories of pension plans from the application of provisions of the Supplemental Pension Plans Act,* there is another type of defined contribution supplemental pension plan, namely, the SPP, which will be discussed in Chapter 3.

Retraite Québec is the agency charged with ensuring that the administration and functioning of the plans comply with the *Supplemental Pension Plans Act*.

1.3.7 *An Act to establish a legal framework for information technology*

It should be noted that pursuant to *An Act to establish a legal framework for information technology,* subject to certain conditions technology-based documents have the same legal value as paper documents or documents in a medium other than paper.

59. Companies that have 10 to 19 employees, must do this as of December 31, 2017, and for companies that have 5 to 9 employees, they must do this on a date to be determined by the government, but not earlier than January 1, 2018.

1.4 Other important federal legislation

1.4.1 *Canadian Charter of Rights and Freedoms*

The *Canadian Charter of Rights and Freedoms*[60] gives Canadian citizens fundamental rights and freedoms and protects them against any infringement of such rights. This Charter forms part of the Canadian Constitution. It guarantees the right to vote and freedom of conscience, religion, thought, opinion and expression, as well as the right to life, freedom and protection against unreasonable search or seizure. The *Canadian Charter of Rights and Freedoms* is the supreme law of Canada and takes precedence over all other statutes.

In theory, no law voted by the federal Parliament or by a provincial legislature can be incompatible with the provisions of the Canadian Charter. However, there are exceptions to this principle: for example, a provision of a law may infringe a right guaranteed by the Canadian Charter if it is justified in a free and democratic society. Therefore, a court may conclude that a provision of a statute infringes a right guaranteed by the *Canadian Charter of Rights and Freedoms*, but rule that the provision is nonetheless valid because the infringement is justified in today's society.

It is important to remember that the Canadian Charter applies only to dealings between the State and individuals, while the Québec Charter applies to everyone (including private dealings).

1.4.2 *Criminal Code*

The *Criminal Code* is a federal statute that deals with crimes liable to lead to criminal prosecution in Canada. Under section 91(27) of the *Constitution Act, 1867,* criminal law falls within the powers of the Parliament and only it can legislate and determine what constitutes a crime. In addition to the *Criminal Code,* other federal laws, such as the *Controlled Drugs and Substances Act,* punish other offences of this type. The first Canadian *Criminal Code* was enacted in 1892.

As for the provinces, they have jurisdiction over the administration of the justice system, which gives them powers regarding the application of laws and judicial proceedings.

Moreover, the provinces have the power to define penal offences (for example, provincial fiscal act offences, securities laws, insurance laws, road safety laws and environmental laws). These are similar to criminal offences, but are not qualified as such because of the division of legislative powers (e.g., violations of securities laws, insurance laws, highway safety laws, environmental laws and provincial tax laws). As with criminal offences, they can result in imprisonment or fines. However, in the event of imprisonment, sentences are not as severe as in criminal matters.

60. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11.

1.4.3 *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*

Since the end of the 1990s, Canada has adopted measures to fight money laundering and the financing of terrorist activities. The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*[61] has three objectives:

- To implement specific measures to detect and deter money laundering and the financing of terrorist activities and to facilitate the investigation and prosecution of money laundering offences and terrorist activity financing offences;
- To respond to the threat posed by organized crime; and
- To assist in fulfilling Canada's international commitments to participate in the fight against transnational crime.

This statute is analyzed in greater detail in Chapter 4.

Financial Transactions and Reports Analysis Centre of Canada (FINTRAC)

The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC) was created in July 2000. Its role is to receive, analyze and disclose financial intelligence on suspected money laundering and terrorist financing.

Certain individuals, including staff of financial institutions and insurance of persons representatives, are required to report suspicious financial transactions to FINTRAC.

More information about FINTRAC and its activities as well as instructions for completing a suspicious transaction report are available on its website (www.canafe.gc.ca).

FINTRAC published guidance which applies to insurance of persons representatives.[62] The Guideline reiterates the obligations imposed on insurance representatives by the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* and the regulations adopted thereunder. The following are the principal obligations:

- Record-keeping requirements;
- Client identification requirements (which also include third party and politically exposed foreign persons determinations);
- Information to be included in a suspicious transaction report or terrorist property report;
- Requirements regarding large cash transactions; and
- Requirements regarding the implementation of a compliance regime.

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61. *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c 17.
62. Financial Transactions and Reports Analysis Centre of Canada, "Record keeping requirements for life insurance companies, brokers and agents," on-line document modified in June 2017, consulted on July 21, 2017. See http://www.fintrac-canafe.gc.ca/guidance-directives/recordkeeping-document/record/li-eng.asp. These guidelines replace FINTRAC Guideline 6A: Record Keeping and Client Identification for Life Insurance Companies, Brokers and Agents.

1.4.4 *Personal Information Protection and Electronic Documents Act* (PIPEDA)

By contrast with *An Act respecting the protection of personal information in the private sector*, which falls under provincial jurisdiction, the *Personal Information Protection and Electronic Documents Act* (PIPEDA) falls under federal jurisdiction.

Since January 1, 2004, the PIPEDA has applied to the collection, use and disclosure of personal information in the course of commercial activities in a province, including businesses under provincial jurisdiction such as insurance companies and firms. However, the federal government can exclude organizations or activities in provinces which have adopted legislation substantially similar to the PIPEDA.[63] Under this provision, pursuant to an order enacted in 2003, the collection, use and disclosure of personal information in the province of Québec are not subject to the federal statute.

However, it would be wrong to think that the PIPEDA does not apply at all in Québec. In fact, the PIPEDA applies to the collection, use and disclosure of personal information by a business under federal jurisdiction such as a bank, as well as the disclosure of personal information outside Québec.

1.4.5 *Telecommunications Act* (National Do Not Call List (National DNCL))

The National Do Not Call List (National DNCL) allows Canadian consumers to decide whether they want to receive phone calls from telemarketers.

Consumers can decide to reduce the number of unsolicited telemarketing calls they receive by registering their cellular, residential, fax or VoIP telephone numbers on the National DNCL.

The National DNCL therefore imposes new responsibilities on Canadian telemarketers. They must use the website of the Canadian Radio-Television and Telecommunications Commission (CRTC) to register their business information, obtain and buy a subscription to the National DNCL, and download or query the National DNCL. The “Telemarketer” section of the CRTC website contains information about subscription rates and file formats as well as other useful information.[64]

1.4.6 *Canada’s Anti-Spam Legislation*

Canada’s Anti-Spam Legislation[65] is designed to deter spam and applies to all electronic messages (e-mails and texts, including messages sent through social media such as LinkedIn or Facebook, etc.) in connection with a commercial activity. Its key feature is the requirement for persons who send commercial electronic messages from or to Canada to obtain the prior consent of recipients.

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63. *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.
64. For more information, see https://www.lnnte-dncl.gc.ca/index-eng.
65. The following is the full title of the statute: *An Act to Promote the Efficiency and Adaptability of the Canadian Economy by Regulating Certain Activities that Discourage Reliance on Electronic Means of Carrying out Commercial Activities, and to Amend the Canadian Radio-television and Telecommunications Commission Act, the Competition Act, the Personal Information Protection and Electronic Documents Act and the Telecommunications Act*, S.C. 2010, c. 23.

Canada's Anti-Spam Legislation and the *Electronic Commerce Protection Regulations* adopted thereunder set out certain exceptions to the anti-spam provisions.[66]

1.4.7 *Pension Benefits Standards Act, 1985*

The *Pension Benefits Standards Act, 1985*, is the federal equivalent of the *Supplemental Pension Plans Act*.

It applies to fields falling under federal jurisdiction. Here are some examples:

- Any work, undertaking or business operated or carried on for or in connection with navigation and shipping, whether inland or maritime, including the operation of a ship and transportation by ship anywhere in Canada;
- Any railway, canal, telegraph or other work or undertaking connecting a province with another province or extending beyond the limits of a province;
- Any line of steam or other ships connecting a province with another province or extending beyond the limits of a province;
- Any ferry between a province and another province or between a province and a country other than Canada;
- Any aerodrome, aircraft or line of air transportation;
- Any radio broadcasting station; and
- Any bank or authorized foreign bank within the meaning of section 2 of the *Bank Act*.

In summary, any private business operating in an area of activity that falls under exclusive federal jurisdiction, such as a bank, railway, airline, shipping company or telecommunications company, as well as any private business in the Yukon Territory, the Northwest Territories or Nunavut, that has established a supplemental pension plan is governed by the *Pension Benefits Standards Act, 1985*, not Québec's *Supplemental Pension Plans Act* or any similar legislation of another province.

The Office of the Superintendent of Financial Institutions (OSFI) is the agency charged with ensuring that the administration and functioning of plans comply with the *Pension Benefits Standards Act, 1985.*

The Canada Revenue Agency is responsible for assigning registration numbers to registered pension plans (RPPs) for tax purposes.

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66. Government of Canada, "Canada's Anti-Spam Legislation," on-line document modified on June 13, 2017, consulted on July 21, 2017.
See http://combattrelepourriel.gc.ca/eic/site/030.nsf/eng/home.
For more information, see http://fightspam.gc.ca/eic/site/030.nsf/eng/h_00211.html.

CHAPTER 2

LEGAL ASPECTS OF INSURANCE OF PERSONS AND GROUP INSURANCE OF PERSONS CONTRACTS

Competency component

- Integrate into practice the legal aspects of insurance and annuity contracts.

Competency sub-components

- Characterize the parties involved in the contract;
- Contextualize the rules relating to the contract's formation, taking effect, reinstatement and cancellation or termination (annulment);
- Explain the main provisions and clauses of an insurance or annuity contracts;
- Integrate into practice the rules relating to beneficiary designation and exemption from the seizure of benefits;
- Contextualize the rules relating to claims and the payment of benefits.

2

LEGAL ASPECTS OF INSURANCE OF PERSONS AND GROUP INSURANCE OF PERSONS CONTRACTS

This Chapter first discusses the features of insurance of persons contracts and the various parties involved in the contract.

It then moves on to the formation of insurance of persons contracts depending on the circumstances, the effective date of the contract, the declaration of risk, the term of the contract and its cancellation or termination (annulment), as well as the assignment and hypothecation (mortgaging) of insurance of persons contracts.

Next, it examines the general provisions of insurance contracts (including the various coverages), exclusion clauses and claims in insurance of persons.

The rules pertaining to the payment of the death benefit, the designation and revocation of beneficiaries and the exemption from the seizure of the rights conferred by insurance of persons contracts are also examined.

Finally, the Chapter discusses group insurance of persons, including the determination of the group and prescription drug insurance.

2.1 Characteristics of insurance of persons contracts

2.1.1 Definition of "insurance contract"

According to article 2389 of the *Civil Code of Québec* (*C.C.Q.*), "[a] contract of insurance is a contract whereby the insurer undertakes, for a premium or assessment, to make a payment to the client or a third person if an event covered by the insurance occurs."[67]

Three elements are necessary in order to have an insurance contract:

- A risk;
- A premium; and
- A payment (benefit).

67. *Association pour la protection des automobilistes inc.* v. *Toyota Canada inc.*, 2008 QCCA 761.

2.1.1.1 Definition of "risk"

Risk is defined as an uncertain event, the occurrence of which leads to a financial loss against which the client wishes to protect himself. Without this element, the insurance contract would not exist.

To be insurable and the object of an insurance contract, the risk must be an uncertain event beyond the will of the parties to the contract.

To be "uncertain," the risk must be a possible and future event. If the event against which the client wishes to protect himself cannot occur, the insurance contract is null, as it does not have an object (arts. 2389, 1385, para. 2 and 1412 *C.C.Q.*). In addition to the notion of a "possible" event, the risk must be "future." An insurance contract covering an event which has already occurred is null.[68]

With respect to the "independence" of the risk, this means the client cannot make it certain by his will alone; if this is the case, the risk is not insurable.

In life insurance, although the death of the insured is certain, the time and circumstances are uncertain.

2.1.1.2 Definition of "premium"

The premium is the amount which the client must pay the insurer and in consideration of which the insurer agrees to pay a benefit to the client (or to the designated beneficiary or the client's succession, as the case may be) when the insured risk occurs. It must be proportional withthe risk. Thus, when there is a high probability the event will occur (such as an illness liable to lead to an early death), the premium will be increased accordingly. If not, the insurer will refuse to cover the risk. Determination of the premium is based on statistical and actuarial calculations.

In individual life insurance, there are different rules applicable to the initial premium and to subsequent premiums. This topic will be discussed later on. Moreover, although it is assumed that the premium will be paid by the client, it can be paid by someone else.[69]

2.1.1.3 Definition of "benefit"

The benefit is the sum the insurer must pay upon the occurrence of the insured event. The client takes out insurance to protect himself against the pecuniary consequences of the occurrence of the event. In theory, when the insured event occurs, the insurer is required to pay the client (or the designated beneficiary or the client's succession, as the case may be) a benefit which, most often, involves the payment of a sum of money.

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68. *Laurendeau* v. *Mutuelle du Canada (La), Cie d'assurance*, [1989] R.R.A. 447 (C.S.).
69. *Caisse populaire des Deux Rives* v. *Société mutuelle d'assurance contre l'incendie de la Vallée du Richelieu*, [1990] 2 S.C.R. 995. See also: *Boucher, Leblanc, Amirault Inc.* v. *Atlas Trucking Co*., J.E. 78-124 (C.P.).

2.1.2 Insurable interest: An additional condition in individual insurance to ensure the validity of the contract

2.1.2.1 Definition of "insurable interest"

Although the definition of insurance contract in article 2389 *C.C.Q.* does not mention it, an insurance contract requires a fourth element: an insurable interest. According to article 2418 *C.C.Q.*, this is an essential condition for the validity of an insurance contract. Thus, an insurance contract is null if the client does not have an insurable interest in the life or health of the insured.

Article 2419 *C.C.Q.* sets out every situation in which a person has an insurable interest. The following are some examples. Life insurance or accident and sickness insurance may be taken out when the insured is:

- The client;
- The client's spouse (which includes a married spouse, a civil union spouse and a *de facto* spouse (or common-law spouse));
- A descendant of the client (children, grandchildren, great-grandchildren);
- A descendant of the client's spouse;
- An employee or staff member of the client (when the client is a business);
- A person who contributes to the client's support or education; or
- A person in whose life or health the client has a pecuniary or moral interest.

The client thus has an insurable interest when that interest results from emotional, economic or moral ties with the insured.

In the absence of an insurable interest in the life or health of the insured, the client must obtain the written consent of the insured for the contract to be valid.

However, to ensure the validity of contracts and avoid problems when a claim is made, insurers normally require the insured's signature when the client and the insured are not the same person. This approach also allows the insurer to obtain the insured's declaration regarding his health.

Lastly, it should be noted that the insurable interest must be assessed when the insurance contract is signed or assigned, not when a loss occurs. Thus, the disappearance of the insurable interest after the policy has been underwritten will not put an end to the insurance.[70]

70. *Piché* v. *Arontec inc.*, 2006 QCCS 2721, appeal dismissed in 2008 QCCA 744.

EXAMPLE

Paul and Manon have been married for eight years. Paul takes out a $200,000 insurance policy on Manon's life. He has an insurable interest in her life since she is his wife. Three years after the insurance is taken out on Manon's life, the couple divorce. Paul can keep this insurance on Manon's life, even though she is no longer his wife. Upon her death, he will receive $200,000.

2.1.3 Insurance contract: A contract of the utmost good faith

Good faith governs the parties' conduct at all stages of the contract, including when it is entered into and during its performance. However, the degree of good faith required for insurance contracts is higher than for other contracts. As a result, it is said that an insurance contract is a contract "of the utmost good faith."[71]

For the client, the utmost good faith means, first and foremost, being honest and competent (or effective),[72] such that even if he is acting in good faith, an inaccurate statement by him could result in a sanction (nullity of the contract).[73] The client must declare everything relevant to the examination and appreciation of the risk, as he is the only one who is aware of all the circumstances. This characteristic of the insurance contract is apparent particularly at the stage of the pre-contractual declaration of risk, as well as when the insurance contract is renewed and benefits are applied for.

Although this obligation of utmost good faith historically applies to the client at the time of the initial declaration of risk, the client and the insurer are also bound to act with good faith in their obligations (or other obligations in the case of the client). The insurer must inform the client of the scope of the coverage offered, failing which the client (or the beneficiary) could claim the benefit to which he would have been entitled, were it not for his lack of information. In addition, the insurer must compensate the insured diligently and have the necessary financial resources to compensate its insured. The client must also act in good faith in its claims with the insurer because otherwise, he could forfeit of his right to receive benefits.[74]

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71. Didier Lluelles, *Précis des assurances terrestres,* 5th ed., Montréal, Les Éditions Thémis, 2009, p. 32 (p. 29 of the 5th revised edition of 2014). See also: *Sirois* v. *Crum & Forster du Canada Ltée*, [1995] R.J.Q. 132, 148 (C.S.).
72. Didier Lluelles, *op. cit.,* p. 33 (p. 30 of the 5th revised edition of 2014).
73. *Turgeon* v. *Atlas Assurance Co*., [1969] S.C.R. 286; *Dunn* v. *La Mutuelle d'Omaha cie d'assurance*, [1979] C.S. 967.
74. In the case *Boulianne* v. *S.S.Q. Mutuelle d'assurance-groupe*, [1997] R.R.A. 36 (C.S.), j. Pierre A. Dalphond, the Superior Court forfeited the insured from her right to benefits because she voluntarily amplified her condition in order to maximize her chances of receiving invalidity insurance benefits. See also *Lefort* v. *Desjardins Sécurité financière*, 2007 QCCQ 10192, j. Raoul P. Barbe.

2.1.4 Insurance contract: A contract of adhesion in the majority of cases

A contract is said to be a contract of adhesion when its essential terms were imposed or drafted by one of the parties, without being freely negotiated. This is generally the case with insurance contracts.[75] In the event of an ambiguity or doubt regarding the interpretation of a contract of adhesion, it will be interpreted in favour of the adhering party.[76]

Insurance contracts also have certain secondary characteristics. In addition to being governed by general rules applicable to contracts of adhesion, insurance contracts are subject to several rules to protect "consumers of insurance." Therefore, in its contract, the insurer cannot grant fewer rights to the client, the insured or the beneficiary than those granted by law (art. 2414 *C.C.Q.*). In addition, the provisions of the *C.C.Q.* relating to insurance of persons contracts contain certain specific rules relating to protection, such as the discrepancy rule (art. 2400 *C.C.Q.*), the exclusion rule (art. 2404 *C.C.Q.*) and the rule about the express stipulation of the nature of the coverage under accident and sickness insurance or the rule about the express stipulation of the nature and extent of the disability covered in disability insurance (art. 2416 *C.C.Q.*).

2.1.5 Other characteristics of insurance contracts

The following are the other secondary characteristics of an insurance contract. An insurance contract is:

- A bilateral (or synallagmatic) contract,[77] i.e., both parties to the contract take on obligations (payment of the premiums by the client and payment of benefits in the case of the occurrence of the risk by the insurer);
- An aleatory contract,[78] i.e., the contract is subject to uncertainty (risk component). The client pays the premiums without knowing when he or his beneficiary will receive benefits from the insurer, and the insurer could have to pay much higher benefits than the value of the premiums collected from the client;
- A contract by onerous title,[79] as opposed to a contract by gratuitous title, i.e., the client has to pay the premiums;
- A consensual contract formed by the simple consent of the parties[80] as soon as the insurer accepts the client's application, subject to certain conditions.

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75. *Industrielle Alliance, compagnie d'assurance sur la vie* v. *Blais*, 2008 QCCA 258; *Cantin* v. *Industrielle Alliance (L'), compagnie d'assurance sur la vie*, J.E. 2005-1150 (C.S.).
76. *Civil Code of Québec*, CQLR, c C-1991, arts. 1432 and 1379.
77. *Ibid*., art. 1380.
78. *Ibid*., art. 1382.
79. *Ibid*., art. 1381.
80. *Ibid*., arts. 1385 and 2398.

2.1.6 Insurance of persons contract: Scope

According to article 2392 *C.C.Q.*, insurance of persons deals with the life, physical integrity or health of the insured, and it can be individual or group insurance (while damage insurance is always individual insurance).

We have completed our examination of the definition and characteristics of insurance of persons contracts. Below we will look at the various documents related to insurance of persons contracts.

2.1.7 Documents pertaining to individual insurance contracts and discrepancies

2.1.7.1 Documents

Individual insurance of persons contracts generally involve a number of documents. First, there is the insurance application which the client must complete and submit to the insurer, and which may be accompanied by a medical questionnaire and a declaration of insurability. When the insurer accepts the insurance application, it issues the client an insurance policy, which is the document evidencing the existence of the insurance contract.

The insurer must remit a copy of the policy to the client, together with a copy of any application made in writing by the client as well as a copy of the declarations made by the client or the insured and the other conditions applicable to the insurance contract (arts. 2399, 2400 and 2403 *C.C.Q.*).

The rules regarding the content of an insurance policy are discussed in the section that provides general information on group insurance, because the rules are the same in individual and group insurance.

2.1.7.2 Discrepancies

In case of a discrepancy between the insurance policy and the insurance application, the application prevails unless the insurer has, in a separate document, indicated the particulars in respect of which there is a discrepancy to the client. Every difference is not necessarily a discrepancy; there must be some incompatibility or a conflict between the policy and the application.

2.2 Parties involved in insurance of persons contracts

2.2.1 Parties involved in individual insurance

There are several parties involved in an individual insurance contract. The words “parties involved in” refer to the people who are part of the contractual relationship as signatories to the contract (the insurer and the client), as well as those affected by the effects of the contract, namely, the

insured and the beneficiary. The following are the four main parties involved in an insurance of persons contract:

- The insurer;
- The client;
- The insured; and
- The designated beneficiary.

2.2.1.1 Insurer

The insurer is the party that pays benefits to the policyholder, the participant or the specified beneficiary upon the occurrence of the risk (art. 2389, 2393 and 2445 *C.c.Q.*). It is one of the two contracting parties to an insurance of persons contract. In Québec, insurers must comply with *An Act respecting insurance* and obtain the proper licences from the *Autorité des marchés financiers* (AMF).

2.2.1.2 Client (policyholder) and subrogated policyholder

The client is the person who takes out insurance with the insurer. He is the other contracting party to an insurance of persons contract. Generally, he asks the insurer for coverage, declares a risk and pays the insurance premiums. The client is the "owner" of the insurance contract. The term "policyholder"[81] is also commonly used.

In fact, the client is the original holder of the insurance contract. Thus, in the event where the client assigns the policy to another person, such person becomes the new owner, which means the new "holder," but does not become the client, the client being the original holder.

The client can exercise the rights arising under the insurance contract, namely designate one or more beneficiaries, revoke the designation of the beneficiary or beneficiaries, claim the cash surrender value or other benefits attached to the insurance contract and assign or hypothecate (mortgage) the contract.[82]

In the majority of cases, the client and the insured are one and the same.

When the client has taken out a policy on the life of a third party rather than on his own, he may designate a "subrogated" policyholder who will become the owner of the contract (the holder of the policy) if the client dies before the insured. Thus, upon the death of the "initial" policyholder (the client), the "subrogated" policyholder will become the holder of the rights and obligations of the

81. In this manual, the terms "client" and "policyholder" are used interchangeably.
82. Annick Guérard-Kerhulu, Geneviève Faribault, Suzanne Hardy-Lemieux, André Bois, Isabelle Hudon and Alain Roch, *L'assurance de personnes au Québec,* Brossard, Les Publications CCH/FM Inc., 1989 (loose-leaf edition), nos. 15-075, p. 1/1197 and 1/1198.

client (or initial policyholder), including the right to receive the face amount in the absence of a designated beneficiary.

However, contrary to an assignment of the policy during the lifetime of the policyholder, the designation of a "subrogated" policyholder does not lead to the revocation of the revocable beneficiary.[83]

EXAMPLE

Jean's mother, Marie, took out a $100,000 insurance policy on the life of her grandson, Alexis, Jean's son, when he was only a few months old. At the time, she named Jean as "subrogated" policyholder and did not designate a beneficiary. Marie dies. All Marie's rights and obligations under the insurance contract are therefore transferred to Jean. He could be paid the face amount upon the death of his son, as no beneficiary has been designated.

2.2.1.3 The insured person

The insured person is the person to whose life the risk applies. This person is also commonly referred to as the "insured."

EXAMPLE 1

Owen takes out life insurance on his own life. In this situation, Owen is both the client (since he is the one who took out the insurance) and the insured person (since the risk applies to his life).

EXAMPLE 2

A grandfather takes out insurance on the life of his grandson. The grandfather is the client and the grandson is the insured person. The grandfather intends to assign the policy to his grandson when he turns 18 (policy assignment during the client's life).

EXAMPLE 3

XYZ Inc. takes out insurance on the life of its principal shareholder, Yves. The company is the client and Yves is the insured person.

83. Didier Lluelles, *op. cit.*, p. 452 (p. 388 of the 5th revised edition of 2014).

2.2.1.4 Beneficiary, subrogated (contingent) beneficiary and client's succession

The beneficiary is the person designated by the client to receive the insured amount upon the occurrence of the risk (e.g., life insurance and accidental death insurance). The designated beneficiary has no obligation under the contract, but may exercise rights if the risk occurs, i.e., upon the death of the insured person.

The client is not required to designate a beneficiary. He may choose to make the insured amount payable to his succession. Thus, when no beneficiary has been designated, the insured amount will be paid to the client's succession (or to the client if he is not the insured person).

However, the client can also designate a subrogated beneficiary, also referred to as a "contingent beneficiary," "replacement beneficiary," "secondary beneficiary" or "subsequent beneficiary," even though the *C.C.Q.* does not mention this type of beneficiary. If the designated beneficiary dies before the client, this designation lapses and the subrogated beneficiary becomes the new designated beneficiary of the insured amount, replacing the designated beneficiary who died before the client.

2.2.2 Parties involved in group insurance contracts

There are also several parties involved in a group insurance contract.

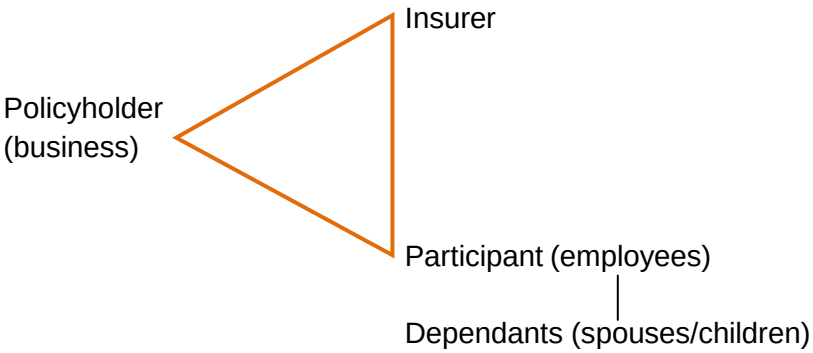
In Québec civil law, a group insurance contract is considered to be a tripartite relationship between the insurer, the policyholder and the participant,[84] as shown in diagram 2.1. Even though the contract is entered into between the insurer and the policyholder, the participants have a direct right of action against the insurer,[85] because a group insurance contract is entered into between an insurer and a policyholder for the benefit of a group of persons (the participants).

In addition to these people, the other main people involved in the contract are those affected by the effects of the contract, namely, the beneficiaries and the participant's dependants (spouse and children).

84. *Côté* v. *Compagnie mutuelle d'assurance-vie du Québec*, J.E. 96-179 (C.A.); *Fortier* v. *Sun Life du Canada, compagnie d'assurance-vie*, 2010 QCCS 4923; *Dubé* v. *Shawinigan (Ville de)*, J.E. 2004-1348 (C.Q.).
85. *Robert* v. *Industrielle (L'), compagnie d'assurance sur la vie*, J.E. 96-2169 (C.S.).

DIAGRAM 2.1

Tripartite relationship



2.2.2.1 Insurer

As mentioned above, the insurer bears the financial risk when an event covered by the insurance contract occurs. It decides whether a claim made to it is eligible. If the insurer rejects a participant's claim, the participant can take an action against the insurer. In certain cases, the participant can also take action against his employer based on the employment relationship between them.

2.2.2.2 Policyholder

The policyholder can be an employer (most often a corporation or company), an association, a parity committee, a professional order (or professional corporation[86]), a professional association or a lending institution. It manages the administrative aspects of the contract, negotiates the terms of a group insurance contract and enters into the insurance contract with the insurer for the benefit of members of a specified group. It generally looks after subscriptions by members of the group to the group insurance contract.

2.2.2.3 Participant and scope of coverage for the other insured persons (spouse and dependants)

The "participant" (or member) is the person who, as an individual eligible under a group insurance contract purchased by the group, subscribes to the contract.[87] As mentioned above, depending on the master policy, the participant has the option of subscribing to it or must subscribe to it if the insurance is mandatory. In addition, his participation may sometimes be subject to certain

86. The expressions "professional order" and "professional corporation" are used in this manual.
87. Michel Gilbert, *L'assurance collective en milieu de travail,* 2nd ed., Cowansville, Les Éditions Yvon Blais inc., 2006, no. 23, p. 16.

conditions established by the policyholder and the insurer.[88] One of these conditions may be to have completed a probation period before being able to subscribe to the contract.

Dependants (often the spouse and children) are people who, because of their relationship with the participant, benefit from the insurance coverage without having to subscribe to the master policy.[89] Their participation is limited to benefiting from the insurance coverage.

2.2.2.4 Beneficiary

As mentioned above, the beneficiary is the person designated to receive the benefits of an insurance of persons contract, more specifically under a life insurance and accidental death insurance contract. The beneficiary is designated by the participant; in the case of life insurance, the beneficiary will be entitled to the face amount under the master policy upon the participant's death. In certain cases, the policy provides for the payment of benefits to the participant, the creditor, or a predetermined survivor.

2.3 Individual insurance: Formation, effective date, declaration of risk, term of the contract (termination (annulment), cancellation and reinstatement) and assignment and hypothecation (mortgaging) of the contract

2.3.1 Rules relating to the formation of the contract

The two stages of the formation of the contract are:

- The client's offer; and
- The insurer's acceptance.

For an insurance contract to be validly formed, there must be a meeting of minds between the client, who submits an insurance application, and the insurer.

Under article 2398 *C.C.Q.,* a contract of insurance is formed upon acceptance by the insurer of the client's application.[90] In addition, the place where the contract is formed is the place where the

88. *Bouthillette* v. *Industrielle Alliance (L'), compagnie d'assurances sur la vie*, [1996] R.R.A. 414 (C.S.).
89. *Civil Code of Québec*, CQLR, C C-1991, art. 2392 and *Regulation under the Act respecting insurance*, CQLR, C A-32, r. 1, s. 59. See also: sections 16 and 17 of *An Act respecting prescription drug insurance*, CQLR, C A-29.01.
90. *Robitaille* v. *Madill*, [1990] 1 S.C.R. 985; *Roy* v. *Capitale (La), assurances et gestion du patrimoine inc. (Capitale (La), assurances de personnes inc.)*, 2012 QCCS 4464; *169912 Canada inc*. v. *Compagnie d'assurance-vie Transamerica du Canada*, J.E. 2005-926 (C.S.).

insurer accepted the application.[91] The differences between the formation of an insurance contract and its effective date are discussed later on.

Given that an insurance contract is consensual by nature,[92] the agreement between the client and the insurer is sufficient for its formation. An insurance application is not subject to any particular form[93] and may therefore be verbal.[94]

It is important to note that the insurance application accepted by the insurer constitutes the insurance contract, while the insurance policy is only the document evidencing the contract.[95]

Moreover, in order for an insurance contract to be validly formed, it must also satisfy the general conditions for the validity of contracts.

2.3.1.1 General conditions for the validity of contracts

To be valid, an insurance of persons contract must satisfy the conditions for the formation of contracts set forth in the *C.C.Q.*; these conditions apply to all contracts. Article 1385 *C.C.Q.* sets out the four conditions required for the validity of a contract:

- Consent;
- Capacity;
- An object; and
- A cause.

Consent

For a contract to be validly formed, each party to the contract must first give its consent. Article 1386 *C.C.Q.* states that the consent may be express or tacit. Express consent is the clear and specific manifestation of a person's will.

91. *2966-2814 Québec inc.* v. *Groupe Commerce (Le), compagnie d'assurances*, J.E. 95-2149 (C.S.). However, pursuant to article 43 of the new *Code of Civil Procedure*, CQLR, c C-25.01, an action based on an insurance contract may be instituted before the court of the insured's domicile or residence despite any stipulation to the contrary in the contract.
92. Formed merely with the consent of the parties.
93. *Airmac systèmes Ltée* v. *Cie d'assurance Continentale du Canada,* [1990] R.R.A. 200 (C.S.), settled out of court on appeal (C.A., 1996-02-27), 500-09-000036-905.
94. *Lussier* v. *Assurance-vie Banque Nationale, compagnie d'assurance-vie*, 2013 QCCS 234.
95. *Poulin-Doyon* v. *Aeterna-Vie,* [1986] R.R.A. 499 (C.S.).

EXAMPLE

Express consent

Lucien wants to rent an apartment and the lessor agrees. This is express consent.

Tacit consent is the manifestation of an implicit wish under certain circumstances from which the conduct of the parties is inferred.

EXAMPLE

Tacit consent

Martin asks Victor if he wants to buy his home theatre system and Victor responds: “Deliver it to me on Saturday!” In this case, Martin can infer that Victor agreed to purchase his home theatre system. This is tacit consent. In insurance matters, however, insurers require express consent.

In addition, to ensure a contract is valid, the consent must be free and enlightened. This means the consent must not be the result of the error, fraud (error induced by deceit), fear or lesion of one of the contracting parties (art. 1399 *C.C.Q.*). A contract affected by one of these defects of consent is not necessarily null. It will be deemed to be null only if one of the parties shows that his consent was vitiated (or impaired) due to an error, fraud, fear or lesion.

Defect of consent: Error

Error is the first defect of consent (art. 1400 *C.C.Q.*). It involves a false view of reality. If there is an error as to the nature of the contract, that error is associated with a lack of consent, which results in the nullity of the contract, unless the error is inexcusable.

EXAMPLE

Luce thinks she is taking out a registered retirement savings plan (RRSP), whereas she is taking out life insurance. There is an error as to the very nature of the contract.[96]

96. *Bolduc* v. *Decelles,* [1996] R.J.Q. 805 (C.Q.).

Defect of consent: Fraud

In some cases, one of the parties enters into a contract on the basis of misrepresentations. This is an error resulting from fraud committed by the other party (art. 1401 *C.C.Q.*).

EXAMPLE

Marc purchases a life insurance contract. He declares that he never had surgery, although he had heart surgery. This fraud vitiates (impairs) the insurer's consent and results in the nullity of the contract. The misrepresentation led the insurer to accept the insurance application, whereas it would not have insured Marc or would have insured him under different conditions if Marc had declared his heart surgery.

Defect of consent: Fear

Fear is a defect of consent. If consent is obtained through moral or physical constraint (violence, threats or blackmail), it is not given in a free and enlightened manner (arts. 1402 and 1403 *C.C.Q.*).

EXAMPLE

Pierre's boss forces him to sign an individual life insurance contract, otherwise he will be fired.

Defect of consent: Lesion

Lesion, the last defect of consent, results when one of the parties exploits the other. It leads to a serious disproportion of the obligations between the parties. However, under article 1405 *C.C.Q.*, lesion vitiates (impairs) consent only in respect of minors and persons of full age under protective supervision who take out insurance without their tutors or representatives.

The term "person of full age under protective supervision" refers to a person at least 18 years of age who is unable to take care of himself or to administer his property. Depending on the circumstances, in order to take out insurance, a person of full age under protective supervision must be assisted or must take out the insurance through a curator, a tutor or an adviser to a person of full age, depending on his degree of incapacity.[97] The term "person of full age under protective supervision" also refers to an incapable person who has a mandatary pursuant to a mandate given in anticipation of incapacity that has been homologated (arts. 2166 to 2174 *C.C.Q.*). Under these circumstances, the curator, tutor, adviser or mandatary could, for example, be asked to collect disability benefits on behalf of the person of full age under protective supervision.

97. Édith Deleury and Dominique Goubau, *Le droit des personnes physiques,* 4th ed., Cowansville, Éditions Yvon Blais, 2008, pp. 593 and ff.

Lesion does not apply automatically or as of right. Minors or persons of full age under protective supervision must prove that they actually suffered harm and that the person with whom they entered into the contract took advantage of their state.

EXAMPLE

A 16-year-old minor buys a car which he cannot afford at a price that is much higher than its value. In this case, there is economic harm which results from exploitation by contract.

The *C.C.Q.* is based on the principle that persons of full age and of sound mind must know what they are doing when signing a contract. Consequently, the law does not allow them to plead lesion in insurance matters[98] (art. 1405 *C.C.Q.*).

Capacity

For a contract to be valid, there must be an exchange of consents between the parties. For their consent to be valid, the parties must have the legal capacity to bind themselves by contract (art. 1398 *C.C.Q.*).

Capacity means that a person holds rights and has the ability to exercise them alone. In theory, every person is fully able to exercise his or her civil rights (art. 4 *C.C.Q.*). With respect to legal persons, this topic was discussed in the previous Chapter and is discussed in Table 2.1.

However, the *C.C.Q.* provides that minors (persons under 18 years of age) and incapable persons of full age cannot exercise their civil rights alone.

Therefore, persons of full age who are incapable cannot take out insurance without the consent of their tutor or curator. Where a person of full age has an adviser, the insurer could request the adviser to intervene in the contract. Such persons are those for whom a protection regime prescribed by the *C.C.Q.* has been authorized by a court.

In addition to these regimes, there is the mandate given in anticipation of incapacity. The situation arises when the occurrence of the mandator's incapacity has been homologated (i.e. confirmed and approved) by a court at the request of the mandatary named in the mandate given in anticipation of incapacity.[99]

98. Under section 8 of the *Consumer Protection Act* (CQLR, c P-40.1), a person of full age may demand the nullity of a contract based on lesion. However, pursuant to section 5(a) of the *Consumer Protection Act*, the most important parts of this statute (sections 8 to 214.11 and 254 to 260) do not apply to insurance contracts.
99. For more information, see the guide: Autorité des marchés financiers, *Trust Must be Earned!*, Groupe de travail pour la protection des personnes vulnérables: https://lautorite.qc.ca/en/general-public/publications/for-general-public/entrusting-the-management-of-your-affairs-to-someone/.

The Public Curator of Québec maintains three registers:

- A register of persons of full age under tutorship or curatorship;
- A register of persons under homologated protective mandates; and
- A register of minors under tutorship.[100]

It should be noted that if a representative notices that his client (who is a person of full age under no protective supervision or is not incapable) has cognitive problems preventing him from understanding or giving his consent, the representative cannot turn a blind eye and ask for his client's signature. He must first discuss the cognitive aspects with his client or the client's family or even contact social services (CLSC) if the situation is serious. These situations are more and more frequent.

Incapacity and minors

In individual insurance of persons, a minor cannot take out insurance without the consent of his tutors (often the parents), unless he is fully emancipated (following a marriage or a court order). A minor who takes out insurance could ask for it to be terminated (annulled) on the basis of lesion and be reimbursed the premiums paid.

In addition, a minor does not have the capacity to collect insurance benefits. Fathers and mothers are tutors to their children as of right. The tutorship extends to the person and property of the minor. Thus, parents are also responsible for the administration of property devolved to the child, including the payment of insurance benefits.[101]

If a child is entitled to insurance benefits exceeding $25,000, the parents (or the designated tutor, as the case may be) must make an inventory of the property and comply with the requirements to that effect in article 209 *C.C.Q.*,[102] and the insurer must notify the Public Curator (art. 217 *C.C.Q.*)

However, the *C.C.Q.* provides that a minor, i.e. 17 years of age or less, may exercise certain rights alone, including:

- Having a bank account;[103]
- Accessing his medical file as of the age of 14;[104]
- Consenting to certain medical care as of the age of 14;[105] and

100. For more information, see https://www.curateur.gouv.qc.ca/registre/pcurateur_man_html/criteres_A.jsp.
101. *Civil Code of Québec*, CQLR, c C-1991, arts. 192 to 194.
102. *Civil Code of Québec*, CQLR, c C-1991, arts. 177, 185 and 192.
103. *Bank Act*, SC 1991, c 46 , s. 437(1); *An Act respecting financial services cooperatives*, CQLR, c C-67.3, s. 74 (even, in this case, a person under the age of 14 or an incapable person).
104. An Act respecting the protection of personal information in the private sector, CQLR, c P-39.1, s. 38.
105. Civil Code of Québec, CQLR, c C-1991, art. 14.

- Performing all acts pertaining to his employment or to the practice of his craft or profession as of the age of 14.[106]

EXAMPLE 1

Samuel, age 17, works for himself (lawn-mowing business). He can purchase a life or health insurance contract on the life of his partner, because this contract can be considered an act pertaining to his employment.

EXAMPLE 2

Liam, age 16, works as a day labourer in a warehouse. His employer took out group insurance with an insurer for the employees. Liam can subscribe to the group insurance, because it is an act pertaining to his employment, and he can designate a beneficiary.[107]

Furthermore, a fully emancipated minor or a minor assisted by his tutor has the legal capacity to take out life insurance.

Object

The object of the contract is the juridical operation contemplated by the parties at the time of its formation.[108] It may be an obligation to do or not do something, to provide goods or to provide or not provide a service. It may be the sale of a house, the lease of an automobile or the donation of a sum of money. In most insurance contracts, the object, from the insurer's point of view, is to pay a benefit upon the occurrence of an insured event.

The possible objects of a contract are limitless, but the object must comply with the law and public order.[109] It must be licit. In other words, it must be allowed by law.

EXAMPLE

The object of a contract cannot be the sale of drugs, because the law prohibits the object of the contract (the sale of illegal substances).

106. *Ibid.*, art. 156.
107. *SSQ, Société d'assurance-vie inc.* v. *Rouillard*, J.E. 2006-195 (C.S.).
108. *Civil Code of Québec*, CQLR, c C-1991, art. 1412.
109. *Ibid.*, art. 1413.

In insurance of persons, the object of the contract is licit, as it is not prohibited by law or contrary to public order.

In addition, the object of the contract must be possible, i.e., the person who has the obligation must be able to perform it. In life insurance, in the event of death, the insurer fulfils its obligation when the insured dies; in accident and sickness insurance, the insurer fulfils its obligation when the insured makes a claim following an accident or sickness covered by his policy.

Furthermore, the object must be determined or determinable, and the person undertaking an obligation must be aware of its extent.

In insurance of persons, the object is determined; the insurer knows the benefit it will have to pay (or the method for calculating it (e.g., in life insurance: benefit equal to twice the policyholder's salary)) upon the insured's death. In accident and sickness insurance, the insurer knows the amount of the maximum benefits it will have to pay to the insured in the event of a particular accident or illness.

Cause

According to article 1410 *C.C.Q.*, the cause of a contract is the reason that drove each party to enter into the contract. It therefore justifies the existence of the contract. The cause must not be prohibited by law or contrary to public order (art. 1411 *C.C.Q.*).

EXAMPLE

A nominee agreement to shelter a person from his creditors is illegal, because it is contrary to public order.[110]

In life insurance, the premium is the reason that caused the insurer to agree to pay a benefit upon the death of the insured. The premium is therefore the cause of the contract for the insurer, and the benefit that will be received is the cause for the client.

In conclusion, four conditions are necessary for a contract—be it an annuity contract or an insurance contract—to be valid:

- The parties must give their consent to the contract;
- The parties must have the capacity to bind themselves;
- The object must not be contrary to law or public order; and
- The cause of the contract must not be contrary to law or public order.

110. *Durand* v. *Drolet,* J.E. 93-1493 (C.A.).

Table 2.1 summarizes the necessary conditions for an insurance of persons contract to be valid.

TABLE 2.1

Necessary conditions for an insurance contract to be valid

CONSENT	Express	It is free and enlightened, not vitiated (impaired) by error, fraud, fear or lesion. It is the clear and specific manifestation of a person's will.
	Tacit	It is free and enlightened, not vitiated (impaired) by error, fraud, fear or lesion. It is an implicit manifestation of a person's will; it is inferred from the conduct of the parties.
CAPACITY TO ENTER INTO A CONTRACT	In the case of a minor	He enters into a contract: ▪ For his usual needs; ▪ For acts pertaining to his employment; ▪ As a married or fully emancipated person or with the consent of his tutors.
	In the case of a person of full age not under protective supervision	He has the capacity to enter into any type of contract which is not prohibited by law or contrary to public order.
	In the case of a person of full age under protective supervision	He enters into a contract through his curator, tutor, adviser to a person of full age or his mandatary in the case of incapacity.
	In the case of a legal person	It has the capacity to enter into an insurance of persons contract provided it is authorized to do so by its charter and by-laws. Moreover, the representative (employee) who acts on behalf of the legal person must have the authority to bind the legal person under the contract.
OBJECT	Juridical operation contemplated by the parties	The operation must not be prohibited by law. The operation must not be contrary to public order.
CAUSE	Reason which leads the parties to enter into a contract.	The reason must not be prohibited by law. The reason must not be contrary to public order.

2.3.1.2 Client's application and acceptance of the application by the insurer

The application for insurance is the client's offer presented to the insurer for the purpose of obtaining insurance coverage. This written application is usually made on a form provided by the insurer. The client indicates on the form the type of coverage required, as well as the amount and duration of the coverage. The client must also declare to the insurer the facts which are likely to influence the insurer's appraisal or acceptance of the risk and the setting of the premium (art. 2408 *C.C.Q.*). The application is filled out by the client or his insurance representative, as the

case may be. In the latter case, however, the application must always be reviewed and signed by the client.

EXAMPLE

Hugo, who is 35 years old and a non-smoker, wants to purchase $250,000 of term life insurance (2 years). His insurance of persons representative, Claude, analyzes his needs. Claude presents Hugo with a proposal on an application form from the company *ABC Assurance-vie Inc*. which has to be filled out. The application form indicates that the insurer requires evidence of insurability, namely, a paramedical exam with a urine test and blood profile as well as three blood pressure readings. Hugo fills out and signs the application, gives it to Claude and also pays the amount of the initial premium. A nurse contacts him a few days later and schedules an appointment to carry out the paramedical examination and tests. Once the insurer has received the insurance application and the paramedical results, its underwriting team analyzes the file in order to accept or refuse the application, or submit a counterproposal (counteroffer).

An insurance application alone does not create a contract. According to article 2398 *C.C.Q.,* the contract is formed only when the insurer accepts the client's application. The acceptance must be clear and unequivocal and cannot merely be presumed from the insurer's silence.

Moreover, the acceptance must be substantially in compliance with the insurance application submitted; it cannot differ as regards material elements such as the requested amount or the duration of the coverage. If the insurer does not accept the material elements of the application, no contract is formed, even if the initial premium was paid. For example, an increase in the price of the premiums (subprime) represents an amendment equivalent to a refusal of the application with a counteroffer by the insurer.[111]

If the insurer decides to refuse the application as submitted, it can make a counter-proposal. The client must accept the counterproposal in order for an insurance contract to be formed.[112] Certain insurers prudently require that the client sign a document evidencing his acceptance of the counterproposal.

111. *Balthazar* v. *New York Life Insurance Company*, J.E. 87-2 (C.S.).
112. *Balthazar* v. *New York Life Insurance Company*, J.E. 87-2 (C.S.); *Gauthier* v. *Assurance vie Banque Nationale*, [2005] J.Q. (Quicklaw) no. 132 (C.Q.).

EXAMPLE

After analyzing Stéphane's insurability file, including the results of the paramedical examination and tests, the company *ABC Assurance-vie Inc*. refuses his application as submitted. It provides a counter-proposal in which it indicates its willingness to insure him under the same conditions as those in his initial application, subject to an increase in the premiums (additional premium). Stéphane accepts the counterproposal and signs it in the place indicated by the insurer. The insurance contract was therefore formed as of Stéphane's acceptance of the counterproposal.

The formation of a contract and its effective date, however, are two different matters. The effective date is the date on which the contract of insurance takes effect.

2.3.2 Effective date of insurance of persons contracts

2.3.2.1 Effective date of life insurance

Once the application (or counterproposal) has been accepted and the contract has been formed, the effective date must be determined. Sometimes, the date of formation of the contract is the same as its effective date, but not in all cases. Articles 2425 and 2426 *C.C.Q.* deal, respectively, with the effective date of life insurance contracts and accident and sickness insurance contracts; in this regard, each is governed by different rules.

With respect to life insurance, article 2425 *C.C.Q.* sets out three essential conditions for the coming into effect of the contract:

- Acceptance of the application by the insurer without modification;
- Payment of the initial premium; and
- No change in the insurability of the risk since the application was signed.[113]

If those three conditions are not met, the life insurance policy does not come into effect.

It is therefore important for the insurance representative to have the applicant to confirm in writing that there has been no material change since the application was signed and to verify that the applicant has paid the premiums (verify that there are no outstanding premiums owed to the insurer). Then the insurance representative can deliver the policy.

However, if the applicant cannot confirm this in writing or fails to remit the proper payment, or if the insurance representative has reason to suspect that there has been a material change despite

113. *Biscuits Leclerc ltée* v. *Compagnie d'assurance-vie Transamérica Occidental*, J.E. 2000-1040 (C.A.); *Caron* v. *Industrielle-Alliance, compagnie d'assurance-vie*, 2008 QCCS 1520.

the applicant's assurance that everything is fine, the insurance representative must not complete delivery. Instead, he must retrieve the policy documents and return them to the underwriter for further consideration. He should also advise the client that the contract is not yet in force. Finally, the insurance representative should always have the policyholder to sign and date an acknowledgment stating that he has received and accepted the policy.

In *Artisans Coopvie*,[114] the Supreme Court of Canada established that the three conditions set forth in article 2425 *C.C.Q.* must exist concurrently in order for the contract to take effect. In this case, the Court found that the insurance policy had never come into effect because the insured's insurability had changed between the date on which the unmodified application was accepted and the date on which the initial premium was paid.

Even if the application is accepted without modification and there is no change in the insured's insurability after the signing of the application, the life insurance contract only comes into effect when the initial premium is paid. The payment is a suspensive condition for the coming into effect of the contract.[115]

Since article 2425 *C.C.Q.* is a provision of relative public order (as opposed to absolute public order), the parties can agree on an earlier effective date.[116]

2.3.2.2 Effective date of accident and sickness insurance contracts

An accident and sickness insurance contract takes effect upon the delivery of the policy to the client, whether delivery is made by the insurer itself or by the insurance representative (art. 2426 *C.C.Q.*).

By contrast with life insurance, the obligation to pay the initial premium is not a condition for the coming into effect of accident and sickness insurance.[117]

Even though the insurer may subject the coming into effect of this type of contract to the payment of the initial premium, the insurance cannot take effect on a date later than the date of delivery of the policy. However, there is nothing preventing the insurer from providing that the policy will take effect before its delivery to the client, since this is more advantageous for the client than what is provided for at law.

Contrary to life insurance (art. 2425 *C.C.Q.*), the *Civil Code of Québec* does not mention the change in the insurable nature of the risk between the date of the signature of the application and the delivery of the policy in accident and sickness insurance. Consequently, if the insurer sends out the accident and sickness insurance policy without any modifications to the insurance representative for delivery to the policyholder, any change to the insurable nature of the risk between the date of the signature of

114. *General Trust of Canada* v. *Artisans Coopvie, Société coopérative d'assurance-vie*, [1990] 2 S.C.R. 1185.
115. *Compagnie d'assurance-vie Transamerica du Canada* v. *Toutant*, [2002] R.R.A. 685 (C.A.).
116. *Chablis Textiles Inc. (Trustee of)* v. *London Life Insurance Co.*, [1996] 1 S.C.R. 160; *Blais* v. *Union commerciale du Canada, compagnie d'assurance-vie*, J.E. 2001-317 (C.A.); *Industrielle Alliance, compagnie d'assurance sur la vie* v. *Blais*, 2008 QCCA 258. This case involved an interim cover note.
117. *Martel* v. *Excellence (L'), compagnie d'assurance-vie*, B.E. 2006BE-28 (C.Q.).

the application and the delivery of the policy will not affect the validity of the policy. However, if the insurer requires from the insurance representative a confirmation from the applicant, in writing, that there has been no change in the insurability of the risk, such would be considered a condition imposed by the insurer and the policy would only come into effect upon the applicant/policyholder providing such confirmation that there has been no change to the insurability of the risk between the time of the application and the time the policy has been delivered.

2.3.2.3 Interim cover notes

Even if, in general, the life insurance contract only takes effect at the moment of the acceptance of the proposition by the insurer, provided that the proposition has been accepted without modifications, that the first premium has been paid and that no change has intervened in the insurability of the risk since the signature of the proposition by the client, it can, in some cases, be enforceable earlier.

In fact, a client can obtain insurance coverage as soon as he signs the application, upon payment of the initial premium, even before the insurer has accepted the application. This situation involves an "interim cover note."

An interim cover note is a contract pursuant to which the insurer offers immediate, but temporary, coverage to the insured while his application is being reviewed. With this note, the client gets immediate coverage. Thus, if the insured dies before the effective date of the insurance contract, the insurer could have to pay the face amount. A cover note takes effect as soon as the insurance application is signed, in return for payment of a certain portion of the premium, which is generally one-twelfth of the annual premium.[118] An interim cover note may also be subject to a maximum coverage.

As for the duration of the interim cover note in life insurance, the insurer may stipulate that it will apply until the permanent contract takes effect, but without exceeding a specific time limit of 30 to 60 days after the application has been signed. In *Industrielle Alliance, compagnie d'assurance sur la vie* v. *Blais*, it was decided that when the duration of an interim cover note is not specified, the temporary insurance will end only if the insured is informed of the insurer's refusal or of the coming into effect of the permanent insurance.[119] Before the permanent policy is issued, the insurer can cancel the conditional insurance as long as one of its conditions of enforceability of the policy has not been fulfilled (e.g., change in the insured's insurability), provided the insured event has not occurred.[120]

It is important that the client be informed of the possibility of obtaining immediate coverage. If an insurance of persons representative fails to offer it even though it is available, he could be sued for damages due to professional negligence if the client (or his succession) sustains harm as a result.

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118. *Daoust-Jean* v. *Laurentienne-vie (La), compagnie d'assurances inc.*, J.E. 92-1210 (C.S.); *Industrielle Alliance, compagnie d'assurance sur la vie* v. *Blais*, 2008 QCCA 258; *Compagnie d'assurance-vie Transamerica du Canada* v. *Toutant*, J.E. 2002-1201 (C.A.); *Flibotte* v. *Industrielle (L'), compagnie d'assurances*, J.E. 91-1031 (C.A.); *Union du Canada, assurance-vie* v. *Dépanneur Centre-ville (1980) Ltée*, J.E. 87-1149 (C.A.).
119. 2008 QCCA 258.
120. *Daoust-Jean* v. *Laurentienne-vie (La), compagnie d'assurances inc.*, J.E. 92-1210 (C.S.).

The Canadian Life and Health Insurance Association (CLHIA) offers a sample interim cover note and recommends that its members use it. An insurance of persons representative must not hesitate to inform its clients of the possibility of obtaining this type of coverage, except in rare cases, such as when the representative has reason to believe that the insured has serious health problems.

EXAMPLE

An insurer may instruct its insurance of persons representative not to offer an interim cover note to an applicant (the person who submits the insurance application to the insurer, i.e., the future client) who is suffering from cancer or has had a heart attack.

In short, since an interim cover note is a *bona fide* insurance contract subject to the general rules of contracts and the specific rules of insurance contracts, the consent of the parties must be obtained.

In the event of a misstatement or omission by the client, the insurer may seek a civil sanction (e.g., refusal to pay, termination or cancellation of the contract). The following section deals with this subject.

2.3.3 Obligations of the client (and of the insured person, where applicable): Declaration of risk

An insurance contract is an agreement requiring the utmost good faith of the parties. In this regard, the insurer expects to obtain precise and accurate information from the client so that it can properly assess the risk, which forms the basis of the insurance contract.

The declaration of risk includes the obligation for the client and the insured (if the insurer requires it when the client and the insured are not the same person) to relay to the insurer any fact which could impact its assessment of this risk.[121] The insured's pre-existing illnesses must be declared,[122] as must any unexplained weight loss or[123] any drug use,[124] tobacco use,[125] alcoholism[126] or criminal

121. *169912 Canada inc.* v. *Compagnie d'assurance-vie Transamerica du Canada*, J.E. 2005-926 (C.S.).
122. *Massy* v. *Compagnie d'assurances American Life*, J.E. 92-79 (C.A.); *Desjardins Sécurité financière, compagnie d'assurance-vie* v. *Deslauriers*, 2012 QCCA 328; *Marcoux* v. *Alternative, compagnie d'assurance sur la vie*, C.Q., 2003-04-24, AZ-50171887; *Transamerica Life Insurance Co. of Canada* v. *Patel*, J.E. 2003-869 (C.S.); *Lehoux* v. *Union-vie (L'), compagnie mutuelle d'assurances*, J.E. 2003-599 (C.S.).
123. *Assurance-vie Desjardins-Laurentienne inc*. v. *Poirier-Wilson*, J.E. 2003-1670 (C.A.).
124. *Hardy* v. *Industrielle-Alliance (L'), compagnie d'assurance sur la vie*, J.E. 2002-1645 (C.S.).
125. *Ouellet* v. *Industrielle (L'), Cie d'assurance sur la vie*, J.E. 93-440 (C.A.).
126. *Bacon* v. *Desjardins Sécurité financière, compagnie d'assurance-vie*, B.E. 2005BE-424 (C.Q.).

record[127] or any symptoms such as persistent fatigue or a fever that occurs at the end of the day, and any blood or urine test results.[128] The insurer may also require the insured to submit to blood or urine tests.

At times, the client may be tempted to hide certain information from the insurer in order to obtain insurance or obtain it at a better price. In such circumstances, one of the roles of the insurance of persons representative is to make sure the client (and the insured person if different from the client, as the case may be) fully understand that any breach of the obligation to give all the information required for a fair assessment of the risk could have serious consequences.

Unless the medical questionnaire gives rise to particular circumstances, the client is not generally obliged to declare any ordinary or insignificant discomfort.[129]

Furthermore, an insurance of persons representative must be very careful if he fills out the insurance application; he must ensure that what he writes down accurately reflects the statements of the client or the insured, as the case may be. Otherwise, the client or the insured may be able to prove that the representative misinterpreted or suggested these statements. In such a case, the client, the insured, the beneficiary or the succession could successfully sue the insurer and the insurer could, in turn, exercise recourse or institute an action in warranty against the insurance of persons representative.

In addition, when an insurance of persons representative fills out the application form on behalf of his client, he must be very careful, because he is acting as his client's mandatary and the insurer could terminate (annul) the insurance contract in the event of a misstatement or misrepresentation. A good way for a representative to avoid writing misinformation on the application is to read each question on the form to the client or the insured, without any interpretation on his part, and to fully indicate the answer of the client (or of the insured, as the case may be), also without interpretation.

The client's obligation to make a declaration exists:

- When he fills out the insurance application himself;
- When the insurance of persons representative fills out the insurance application; and
- When, during the term of the contract, certain circumstances result in an aggravation of the occupational risk (see the following section entitled *Warranties and aggravation of risk*).

In insurance of persons, the client must represent all facts liable to help the insurer assess the risk at the time of the insurance application, before the insurer agrees to provide insurance coverage. If, before the insurer's acceptance or before the payment of the initial premium, the client learns of

127. *Plante* v. *Métropolitaine (La), Compagnie d'assurance-vie*, J.E. 91-423 (C.S.) (impaired driving). See also: *Union-Vie (L'), compagnie mutuelle d'assurances* v. *Landry*, 2005 QCCA 1036.
128. *Biscuits Leclerc ltée* v. *Compagnie d'assurance-vie Transamérica Occidental*, J.E. 2000-1040 (C.A.).
129. *Compagnie d'assurance-vie RBC (Unum Life Insurance Company of America)* v. *Gagnon*, 2012 QCCA 1150; *Bernier* v. *Mutual Life Assurance Co. of Canada*, [1973] C.A. 892; *Smith* v. *Desjardins*, 2005 QCCA 1046; *Geoffroy* v. *Westbury Canadienne, compagnie d'assurance-vie*, B.E. 2000BE-1058 (C.S.).

a material element affecting appraisal of the risk, he has the obligation to inform the insurer thereof. If he has informed the insurance representative, said representative has the obligation to inform immediately the insurer. However, this obligation ends after the insurer's acceptance of the client's application and payment of the initial premium to the insurer in life insurance, or after delivery of the policy in accident and sickness insurance (subject to the exception mentioned in the following section (aggravation of the occupational risk)).

The fact that the client has given the insurer the authorization to consult his medical record is not an excuse for the client's failure to disclose his health condition.[130]

In response to a question from the insurer relating to the risk, the client or the insured must answer truthfully, to the extent he knows the truth[131] (arts. 2408 and 2409 *C.C.Q.*). Even in the absence of a question, the client has the obligation to relay any event or information that is relevant to the risk.[132]

2.3.4 Warranties and aggravation of risk

2.3.4.1 Warranties

Pursuant to article 2412 *C.C.Q.*, a warranty is an obligation requiring the client to act prudently in order to reduce the risk, for example, by installing an alarm system and a smoke detector. The warranty must be express, not implied, and it must be relevant to the risk.

Although an insurer may impose warranties on a client in insurance of persons, warranties are much more common in damage insurance.

2.3.4.2 Aggravation of the occupational risk

Once the contract is enforceable, the question is whether the client must bring to the attention of the insurer a change of circumstances which makes the initial declaration of risk inaccurate after the fact or which could generally change the assessment of the risk.

In life insurance, the client does not have to notify the insurer of an aggravation of the risk, as the assessment of the risk occurs when the contract is entered into. The insured under a life insurance contract is therefore not required to declare, during the contract, that he now has a serious illness.

130. *Gravel (Succession de)* v. *Compagnie d'assurance du Canada sur la vie "Canada-Vie,"* 2007 QCCS 5796; *Audet* v. *Industrielle-Alliance (L'), Cie d'assurance sur la vie*, [1990] R.R.A. 500 (C.S.).
131. *Compagnie d'assurance-vie Transamerica du Canada* v. *Nourcy*, REJB 1999-11820 (C.A.), leave to appeal to the Supreme Court of Canada refused on March 23, 2000, file no. 27 335.
132. *Italchain* v. *J. A. Madill*, [1984] R.L. 175 (C.S.); *Landry* v. *St-Maurice (La), compagnie d'assurances*, [1995] R.R.A. 1221(C.Q.).

In sickness and accident insurance, the situation is sometimes different, particularly when there is an aggravation of the occupational risk.

In such a case, the insured has every interest in informing the insurer, during the contract, about any aggravation of his occupational risk which has lasted for six months or more (art. 2439, para. 1 *C.C.Q.*). In such a situation, the *C.C.Q.* provides for the corresponding reduction of the indemnity. The insured is not required to declare it, but if he does and agrees to the proposed premium increase, there will be no reduction of the benefit. An insurer who has been informed of the situation might not ask for an increased premium, thereby indicating its wish not to change anything about the initial contract entered into by the parties. If there is a reduction in the occupational risk, the insured's insurance premiums may be reduced.

EXAMPLE

Luc, a self-employed trucker, purchased an individual disability insurance contract. For the past six months, he has been transporting hazardous materials, but does not inform his insurer about this aggravation of the risk. If Luc has an accident that leaves him disabled, the insurer may decide to reduce the disability benefit based on the premium that would have been payable if it had known about this risk.

2.3.5 Term and end of the contract (Annulment or cancellation)

2.3.5.1 Term of the contract

Insurance coverage remains in effect for the entire term of the contract. At the end of the coverage period, the parties are released from their respective obligations unless the contract is renewed. However, other circumstances may put an end to an insurance contract: its termination (annulment) or cancellation.[133]

Annulment of the contract

An insurance of persons contract, like any other contract, may be terminated (annulled) if there is a defect of consent, such as error or fraud (deceit) (arts. 1398 and ff. *C.C.Q.*).

An annulment of the insurance contract places the parties in their pre-contractual state, as though the contract had never existed.

Certain reasons specific to insurance law allow for the termination (annulment) of an insurance contract, such as the absence of an insurable interest (art. 2418, para. 1 *C.C.Q.*) or misrepresentations, concealment or fraud regarding the risk (arts. 2408 to 2413 and 2420 to 2424 *C.C.Q.*).

133. *Bélanger* v. *Great West, compagnie d'assurance-vie*, REJB 1999-14473 (C.S.).

Right of termination of the contract by the client for certain insurance contracts.

Pursuant to the CLHIA's *Guideline G10* entitled "10-Day Insurance Contract Rescission Right,"[134] with which member insurers are required to comply, a policyholder can cancel an insurance contract within 10 days of signing it, without penalty and with a reimbursement of the premiums paid.[135]

In the case of individual variable annuity contracts, also referred to as "individual annuity contracts relating to segregated funds" (also known as "individual variable insurance contracts" or "IVICs"), the contract holder has a right to cancel (or "rescind") the contract, without penalty and with a reimbursement of the contributions (subject to any fluctuation in the value of the segregated funds), within two business days starting from the earlier of when the contract holder receives the confirmation or five business days after the confirmation is mailed.[136]

Cancellation and annulment of the contract

Unlike annulment (also referred to as resolution in the *C.C.Q.*), cancellation (also referred to as resiliation in the *C.C.Q.*) only cancels the contract for the future (arts. 1439 and 1606 *C.C.Q.*).

In addition to the grounds an insurer can invoke (including those for default of payment of premiums) in order to cancel an insurance contract, a policyholder can also cancel an insurance contract.

After the 10-day period mentioned above with respect to individual life insurance contracts or accident and sickness insurance contracts, a policyholder can still cancel his insurance contract at any time. However, in such a case, the premiums paid will not be reimbursed to the policyholder and the policy may impose penalties. As regards individual variable annuity contracts, in general, a contract holder can redeem his annuity contract at any time and receive the value of any accrued amounts, but he may be required to pay withdrawal or repurchase (surrender) fees (or penalties).

134. Canadian Life and Health Insurance Association, "Guideline G10 – 10-Day Insurance Contract Rescission Right," on-line document modified in 2010, consulted on July 21, 2017. See http://www.clhia.ca/domino/html/clhia/CLHIA_LP4W_LND_Webstation.nsf/resources/Guidelines/$file/Guideline_G10.pdf.
135. See also: section 19 of *An Act respecting the distribution of financial products and services* and section 2 and Schedule 1 of the *Regulation respecting information to be provided to consumers*, CQLR, c D-9.2, r. 18.
136. *Regulation respecting information to be provided to consumers*, CQLR, c D-9.2, r.18, s. 4.20. Also see: CLHIA *Guideline G2* entitled "Individual Variable Insurance Contracts Relating to Segregated Funds," Form 1, Part B, Item 8 (p. 59), and Item 9 (p. 61) of the AMF *Guideline on Individual Variable Insurance Contracts Relating to Segregated Funds*.

2.3.5.2 Annulment for fraud, misrepresentation or concealment

During the first two years following the effective date of the contract, the insurer can seek to have it nullified if the insured's statements were false or inaccurate, e.g., if they were likely to influence the insurer in the decision to cover the risk or set the premium, whether or not the insured acted in good faith. After this period, the insurer cannot seek the nullity of the contract, except in case of fraud on the part of the insured. The connection between the omitted or concealed fact and the occurrence of the loss is irrelevant.

The following are considered breaches of the client's obligation to represent the facts, pursuant to which the insurer may terminate (annul) or cancel the insurance contract:

- Misrepresentation with respect to age;
- Other misrepresentations;
- Concealment; and
- Fraud.

Misrepresentation with respect to age

The review of an insurance contract may show that there was a misrepresentation as to the insured's age. The law provides that such a situation does not necessarily lead to the nullity of the insurance contract (art. 2420, para. 1 *C.C.Q.*).[137]

In life insurance, the benefit (face amount) can be adjusted in proportion to the premium collected compared with that which should have been collected, if the true age of the insured is within the age limits set by the insurer's rates.

EXAMPLE

Michèle represents that she is 30 years old when, in fact, she is 40. She takes out $10,000 of life insurance. The insurance premium is $100 per year for a 30-year-old non-smoking woman. By paying this premium, a 40-year-old woman would only be entitled up to $7,000 of coverage. Upon Michèle's death, the insurer will therefore pay $7,000.

In accident and sickness insurance, the insurer can adjust the premium to make it correspond to the premium applicable or reduce the insured amount proportionately (art. 2420, para. 1 *C.C.Q.*).

When the insurance is to end at a specified age and the misrepresentation is discovered before death, the end of the contract will be based on the true age of the insured (art. 2422, para. 1 *C.C.Q.*).

137. Luc Plamondon, *L'erreur sur l'âge en assurance de personnes*, (2006) 40 *R.J.T.* 509.

There are, however, two exceptions which allow the insurer to ask for the nullity of the contract (arts. 2410, 2421 and 2424 *C.C.Q.*):

- If there was fraud;
- If, at the time of the formation of the contract, the age of the insured exceeded the age limits fixed by the insurer's rates. In such a case, the insurer must act within 3 years of the effective date of the contract, provided it does so during the lifetime of the insured and within 60 days after becoming aware of the insured's real age.

EXAMPLE

Christian, who is 68 years old, dies. His $10,000 life insurance contract was to end at the age of 65. According to the insurer's records, Christian is 64 years old. In this case, the insurer will nevertheless have to pay the amount of $10,000, because the misrepresentation as to age was not discovered before the death.

Other misrepresentations

Misrepresentation is the giving of inaccurate information that could affect the premium rate or the decision to cover the risk[138] (art. 2408 *C.C.Q.*).

EXAMPLE 1

A person declares that he saw his doctor five times during the past five years for routine examinations. In fact, the person saw his doctor 10 times because he suffered from migraines.

EXAMPLE 2

A person declares that he has not smoked during the past year. In fact, he smoked several cigarettes at a high school reunion.

In *Lavoie* v. *Cie d'assurance-vie de Montréal*,[139] the client, who was also the insured, declared that he had never taken narcotics, which was not true, and also failed to declare that he had consulted a psychiatrist on a few occasions. The Court of Appeal terminated (annulled) the insurance contract due to the client's misrepresentations.

138. *2958-2951 Québec inc*. v. *Assurance-vie Desjardins inc.*, REJB 1999-10332 (C.S.).
139. [1989] R.R.A. 402 (C.A.).

In *Massy* v. *Cie d'assurance American Life*,[140] the Court of Appeal dismissed the beneficiary's claim. In response to a specific question asking whether the beneficiary had ever suffered from headaches, asthma or allergies, he had answered "no." However, three years earlier, he had stated the contrary to his physician. The Court of Appeal stated that if the client had not made misrepresentations in the insurance application, a reasonable insurer would have reviewed the application much more exhaustively and the client might have been subject to an additional premium or the requested insurance coverage might have been refused.

In *Ouellet* v. *Industrielle (L'), Cie d'assurance sur la vie*,[141] the insured died as a result of a car accident. He had declared that he had not used tobacco in the previous 12 months, although he had, in fact, smoked a few small cigars. The Court of Appeal ruled that the questionnaire left no room for interpretation and it terminated (annulled) the insurance contract due to the insured's misrepresentation.

However, a client does not need to declare common symptoms, whose importance he does not realize, and for which he did not consult a doctor.[142]

In the absence of fraud, a misrepresentation or concealment must be invoked within two years following the effective date of the policy.[143] In disability insurance, when there is a misrepresentation or concealment, the insurer may terminate (annul) or reduce the insurance coverage if the disability occurs during the first two years of the insurance.[144]

Concealment

Concealment is a voluntary or involuntary omission of a fact or information that could affect the premium rate or the insurer's decision to accept the risk. Concealment is caused by the insured's oversight or by his failure to declare information which he did not consider relevant.[145] The insured's intent is not to mislead the insurer.[146]

The term "relevant" is important, because the insurer can argue that the client or the insured is guilty of concealment, even if the client or the insured considered this element as being irrelevant with respect to his obligation to declare.

140. [1992] R.R.A. 154 (C.A.).
141. *Ouellet* v. *Industrielle (L'), compagnie d'assurance sur la vie*, [1993] R.R.A. 464 (C.A.).
142. *Geoffroy* v. *Westbury Canadienne, compagnie d'assurance-vie*, B.E. 2000BE-1058 (C.S.).
143. *Civil Code of Québec*, CQLR, c C-1991, art. 2424. See also *Gagnon* v. *Constellation-vie (La),* J.E. 88-379 (C.S.).
144. *Gagnon* v. *Constellation-vie (La)*, J.E. 88-379 (C.S.).
145. *Biscuits Leclerc Ltée* v. *Compagnie d'assurance-vie Transamérica Occidental*, REJB 1997-08712 (C.S.).
146. Didier Lluelles, *op. cit.,* pp. 240 and 281 (pp. 207 and 242 of the 5th revised edition of 2014).

EXAMPLES

- Not disclosing a urinary tract infection treated one year earlier.
- Not declaring that a person regularly takes certain medication.
- Not declaring that a person was hospitalized or had surgery.

In some situations, the applicant may be unaware that he is concealing facts.

EXAMPLE

Martine has cancer. Out of concern, her doctor never told her the truth about her state of health. If Martine purchases life insurance, the insurer will not be able to ask for the termination (annulment) of the contract under the pretext that there was concealment. The insured cannot be faulted for being unaware of her real state of health.

Once discovered, misrepresentations and concealment can influence the insurer's appraisal of the risk and then justify the termination (annulment)[147] or reduction of insurance coverage.

In this regard, an insurer who discovers a misrepresentation or concealment can ask for the termination (annulment) of the insurance contract, provided it does so within two years of the effective date of the insurance coverage (art. 2424 *C.C.Q.*). This gives rise to two situations:

- If the insured is alive, the insurer will send him a letter notifying him of the termination (annulment) of the contract and a cheque representing all the premiums paid. If the insured wants to contest the decision, he must bring the dispute before a court of competent jurisdiction;
- If the insured dies within two years of the effective date of the insurance, the insurer may refuse to pay the face amount. It is then up to the beneficiary to take measures against the insurer.

If the insured dies more than two years after the effective date of the insurance, the insurer cannot refuse to pay the insured amount unless the misrepresentation or concealment is fraudulent.

In conclusion, any misrepresentation, no matter how unimportant it may seem today, can lead the insurer to refuse to pay the face amount, even if the cause of death is unrelated to the misrepresented facts.

147. *Assurance-vie Desjardins* v. *Éthier (Succession de)*, REJB 1997-00392 (C.A.).

EXAMPLE

Mathieu takes out life insurance. He declares that he has not smoked during the past year. This statement is false, because he smoked three cigarettes during an evening out at a discotheque. A few months later, he dies following an automobile accident. The insurer refuses to pay the face amount, because it learned during its investigation that there was a misrepresentation with respect to the use of tobacco. Several people who were at the discotheque that evening testify about this. They are unfamiliar with the field of insurance and believe that, in such a case, the court will order the insurer to pay the face amount, but they are wrong. The fact that Mathieu died due to an automobile accident will not make any difference to the court.[148]

Fraud

Fraud is an action carried out in bad faith in order to deliberately deceive. In the case of an insurance contract, fraud consists of voluntarily giving misinformation or not revealing certain essential information with the clear and firm intention of misleading the insurer.[149]

In insurance of persons, fraud also results from a misrepresentation by the client or the insured who is aware that if the truth were told, the insurer might not issue the policy under the negotiated terms.[150] Although the misrepresentation must be intentional (or deliberate),[151] it need not be premeditated.[152] Since everyone is presumed to act in good faith,153 the insurer has the burden of proving the fraud.[154]

If fraud is proven, the insurer can ask for the termination (annulment) of the contract at any time. It is not always easy to draw a line between misrepresentation and fraud. The insurance of persons representative must be vigilant and perceptive.

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148. *Ouellet* v. *Industrielle (L'), compagnie d'assurance sur la vie*, [1993] R.R.R. 464 (C.A.).
149. *Boulianne* v. *SSQ Mutuelle d'assurance groupe*, REJB 1997-02899 (C.S.).
150. *Giguère* v. *Mutuelle vie des fonctionnaires du Québec*, [1995] R.J.Q. 1990 (C.A.); *Desjardins sécurité financière, compagnie d'assurance-vie* v. *Tétreault*, 2009 QCCA 2183; *Axa Assurances inc.* v. *Délicatesse Nourcy inc.*, J.E. 2002-772 (C.A.); *Phillipp* v. *Sun Life du Canada, compagnie d'assurance-vie*, 2007 QCCS 555; *Transamerica Life Insurance Co. of Canada* v. *Patel*, J.E. 2003-869 (C.S.); *Tremblay* v. *Clarica, compagnie d'assurance sur la vie*, J.E. 2000-1697 (C.S.); *Union-Vie (L')*, *compagnie mutuelle d'assurances* v. *Laflamme*, 2005 QCCA 394; *McDuff* v. *Industrielle Alliance (L'), assurances et services financiers inc.*, 2009 QCCS 530.
151. *Falduto* v. *Compagnie d'assurance-vie Federated du Canada*, 2008 QCCA 438; *Gravel (Succession de)* v. *Compagnie d'assurance du Canada sur la vie*, 2007 QCCS 5796.
152. *Union-Vie (L'), compagnie mutuelle d'assurances* v. *Laflamme*, 2005 QCCA 394; *Gravel (Succession de)* v. *Compagnie d'assurance du Canada sur la vie*, 2007 QCCS 5796.
153. *Civil Code of Québec*, CQLR, c C-1991, art. 2805.
154. *Rongionne* v. *Mutuelle des fonctionnaires du Québec*, [1989] R.R.A. 673 (C.S.), appeal dismissed in J.E. 95-1026 (C.A.); *Giguère* v. *Mutuelle vie des fonctionnaires du Québec*, J.E. 95-1441 (C.A.); *S.A.* v. *Compagnie d'assurance-vie RBC*, 2009 QCCS 3280; *Gravel (Succession de)* v. *Compagnie d'assurance du Canada sur la vie*, 2007 QCCS 5796.

Facts known to the insurer or presumed to be known from their notoriety

The client does not have to declare facts known to the insurer or presumed to be known from their notoriety (art. 2408 *C.C.Q.*).

In *Jobin-Blouin* v. *La Mutuelle du Canada, Cie d'assurance sur la vie*,[155] the insurance of persons representative knew that the insured had an alcohol problem and high blood pressure and that he was the apparent mandatary of the insurer. He "knew" about the insured's problems.[156] Therefore, the insured was not obliged to declare them to the insurance of persons representative.

However, the representative must declare these facts to the insurer which, otherwise, could exercise recourse against the representative.

A notorious fact is one that a reasonably competent insurer should know when it operates in a particular field.[157] For example, the health risks of asbestos is a notorious fact.[158]

2.3.5.3 Cancellation for non-payment of life insurance premiums

In life insurance, other than the initial premium which must be paid in order for the life insurance to come into effect (art. 2425 *C.C.Q.*), non-payment of the premiums leads to the automatic cancellation of the contract after 30 days (art. 2427, para. 1 *C.C.Q.*). This cancellation is automatic and the insurer does not have to send a notice of default to the client.[159]

It should be noted that if the client pays the premium within the 30-day grace period given to him, the insurance will remain in effect.[160] Failing payment within that period, the insurance is cancelled.

However, if the life insurance contract has a cash surrender value, the insurer can pay the premium from the cash surrender value in order to keep the contract in effect.

The cancellation is not final, however (also see the section dealing with reinstatement following cancellation for non-payment of premiums), since the insurer is obliged to reinstate the individual life insurance under the following conditions (art. 2431, para. 1 *C.C.Q.*):

- The client applies for the reinstatement within two years of the date of the cancellation; and
- The insurer determines that the insured still meets the insurability conditions of the cancelled contract.[161]

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155. J.E. 85-1056 (C.S.).
156. See also: *Lehoux* v. *Union-vie (L'), compagnie mutuelle d'assurances*, J.E. 2003-599 (C.S.).
157. *2849-7378 Québec inc.* v. *Groupe Commerce (Le), compagnie d'assurances*, J.E. 2002-513 (C.S.).
158. *Canadian Indemnity Co.* v. *Canadian Johns-Manville co.*, [1990] 2 S.C.R. 549.
159. *Économie (L'), mutuelle d'assurance* v. *Roy*, J.E. 85-343 (C.A.); *Compagnie d'assurance-vie Eaton* v. *Leblond, Buzetti*, J.E. 96-1995 (C.A.).
160. *Rocheleau* v. *Union-vie, compagnie mutuelle d'assurance*, REJB 1999-13793 (C.S.).
161. *Harvey-Côté* v. *National Life Assurance Co. of Canada*, J.E. 91-1445 (C.A.); *Compagnie d'assurance-vie Eaton* v. *Leblond, Buzetti*, J.E. 96-1995 (C.A.).

2.3.5.4 Cancellation for non-payment of sickness and accident insurance premiums

In sickness and accident insurance, non-payment of the premiums while the policy is in effect leads to the cancellation of the contract only if the insurer gives the client 15 days' prior notice to such effect (art. 2430 *C.C.Q.*). Thus, in the case of sickness and accident insurance, if the insurer fails to send a prior written notice of cancellation to the client, the coverage will remain in effect.

2.3.5.5 Reinstatement following cancellation for non-payment of premiums

Only an individual life insurance contract that has been cancelled for non-payment of the premium (art. 2427 *C.C.Q.*) can be reinstated under certain conditions to be met by the client. These conditions are set forth in article 2431 *C.C.Q.*:

- Apply for the reinstatement within two years of the date of the cancellation;
- Prove that the insured still meets the insurability conditions under the cancelled contract;
- Pay the overdue premiums; and
- Repay the advances obtained on the policy.

Time limit for reinstatement

To meet the first condition, the client must apply to the insurer to reinstate the policy. This application must be made within two years following the date of the cancellation.

EXAMPLE

The life insurance contract purchased by Dimitri took effect on May 1, 2010. According to his contract, the premium (other than the first one, arts. 2425 and 2427 *C.C.Q.*) must be paid on the first day of each month. On May 1, 2012, Dimitri forgets to pay it. His insurance will thus remain in effect for 30 days, i.e. until May 31, 2012.

Dimitri also fails to pay the premium before the expiry of that 30-day period. The insurance contract will therefore be cancelled automatically. Dimitri then has a period of two years from the date of the cancellation of his contract (May 31, 2012) to apply to the insurer for the reinstatement of his contract, i.e., until May 31, 2014. If Dimitri had died during the time period from May 1, 2012 to May 31, 2012, inclusively, the insurer would have been obliged to pay the face amount to the designated beneficiary or to Dimitri's succession, as the case may be.

Proof of insurability

The client's application for reinstatement of the cancelled contract will be refused if the insured's state of health deteriorated since the contract was purchased and the insured no longer satisfies the insurability conditions.

Payment of overdue premiums

When reinstatement is requested, all overdue premiums (including accrued interest) must be paid.

Repayment of advances

A "policy advance" is an amount of money advanced by the insurer to the owner of the contract (policyholder) from its actuarial reserve for the individual policy. The advance reduces the future benefit by the amount of the advance.[162] When reinstatement is requested, all advances made by the insurer before the cancellation of the policy must be repaid. The repayment must include interest at the rate in effect at the time of the advances (art. 2431 *C.C.Q.*).

Effect of reinstatement

Pursuant to article 2434 *C.C.Q.*, as of the date of the reinstatement of the insurance contract, the two-year period during which the insurer can seek the termination (annulment) of the contract or a reduction of coverage by reason of misrepresentation or concealment (art. 2410 *C.C.Q.*), or invoke an exclusion clause due to suicide (art. 2441 *C.C.Q.*), starts again.[163]

2.3.6 Assignment and hypothecation (mortgaging) of rights arising from a contract of insurance

2.3.6.1 Assignment of policy

Assignment during the client's lifetime

Assignment consists in transferring the client's rights and obligations under an insurance policy to another person with an interest in the insured's life or health and thereby replacing the client. Since January 1, 1994, article 2418 *C.C.Q.* has provided that if the new policyholder does not have an insurable interest at the time of the assignment, the assignment will be null and void, unless the insured has given his written consent to the assignment.

Upon an assignment, the designation of beneficiaries and subrogated policyholders is automatically revoked (art. 2462 *C.C.Q.*), thereby allowing the assignee (the new client) to designate a new beneficiary. However, there is one exception: if the beneficiary was irrevocable, the assignee cannot

162. Didier Lluelles, *op. cit.,* 2009, pp. 460 and 461 (pp. 394 to 396 of the 5th revised edition of 2014).
163. *1558-0894 Québec inc*. v. *La Compagnie d'assurance Standard Life*, [1999] R.J.Q. 729 (C.A.); *La Solidarité, Compagnie d'assurance sur la vie* v. *Poulin*, J.E. 99-732 (C.A.).

change the irrevocable beneficiary unless the irrevocable beneficiary consents. Thus, the designation of an irrevocable beneficiary, unlike that of a revocable beneficiary, is not automatically revoked by an assignment.[164]

Pursuant to article 2461 *C.C.Q.*, an assignment cannot be set up against the insurer, the beneficiary or third parties until the insurer receives notice thereof. Where there are multiple assignees, priority is determined by the date on which the insurer receives the notice.

EXAMPLE

Jeannot's mother, Megan, takes out a $100,000 insurance policy on the life of her grandson, Alexis, Jeannot's son, when he is only a few months old. She designates her husband Étienne as the irrevocable beneficiary. On her 70th birthday, Megan assigns the contract to Jeannot. This is an assignment by Megan to an individual, Jeannot, who has an insurable interest in the life of Alexis, his son (the insured person). The insurer is required to give effect to this assignment only if it receives a notice thereof. Moreover, if Alexis dies, Étienne will receive the face amount in his capacity as the irrevocable beneficiary.

The assignee (the person to whom the insurance policy is assigned) must have an insurable interest in the life of the insured, unless the insured has consented in writing to the assignment.[165] However, it is not necessary for the assignor (the person assigning the policy) to have maintained his insurable interest on the date of the assignment.[166]

Assignment due to the death of the policyholder

See the section dealing with clients (policyholders) and subrogated policyholders.

2.3.6.2 Hypothecation (mortgaging) or collateral security

Article 2660 *C.C.Q.* defines a hypothec (mortgage) as a real right on property—that is, a right that attaches to immovable or movable property and not to a person—that guarantees the performance of an obligation. "It confers on the creditor the right to follow the property into whomsoever's hands it may come, to take possession of it, to take it in payment, to sell it or to cause it to be sold and thus to have a preference upon the proceeds of the sale, according to the rank as determined in this Code."

164. Didier Lluelles, *op. cit.,* pp. 153 to 156 (pp. 129 to 132 of the 5th revised edition of 2014).
165. *Civil Code of Québec*, CQLR, c C-1991, art. 2418, para 2.
166. *Piché* v. *Arontec inc.*, 2006 QCCS 2721, appeal dismissed in 2008 QCCA 744.

A client can hypothecate (mortgage) his rights under the insurance policy in favour of one of his creditors in order to secure a debt. The hypothecation (mortgaging) automatically entails the revocation (cancellation) of the designation of any revocable beneficiary and any subrogated policyholder up to the amount of the debt. The hypothec (mortgage) confers a right on the hypothecary (mortgage) creditor only up to an amount equal to the balance of the debt, interest and included accessories (art. 2462 *C.C.Q.*).

EXAMPLE

Jean-Simon wants to borrow $30,000 from François. François agrees to lend him the money, but requires a guarantee to ensure he will be reimbursed if Jean-Simon dies.

Jean-Simon holds a $100,000 life insurance policy. The revocable beneficiary designated in the policy is Carole, his wife. Jean-Simon decides to grant François a movable hypothec (mortgage) and, as a result, he consents to hypothecate (mortgage) his insurance contract as collateral security to guarantee the $30,000 debt. If Jean-Simon dies while he still owes François $20,000, i.e., before having fully reimbursed his debt, François will have the right to receive an amount equal to the unpaid balance owed to him, namely, $20,000. As the designated beneficiary, Carole will receive the balance of the face amount, namely, $80,000.

The hypothecation (mortgaging) of rights arising from an insurance contract does not have the effect of revoking the designation of an irrevocable beneficiary for an amount equal to the balance of the hypothecary (mortgage) creditor's loan, except if the irrevocable beneficiary has consented thereto.

As with an assignment, the hypothecation (mortgaging) of a right resulting from an insurance contract cannot be set up against the insurer, the beneficiary or third parties until the insurer receives notice thereof. Where there are multiple hypothecs (mortgages), priority is also determined based on the date on which the insurer receives the notice (art. 2461 *C.C.Q.*). Insurers often have a form that constitutes the notice of hypothec (mortgage).

EXAMPLE

Jason has $100,000 of life insurance. He takes the following steps:

- On February 15, 2014, he designates Lily as a revocable beneficiary on a form that he sends to the insurer;
- On March 15, 2014, he hypothecates (mortgages) his insurance contract in favour of Mario in order to guarantee a $100,000 loan and he notifies his insurer in writing;

- On April 15, 2014, he once again hypothecates (mortgages) his insurance contract, but this time in favour of Sandrine, in order to guarantee another loan for an amount of $5,000, and he notifies his insurer in writing.

If Jason dies and he still owes Mario $100,000 and Sandrine $5,000, Mario will receive the entire face amount. Lily will not receive anything, because her designation was totally revoked by the hypothec (mortgage) whose balance is equal to the face amount. Moreover, Sandrine will not receive anything due to the priority granted by law to the notice of hypothec (mortgage) received first by the insurer.

A movable hypothec (mortgage) on the rights arising under a policy can also confer upon the creditor the right to request the cash surrender value in the event of default.

2.3.6.3 Other rights of the client

Participation right (participating policies)

Some individual life insurance policies entitle the client to receive dividends. These are referred to as participating policies.

Pursuant to article 2454 *C.C.Q.,* the client has the right to receive these dividends, even if an irrevocable beneficiary has been designated.

Cash surrender value

Term life insurance policies generally do not have a cash surrender value, unlike whole life (permanent) insurance policies.

The client has the power to exercise his right to the cash surrender value, in whole or in part. If he asks the insurer for the entire cash surrender value, this puts an end to the life insurance policy. If he asks for only part of the cash surrender value, the life insurance policy will remain in effect, but in most cases, the face amount will be reduced in proportion to the partial surrender.

If the client asks for the cash surrender value of his policy when an irrevocable beneficiary has been designated, the insurer will refuse the request unless the client provides the insurer with the designated beneficiary's written consent.[167] If the irrevocable beneficiary is a minor, the client will have to wait until the beneficiary reaches the age of majority before asking him to consent to the surrender of the policy.[168]

167. *Civil Code of Québec*, CQLR, C C-1991, art. 2460.
168. *Bélanger* v. *Bélanger (Succession de)*, [2009] J.Q. no. 16784, paras. 29 and 30, 32 to 34 and 42 to 44.

Policy advance

When an individual life insurance policy has a cash surrender value, the client can ask the insurer to lend him part of that value.[169] If the insurer agrees, the policy remains in effect for the entire face amount.

The client can repay the insurer. The insurer's loan bears interests from the date of the disbursement by the insurer to the client.

If the client has not reimbursed the insurer by the time the insured dies, or has only partially reimbursed the insurer, the face amount will be reduced by the unpaid amount of the loan and any interest owed to the insurer.

2.4 General provisions of individual insurance contracts, exclusion provisions and claims

2.4.1 General provisions of individual insurance contracts

2.4.1.1 Types of insurance coverage (insurance coverage or protections)

The word "coverage" refers, in simple terms, to the insured risk. It is the insurance protection offered by the insurer. The scope of the coverage set out in the contract as well as the reductions or exclusions imposed by the insurer in an insurance of persons contract will be examined below. An insurance of persons contract can contain several types of coverage, especially in group insurance. Thus, mostly in group insurance, it is frequent that an insurance policy contains not only a life insurance coverage, but also an insurance coverage in case of accidental death, a disability insurance coverage (which is an insurance against sickness and accident) and various other insurance coverages against sickness and accident.

The insurance contract determines the risk covered; in other words, it specifies the event for which coverage is provided (arts. 2399, 2415 and 2416 *C.C.Q.*). It is important for the client to carefully read these clauses and definitions, because they form the basis for the insurer's acceptance or refusal of a claim.

Life insurance is one type of coverage offered in insurance of persons, but a life insurance policy can also contain other insurance coverage, such as coverage against sickness and accidents. These clauses are then referred to as being accessory to the life insurance contract (art. 2394 *C.C.Q.*). The opposite is also possible: an accident and sickness insurance contract can contain life insurance coverage as an accessory.

However, when it is impossible to determine which coverage is the principal coverage under an insurance contract, the rules of life insurance must be applied to claims based on the life

169. Didier Lluelles, *op. cit.*, pp. 460 and 461 (pp. 394 to 396 of the 5th revised edition of 2014).

insurance coverage and the rules of accident and sickness insurance must be applied to claims based on the accident and sickness coverage.[170]

An insurance contract does not only define the scope of the coverage. It also sets out the coverage limitations, reductions and exclusions.

2.4.2 Coverage exclusion, limitation and reduction provisions

2.4.2.1 Distinction between coverage exclusion, limitation and reduction provisions

Limitations can apply, among other things, to the maximum amount of benefits the insurer will pay, or to the number of months (or weeks or age limit) during which the insurer will pay benefits. Coverage can also apply only to a certain type of situation or event.

In insurance of persons contracts, one speaks of a “reduction” or, sometimes, a “restriction.” These terms refer to a decrease in the coverage: the coverage will not apply in certain situations, or it will be limited, reduced or decreased based on certain facts, conducts, circumstances or conditions established by the insurer.

EXAMPLE

Restriction

An accident insurance policy states that a fracture or break must be diagnosed within 30 days of the accident, otherwise no benefits will be payable. This is a restriction.

EXAMPLE

Reduction

An insured who is 65 years or older on the date of the accident will only be entitled to 50% of the amounts indicated in the table of losses due to an accident. This is a reduction.

The term “exclusion” refers more particularly to an exception, that is, an event or circumstance that is not covered by the insurance contract. In a situation involving an exclusion expressly mentioned in the contract, no insurance coverage will be provided.

170. *Excelsior (L’), Compagnie d’assurance-vie* v. *S.S.Q. Mutuelle d’assurance-groupe*, [1993] R.R.A. 629 (C.A.), p. 631.

2.4.2.2 Legal exclusions

An insurance of persons contract contains legal exclusions and contractual exclusions. The client's intentional fault is considered to be a legal exclusion; it is a risk excluded by law without the contract having to mention it.

The example codified in the *C.C.Q.* is an attempt on the insured's life by the policyholder (art. 2443 al. 1 *C.C.Q.*). or by the designated beneficiary (art. 2443 al. 2 *C.C.Q.*).

2.4.2.3 Contractual exclusions

Contractual exclusions are set out by the insurer and pertain to an illness,[171] the origin of the loss[172] or the circumstances in which it occurred, suicide or the commission of an indictable offence[173] (arts. 2402, para. 1 and 2441 *C.C.Q.*).

These terms all involve circumstances that have the same effect—the absence of benefits or the reduction of the specified benefit if the situation or event indicated in the insurance policy occurs. According to article 2404 *C.C.Q.*, the insurer cannot invoke any exclusions or reduction of coverage clauses except those clearly indicated under an appropriate heading in an insurance of persons contract.

EXAMPLE 1

In an accident insurance policy, the insurer may state that it will not pay any benefits for an accident resulting from the practice of gliding, hang gliding, parachuting, mountain climbing, scuba diving or bungee jumping, or the participation by the insured in car racing.

EXAMPLE 2

An insurer may state that it will not pay any benefits for an accident resulting from a riot, insurrection or war, or the participation by the insured in a crime.

171. *Bastien* v. *Crown, compagnie d'assurance-vie*, REJB 1998-10165 (C.S.).
172. *Chevrier* v. *Union canadienne, compagnie d'assurance*, REJB 1998-04451 (C.A.).
173. *Desjardins Sécurité Financière, compagnie d'assurance-vie v. Émond, 2017 SCC 19, March 31, 2017, Rosalie Silberman Abella, Michael J. Moldaver, Andromache Karakatsanis, Richard Wagner, Clément Gascon, Suzanne Côté and Russell Brown, JJ,upholding: Desjardins Sécurité financière, compagnie d'assurance-vie v. Émond, 2016 QCCA 161, St-Pierre, Vauclair and Mainville, JJA,February 2, 2016, upholding: Émond v. Desjardins Sécurité financière, J.E. 2014-786 (C.Q), Céline Gervais, J.*

Exclusion of a disclosed disease or ailment

Provided the insurer complies with the conditions set forth in article 2417 *C.C.Q.*, it can exclude from the policy certain diseases or ailments known to the participant before the effective date of the contract. The following expressions are generally used to describe these types of clauses: “pre-existing illness,” “pre-existing condition” or “pre-existing medical condition.”

In group insurance, participants must sometimes fill out a medical questionnaire. In such a case, the insurer may not exclude or reduce the coverage by reason of a disease or ailment disclosed in the enrolment form, unless a clause in the policy clearly indicates the disease or ailment in question under an appropriate heading (arts. 2404 and 2417, para. 1 *C.C.Q.*). An exclusion clause which does not meet these requirements is null. However, this rule does not apply in the case of fraud.

EXAMPLE

Lucie has diabetes. In 2015, she decides to subscribe to the group insurance plan of her professional association. The insurer agrees to cover Lucie. However, an exclusion clause explicitly provides that no benefits will be paid for 20 weeks following the effective date of her insurance certificate for a disability resulting from her diabetes.

In group insurance, a specific exclusion clause concerning declared diseases or ailments applies, in theory, for limited periods of 13 or 26 weeks. After that time, the exclusion is no longer in effect if the participant worked during that time.

Exclusion of an undisclosed disease or ailment

Generally in individual insurance and sometimes in group insurance, the client/participant fills out a medical questionnaire. In such a case, except in the case of fraud, an insurer may not, by a general clause, exclude or limit the coverage by reason of a disease or ailment not disclosed in the enrolment form unless the disease or ailment appears within the first two years of the insurance (art. 2417, para. 2 *C.C.Q.*). In the event of an undisclosed disease or ailment, it can be a disease or ailment known or unknown by the client or the insured.

EXAMPLE

Martin purchased an individual disability insurance policy in August 2014. In March 2015, he had to leave work for an indeterminate period of time due to his illness, multiple sclerosis. He claimed benefits from his insurer. The insurer refused to pay, because when Martin’s policy came into effect, he had previously received medical care for his pre-existing illness during the 12 months preceding the date of his application. Martin sued his insurer. Martin’s insurance policy contained an exclusion with respect to an

undisclosed disease or ailment: "No benefits will be payable for disability directly or indirectly resulting from one or more of the following: limitations relating to a pre-existing medical condition, injury or illness for which treatment was received within 12 months preceding the date on which you became an insured […]" Martin's medical reports revealed that he had consulted a doctor within 12 months of the effective date of his policy, and the doctor had noted that he had multiple sclerosis. He had prescribed Motrin, an over-the-counter drug. The court held that the insurer's decision was well-founded given the circumstances of the case and the exclusion clause.[174]

2.4.2.4 Distinction between co-ordination and reduction of benefits

This distinction is discussed in Chapter 1 of this manual.

2.4.2.5 Disability and retirement benefits and other amounts governed by co-ordination and reduction provisions

This subject is discussed in Chapter 1 of this manual, in the section that deals with coordination and integration of benefits between public plans and private insurance plans.

2.4.2.6 Suicide exclusion

One of the most common contractual exclusions found in life insurance is the "suicide clause." Suicide defined as intentionally causing one's own death. Unless a life insurance contract contains a clause excluding suicide, the insurer cannot invoke suicide to refuse payment of the life insurance benefit.[175]

Moreover, unlike other contractual exclusions, a suicide clause is limited in time (two years). Thus, insurers cannot exclude suicide if it occurs after two years of uninterrupted insurance[176] (art. 2441 *C.C.Q.*). This period may be reduced by agreement between the insured and the insurer, but it cannot be increased (art. 2414 *C.C.Q.*).

The starting point for the time limit is the effective date of the contract, that is, when the insurer accepts the initial application, without modification, provided the initial premium has been paid and there has been no change in the insurability of the risk[177] since the application was signed (art. 2425 *C.C.Q.*). If the insurance coverage is increased, the effective date of the additional coverage (additional amount) constitutes the starting point for the two-year time limit of the suicide clause as regards the additional amount.

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174. *Tassé* v. *Canada-Vie,* REJB 2000-16726 (C.S.).
175. *Landry-Chicoine* v. *Assurance-Vie Desjardins*, J.E. 91-35 (C.A.).
176. *Cardinal* v. *Sun Life du Canada, compagnie d'assurance-vie*, REJB 1999-13297 (C.A.).
177. *Biscuits Leclerc Ltée* v. *Compagnie d'assurance-vie Transamérica Occidental*, REJB 1997-08712 (C.S.).

Furthermore, pursuant to article 2434 *C.C.Q.*, when an insurance contract is reinstated, the suicide clause and any misrepresentations or concealment pertaining to risk begin to run again as of the reinstatement date.

The burden of proving suicide rests on the insurer.[178]

Moreover, in accidental death insurance, suicide is not considered an accident.[179]

2.4.3 Contract amendments (riders)

Article 2405 *C.C.Q.* provides that once an insurance contract has been entered into, any changes the parties wish to make to the contract must be evidenced in a separate document; this document is generally referred to as a "rider" to the policy. Article 2405 *C.C.Q.* also specifies that any rider stipulating a reduction of the insurer's liability or an increase in the insured's obligations, other than an increased premium, has no effect unless the client consents to the change in writing.

2.4.3.1 Amendment other than upon renewal of an insurance contract

The contract may be amended, before it is terminated or is renewed, by means of a rider. The client must consent thereto in writing if the amendment has the effect of reducing the insurer's obligations or increasing the client's obligations (other than a premium increase).

2.4.3.2 Amendment upon renewal

Unless the contract contains an automatic renewal clause, it ends upon the expiry of the specified term (e.g., term life insurance). If the client wishes to extend the coverage beyond that date, the parties must agree on the issuance of a new policy.

When the insurer wishes to amend the contract upon its renewal (accident and sickness insurance contracts often contain end dates with a renewal), it must clearly indicate the change in a separate document from the rider which stipulates it. In such a case, the change is presumed to be accepted by the insured 30 days after receipt of the document.

Renewal of an insurance contract is an agreement in and of itself. To be valid, it must comply with the rules relating to consent. The coverage may be extended on the same terms as in the initial contract or contain modifications. In order to be set up against the insured, the modifications must comply with article 2405 *C.C.Q.* The renewal may be evidenced by a certificate of renewal or the

178. *Parenteau* v. *Personnelle (La), compagnie d'assurances du Canada*, B.E. 99BE-618 (C.Q.); *Shallow* v. *Colonia Life Insurance Co*., J.E. 95-1734 (C.S.).
179. *Vallée* v. *Assurance-vie Desjardins*, J.E. 2001-1547 (C.A.); *McGuerrin-Houle* v. *Cie d'assurance Combined d'Amérique (La)*, [1986] R.R.A. 701 (C.P.).

issuance of a policy. Even where a policy is issued, the renewal does not constitute a new insurance contract, unless substantial amendments have been made to the basic contract.[180]

Unless otherwise stipulated in a life insurance contract, the client must make a new declaration of risk when a term life insurance contract is renewed.

2.5 Rules relating to the designation and revocation of beneficiaries, to the payment of the death benefit and to the exemption from the seizure of benefits

The rules relating to the beneficiary of an insurance policy upon the death of the insured are set out in articles 2445 to 2460 *C.C.Q.*

2.5.1 Death benefit payable to a designated beneficiary

The beneficiary is the person designated to receive benefits under an insurance or annuity contract. In individual insurance of persons and annuity contracts, only the client, as the owner of the contract, has the right to designate a beneficiary.[181] Upon the death of the insured person, the beneficiary will be entitled to the death benefit under the contract.

Article 2447 *C.C.Q.* specifies that it is not necessary for the beneficiary to exist or be expressly determined at the time of the designation. What is important, is that he exists "at the time his right becomes exigible," i.e., upon the death of the insured person. Thus, as regards a child who has been conceived, but is not yet born at the time of the death of the insured person, the *C.C.Q.* stipulates that his designation as a beneficiary will be valid, provided he is born alive and viable and his quality as beneficiary is recognized.

EXAMPLE

The designation of beneficiary indicates "all my children." Pierre has only one child when he makes the designation. At the time of his death, he has two children and a third on the way. The three children will therefore be beneficiaries, unless the third child dies before he is born.

180. See, in matters of group insurance, the ruling in *Lachapelle* v. *Croix Bleue (La) (Mutuelle-vie du Québec),* J.E. 96-494 (C.A.).

181. *Citadelle Assurance* v. *Beaulé,* J.E. 87-1232 (C.A.). (In group insurance, insurance on the life of the participant's spouse must be paid to the participant's succession in accordance with the contract (in this case, to the participant's succession); *Bourgouin* v. *Clarica,* June 7, 2002, C.Q. (Small Claims Division), no. 200-32-027183-010.

The face amount that is payable to the designated beneficiary does not form part of the client's succession. Therefore, it cannot be used to pay the succession's debts or be seized by the creditors of the succession (art. 2455 *C.C.Q.*).[182]

2.5.1.1 Right and capacity to designate a beneficiary

Pursuant to article 2445 *C.C.Q.*, the holder (or a participant under a group insurance contract, as the case may be) has the right to designate one or more beneficiaries of the insured amount.

Since this is a personal right, a mandatary acting pursuant to a power of attorney, a mandatary in the event of incapacity, a tutor or a curator does not have the right to designate a beneficiary instead of the policyholder (client).[183] A minor (except in certain situations[184]) or a person of full age who is incapable does not have the right to designate a beneficiary.

A policyholder's "designation" of the succession as the recipient of the insured amount does not constitute the designation of a beneficiary.[185]

As regards insurance taken out on the life of the client, if no beneficiary is designated and the "succession of the policyholder" box has not been cheicked, upon the death of the client, the death benefit will be payable to the client's succession. As regards insurance taken on the life of a third party (someone other than the client), if no beneficiary has been designated, upon the death of the insured, the death benefit will be payable to the policyholder.

When the policyholder designates himself as the beneficiary of insurance on his own life, which is not a genuine designation of a beneficiary,[186] the death benefit will be payable to his succession. When the policyholder designates himself as the beneficiary of insurance on a third party's life, upon the death of the insured, the death benefit will be payable to the policyholder.

2.5.1.2 Difference between designated beneficiary and succession

When the death benefit (the insured amount) is payable to a designated beneficiary, it does not form part of the policyholder's succession (art. 2455 *C.C.Q.*) as mentioned above.

When the death benefit is payable to the client's succession, the client's creditors (in other words, the creditors of the client's succession) must be paid before its legatees and heirs. This means the

182. *Clément* v. *Clément*, J.E. 2001-686 (C.Q.); *Industrielle-Alliance (L'), compagnie d'assurance sur la vie* v. *C.C.*, J.E. 2003-1277 (C.A.).
183. *Bourgouin* v. *Clarica,* June 7, 2002, C.Q. (Small Claims Division), no. 200-32-027183-010. See also: Madeleine Cantin Cumyn and Michelle Cumyn, *L'administration du bien d'autrui*, 2nd ed., Cowansville, Les Éditions Yvon Blais inc., no. 216, p. 205.
184. See section 2.3.1.1, "Incapacity and minors."
185. *Civil Code of Québec*, CQLR, C C-1991, art. 2456. See, in contrast, art. 2455.
186. *Citadelle Assurance* v. *Beaulé,* J.E. 87-1232 (C.A.). See, however, *Perron-Malenfant* v. *Malenfant (Trustee of)*, [1999] 3 S.C.R. 375, para. 54.

client's creditors will be paid in preference to the legatees by particular title and the heirs of the client's succession.

Consequently, if the policyholder's succession has more debts than assets, the legatees by particular title and the heirs of the policyholder's succession may not receive anything from the death benefit paid by the insurer.

What forms part of the succession

The insured amount (death benefit) under an insurance of persons or annuity contract will be paid to the succession if the client has indicated that the benefit is to be paid to its (art. 2456, para. 1 *C.C.Q.*):

- Succession;
- Assigns;
- Heirs;
- Liquidators; or
- Legal representatives.

The insured amount will also be paid to the succession if the client has used a term "similar" to those mentioned above. The following may be considered similar terms:[187]

- Successor at law;
- Legatees;
- Testamentary executors; and
- Trustees (in the absence of a trust that exists at the time of death).

Lastly, the insured amount will also be paid to the succession if the designated beneficiary is already deceased when the insured dies, unless a contingent beneficiary has been designated (art. 2447 *C.C.Q.*).[188]

2.5.1.3 Revocable beneficiary

Since October 20, 1976, the designation of a person as a beneficiary may be revoked at any time, unless otherwise stipulated (art. 2449 *C.C.Q.*). This means the client can change the designation of a beneficiary.

187. Didier Lluelles, *op. cit.*, p. 429 (p. 368 of the 5th revised edition of 2014). See also: *Robitaille* v. *Dion*, [1979] 1 S.C.R. 359.
188. Didier Lluelles, *op. cit.*, p. 432 (p. 29 of the 5th revised edition of 2014) (the author uses the expression "substitute beneficiary").

However, there are two important exceptions to this rule: the irrevocable beneficiary and the presumption in favour of the legal spouse (married spouse or civil union spouse).

First exception: Person designated irrevocably

If the client wishes, he can state that his beneficiary will be irrevocable. However, in most cases he should avoid doing so, especially if the beneficiary is a minor. A client who has designated his beneficiary irrevocably must obtain the beneficiary's consent if he wishes to change the designation or take certain steps, as the case may be. According to case law, a minor cannot consent to the revocation of his designation as an irrevocable beneficiary.[189]

Second exception: Married or civil union spouses

The designation of a person with whom the client (or policyholder) is married (spouse) or in a civil union as a beneficiary in a written document other than a will—such as a form provided by the insurer or the insurance application itself—is irrevocable,[190] unless otherwise stipulated in the document.

Thus, when a policyholder designates his legal spouse as a beneficiary, without further specification, the designation will be considered irrevocable.

However, the irrevocable nature of such a designation is not final until the insurer receives the written document (art. 2451 *C.C.Q.*). After this time, the client can no longer revoke the beneficiary unless he obtains his consent. Moreover, only a written waiver from the irrevocable beneficiary can bind the insurer.[191]

Clearly, the client does not have to obtain this consent if the irrevocable beneficiary has died. The client is also not required to obtain it if there has been a divorce, annulment of marriage, or dissolution or annulment of a civil union since 1982. These rules will be examined in greater detail below.

Insurers' forms for designating a beneficiary generally contain a clause authorizing the client to choose whether the designation of the legal spouse (married spouse or civil union spouse, but not a *de facto* spouse (or common-law spouse)) as a beneficiary will be revocable or irrevocable.

2.5.1.4 Multiple beneficiaries

Very often, the client will designate several people as beneficiaries of his insurance. They are referred to as "co-beneficiaries" (art. 2456, para. 2 *C.C.Q.*). Where one of the co-beneficiaries predeceases the insured, the provisions of the *C.C.Q.* concerning accretion in matters of successions generally apply.[192] The following are an example of an accretion and an example where there is no accretion.

189. *Bélanger* v. *Bélanger (Succession de),* 2009 QCCS 6159, paras. 29 and 30, 32 to 34 and 42 to 44.
190. Art. 2449, para. 1 *C.C.Q.*
191. *Blanchard* v. *Lapointe,* [2001] R.R.A. 98.
192. Art. 755 *C.C.Q.*; Didier Lluelles, *op. cit.*, 2009, pp. 433 and 434 (p. 372 of the 5th revised edition of 2014).

EXAMPLE 1

Maxime designates Geneviève, Sofia and Jonathan as beneficiaries of his life insurance without specifying the share each one will receive. If Geneviève predeceases Maxime, when Maxime dies, Sofia and Jean will each receive half of the total insured amount (art. 2456, para. 2 *C.C.Q.*).

EXAMPLE 2

Maxime designates Geneviève, Sofia and Jonathan as beneficiaries of his life insurance. However, he specifies that Geneviève will receive half the insured amount, and Sofia and Jonathan will each receive one quarter of the insured amount. If Sofia predeceases Maxime, when Maxime dies, Geneviève will be entitled to half of the insured amount and Jonathan will be entitled to one quarter. In the absence of any other provision, the quarter originally intended for Sofia will be paid to Maxime's succession (arts. 756 and 2456 *C.C.Q.*).

2.5.1.5 Designation of beneficiary null under the law

Pursuant to sections 275 and 276 of *An Act respecting health services and social services*,[193] neither the owner of an establishment (a local community service centre, a hospital centre, a social service centre or a reception centre), a member of the establishment's board of directors, an individual employed in the establishment nor a member of a foster family may solicit or accept a gift or bequest from a person housed in the establishment or taken charge of by a foster family.

Article 761 *C.C.Q.* is similar. It provides that a bequest made to the owner, director or employee of a health or social services establishment who is neither the spouse nor a close relative of the testator is without effect if it was made while the testator was receiving care or services from the establishment and that a bequest made to a member of a foster family while the testator was residing with that family is also without effect.

In such a context, the case law has likened the designation of a beneficiary to a testamentary disposition or gift.[194]

It should also be noted that case law and doctrine applicable to matters of undue influence[195] also apply to the designation of beneficiaries.[196] Undue influence consists in attempting to obtain a succession or receive a gift from someone through reprehensible tactics.

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193. *An Act respecting health services and social services*, CQLR, c S-4.2.
194. *Charbonneau (Succession de)*, J.E. 2006-12 (C.S.). See also: *Commission des droits de la personne* v. *Bradette Gauthier,* J.E. 2010-1172 (Human Rights Tribunal).
195. This doctrine and case law is based, in particular, on articles 4, 154, 703, 706, 707, 1398, 1399, 1811 and 2849 *C.C.Q.*
196. *J.G.* v. *C.D.*, 2008 QCCQ 3201, Lina Bond J.

An insurance representative must not agree to be his client's designated beneficiary (excluding, for example, when the policyholder is his spouse or one of his parents or children). According to the *Code of ethics of the Chambre de la sécurité financière*,[197] an insurance representative who is designated as a beneficiary represents a situation of conflict of interests with his client. Insurers will refuse such a designation if they realize that the beneficiary is the client's insurance representative (except in the cases mentioned above) or that the insurance representative has falsely indicated a relationship with the policyholder so that the insurer will accept the designation of beneficiary. In addition, in such a situation, the insurance representative's certificate may be revoked.

2.5.2 Means of designating a beneficiary

A beneficiary must be designated in writing. This can be done in a number of ways (art. 2446 *C.C.Q.*):

- In a written document other than a will (most often in the application or in a form prepared for that purpose by the insurer); or
- In a will.

In Québec, a beneficiary may be designated electronically, because an electronic designation can constitute a written document within the meaning of *An Act to establish a legal framework for information technology*. However, few insurers currently accept this method.

2.5.2.1 Means of designating a beneficiary in an application (group insurance enrolment form), in a change of beneficiary form or in another written document

Conditions for validity

A designation need not be made in the application or in a form provided by the insurer. It may simply be written on a sheet of paper, in a letter addressed to the insurer, on a postcard or by any other means (art. 2446 *C.C.Q.*). However, it is more prudent to include it on a form provided by the insurer. Moreover, it must be possible to recognize and identify the beneficiary or beneficiaries the client or the holder wishes to designate.

EXAMPLE

The designation of a beneficiary on a sheet of paper found in a deceased client's chest of drawers is valid. However, it must be brought to the insurer's attention.

197. *Lévesque* v. *Giroux*, 2011 QCCQ 11691; *Champagne* v. *St-Jean,* CD00-1020, Disciplinary Committee of the *Chambre de la sécurité financière*, October 30, 2013; *Champagne* v. *Thibault*, CD00-0860, Disciplinary Committee of the *Chambre de la sécurité financière*, October 15, 2013.

It is not necessary that the designation of a beneficiary be dated to be valid. A signed but undated designation is valid if it is the only one there is. However, it is more prudent to date it. Where there are two dated and different designations, the most recent one will prevail. However, where there are two designations, one dated and the other undated, the insurer must request a court to determine the designation that applies.[198]

Revocability of a designation

A client or a policyholder may change the designation of a revocable beneficiary at any time. As the owner of the contract, he is the only person who can revoke the status he conferred on the beneficiary. To do so, it is preferable to use the change of beneficiary form provided by the insurer. However, the designation of a revocable beneficiary can be changed or revoked in any other written document. When such a change or revocation is made by will, the language used is very important.

2.5.2.2 Means of designating a beneficiary in a will

Before discussing how to designate a beneficiary in a will, we must first define the word "will" and then analyze the various forms of wills and the requirements for their validity.

Wills: Recap (see Chapter 1)

A will is a set of directions (usually written) in legal form for the disposition of one's property after death.[199] There are three forms of will:

- The notarial will;
- The will made in the presence of witnesses; and
- The holograph will.[200]

Transmission of face amount through a will

There are several ways to transmit the face amount of an insurance contract in a will. However, the wording proposed in the following examples is the most common.

EXAMPLE

A transmission in the form of a "bequest"[201] (also referred to as a "legacy") can be worded as follows in the will: "I bequeath all my property to Michel, including my insurance policies."

198. *Code of Civil Procedure*, CQLR, c C-25, arts. 33, 34 142, and 529 to 535.
199. *The Canadian Oxford Dictionary*, Toronto, Oxford University Press, 1998.
200. Art. 712 *C.C.Q.*
201. The word "bequest" means the disposition of one or more items of property – described specifically in a will – in favour of a person who is clearly identified or identifiable.

In this type of transmission, the face amount passes through the insured's succession first before being given to Michel. If the succession has more debts than assets, Michel may not receive any amount, since creditors are the first to be paid by law. In such a case, the insurer will pay the succession or its liquidator.

The following is an example of the designation of a beneficiary made by will.[202]

EXAMPLE

"I designate Michel as the beneficiary of my $50,000 insurance policy No. 1234 issued by *DEF Assurance-vie Inc.* on November 6, 1982."

In this case, the face amount no longer forms part of the succession. The insurer will give the face amount to Michel directly. Thus, even if the succession has more debts than assets, the creditors will not be able to touch the face amount.

Conditions for the validity of a designation of beneficiary in a will

Any designation in a will is subject to specific rules. How each of these rules applies must be known when the face amount is transmitted in the form of a bequest or the designation of a beneficiary.

A will is always revocable, i.e. it can be cancelled. If the testator revokes his will, the transmission of the face amount in the form of a bequest or the designation of a beneficiary is also revoked (art. 2450, para. 1 *C.C.Q.*). It should also be noted that the designation of a beneficiary in a will is always revocable (art. 2449 *C.C.Q.*), even if the testator has specified that the designation is irrevocable.

If a court invalidates the will for a defect of form only, the transmission of the face amount in the form of a bequest will be invalidated. However, the transmission in the form of a designation of beneficiary will not be invalidated, provided the will is dated and signed by the testator (the client)[203] (art. 2450, para. 1 *C.C.Q.*). A defect of form is an irregularity in a juridical act due to non-observance of a formality required by law.

202. *Therreault* v. *Therreault (Succession de)*, J.E. 87-231 (C.S.). Principle applied in *Lepage* v. *Lepage,* EYB 1994-84349 (C.S.). See also: *Beauchamps* v. *Dubé*, J.E. 92-1162 (C.S.) and *Dawn-Reed* v. *Reed*, J.E. 94-1646 (C.S.).
203. Annick Guérard-Kerhulu, Geneviève Faribault, Suzanne Hardy-Lemieux, André Bois, Isabelle Hudon and Alain Roch, *op. cit.*, p. 3122.

EXAMPLE

In his will made in the presence of witnesses, Jean designated Alexis as the beneficiary of his $100,000 life insurance policy No. 1234 issued by *DEF Assurance-vie Inc.* However, Jean's will is being challenged in court, because although the names of the witnesses appear on the document drafted using a word processor, they did not sign it. The court can invalidate the will due to a defect of form, without the designation of the beneficiary being invalid as a result.

Furthermore, it is important to note that a designation or revocation contained in a will does not avail against a designation of a beneficiary made prior to the signing of the will unless the will refers to the insurance policy in question or unless the intention of the testator is manifest (art. 2450 *C.C.Q.*).[204]

EXAMPLE

At the time Jean's will was drafted, he had already named Sandrine as the revocable beneficiary in the insurance application for his policy issued by *DEF Assurance-vie Inc*. However, in his will, Jean made the following bequest: "I bequeath to my children the policy I took out with *DEF Assurance-vie Inc*." This bequest had the effect of revoking the prior designation of a beneficiary, because Jean's intent was manifest. Moreover, because of the terms used ("I bequeath"), this is not a designation of a beneficiary. The insurer will therefore pay the insured amount to the succession.

204. *Brossard* v. *Journal La Presse ltée,* 2006 QCCS 3887, appeal dismissed on other grounds in 2008 QCCA 573; *Gélinas* v. *Simard (Succession de),* B.E. 2003BE-117 (C.S.), Gratien Duchesne J, appeal dismissed on December 11, 2003, AZ-04019524; *SSQ, Société d'assurance-vie inc.* v. *Richard,* EYB 2005-98488 (C.S.), Bernard Godbout J; *Memmi* v. *Compagnie d'assurance générale Héritage,* REJB 1997-01180 (C.S.), Diane Marcelin J, motion for revocation of judgment dismissed, July 11, 1997; *G.P.* v. *M.L.*, 2004BE-163 (C.A.), Proulx, Thibault and Rochette JJA; *Simard* v. *Beaulieu,* REJB 2002-34686 (C.S.), para. 81, Jacques Babin J; *Pommet* v. *Mailloux,* [1996] R.R.A. 817 (C.S.), Armand Carrier J; *Labranche* v. *Hébert,* J.E. 95-1900 (C.S.), Léo Daigle J; *Régime de sécurité sociale, Syndicat des débardeurs, section locale 375* v. *Berthelet,* REJB 2000-17454 (C.S.), Carol Cohen J; *Morin* v. *Nault,* J.E. 2001-810 (C.S.), pp. 40 to 43, Clément Trudel J, out-of-court settlement on appeal, C.A.M., no. 500-09-010818-011, 2005-06-09; *Shaw, ès qualités "Tutrice"* v. *Sénéchal,* REJB 1998-06410 (C.S.), Jean-Jacques Crôteau J; *Rousse* v. *Beaulieu,* REJB 2000-21801 (C.S.), Carole Julien J, appeal dismissed on motion, C.A.M., no. 500-09-010425-007, February 5, 2001; *Gagné* v. *Aetna, Cie d'assurance-vie du Canada,* REJB 1999-16846 (C.Q.); *G. (L.-M.) (Succession de),* REJB 2003-40920 (C.S.), Jean Bouchard J.

2.5.3 Effect of designations against the insurer

The client must inform the insurer in writing of any designation or change of beneficiary. Article 2452 *C.C.Q.* states that designations and revocations may be set up against the insurer only from the day it receives them.

The insurer will therefore be deemed to have fulfilled its obligation by paying the face amount to the last known beneficiary, i.e. to the designated beneficiary appearing in its files when the insurer has paid the insured amount. As regards the insurer's obligation, the most recent change received by it will prevail over the others (art. 2452 *C.C.Q.*).

If a will revokes the designation of a beneficiary, the will must be brought to the insurer's attention. An advisor who knows that his client has made or will make a will must discuss with the client the importance of ensuring his will and his designations of beneficiaries are properly co-ordinated so that his most recent wishes can be respected. When warranted, the client should be advised to consult a legal adviser.

EXAMPLE

Jean had a life insurance in which he had designated his son Alexis as the revocable beneficiary. He had informed the insurer thereof. Jean died on March 15, 2014. Some 10 days before his death, in his will he had designated his wife Juliette as his sole beneficiary of this insurance and had indicated the policy number. However, he had not informed the insurer of this change. At the time the succession is opened, the liquidator must inform the insurer of this change to the designation of the beneficiary as quickly as possible. If he does not do so, no one may hold the insurer responsible for paying the face amount to Alexis. In such a case, Alexismay be required to make restitution and give Juliette the amount received from the insurer.

2.5.3.1 Receipt of designation by the insurer

In order for a designation of beneficiary to be set up against the insurer and third parties, the insurer must receive it. Sometimes, after the death of the insured, his succession or a relative will send the insurer a written document that includes the designation of a beneficiary made by the client before his death. The fact that a designation is sent to the insurer after the death of the policyholder will not nullify the designation.[205]

Moreover, it is important to note that "every designation of beneficiaries remains revocable until received by the insurer" (art. 2451 *C.C.Q.*).

Where there are several irrevocable designations of beneficiaries, "they are given priority according to their dates of receipt by the insurer" (art. 2452, para. 1 *C.C.Q.*).

205. *M.L.* v. *Desjardins Sécurité financière*, 2010 QCCA 586; *Gamache* v. *Sun Life du Canada*, 2013 QCCS 321; *Bouffard* v. *Assurance-vie Desjardins inc*., J.E. 97-892 (C.S.).

2.5.3.2 Payment in full discharge

For the insurer, it is important to make a payment in full discharge, because it does not want to have to pay the insured amount twice.

Consequently, the insurer is entitled to require several documents from the succession or from the party claiming to be the designated beneficiary. The co-operation of the claimant and the insurance representative is therefore important.

Moreover, the insurer has a maximum of 30 days in life insurance and 60 days in accident and sickness insurance to pay the insured amount. However, this time limit runs only once the insurer has received all the requested documents (proof of loss).

The insurer is discharged by paying the insured amount "in good faith […] to the last known person entitled to it" (art. 2452, para. 2 *C.C.Q.*).

2.5.4 Consequences of conjugal breakdown for a spousal beneficiary

2.5.4.1 Divorce, separation from bed and board, nullity (annulment) of marriage or a civil union and dissolution of a civil union

Definition of "breakdown"

The term "breakdown" refers to separation from bed and board, divorce, nullity of marriage or dissolution, or nullity of a civil union, as well as their effects on the spouse who is the beneficiary under insurance or an annuity.

Separation from bed and board

Separation from bed and board does not automatically cancel the designation of a spouse as a beneficiary. However, since December 1, 1982, a court may, when granting a separation from bed and board (art. 2459, para. 1 *C.C.Q.*):

- Declare that an irrevocable designation is revocable; the policyholder can then designate a new beneficiary, failing which the spouse continues to be the beneficiary;
- Declare that the designation of the spouse as revocable or irrevocable beneficiary has lapsed (i.e., to cancel it); in such a case, if the client does not appoint a third party as the beneficiary after such a declaration, the insurance benefit will be payable to the succession; or
- Declare the designation of the spouse as a subrogated policyholder to have lapsed.

Divorce

Any divorce rendered since December 1, 1982, results in and of itself in the cancellation of the designation of a spouse as beneficiary or subrogated policyholder. This rule applies to both revocable and irrevocable designations (art. 2459, para. 2 *C.C.Q.*).

However, after the divorce, if the client wishes, he can once again designate his former spouse as a beneficiary in his will or otherwise (such as on a designation of beneficiary form).

Furthermore, within the scope of their divorce, the parties may, in the agreement regarding accessory measures, agree to maintain the designation of beneficiary or agree to designate the former spouse as beneficiary of a life insurance policy. If this agreement is breached, the aggrieved former spouse can exercise recourse against the succession of the former spouse who committed the breach.[206]

EXAMPLE

David designates his wife Katia as the beneficiary of his insurance contract on October 28, 2010. David and Katia divorce on June 4, 2015. Katia is therefore no longer the beneficiary of David's insurance as July 5, 2015, because the judgement of divorce takes effect the 31st day following the date when the judgement is pronounced[207]. If, notwithstanding the divorce, David wants the face amount to be paid to Katia, he will have to once again designate Katia as beneficiary of his insurance contract.

Annulment of marriage and dissolution or annulment of a civil union

When a judgment declares the nullity of a marriage or the dissolution or nullity of a civil union, the designation of the spouse as beneficiary or subrogated policyholder is subject to the same rules as those that apply at the time of a divorce; it is automatically revoked (art. 2459 *C.C.Q.*).

2.5.4.2 Designations of beneficiaries made before October 20, 1976

Definition of "preferred beneficiaries" and "ordinary beneficiaries"

In Québec, prior to the coming into force of *An Act respecting insurance* on October 20, 1976, there were two categories of beneficiaries:[208]

- Preferred beneficiaries, i.e., those designated as beneficiaries under the *Husbands and Parents Life Insurance Act*. Under this statute, a husband could designate his wife as a beneficiary; and
- Ordinary beneficiaries, i.e., those designated as beneficiaries under the *Civil Code of Lower Canada*.

206. *SSQ, Société d'assurance-vie inc.* v. *Richard (Succession de)*, J.E. 2006-143 (C.S.); *Zawada* v. *Zawada (Succession de)*, [2002] R.R.A. 554 (C.S.); *King (Succession de)*, 2006 QCCQ 11568.
207. Divorce Act, LRC 1985, c.3. (2nd suppl.), s. 12.
208. Annick Guérard-Kerhulu, Geneviève Faribault, Suzanne Hardy-Lemieux, André Bois, Isabelle Hudon and Alain Roch, *op. cit.*, nos. 15-225, pp. 1/1247 to 1/1250.

Insurance representative's obligation to check

It is important to remember that many designations of beneficiary that were made before October 20, 1976, are still in effect today. If the examination of a designation of a beneficiary made before October 20, 1976, reveals that the beneficiary designated in the policy was the client's spouse or children, the representative must check whether there was a change of beneficiary during the time it was possible to do so, i.e. between October 20, 1976, and October 20, 1977.

Due to the very complex nature of the rules relating to beneficiaries designated before October 20, 1976, the representative must check the legal provisions applicable to each case. To this end, the Canadian Life and Health Insurance Association (CLHIA) published a table (reproduced below in Table 2.2). It would therefore be prudent to refer to this table each time a client wishes to change a designation of beneficiary made before October 20, 1976.

TABLE 2.2

Designation of beneficiary

BENEFICIARY DESIGNATED UNDER INSURANCE POLICY	POSSIBLE CHANGE OF BENEFICIARY
MARRIED OR CIVIL UNION SPOUSE	
Married or civil union spouse designated on or after 1976-10-20 if indicated as revocable on the enrolment form	Any beneficiary
Married or civil union spouse designated on or after 1976-10-20 without a stipulation of revocability or with a stipulation of irrevocability	Cannot be changed unless: 1) A waiver is signed; 2) A divorce was granted on or after 1976-10-20 and before 1982-12-01 terminating the spouse's rights; or 3) A divorce was granted on or after 1982-12-01.
HUSBAND	
Husband designated on or after 1970-07-01 but before 1976-10-20 with or without a stipulation of revocability	Any beneficiary
Husband designated on or after 1970-07-01 but before 1976-10-20 with a stipulation of irrevocability	Cannot be changed unless: 1) A waiver is signed; 2) A divorce was granted on or after 1976-10-20 and before 1982-12-01 terminating the husband's rights; or 3) A divorce was granted on or after 1982-12-01.
Husband designated before 1970-07-01	Any beneficiary

BENEFICIARY DESIGNATED UNDER INSURANCE POLICY	POSSIBLE CHANGE OF BENEFICIARY
WIFE	
Wife designated before 1976-10-20, and divorce granted before 1976-10-20	Any beneficiary
Wife designated before 1976-10-20, and divorce granted on or after 1976-10-20 but before 1982-12-01	Child until 1977-10-20; otherwise wife's designation is irrevocable unless she waived her right or the divorce terminated her rights.
Wife designated before 1976-10-20, but divorce granted on or after 1982-12-01	Any beneficiary provided the beneficiary was designated after the divorce.
CHILD	
Child designated on or after 1977-10-20	Any beneficiary
Child designated on or after 1976-10-20 but before 1977-10-20	Irrevocable if the child replaces a wife or child designated before 1976-10-20. Otherwise any beneficiary.
Child designated before 1976-10-20	Wife until 1977-10-20. Other child until 1977-10-20. Otherwise irrevocable, unless a waiver is signed.
OTHER	
Any irrevocable beneficiary (beneficiary designated with stipulation of irrevocability on the application form) other than the wife	Cannot be changed unless a waiver is signed.
Other beneficiary	Any beneficiary

2.5.4.3 *De facto* spouse (or common-law spouse)

As regards the designation of beneficiaries in insurance of persons, a *de facto* spouse (or common-law spouse) is not recognized in the same manner as a married spouse or civil union spouse.[209]

Thus, the designation of a *de facto* spouse (or common-law spouse) is revocable unless otherwise stipulated, as is the case with any other beneficiary.

Moreover, when the relationship between *de facto* spouses (or common-law spouses) ends, it does not have the effect of revoking a designation of the beneficiary, unlike divorce.[210]

209. Arts. 2449 and 2457 *C.C.Q.*
210. *Smith* v. *La Survivance*, *cie mutuelle d'assurance-vie*, [1995] R.R.A. 676 (C.S.).

EXAMPLE

Luc designates Manon as his revocable beneficiary on January 1, 2010. They marry on January 1, 2011, and divorce on July 1, 2013. Luc dies on January 1, 2014. Manon will receive the insured amount as the beneficiary, because the designation of beneficiary was made before the marriage and the divorce did not have the effect of revoking the designation of beneficiary made on January 1, 2010.

2.5.5 Death benefit payable to the succession of the policyholder (or the participant)

Pursuant to article 2455 *C.C.Q.*, the insured amount payable to a designated beneficiary is payable "without regard to the succession."

However, if the insured amount is payable to the succession, the insurer will want to know the identity of the succession's liquidator so it can pay the insured amount to him, regardless of who, under the will (or pursuant to the legal rules of devolution of successions in the case of an intestate succession), is the legatee or heir who will receive the insured amount.

Some insurers send the liquidator of the succession a cheque payable to "Succession of X," while other insurers send a cheque payable to the order of the liquidator "in his capacity as liquidator of the succession of X."

2.5.6 Exemption from seizure

The property of a debtor is the common pledge (collateral) of his creditors (art. 2644 *C.C.Q.*). Seizability is the rule and unseizability is the exception.

Rights arising under life insurance contracts (including annuity contracts) and certain insurance of persons contracts may, in certain circumstances, be exempt from seizure.

2.5.6.1 Life insurance: Designation of the policyholder's (or participant's) ascendant, descendant or legal spouse

Pursuant to article 2457 *C.C.Q.*, the designation as beneficiary of the policyholder's (or participant's) ascendant, descendant or legal spouse (married spouse or civil union spouse) renders the rights conferred by the insurance contract unseizable by the policyholder's creditors or trustee in bankruptcy until the beneficiary has received the insured amount.

The designation of a *de facto* spouse (or common-law spouse) as revocable beneficiary does not render the rights conferred by the insurance contract exempt from seizure.

It should be noted that these beneficiaries, who render the contract unseizable, are sometimes referred to as “preferred beneficiaries.”

Since unseizability is the exception, it is interpreted restrictively and is subject to limits. The federal Crown may refuse to recognize unseizability arising under provincial rules.[211]

2.5.6.2 Life insurance: Irrevocable designation

Pursuant to article 2458 *C.C.Q.*, the designation of any person (including a *de facto* spouse (or common-law spouse)) as irrevocable beneficiary renders the rights conferred by the contract unseizable by the policyholder’s creditors or trustee in bankruptcy as long as the designation remains irrevocable.

2.5.6.3 Life insurance: Designation of a non-preferred beneficiary and no designation of beneficiary

The cash surrender value of a life insurance policy is seizable by the trustee in bankruptcy if the policyholder has designated as revocable beneficiary a person other than a preferred beneficiary or if no beneficiary has been designated.[212]

Moreover, if the policyholder dies and there is a designated beneficiary (whether or not preferred), the insured amount is payable directly to the designated beneficiary, without regard to the succession (art. 2455 *C.C.Q.*). Therefore, the policyholder’s creditors cannot assert a right against the insurer or the beneficiary for the insured amount.[213]

2.5.6.4 Accident and sickness insurance

Accident and sickness insurance benefits may be seized by the policyholder’s creditors, because these amounts form part of his patrimony.

Until December 31, 2015, periodic disability insurance benefits were exempt from seizure under paragraph 8 of article 553 of the former *Code of Civil Procedure*[214].

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211. *Marcoux* v. *Canada (Attorney General)*, 2001 FCA 92, Noël, Décary and Létourneau JJA; *London Life Insurance Company* v. *Canada*, 2014 FCA 106 (CanLII), leave to appeal to the Supreme Court of Canada (file no. 35961); *M.N.R.* v. *Anthony*, (1995) 32 C.B.R. (3d) 109 (Nfld. C.A.); *M.N.R.* v. *Ross*, [1997] F.C.J. 1765 (Fed.C.A.); *Red Development Corporation* v. *Triman Industries Ltd.*, [1991] 6 W.W.R. 481 (Man. C.A.).
212. *Perron-Malenfant* v. *Malenfant (Trustee of)*, [1999] 3 S.C.R. 375, paras. 54 to 56.
213. *Coopérative funéraire de la Mauricie* v. *Gendron*, J.E. 2004-110 (C.Q.). See also: *Boudreault* v. *Laforest*, 2013 QCCS 4575; *Clément* v. *Clément*, J.E. 2001-686 (C.Q.).
214. *New Code of Civil Procedure*, CQLR, c C-25.

Since January 1, 2016, this rule will no longer apply according to the new *Code of Civil Procedure*, whereby disability insurance benefits are seizable.[215] However, such benefits remain unseizable in the hands of the insurer.[216]

2.6 Rules pertaining to claims and the payment of benefits

2.6.1 Rules pertaining to claims

The *C.C.Q.* sets out the procedure and the respective obligations of the insured and the insurer with respect to the settlement of a loss, whether it be the notice of loss, the time limit for sending in documents relating to the analysis of the claim, providing evidence by means of a medical examination or the time limit given to the insurer to pay the benefits. The insurance contract can also contain relevant provisions, provided they do not confer fewer rights on the client, the policyholder, the insured, the participant or the beneficiary.

2.6.1.1 Notice of "loss" in life insurance, proof of death and other information required

The *C.C.Q.* does not impose any formality regarding the sending of a notice of loss to the insurer. However, the insurer must be notified of the loss in order to be compelled to pay benefits. In such a case, the provisions of the contract must be checked to determine what it provides in this regard. In Québec, an insured is presumed deceased at the age of 100 in accordance with the Unclaimed Property Act (s. 3 par. 9). If the insurer is unable to determine whether the insured is still alive, pursuant to the *Unclaimed Property Act*[217] it may be required to remit the sums to the *Ministère du Revenu* (Ministry of Revenue).

Proof of death: Attestation of death

The payment of life insurance benefits is subject to certain rules prescribed by the *C.C.Q.* An attestation of death is the document evidencing the occurrence of the insured risk. The physician who establishes that the death has occurred fills out the attestation of death and gives it to the funeral director who provides a copy of it to the individual who fills out the declaration of death. The attestation and declaration of death are sent to the registrar of civil status. At the request of the person making the declaration, the registrar of civil status will provide a death certificate (act of death) or a copy thereof (arts. 122 and ff. *C.C.Q.*).[218] In general, the insurer will ask for a death certificate or a copy of the act of death. Sometimes, it will accept as proof of death a declaration of death signed by the funeral director.

215. *New Code of Civil Procedure*, CQLR, c C-25.01 ss. 694 and 696. However, we are unaware of any relevant decisions having interpreted these new provisions.
216. *New Code of Civil Procedure*, CQLR, c C-25.01, art. 698. However, we are unaware of any relevant decisions having interpreted this new provision.
217. *Unclaimed Property Act*, CQLR, c B-5.1.
218. See http://www.etatcivil.gouv.qc.ca/en/certificate-copy-act.html.

Additional information

The insurer may require additional information regarding the circumstances surrounding the death in order to determine whether the contract covers this type of death. For example, the insured's suicide may be excluded by the insurer if it occurs within the first two years of the effective date of the insurance.

Proof of the insured's age

The attestation of death is admissible as proof of the insured's age at the time of death. If the insured's true age does not correspond to that declared to the insurer and falls within the range of rates established in the contract, the insured amount will be adjusted in such proportion as the premium collected bears to the premium that should have been collected based on the insured's true age (art. 2420 *C.C.Q.*).

When the insured's age exceeds the limits fixed by the insurer's rates, the insurer may bring an action in nullity of the insurance coverage only under certain conditions. The second paragraph of article 2421 *C.C.Q.* states that the insurer must apply for the nullity within three years of the effective date of the contract, provided the insured is still alive. The insurer must therefore pay the insured amount even if the age of the participant at the time of his death exceeds the limits fixed by the contract.

EXAMPLE

Nicole fills out an insurance application and inadvertently indicates that she is 50 years old, although she just turned 59. In fact, she did not write the "9" clearly and it looks like a "0" on the application form. She dies four years later. The insurer notices the error and adjusts the face amount in such proportion as the premium collected bears to the premium corresponding to Nicole's age at the time she died, because this age falls within the limits of its rates.

Time limit for notifying the insurer about the death and prescription

In life insurance, by contrast with accident and sickness insurance, the *C.C.Q.* does not impose a time limit whose expiry entails forfeiture, i.e. a time limit that allows a person to assert any rights he may have under a policy, after which the person can no longer assert those rights.

Thus, in theory, a person who has rights with respect to the proceeds of life insurance has three years from his knowledge of the insured's death within which to take action against the insurer (arts. 2925 and 2880 *C.C.Q.*), that is, the ordinary prescription period.

However, in life insurance, the insurer cannot set up this prescription against Québec's Minister of Revenue (to whom insurers remit unclaimed property, as defined under the *Unclaimed Property Act*) and it must remit any unclaimed life insurance proceeds to the *Ministère du Revenu du*

Québec.[219] The person entitled to the death benefit may claim this amount from the *Ministère du Revenu* at any time.[220]

2.6.1.2 Notice of "loss" in accident and sickness insurance, information required and proof of losses

In accident and sickness insurance, the *C.C.Q.* requires that the policyholder, the beneficiary or the insured notifies the insurer in writing of the loss within 30 days of acquiring knowledge thereof (art. 2435 *C.C.Q.*).[221]

Within 90 days of the loss, the policyholder, the beneficiary or the insured must give the insurer all information regarding the circumstances and extent of the loss (art. 2435, para. 1 *C.C.Q.*). In some situations, the insurer could also request a copy of the coroner's report, in order to determine whether the death was accidental in the case of accidental death insurance.

If the person entitled to payment of the benefit proves that it was impossible for him to act within the prescribed time, he will be entitled to receive the benefit if a notice is sent to the insurer within one year of the loss (art. 2435, para. 2 *C.C.Q.*). This is a time limit whose expiry entails forfeiture.[222]

Medical examination requirement

In matters of disability insurance, the insured must submit to a medical examination when the insurer is entitled to require it owing to the nature of the disability. If the insured refuses to prove his disability or to submit to a medical examination, he is failing to fulfil an obligation under the insurance policy. In such circumstances, the insurer may refuse to pay or to continue to pay the benefits (art. 2438 *C.C.Q.*).[223]

2.6.2 Payment of benefits

2.6.2.1 Time limit for paying benefits in life insurance

General rule

The insurer must pay the insured amount within 30 days after receipt of the proof of loss (art. 2436 *C.C.Q.*).

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219. *Unclaimed Property Act*, CQLR, c B-5.1, ss. 10 and 3.
220. *Idem*, s. 30.
221. *Métropolitaine, compagnie d'assurance-vie* v. *Manufacturers Life Insurance Company*, REJB 97-03424 (C.S.), affirmed by REJB 2003-37076 (C.A.).
222. *Bourcier* v. *Citadelle (La), compagnie d'assurances générales*, 2007 QCCA 1145.
223. *Caisse populaire de Maniwaki* v. *Giroux*, [1993] 1 S.C.R. 282; *R.W.* v. *Industrielle Alliance*, 2011 QCCS 3314; *Taillon* v. *Desjardins Sécurité financière, compagnie d'assurance-vie*, 2007 QCCS 1510.

EXAMPLE

Stéphanie is involved in a car accident and dies from her injuries in the hospital a few days later. Her succession will send all the documents required by the insurer, including the death certificate, in order to obtain the insured amount under Stéphanie's life insurance. The insurer will be required to pay within a period of 30 days following receipt of the requested documents.

Disappearance of the insured

In the case of a disappearance of the insured, it may be impossible to prove the insured's death even though the death seems likely. Where death is uncertain, a declaratory judgment of death can only be obtained after seven years have elapsed since the disappearance. This period may be reduced where the death of the insured is considered to be certain (e.g., the sinking of a ship or a plane crash) even though it is impossible to draw up an attestation of death. An application for a declaratory judgment of death may be made by any interested person, including the beneficiary of the life insurance (art. 92 *C.C.Q.*).

EXAMPLE

A woman disappeared from her home five years ago and no one has heard from her since. The beneficiary of her insurance policy will have to wait seven years (i.e., two more years) before obtaining a declaratory judgment of death.

2.6.2.2 Time limit for paying benefits in accident and sickness insurance

The insurer must pay the sums claimed within 60 days after receipt of the proof of loss (art. 2436, para. 2 *C.C.Q.*). Where the insurance covers losses of income due to disability, payment of the initial benefit must occur within 30 days of the attestation of disability or, if the policy stipulates a waiting period, within 30 days of the expiry of that period (art. 2437, para. 1 *C.C.Q.*).

2.6.2.3 Insured amount payable to a beneficiary who is a minor, to a tutor or to a curator

Benefits: Person of full age who is incapable

In the case of a person of full age, the benefit payable is remitted directly to him.

However, if the client or the beneficiary to whom the benefit is payable is incapable of administering his property, the benefit is paid to the person who administers his property, i.e., the tutor or curator to the insured's property (arts. 258, 281 and 285 *C.C.Q.*) or the mandatary in the case of incapacity (arts. 2166 and ff. *C.C.Q.*). In certain cases, the benefit may be payable to the

Public Curator (if the person of full age who is incapable does not have a tutor or curator to his property) or to *Revenu Québec* (if the property (financial product) is unclaimed).

Benefits: Minors

When the benefit is payable to a minor, it is paid to the father and mother, who are the tutors of their children as of right (art. 192 *C.C.Q.*).

It is important not to confuse the designation of a minor as beneficiary with the designation of a beneficiary which, for example, is a testamentary trust established for the benefit of a minor.

Benefits: Father and mother deprived of parental authority

Firstly, it should be noted that the expression “deprived of parental authority” means the loss by either parent, or both of them, of parental authority over their children. As stated in article 606 *C.C.Q.*, a court will deprive parents of their parental authority for a grave reason and in the interest of the child.

If a father and mother are deprived of parental authority, they lose the tutorship of their child (art. 197 *C.C.Q.*) and the benefit is paid to the person appointed as a tutor. If no such tutor is appointed or otherwise acting, the director of youth protection is appointed as legal tutor (art. 199 *C.C.Q.*).

Benefits: Deceased father and mother

Article 200 *C.C.Q.* states that a father and mother may appoint a tutor to their minor child by will, by a mandate given in anticipation of their incapacity or by filing a declaration with the Public Curator. In such a case, the benefit is paid to that person upon presentation of the documents evidencing his status as tutor (generally a judgment of homologation).

The benefit may also be paid to the Public Curator if the appointed tutor refuses to assume his duties (arts. 180 and ff. *C.C.Q.*).

Benefits: Trusts

Pursuant to article 1262 *C.C.Q.,* a trust can be created by will, by contract, by law or by judgment (where authorized by law).

Thus, in practical terms, a trust can be created by will or by contract. A policyholder can designate a trust as beneficiary. According to a recent Québec Superior Court judgment, a trust cannot be created merely through a designation of beneficiary on the insurer’s enrolment form or insurance application.[224]

224. *Compagnie d’assurance-vie Manufacturers (Financière Manuvie)* v. *Massouh*, 2010 QCCS 2060, Bernard Godbout J.

Where a trust has been validly created, the insurer will have to pay the insured amount to the trustee under the trust, who, in a testamentary trust, may often be the same person as the liquidator of the succession.

Benefits: Administrator appointed in accordance with article 210 *C.C.Q.*

Pursuant to article 210 *C.C.Q.*, it is possible to give or bequeath property to a minor on condition that the property be withdrawn from the administration of the tutor and be administered by a third party appointed by the donor or testator.

Such a situation can arise, for example, if the parents are divorced and one of the parents does not want the surviving parent (a former spouse) to administer the property on behalf of the child.

Again, according to a recent Québec Superior Court judgment, such an administrator cannot be appointed through a designation of beneficiary on the insurer's enrolment form or insurance application.[225] In such a situation, the insurer will have to pay the death benefit to the surviving parent.

2.7 Group insurance contracts

The subject of the parties involved in group insurance contracts was discussed earlier.

Moreover, the rules regarding the designation of beneficiaries, exemption from seizure and exclusions, as well as the other rules previously discussed, also apply to group insurance.

However, there are certain principles specific to group insurance which must be considered.

2.7.1 General

Definition: Insurance policy

The group insurance policy or master policy is defined as the document evidencing the existence of the contract of insurance and must contain the particulars prescribed by law. The policy specifically sets out the obligations of the parties and the scope of the insurance coverage (arts. 2399, para. 2, 2415 and 2416 *C.C.Q.*).

Content of the policy

As is the case with individual insurance, article 2399 *C.C.Q.* states that the policy is the document evidencing the existence of the contract of insurance. To that effect, the policy must set out the following elements:

225. *Ibid*.

- The name of the policyholder and of the insurer;
- The object and amount of the coverage;
- The nature of the risks;
- The time from which the risks are covered;
- The term of the coverage; and
- The amount and rate of the premiums and the dates on which they are due.

This article is supplemented by articles 2415 to 2417 *C.C.Q.* which state what an insurance of persons policy must contain. The policy must indicate, among other things, the right to convert group life insurance into individual insurance.

A group insurance contract generally includes several types of insurance protection or coverage. The following are the most common:

- Basic insurance on the life of the participant and additional insurance (with proof of insurability in the latter case);
- Insurance on the life of the participant's spouse;
- Insurance on the life of the participant's dependent children;
- Accidental death insurance on the life of the participant;
- Accidental mutilation insurance;
- Critical illnesses insurance;
- Short-term salary insurance (disability insurance);
- Long-term salary insurance (disability insurance);
- Health-care insurance, which can be divided as follows:
  - Prescription drug insurance;
  - Hospitalization (private or semi-private hospital room);
  - Health-care establishment (convalescent home);
  - Health professionals: (acupuncturist, audiologist, chiropractor, dietician, occupational therapist, naturopath, speech therapist, osteopath, physiotherapist, physical rehabilitation therapist, podiatrist, homeopath, homeopathic remedies, psychoanalyst, psychiatrist, psychologist, social worker, kinesitherapist, massage therapist, orthotherapist);
  - Vision care (optometrist, ophthalmologist, eye glasses, contact lenses, laser vision correction);

- Other medical care (ambulance, laboratory analyses, hearing aids, respirators, braces, orthopedic shoes, detoxification programs, ultrasounds, electrocardiograms, wheelchairs, home nursing care, hospital beds, artificial limbs, insulin pumps, prostheses, X-rays, dental treatment for natural teeth following an accident, etc.);
- Medical assistance (second medical opinion);

- Travel insurance and trip-cancellation insurance (with travel assistance); and
- Dental care insurance.

Rules specific to group insurance

The *C.C.Q.* contains few provisions specific to group insurance. It is sometimes difficult to reconcile the provisions applicable to individual insurance with the principles of group insurance, but, unless otherwise indicated, these rules apply with the necessary changes.

Article 2401 *C.C.Q.* provides that the insurer must deliver a copy of the group insurance policy (also referred to as the "master policy") to the client (i.e., the policyholder). In order to inform participants about the contents of the master policy, the insurer must deliver insurance certificates to the policyholder (often a booklet or an explanatory brochure). The certificate provides participants with a general description of the coverage. According to the *C.C.Q.*, the policyholder then has the obligation to distribute the certificates to the participants. This can be done electronically. As regards the master policy, the participant and the beneficiary are entitled to consult it at the policyholder's place of business and obtain a copy thereof.

Some of the provisions of the *C.C.Q.* are of public order, i.e., the insurer cannot derogate therefrom by contract (unless it offers more advantageous conditions).

For example, a clause of a master group insurance policy which provides that the insurer may pay within 90 days of receipt of the sickness and accident insurance claim would be null, as it would give the participant fewer rights than those provided at law (article 2436, para. 2 *C.C.Q.* provides for a 60-day period). However, a clause could provide that the payment will be made within 45 days of receipt of the claim; such a clause would be valid as this derogation is to the advantage of the participant.

EXAMPLE

Mariette is claiming the reimbursement of her sessions with a psychologist. *Les belles épargnes assurances inc*. (the insurer) has 60 days to pay her the insured sums upon receipt of the proof of loss (art. 2436, para. 2 *C.C.Q.*).

The insurer also has the obligation to furnish a copy of the medical questionnaires to the participant when they are applicable, e.g., when a participant wishes to purchase additional insurance. The insurer must do so in order to be able to invoke misrepresentations or concealment by the participant (arts. 2406 and 2424 *C.C.Q.*).

Discrepancies between the policy and the insurance certificate

The second paragraph of article 2401 *C.C.Q.* states that, in case of discrepancies between the policy and the insurance certificate (which may be the brochure), participants may invoke the one that is most favourable to them.[226] In some cases, an insurance certificate may contain a note stating that, in case of discrepancy, the provisions of the policy will prevail. In Québec, this note is not valid.

However, please recall that a difference is not necessarily a discrepancy.

EXAMPLE 1

François had an accident which caused him back pain. He consulted a doctor and a chiropractor. The doctor was unable to determine what illness François was suffering from. However, the chiropractor diagnosed it. He gave François a certificate stating that he was unable to perform his work. François claimed disability insurance benefits from the insurer, who refused to make the payments because François was not under the care of a doctor and because the disability had to be diagnosed by a doctor. François had not received a copy of the policy; he had only received an insurance certificate which did not state that the disability had to be diagnosed by a doctor.

In a similar case, the Court ruled that in the absence of any indication to the contrary, a disability report signed by a chiropractor was sufficient proof of the inability to work.[227]

EXAMPLE 2

In February 1989, Julien's employer offered its employees group insurance, even though the contract between the employer and the insurer had not yet been signed. At the time, Julien was on sick leave. He decided to subscribe to the group insurance. A few weeks later, he received a certificate of insurance stating that coverage for dependants was in effect. While Julien was on disability leave, his wife died. The contract between the insurer and Julien's employer was finally signed in June 1990, retroactive to February 1, 1989. Julien claimed from the insurer the face amount on the life of his wife. The insurer refused to pay the amount, claiming that the insurance could not have come into effect as long as Julien had not returned to work.

226. *SSQ Mutuelle d'assurance groupe* v. *Larrivée*, J.E. 2000-1408 (C.A.); *Gestion AVD Verville inc*. v. *Great West, compagnie d'assurance-vie*, 2013 QCCS 4336.
227. *Dubreuil* v. *Lavigne Ltée,* 1989 R.R.A. 451 (C.Q.).

The judge noted that the certificate of insurance was silent as to the requirement of being actively at work. Accordingly, the judge held that the certificate should prevail over the wording of the policy, and he ordered the insurer to pay Julien the face amount.[228]

2.7.1.1 Disability insurance: Some specific considerations

Disability insurance constitutes accident and sickness insurance. Although disability insurance exists as individual insurance, it is more common to find this type of coverage as part of workplace group insurance. It can also be found as part of a debtor group health insurance in connection with a hypothecary (mortgage) loan.[229]

In disability insurance, the insurer must set out, expressly and in clearly legible characters, the terms and conditions of payment of the indemnities and the nature and extent of the disability covered. Failing clear indication as to the nature and extent of the disability covered, the inability to carry on one's usual occupation constitutes the disability (art. 2416 *C.C.Q.*).

In certain individual policies, the definition of disability may consist in the inability of a person to perform a number of daily tasks, such as washing up or making food.

In group insurance, disability insurance is also referred to as salary insurance, because benefits are linked to the participant's salary. The standard definition of the term "disability" in this type of policy is two-fold: one definition applies during the first 24 months of the disability (referred to as "own occupation"), and the other definition applies after the first 24 months of the disability (referred to as "any occupation").

Definition of disability (standard clause)

During the first 24 months of a period of disability:

- Total and continuous incapacity caused by an accident or illness that prevents you from carrying out the main duties of your usual occupation.

After the above-mentioned period:

- Total and continuous incapacity caused by an accident or illness that prevents you from performing any remunerative occupation for which your education, training or experience has reasonably prepared you, regardless of the availability of employment.

228. *Syndic de Les Coopérants* v. *Curadeau*, 1993 R.R.A. 716 (C.S.).
229. *Regulation Respecting the Application of the Act Respecting Insurance*, RRQ 1981, c A-32, r 1, ss. 75 to 85.

2.7.2 Group insurance: A contract entered between the policyholder and the insurer for the benefit of the participants

Article 2392 *C.C.Q.* states that group insurance of persons, under a master policy, covers the members of a specified group and, in some cases, their dependants (spouse, children). In group insurance, the same contract covers more than one person. The relationship is no longer simply between the insurer and policyholder, as in individual insurance; the holder of the master policy is also involved. However, the group insurance contract is entered into for the benefit of the participants, not the policyholder, and the participants have, subject to certain exceptions, the same rights as an individual policyholder.

The relationship between the insurer, the policyholder and the participant is a tripartite relationship (three parties). However, for a group insurance contract to be validly formed or amended, only the agreement of the insurer and the policyholder is required. Once the contract is entered into, a person forming part of the group will be asked to participate in the contract. Sometimes participation is mandatory, i.e., the employer obliges the employee to enroll in the employee benefits plan as a condition of employment.

According to the *C.C.Q.*, the main characteristic of a contract of insurance is that it is an adhesion contract based on good faith.[230] In group insurance, the notion of contract of adhesion primarily involves the relationship between the insurer and the participant. The policyholder and the insurer have often negotiated the terms of the contract (or often have the possibility of doing so, except, at times, for smaller groups where the contract is more standard). As for good faith, it must be present in any contract, regardless of what kind of contract it is. The concepts of adhesion and good faith are not the only characteristics of group insurance contracts; there is also the concept of group.

It should be noted that the general rules of contracts apply to uninsured employee benefit plans (referred to as administrative services only (ASO) plans) or financial agreements, or agreements on costs and services that exist in group insurance. ASO plans are sometimes negotiated by the parties in a collective agreement. In certain cases, a group plan may include insurance coverage provided by an insurer (life and disability insurance) and other protections offered under an ASO plan (medical and dental protections). Since July 1, 2014, employers under federal jurisdiction (see Chapter 1 to find out which firms are under federal jurisdiction) that offer their employees long-term disability coverage are required to insure this coverage with an insurer in insurance of persons. Long-term disability cannot be covered under an ASO plan.[231] It should be noted that this manual deals with insurance contracts subscribed through an insurer.

230. Didier Lluelles, *op. cit.*, pp. 32 and 33 (pp. 29 to 32 of the 5th revised edition of 2014).
231. *Canada Labour Code*, R.S.C. 1985, c L-2, s. 239.2(1)

2.7.3 Laws applicable to contracts (place of residence of the participant) and the jurisdiction of Québec Courts

Even if the master policy was entered into in another province, the laws of Québec will apply to the participant if he resided in Québec at the time he became a participant.[232] The laws of Québec will continue to apply to him even if he moves.

Moreover, Québec courts have jurisdiction to hear an action based on a contract of insurance where the policyholder, the insured or the beneficiary of the contract is domiciled or resident in Québec, the contract is related to an insurable interest situated in Québec or the loss took place in Québec (art. 3150 *C.C.Q.*).

2.7.4 *Civil Code of Québec, Regulation under the Act respecting insurance* (RARI) and determination of the group

The characteristic which distinguishes group insurance and annuities from individual insurance and annuity contracts is the specified group of persons for whose benefit the contract is issued, i.e. the participants.

A group is a set of individuals with something in common, such as social, economic or cultural interests. In general, it is composed of persons who have or had an employment relationship with one or more employers, or persons in the same profession or occupation. The members of a financial services cooperative or of a mutual insurance association can also constitute a group.

There is no particular requirement with respect to the type of business; however, insurers require a minimum of three or five employees. Most of the time, the insurer and the employer agree on the coverage to be offered to the group and the employees decide whether or not to enroll when participation is optional. However, in Québec, there is an important exception as regards prescription drug insurance.

2.7.5 *An Act respecting prescription drug insurance* and its mandatory nature

Prescription drug insurance

Since January 1, 1997, all Quebeckers must be covered by prescription drug insurance, whether through a private insurance plan or through the public plan administered by the *Régie de l'assurance maladie du Québec* (RAMQ).[233] The law sets out, among other things, the list of medications that are mandatorily covered (over 6,000), the minimum percentage of coverage

232. Art. 3119 *C.C.Q.* See also: *Johnston* v. *Great West Life*, 2013 QCCS 1404.

233 See: http://www.ramq.gouv.qc.ca/SiteCollectionDocuments/citoyens/fr/autres/information-assurance-medicaments-fr.pdf (available only in French).

(68% of the cost of the drug) as well as the maximum annual contribution.[234] However, private plans may be more generous and, for example, cover 80% of the cost of prescription drugs, but they cannot cover listed medications for less than the minimum percentage.

Private plans

For purposes of *An Act respecting prescription drug insurance*, "a private plan is a group insurance or employee benefit plan offering basic coverage for prescription drugs."[235] Moreover, within the meaning of this Act, an employee benefit plan is an administrative service only (ASO) plan which, in practice, is often administered by an insurer. All Quebeckers under the age of 65 who have access to a private plan that is offered to a group in accordance with the law must subscribe to the prescription drug insurance coverage under a group insurance contract for a group described under Section 15.1 of *An Act respecting prescription drug insurance* and have all their dependants enroll in such coverage.[236]

The definition of "group" in *An Act respecting prescription drug insurance* is narrower than that in the *C.C.Q.*, and the RARI. Thus, associations not related to a professional order must consist of persons engaged in the same trade or occupation.[237]

EXAMPLE

The insurer ABC offers life insurance and accidental death and mutilation insurance to the *Association des femmes d'affaires de l'Estrie*. However, it cannot offer prescription drug insurance to this group, because its members do not perform the same work.

It is interesting to note that an insurer or an administrator of an employee benefit plan must offer prescription drug coverage that complies with the law if it offers coverage for accidents, illness or disability (e.g., disability insurance, accidental death and mutilation insurance or merely a health

234. From July 1st 2017 to June 30th 2018, the maximum annual contribution is $1066 for individuals between 18 and 64 years of age and for individuals over 65 if they are not receiving a guaranteed income supplement (GIS), 0$ for individual under 18 years of age, and $632 for individuals over 65 years of age who receive a GIS at a rate between 1% and 93% (0$ for those with a GIS with a rate between 94% and 100%).
See http://www.ramq.gouv.qc.ca/en/citizens/prescription-drug-insurance/Pages/summary-costs.aspx.

235. *Régie de l'assurance maladie du Québec*, "Prescription drug insurance," on-line document consulted on July 21, 2017.
See http://www.ramq.gouv.qc.ca/en/citizens/prescription-drug-insurance/Pages/description.aspx.

236. *An Act respecting prescription drug insurance*, CQLR, c A-29.01, s. 16.

237. *Ibid.*, CQLR, c A-29.01, s. 15.1. See also: *Sogedent Assurances inc.* v. *Régie de l'assurance-maladie du Québec*, 2006 QCCS 3970, Michel Caron J; *AREQ (CSQ) (Association des retraitées et retraités de l'éducation et des autres services publics du Québec)* v. *Régie de l'assurance-maladie du Québec*, 2011 QCCS 1088, Benoît Moulin J.

spending account) to a specified group of employees or to members of a professional association, a union, or an association whose membership consists of persons engaged in the same trade or occupation.[238]

Individual prescription drug insurance is prohibited under *An Act respecting prescription drug insurance*. An insurer that offers individual sickness and accident insurance contracts with one or more characteristics specific to group insurance is also contemplated. Thus, insurers cannot skirt the law by offering accident and sickness insurance by means of individual contracts to the members of a group contemplated in *An Act respecting prescription drug insurance* so as to avoid the requirement of having to include prescription drug coverage.[239] It is, however, possible to offer only group life insurance without having to include prescription drug coverage.

EXAMPLE

The company *Génie inc.* only offers a health spending account to its retired employees. The plan administrator must also offer prescription drug insurance, even if certain retirees are over the age of 65. However, persons who are 65 years of age or more have the right to opt for the RAMQ's public plan instead of the private prescription drug insurance plan to which they have access.

An insurer may offer prescription drug insurance to members of a professional corporation. It can also offer it to employees of members of the professional corporation, if the contract so provides.

2.7.6 Eligibility of participants and the *Charter of Human Rights and Freedoms* (Québec)

In order to determine eligibility for group insurance, certain eligibility requirements are often established within a group. This helps define the group. It is a preliminary step taken before a group insurance contract is entered into. For example, a group plan may require a minimum number of hours worked or impose a probation period as an eligibility criterion. A plan can also exclude part-time workers, temporary workers or retirees.

The insurer must know how the group is defined in order to have an idea of the risk the applicant is asking it to assume and in order to determine the relevant rates.

To establish the premium rate, the insurer must determine the risk factor for the group using statistical data compiled for groups having similar characteristics. The greater the likelihood that the risk will occur, the higher the premium will be.

238. *An Act respecting prescription drug insurance*, CQLR, c A-29.01, ss. 34, 35 and 38.

239. Finances Québec, "Harmonization with certain federal tax measures and other tax measures," on-line document modified on June 18, 2015, consulted on July 21, 2017. See http://www.finances.gouv.qc.ca/documents/bulletins/en/BULEN_2015-4-a-b.pdf. (pp. 28 to 30).

2.7.6.1 Discriminatory distinctions under the *Charter of Human Rights and Freedoms* (Québec) – Role of section 10

An insurer cannot use certain criteria if they result in a distinction or exclusion contrary to law.

Section 10 of the *Charter of Human Rights and Freedoms* states the criteria that are considered discriminatory:

> 10. Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

However, in the case of insurance and annuities, the legislature has limited the effects of these distinctions or exclusions by enacting section 20.1 of the *Charter of Human Rights and Freedoms.* This provision allows insurers, on certain conditions, to use criteria which would otherwise be discriminatory.

2.7.6.2 Distinctions deemed valid under the *Charter of Human Rights and Freedoms* – Role of section 20.1

This section states that, in insurance, certain criteria may be used to define a group. Section 20.1 of the *Charter of Human Rights and Freedoms* reads as follows:

> 20.1 In an insurance or pension contract, a social benefits plan, a retirement, pension or insurance plan, or a public pension or public insurance plan, a distinction, exclusion or preference based on age, sex or civil status is deemed non-discriminatory where the use thereof is warranted and the basis therefore is a risk determination factor based on actuarial data.
>
> In such contracts or plans, the use of health as a risk determination factor does not constitute discrimination within the meaning of section 10.

Thus, an insurer can use age, sex and civil status as a criterion for eligibility in the group, but it must have actuarial data in order to do so and the use of the distinction must be warranted. Moreover, the insurer may also include the status of health as a factor to determine risk, without having to look to actuarial data. Furthermore, the insurer may also include life habits of an insured (for instance: smoker or non smoker), since it is not discriminatory under section 10 of the *Charter of Human Rights and Freedoms*.

2.7.7 Group representation

In group insurance and annuity contracts, the contract is entered into between the insurer and the policyholder. The policyholder must have the capacity to bind itself by contract and the authority to represent the group. The person who represents the group is most often the employer, acting for the benefit of its employees, but a union, an association or a professional order can also enter into such a contract. The policyholder must also have the capacity to administer the master policy, to provide for enrolment by participants and to collect and remit the premiums. However, section 61 of the *Regulation under the Act respecting insurance* provides that if the policyholder is an association of employees or a professional syndicate, it may enter into an agreement with the employer or a third party so that the employer or third person manages the master policy.

2.7.7.1 Policyholder and rules of mandate

In certain cases, the collective agreement between the employer and the union contains provisions respecting the insurance coverage to be negotiated for the benefit of the employees. It may also contain an obligation for the union and the employer to take out insurance jointly. The terms of a collective agreement cannot be set up against the insurer, because it has no knowledge of the content of the collective agreement and it is not a party thereto.

In most cases, the employer is the policyholder and represents the participants. Its consent when the contract is entered into will bind the members of the group. A company sometimes takes out group insurance not only for all staff who work directly for it, but also for staff who work for its subsidiaries or affiliates. An insurance committee may be formed to negotiate the insurance contract and to deal with the insurer thereafter. Sometimes, an association or a professional order also has the mandate to represent its members.

Requirements for a mandate to exist

Where the policyholder is not the employer, the existence of a mandate given to the policyholder may stem from a collective agreement, or it may result from a statute (such as a statute that creates a professional order) or from another written instrument which states who has the authority to represent the members. Written instruments are not the only way to confirm the existence of a mandate; all facts surrounding the negotiation and signing of a group insurance contract may be taken into consideration to establish the existence of a mandate.

Consequences of a mandate

As seen in Chapter 1, pursuant to the *C.C.Q.*, a mandatary is subject to certain obligations, including the obligation to act with loyalty; this means he must put the interests of his mandator before his own interests.

Application of the theory of mandate

The courts may use the theory of mandate to satisfy a participant's claim by recognizing the employer as mandatary of the insurer.

2.7.7.2 Policyholder's obligation to inform

The law does not require a policyholder to inform members of the group before they subscribe to the contract. However, the obligation to inform is considered to stem from the requirements of good faith and the concept of enlightened consent.[240]

Similarly, when the coverage is modified during the term of the contract, the case law recognizes that the policyholder has a certain obligation to inform the participants.[241] This obligation is not as demanding as the duty imposed on group insurance representatives, because the policyholder is not an insurance specialist (see Chapter 4 of this manual).[242]

EXAMPLE

Jules, who owns the business *Les fines herbes Inc.*, would like to offer his employees a group insurance plan, the cost of which would be shared by the employer and the employees. Following his conversation with Marika, a group insurance representative, he meets with his staff to explain the coverage offered as well as the associated costs. He mentions that they can apply for additional protection over and above the basic protection. The information provided by Jules will allow the employees to make an informed decision when subscribing to the master policy.

2.7.8 Types of group insurance

2.7.8.1 Workplace group insurance offered by employers or unions

As previously mentioned, the policyholder in workplace insurance can be an employer or a union. Sometimes, it can be both of them, by means of a parity committee. It is important to ensure that they are duly constituted legal persons. The employer is generally a business enterprise (a business corporation) or a partnership.

240. Michel Gilbert, *L'assurance collective en milieu de travail,* 2nd edition, Cowansville, Les Éditions Yvon Blais, 2006, p. 44.
241. *Fortier* v. *Sun Life du Canada, cie d'assurance-vie*, 2010 QCCS 4923.
242. Michel Gilbert, *op. cit.,* pp. 44 to 46.

Distribution of insurance costs

Basic insurance coverage is generally paid for by both the employer and the employee. The amounts paid by the employee are deducted at source by the employer. Once deducted, premiums no longer belong to the employer; they belong to the insurer.[243] The employer's participation may be total or partial, i.e. it may pay for all the coverage offered or only part of it. Even if the employer does not always contribute financially to the various types of insurance coverage, its administrative role, i.e. managing the contract, is a substantial contribution.

2.7.8.2 Insurance offered through professional associations and orders

Definition: Professional association or order

A professional association is an association formed to protect and promote the privileges and rights of a profession or occupation, to ensure the competence of those who engage in it, to impose a code of ethics and, generally, to develop the economic, social and educational interests of its members. A professional order (or professional corporation) brings together those in the same profession and has regulatory and disciplinary powers: the *Barreau*, the *Chambre des notaires* and the *Ordre des pharmaciens* are professional orders.

EXAMPLES

- An association of business people and a sports association are associations constituted for a specific purpose when they charge annual dues and elect directors.
- The *Ordre des ingénieurs du Québec* is a professional order of which engineers must be members; it offers its members the possibility to enrol for group insurance subscribed by the order.

2.7.8.3 Group insurance contracts on the life or health of debtors and/or depositors

A financial institution (e.g., a bank or *caisse populaire* (credit union)) can also offer insurance and be the policyholder of a group insurance policy issued by an insurer in insurance of persons. It offers insurance on the life or health of debtors to consumers when they take out a loan, in order to purchase a car or house, for example.

Group insurance on the health or life of debtors is often referred to as "loan insurance," "credit insurance" or "creditor's life insurance." Insurance taken out when a house is purchased is hypothecary (mortgage) insurance which guarantees the balance of the hypothecary (mortgage) loan or line of credit. It guarantees the repayment of the loan in the event of the death or disability (and even, at times, the involuntary loss of employment) of the borrower.

243. *Corporation Jetsgo (Syndic de)*, 2010 QCCA 1286.

Group insurance on the life or health of investors is less common. One example of this type of insurance is life or disability insurance offered when a scholarship plan is purchased for a registered education savings plan (RESP's).

In all cases, the lender is both the holder of the group insurance policy and the beneficiary. Therefore, the borrower will receive the death benefit upon the death of the borrower (the participant) or the disability insurance benefits in the event of the borrower's disability namely, up to the balance of the loan.

EXAMPLE

Jacques takes out a $10,000 loan from a bank to purchase furniture and, at the same time, he subscribes to the group insurance offered by the bank. The insurance will cover the repayment of his loan in the event of death or his monthly payments in the event of disability.

Definition: Creditor

Only a creditor (or an entity representing a group of creditors) can be a policyholder under this type of insurance on the life or health of a debtor. A creditor can be a *caisse populaire* (credit union), a bank, a trust company or any enterprise carrying on similar activities. In such a case, the enterprise is referred to as a "distributor of group insurance." No registered representative is involved in offering the insurance to consumers; in fact, it is offered by employees of the financial institution (or of another provider according to *An Act respecting the Distribution of Financial Products and Services*, such as a car dealer) who are not registered as insurance representatives with the AMF. This type of distribution is further discussed in detail in Chapter 4.

2.7.9 Rules relating to formation and effective date

2.7.9.1 Application, call for tenders and specifications

The two stages of the formation of a contract are the offer by the policyholder (the application) and the acceptance by the insurer.

The application is a request for insurance in which the applicant indicates the type of coverage required, the amount of coverage and the duration of the coverage. At this time, the policyholder also mentions the risks against which it wishes the members to be protected and declares to the insurer any circumstances likely to influence the acceptance of the risk (e.g., the types of occupations).

In group insurance, unlike individual insurance, the application is a detailed offer; it specifically sets out the details of the group insurance plan provided to the members. It is written and filled out by the policyholder or the representative, and sometimes by an actuary. The policyholder must comply with the undertakings made in favour of the members of the group, which are sometimes contained in a collective agreement.

Larger businesses often prepare a set of specifications and proceed by way of a call for tenders. When the policyholder is a public body such as a municipality, it must proceed by way of a public call for tenders. With the occasional exception, the contract must be awarded to the lowest compliant bidder.

Once the parties have given their consent, the group insurance policy takes effect on the date determined by the policyholder and the insurer.

2.7.9.2 Effective date for the participant: Active attendance at work

Requirements: Workplace group insurance

In workplace group insurance, the most common requirement is the need to work for a certain time before becoming eligible or to have completed the probation period. Some businesses also require that an employee work a certain number of hours per week in order to be eligible for workplace group insurance.

EXAMPLE

In order to be able to subscribe to the group insurance offered by his employer, Charles must have been employed for 3 months before his application and work at least 24 hours per week.

As mentioned earlier with respect to individual insurance, for a person to benefit from group insurance protection, the event against which he wishes to protect himself must not have occurred: a person who knows that he has cancer and who would like to take out insurance to cover this type of illness (such as critical illness insurance) will not be insurable because the event has already occurred before the coming into force of the group insurance contract.

In group insurance, the proof of insurability of participants is often limited to their presence at work on the date the contract takes effect. The insurer assumes that if the person is working, he is in good health. Thus, in the vast majority of cases, no medical questionnaire is required for basic insurance in employer-employee group insurance. However, if the employee wishes to enhance his life insurance with additional optional coverage, the insurer may ask him to fill out a medical questionnaire, make a declaration of insurability and undergo certain tests.

When an employee is eligible for insurance but is absent on the date the contract takes effect, such as in the case of annual vacations, he must not be deprived of the protection offered under the insurance, because the absence has nothing to do with his health.[244]

244. *Regulation under the Act respecting insurance*, CQLR, c A-32, r. 1, s. 71.

Subject to situations involving a change of insurer in group insurance (ss. 68 and ff. of the *Regulation under the Act respecting insurance*), the effective date of the protection offered under certain insurance coverage will be postponed when the absence from work is due to the employee's health. In some cases, the insurer may ask the participant to fill out a medical questionnaire.

As regards group insurance offered by associations or professional orders, the insurer will generally require evidence of insurability (questionnaire regarding the state of health), that members be in good standing and that their dues be paid.

2.7.9.3 Participant's representations

As previously mentioned, an insurer will sometimes require a potential participant to fill out a questionnaire about his state of health. It may also ask him to undergo a medical examination if it considers it necessary to prove his insurability.

Questions in the application

When appropriate, as in individual insurance, when applying for group insurance or for group insurance on the life and health of debtors and depositors, the applicant must correctly and honestly answer the questions asked about his state of health. If he answers "no" to all the questions, he will obtain the insurance coverage without any further formality.

If the applicant does not answer honestly and the insurer finds out, the insurer may refuse to pay the insured amount. Its grounds for doing so will be clear: the applicant failed to indicate, for example, certain health problems when applying for the insurance.

EXAMPLE

Beatrice fills out an application in order to obtain life insurance to cover the balance of her hypothecary (mortgage) loan. There is a question about the condition of her heart. Although she is being treated for high blood pressure, she nonetheless answers "no" when asked whether she has heart problems. She dies six months later of a heart attack. The insurer refuses to pay the face amount because Beatrice stated that she did not have this type of problem. Even if she dies for another reason, the insurer may also deny the claim.

If the applicant answers "yes" to any of the questions, his file will be transferred to the underwriting department for further review. The applicant may be asked additional questions about his state of health. Once the insurer has obtained all the information necessary to assess the risk, it will decide whether or not to accept it (and will also decide on the rates).

The applicant must be specific when answering questions about his state of health. If the question has several elements and only one involves the applicant, he must indicate it in the questionnaire.

EXAMPLE

Philip subscribes to the master life insurance policy offered by his association. One of the questions on the application is the following: "Have you been treated or hospitalized during the past year or have you taken medication?" Philip answers "yes" to the question, even though only one aspect of the question involves him, namely the taking of medication.

Protection conditional upon acceptance by the insurer

The insurer may impose conditions (e.g., a medical examination). Under these circumstances, the contract often contains provisions stating that the participant's coverage comes into effect when the participant meets the eligibility requirements set by the insurer.

2.7.10 Enrolment and coverage of insured persons (spouse and dependants)

2.7.10.1 Mandatory enrolment according to eligibility rules

Subscription to the master policy by the members of the group completes the tripartite relationship between the insurer, the policyholder and the participant. Once the member of the group has subscribed to the master policy, he becomes a full party to the contractual relationship. Enrolment by a member is mandatory or optional, depending on what the master policy states.

Mandatory enrolment

When enrolment is mandatory for all members of a group, the policyholder gives the insurer the list of members covered by the contract. Enrolment then becomes an obligation from which the member cannot be exempt. He loses the ability to choose whether or not he will participate. However, as regards prescription drug insurance and health insurance coverage (dental care, vision care, health professionals, travel insurance), an employee who is covered by his spouse's plan may unsubscribe as regards this coverage by providing evidence of insurance to his employer, unless participation in this coverage is a condition of employment.[245] Nonetheless, even in such a case (of unsubscribing), he must be covered by his employer's group insurance as regards life insurance and salary insurance (disability insurance), where applicable.

Optional enrolment

There are plans which give the possibility of subscribing or not subscribing to the master policy. Under these circumstances, the participant has a choice. Some plans provide basic coverage which can be combined with other coverage. Other plans, referred to as "à la carte" or "flexible," are more sophisticated. They give participants the choice between several types and degrees of

245. *An Act respecting prescription drug insurance*, CQLR, c A-29.01, s. 44.1.

coverage. Nonetheless, pursuant to *An Act respecting prescription drug insurance*, the participant must subscribe to the prescription drug insurance and also cover his spouse and dependants, unless he is already covered by another private drug insurance plan.

2.7.10.2 Mandatory enrolment for coverage under the prescription drug insurance plan and mandatory coverage of spouse and children

As previously mentioned, a participant in a group plan must subscribe to the prescription drug insurance of that plan, unless he has access to another plan, such as through the group insurance of his spouse or his professional association. Participants are also obliged to ensure that coverage is provided to their spouse, if they share the same domicile (unless, of course, the spouse is a member of another plan), to their children and to persons suffering from a functional impairment who share the same domicile.[246]

Under *An Act respecting prescription drug insurance*,[247] two persons (of the opposite or same sex) are considered to be spouses in the following cases:

- They are married or in a civil union;
- They have been cohabiting in a conjugal relationship for at least 12 months; or
- They are cohabiting in a conjugal relationship and have a child together.

EXAMPLE 1

Paul and Mia are spouses and have two children. Paul, a self-employed worker, is not a member of an association, a professional order or a union. Mia works as a lawyer in a manufacturing company. As such, she has a disability insurance and prescription drug insurance. Pursuant to *An Act respecting prescription drug insurance*, Mia must enroll in the plan offered by her employer and have Paul and their children enroll in the plan.

EXAMPLE 2

Louise has decided to become a member of the *Association des acupuncteurs* since she is an acupuncturist. Membership in the association is optional; Louise is not obliged to join it in order to practise her profession. If she decides to join the association, she must enroll in the prescription drug insurance offered by the association, unless she has access to another private plan through her spouse.

246. *Ibid.*, s. 18.
247. *Ibid.*, s. 17.

A child whose father or mother is covered by a private plan must also benefit from this coverage until his 18th birthday. Afterwards, this insurance coverage must continue if he is domiciled with the participant and is a full-time student, until the age of 25, or if he is suffering from a functional impairment. It should be noted that an insurer may have definitions of spouse and child that are broader than those in the Act (e.g., the plan may define a child as a person 21 years of age or younger).

EXAMPLE

Sébastien is 22 years old. He is single, a full-time student at the University of Québec at Trois-Rivières and lives with his parents. His father has group insurance covering prescription drugs. Sébastien must therefore enroll in the prescription drug insurance plan offered by his father's private plan. He cannot be covered by the public plan.

The public plan

The public Prescription Drug Insurance Plan is the plan offered by the Government of Québec (the RAMQ). It covers all Quebeckers who do not have access to a private drug insurance plan.

The following persons are eligible for the public Prescription Drug Insurance Plan:

- Persons 65 years of age or over. It should be noted that they can choose between coverage under a private plan, if they are eligible, and the public plan;
- Recipients of last-resort financial assistance and holders of a claim slip;
- Persons who do not have access to a private plan (e.g., self-employed workers); and
- Children of persons covered by the public plan.[248]

In most cases, the RAMQ must be contacted in order to benefit from the public Prescription Drug Insurance Plan. Persons who pay a premium when filing their income tax return are not automatically registered for the public plan. Only certain individuals will be automatically registered for the plan without having to make an application, such as persons 65 years of age or over. These individuals may choose to participate in a private plan, if they are still eligible, and unsubscribe from the public plan.

Moreover, a person under the age of 65 who retires and has access to a private plan (e.g., through a professional association) must enroll in the private plan; that person cannot be covered by the RAMQ.

248. *An Act respecting prescription drug insurance*, CQLR, c A-29.01, s. 15.

The RAMQ monitors the eligibility of registrants on a regular basis. Some must rectify the situation either by reimbursing to the RAMQ the cost of the medications paid by the RAMQ or by retroactively claiming back the premiums paid to the RAMQ.

On the RAMQ website, the *Bulletin Info Assurance-médicaments* (available only in French) sets out the RAMQ's position regarding the Act. On its website, the RAMQ has also set up a questionnaire allowing any Québec resident to determine whether he should be covered by a private insurance plan or by the public plan.[249]

2.7.11 End of a group insurance contract, non-payment of premiums and cancellation notice

The insurance coverage is in effect for the term of the master policy. However, the insurance may end earlier if the master policy expires or is cancelled. In addition, an insurance contract whose term will expire can be renewed. These rules are discussed in this section.

Renewal of the master policy

If the policyholder wishes to extend the insurance coverage, whose term is generally one year, the parties must agree to renew the contract.

Rules respecting renewal

The coverage may be extended under the same terms as in the initial contract or contain changes. In accordance with paragraph 3 of article 2405 *C.C.Q.*, these changes must be indicated clearly in a separate document from the rider which stipulates them. A change is presumed to be accepted 30 days after receipt of the document.

Nature of renewed master policy

The renewal may be evidenced by a certificate of renewal or the issuance of a policy. Even where a policy is issued, it does not constitute a new insurance contract, unless it was preceded by genuine negotiations or unless substantial changes were made to the basic contract.

249. *Régie de l'assurance maladie du Québec*, "*Info assurance médicaments*," on-line document modified in March 2012, consulted on July 21, 2017. (available only in French).
See http://www.ramq.gouv.qc.ca/SiteCollectionDocuments/citoyens/fr/autres/information-assurance-medicaments-fr.pdf.

End of the master policy

Expiry of the term

Upon the expiry of the coverage period, the parties are released from their respective obligations, except the insurer as regards insured events that occurred before the expiry, unless the contract is renewed, as mentioned above.

It is important to note that a participant who has been insured for at least five years has a right to convert his life insurance into individual insurance when the master policy expires (without being replaced by another insurer's group insurance contract). The right of a participant to convert his group insurance coverage into individual insurance will be discussed further below. However, other circumstances may lead to the end of an insurance contract, including the cancellation of the contract due to the policyholder's failure to pay the premium.[250]

Cancellation of the master policy before the expiry of the term

Cancellation only puts an end to the master policy for the future. Once the cancellation is in effect, the insurer ceases to have obligations toward the participants if a new insured event occurs. However, there are certain exceptions in disability insurance and life insurance. This topic will be discussed further below.

Cancellation agreed upon between the insurer and the policyholder

The insurer and the policyholder may agree on certain reasons justifying the cancellation of the contract. For example, if the number of members of the group falls below the number set by the insurer and the policyholder, the insurer can cancel the contract.

Cancellation of a group insurance contract resulting from non-payment of the premium by the policyholder

At times, the policyholder, who is responsible for paying (or remitting) the premium, is unable to pay the insurer the premiums specified in the contract. It may be experiencing financial difficulties as a result. The law provides for these situations by setting out different rules for life insurance, accident and sickness insurance and prescription drug insurance (which is a type of accident and sickness insurance). These provisions also have consequences for the participants.

The insurer will provide a 30-day cancellation notice to the group insurance policyholder in order to terminate all the coverages of the group insurance contract[251].

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250. *Bélanger* v. *Great-West, compagnie d'assurance vie,* REJB 99-14473 (C.S.), September 20, 1999.
251. See arts. 2427 (no notice required for life insurance: 30 day grace period) and 2430 (15 day written notice required for accident and sickness insurance) of the *Civil Code of Québec* and s. 47 of an Act Respecting Prescription Drug Insurance (30 day written notice required to the policyholder or participant as applicable for prescription drug insurance.).

Non-payment of premium by the employer or participant

The payment of the premium is an obligation generally assumed by the policyholder.

However, when a plan member does not receive a salary from his employer, the employer is no longer able to deduct premiums from his employee.

This situation occurs when an employee is not at work (e.g., on leave) and there are no premiums that can be deducted. In such situation, the employer and employee must absolutely determine how to resolve this issue.

When no solution is found, coverage will be terminated for such employee.[252]

Consequences of non-payment of the premium: Life insurance

In life insurance, non-payment of the premiums, other than the initial premium, results in the cancellation of the contract after 30 days (art. 2427, para. 1 *C.C.Q.*). Pursuant to the first paragraph of article 2415 *C.C.Q.*, the insurance policy must indicate the time limits for payment of the premium.

If the policyholder pays the premiums within the 30-day grace period, the insurance will remain in effect.[253] The 30-day period is a minimum. Nothing prevents the insurer and the policyholder from agreeing on a longer time limit. The insurer can, in fact, extend the time limit to allow the policyholder to pay the premium. If a loss occurs during the grace period, the participant is covered, even if the premium has not been paid.

Consequences of non-payment of the premium: Accident and sickness insurance

In sickness and accident insurance, non-payment of the premiums while the contract is in effect leads to the cancellation of the contract only if the insurer sends the policyholder a 15 days' prior written notice (art. 2430 *C.C.Q.*).

However, in prescription drug insurance, the law requires the insurer (or the ASO plan administrator) to give a prior notice of 30 days in order to cancel the contract.[254]

Difference compared with life insurance

Under accident and sickness coverage and contrary to life insurance, article 2430 *C.C.Q.* requires that an insurer give prior notice before cancelling the contract. This allows the person concerned to remedy the default. If non-payment of the premium by the policyholder involves all the

252. See arts. 2427 (no notice required for life insurance: 30 day grace period) and 2430 (15 day written notice required for accident and sickness insurance) of the *Civil Code of Québec* and s. 47 of an Act Respecting Prescription Drug Insurance (30 day written notice required to the policyholder or participant as applicable for prescription drug insurance.).
253. *Rocheleau* v. *Union-Vie, compagnie mutuelle d'assurance*, REJB 1999-13793 (C.S.), May 27, 1999.
254. *An Act respecting prescription drug insurance*, CQLR, c A-29.01, ss. 47 and 48.

employees, the contract will be cancelled. However, if the participant is the person involved and he does not make the payment, his insurance coverage (and those of his dependants) will be cancelled.

End of insurance coverage for the participant

A participant's insurance coverage can end for a variety of reasons. In examining them, we will analyze the factors which lead to the loss of eligibility by a participant (non-payment of the premium and end of affiliation with a group, among other things) as well as the right to convert group insurance coverage into individual insurance.

Loss of eligibility for insurance

In order to keep his insurance coverage in effect, a participant must maintain his eligibility for the insurance. To do so, he must continue to satisfy the eligibility criteria. A participant's insurance coverage (and that of his covered dependants) will cease if he is dismissed or voluntarily leaves his employer, if he retires or if he is no longer a member of an association or professional corporation. Normal absences provided for in the employment contract between the employer and the employee (maternity leave, sick leave) do not put an end to the insurance coverage of the employee in question. Pursuant to *An Act respecting labour standards*, the employer must maintain the coverage of employees who are on maternity or parental leave, subject to payment of the participant's premium.[255] Employees on strike, lock-out, or on leave of absence may sometimes continue to be covered if the policy provides for such.

An employer may offer group coverage to retirees (usually a less generous plan than that offered to active employees), but this type of plan is less common now than it used to be.

All of these situations involve a person ceasing to be affiliated with a group. As soon as a participant is no longer a member of the group to which he belonged, his insurance coverage ceases.

2.7.11.1 Participants' rights when a group insurance contract ends and the contract is not replaced

Conversion right

Pursuant to section 66 of the *Regulation under the Act respecting insurance,* a participant who has been insured for at least 5 years before the end of a group insurance contract has the right, without having to provide evidence of insurability, to convert his group life insurance coverage to individual life insurance within 31 days after the expiry of the master policy if the master policy is not replaced or if it is replaced by another group insurance contract that provides a lesser amount of life insurance.

255. *An Act respecting labour standards*, CQLR, C N-1.1, ss. 49, 70, 79.3 and 81.15.

The amount of insurance that may be converted must be at least $10,000 or 25% of the amount of the participant's life insurance on the expiry of the master policy, whichever amount is greater.

The conversion option does not apply to sickness or accident coverage included in the group insurance contract.

Disability insurance

A participant who is disabled within the meaning of the insurance policy before the end of the group insurance contract has the right to receive disability insurance benefits from the insurer even if the group insurance contract is ended after his disability; he is entitled to such benefits as long as he is disabled within the meaning of the policy (subject to the end of coverage under the terms of the policy, e.g., once the participant reaches the age of 65).

In certain cases, a participant will be entitled to receive disability insurance benefits in the event of a recurrence after the end of the group insurance contract if the contract has not been replaced by a new group insurance contract. However, the participant will not be entitled to receive disability insurance benefits in the event of a recurrence of the disabling affliction after the expiry of the contract if it has been more than 180 days since the participant was disabled.

2.7.11.2 Participants' rights when a group insurance contract ends and the contract is replaced by another contract with a new insurer

Where there is a change of insurer, there are rules that provide which risks are assumed by the former insurer and which ones are assumed by the new insurer. The following are the principal rules.

Risks assumed by the former insurer

If a loss occurs before the master policy is replaced, the former insurer must cover it, whether the situation involves life insurance or accident and sickness insurance.

Rules respecting disability insurance

If a participant's disability (disability date) occurs prior to the expiry of the master policy, the former insurer must assume responsibility therefore; it will have to pay insurance benefits throughout the duration of the disability (subject to any insurance limits set forth in the policy). It must be responsible for any consequences that occurred prior to the end of the master policy. N.B.: The insurer's obligation will arise only at the end of the waiting period, provided the participant is still disabled.

EXAMPLE

Rolande subscribed to the master group insurance policy of her professional order. She has life insurance and disability coverage. She has been very tired for some time. Her doctor signs a note for her to stop working due to work-related exhaustion. She claims disability benefits from the insurer, who tells her that she will only be eligible for benefits at the end of the 30-day waiting period. Three months after the disability began, Rolande is still unable to return to work. The employer renewed the master group insurance policy with another insurer. Since Rolande is still disabled at the time of the change of insurer, the former insurer will continue to pay her disability benefits as long as she remains disabled.

Recurrence

The former insurer may be required to pay disability benefits again if a participant has a recurrence of the same disability, but only if the recurrence arises within 180 days after the end of the initial period of disability and provided the participant has not returned to work for 30 days of full-time work since the expiry of the former contract.[256]

Cancellation of the contract

When the former master policy is cancelled and replaced by a new contract with coverage comparable to the previous one, the former insurer no longer has to cover the consequences of a risk that occurs prior to the expiry of the master policy, if the new insurer agrees to cover the risk, which may happen frequently.[257]

Conditions of replacement of a contract

The replacement must take place within 31 days of the cancellation of the former contract.[258] Replacement of the contract by another contract with comparable provisions within 31 days ensures that participants are covered, as of right, by the new master policy.[259] Moreover, this rule prevents the new insurer from invoking pre-existing condition limitations, including those concerning declared diseases or ailments.

In addition, a participant covered under the former contract may not be refused by the new insurer for the sole reason that he was not actively in attendance at work when the new master policy came into effect.

256. *Regulation under the Act respecting insurance*, CQLR, c A-32, r. 1, ss. 70 and 72.
257. Michel Gilbert, *op. cit.*, p. 196; *Regulation under the Act respecting insurance*, s. 70, para. 2.
258. *Regulation under the Act respecting insurance*, CQLR, c A-32, r. 1, ss. 67 and 71.
259. *Ibid*.

2.7.11.3 Participants' rights upon leaving the group

When a participant's insurance coverage ends before the age of 65 because he ceases to be an employee of the policyholder or to belong to a group, he has the right to convert his group life insurance coverage into individual life insurance without having to provide proof of insurability.

This conversion right is very advantageous for former employees, and even more so for those who are no longer insurable, because the insurer cannot ask for evidence regarding their state of health.

In the group insurance contract, the insurer may grant more generous conversion privileges to certain participants, such as those over the age of 65 or for a period extending after the age of 65 (the age at which life insurance coverage ends under most group life insurance contracts).

At the time of the conversion, the participant must be able to obtain coverage comparable to that of his group insurance without interruption of that coverage, subject to the prescribed maximum. Since September 10, 2009, the conversion privilege has also extended to dependants (spouses and children) who are insured. Table 2.3 sets out the rules applicable as of September 10, 2009, and the former rules that are still in force if the contract was entered into before September 10, 2009.

TABLE 2.3

Rules applicable to the conversion right in group insurance

	REGULATION SINCE SEPTEMBER 10, 2009		REGULATION BEFORE SEPTEMBER 10, 2009	
	Minimum amount	**Maximum amount**	**Minimum amount**	**Maximum amount**
Participant	$10,000	The lesser of: $400,000 or amount covered under the group contract	$5,000	$200,000
Dependant	$5,000	The lesser of: $400,000 or amount covered under the group contract	Not applicable	Not applicable

The conversion right under the law applies only to life insurance.

EXAMPLE

Benoît, who is 60 years old, decides to retire. His group insurance offers $100,000 of life insurance until the age of 65. Pursuant to the *Regulation under the Act respecting insurance,* he has a right to convert his group life insurance to $100,000 of individual life insurance until the age of 65. Benoît has 31 days to exercise his conversion privilege. Some insurers even offer a right to convert to whole life insurance (permanent insurance).

Conditions for exercising the conversion right

Section 62 of the *Regulation under the Act respecting insurance* sets out the rules allowing a participant to convert his group life insurance to individual life insurance.

A participant who wishes to convert his insurance coverage must be less than 65 years of age when he ceases to be eligible for the insurance. The loss of eligibility must result from the end of employment or of affiliation with a group.

To exercise his conversion privilege, the participant must apply within 31 days of the end of his employment or his affiliation with the group. In general, the participant will obtain the same amount of insurance he had under the group insurance, subject to the $400,000 maximum set by law.[260]

Another rule regarding the conversion privilege applies when the master policy ends and is not replaced or if the new contract provides for an amount of coverage that is less than the amount provided for in the master policy being replaced (see the section entitled *Participants' rights when a group insurance contract ends and the contract is not replaced*).

The participant therefore has 31 days to convert his life insurance coverage. During that period, he continues to benefit from the life insurance coverage provided under the group insurance contract.[261] Thus, if he dies during this 31-day period, the insurer will have to pay the insured amount to his designated beneficiary or, failing such, to the participant's succession.

The individual products offered by the insurer must comply with the following rules:

- The insurance (temporary until age 65, or permanent if offered by the insurer) must provide coverage comparable to that offered under the group contract. The premium for the first year must not exceed the premium for temporary one-year insurance; and
- One-year insurance must provide coverage comparable to that offered under the group contract, and convertible into insurance described above.[262]

Section 67 of the *Regulation under the Act respecting insurance* describes comparable coverage as follows: "[P]rotection is comparable if the content is the same despite differences in the amounts of insurance, the amounts of premium waivers or the conditions of eligibility."

The premiums may be established on the basis of the participant's age, sex and lifestyle (smoker or non-smoker), but not his health condition.

If the participant does not exercise his conversion right, the group insurance coverage ends after the 31-day period.

260. *Regulation under the Act respecting insurance*, CQLR, C A-32, r. 1, s. 62.
261. *Ibid.*, s. 62.
262. *Ibid.,* s. 63.

Obligation to inform

According to case law, it is up to the employer,[263] who is the policyholder, to properly inform participants about the existence of the conversion privilege and the conditions for exercising it, more particularly at the time the group coverage ends. While the insurer has the obligation to offer the conversion privilege, it does not generally know when a person's employment ends.

EXAMPLE

Maude works as a human resources manager in a dinnerware manufacturing company. She has life and disability insurance under her employer's group insurance plan. Following various health problems, Maude learns that she has skin cancer. She has to stop working to undergo chemotherapy. She receives disability benefits during that time.

Two months after her disability begins, her employer reorganizes the company's administration and her position is abolished. The employer informs Maude about the situation in writing. It tells her that, as long as she is disabled, she will receive her disability benefits. As regards her life insurance coverage, it says that she will keep her group insurance coverage as long as she is disabled. According to the employer, when she is no longer considered disabled, and if she does not come back to work, she will benefit from her group life insurance coverage for 31 days. However, if she wants to continue to benefit from that coverage during the 31-day period, she will have to convert her group insurance coverage into individual insurance and pay her first premium. She will also be entitled to exercise a conversion privilege as regards her spouse and dependent children if they are already covered.

2.8 Assuris guarantees

Assuris is a not-for-profit organization that protects Canadian policyholders if their life insurance company should fail. It is funded by its members, i.e., life insurance companies doing business in Canada.

Its role is to protect policyholders by minimizing the loss of benefits and ensuring a quick transfer of their policies to a solvent insurance company, where their protected benefits will continue.

Assuris's Supplementary Rules relating to coverage dated December 10, 2009, replaced the Supplementary Rules dated September 2001.

263. *Bidégaré* v. *UNUM d'Amérique, cie d'assurance-vie,* REJB 2004-61767 (C.Q.); Michel Gilbert, *op. cit.*, nos. 60 and 330, pp. 44 to 46 and 218.

Under these rules, other than the coverage applicable to annuities (see Chapter 4), Assuris provides guarantees (or protection) for life insurance products. A summary of these guarantees is presented and explained on the Assuris website.[264]

For example, if a life insurance company that is an Assuris member becomes insolvent, its insurance contracts will be transferred to a solvent insurer (through the combined efforts of Assuris and the insolvent insurer's liquidator). The insolvent insurer's clients (or their assigns) will enjoy the following protection, among others, upon the transfer:

- Life insurance — Assuris guarantees that the client will retain up to $200,000 or 85% of the promised death benefit, whichever is higher. If the product includes a cash surrender value, the protection offered is $60,000 or 85% of the cash surrender value, whichever is higher;
- Disability or long-term care insurance — Assuris guarantees that the client will retain up to $2,000 per month or 85% of the promised monthly income benefit, whichever is higher;
- Critical illness insurance — Assuris guarantees that the client will retain up to $60,000 or 85% of the promised benefits, whichever is higher.

If the client has several types of coverage with the same life insurer, all similar benefits issued will be added together under certain categories before Assuris's protection is applied.

264. See http://www.assuris.ca/Client/Assuris/Assuris_LP4W_LND_WebStation.nsf/page/Policyholder?OpenDocument&audience=policyholder.

CHAPTER 3

INDIVIDUAL AND GROUP ANNUITY CONTRACTS (INCLUDING SUPPLEMENTAL PENSION PLANS)

Competency component

- Incorporate the legal aspects of annuity contracts into professional practice.

Competency sub-component

- Explain the terms and main clauses of an annuity contract;
- Characterize the parties involved in the contract;
- Integrate into practice the rules relating to the beneficiary designation and exemption from seizure of benefits;
- Contextualize the rules relating to claims and the payment of benefits.

3

INDIVIDUAL AND GROUP ANNUITY CONTRACTS (INCLUDING SUPPLEMENTAL PENSION PLANS)

This Chapter discusses annuity products, including investment and retirement products which may be distributed by financial security advisors, group insurance plan advisors and group annuity plan advisors, as the case may be.

Important legal concepts about individual investment and retirement products as well as group products, including segregated funds will also be examined.

We will also discuss notions applicable to individual investment and retirement products as well as those involving only group investment and retirement products, including supplemental pension plans.

3.1 Introduction to investment and retirement products

Investment and retirement products available in the market are issued by various financial institutions or entities such as banks, financial services cooperatives (also known as credit unions or "*caisses populaires*"), trust companies, life insurance companies and investment fund managers. Various people distribute these products: insurance representatives, dealing representatives (mutual fund dealers) and dealing representatives (investment dealers).

Chapter 4 deals with products that these financial institutions and other entities may issue or distribute. Note also that in Québec, approximately 90 insurers are currently licensed by the *Autorité des marchés financiers* (AMF) to issue life insurance policies, of which about 15 are effectively active in the segregated fund business.

In this Chapter, since the only types of contracts which may be distributed by financial security, group insurance and group annuity advisors and group annuity plan advisors are life insurance contracts (including accident and sickness insurance policies), and annuity contracts issued by insurers are assimilated to life insurance[265] by law, it is advisable to carefully study annuity contracts, which are the basis for all[266] investment and retirement products issued by insurers.

265. *Regulation under the Act respecting insurance*, CQLR, c A-32, r. 1 and the Civil Code of Québec, art. 2393.
266. Other than with respect to insurers incorporated in Québec and licensed by the AMF to receive deposits under the *Deposit Insurance Act,* CQLR, c A-26.

3.2 Legal nature of annuity contracts

In Québec, annuity contracts are governed by articles 2367 to 2388 of the *Civil Code of Québec*.[267]

According to article 2367 of the *C.C.Q.,* "[a] contract for the constitution of an annuity is a contract by which a person, the debtor, undertakes, by gratuitous title or in exchange for the alienation of capital for his benefit, to make periodic payments to another person, the annuitant, for a certain time."

To be considered an annuity contract, the contract must meet the five criteria set forth in the *C.C.Q.*, as interpreted by the Supreme Court of Canada in *Bank of Nova Scotia* v. *Thibault:*[268]

- There must be a debtor (art. 2367 *C.C.Q.*), i.e., the debtor of the annuity: the insurer;
- There must be an annuitant (art. 2367 *C.C.Q.*), i.e., the person who receives the annuity: the payee;
- There must be an alienation of capital,[269] i.e., the payment to the insurer of a sum of money, as capital, for the constitution of an annuity (art. 2367 *C.C.Q.*);
- There must be an obligation to pay an annuity (art. 2367 *C.C.Q.*);
- There must be a specification of a periodic amount for a fixed time (art. 2367 *C.C.Q.*);[270]

It should be noted that this Supreme Court of Canada case involved a trust company, not an insurer. When an annuity contract is purchased from an insurer, there must also be an insured life (the person on whose lifetime the duration of the annuity contract is based) (art. 2371 *C.C.Q.*) for life annuity contracts.

The word "annuity" often refers to the periodic payments received, for example, monthly. However, it also refers to the type of contract. This is what we will discuss in this Chapter.

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267. *Civil Code of Québec*, CQLR, c C-1991, the definition of an annuity contract is found in section 2387 of the *Civil Code of Québec*.
268. *Bank of Nova Scotia* v. *Thibault*, [2004] 1 S.C.R. 758.
269. In response to the interpretation of this requirement by the Supreme Court of Canada in *Bank of Nova Scotia* v. *Thibault*, the Québec legislator introduced section 33.4(1) and (2) of *An Act respecting insurance* through *An Act to amend the Act respecting insurance and the Act respecting trust companies and savings companies,* CQLR, c 51, which states that the fact that an insurance company offers a choice of investments does not preclude the company from having control of the capital accumulated for the payment of the annuity and that right to withdraw all or part of the capital accumulated for the payment of an annuity may be stipulated, but the exercise of that right reduces the insurance company's obligations correlatively.
270. In response to the interpretation of this requirement by the Supreme Court of Canada in *Bank of Nova Scotia* v. *Thibault*, the Québec legislator introduced section 33.4(3) of *An Act respecting insurance* through *An Act to amend the Act respecting insurance and the Act respecting trust companies and savings companies,* CQLR, c 51, which states that the amount of the annuity to be paid periodically must, at the time the contract is entered into, be determinate, or at least determinable according to variables and a computation method specified in the contract.

Annuities are for life (for the lifetime of a certain person) or a fixed term (payable for a set duration of time).

Annuity contracts are generally purchased from an insurer or sometimes from a trust company. However, trust companies cannot issue life annuity contracts.[271]

Moreover, when a life or fixed term annuity contract is purchased from an insurer, it is assimilated to life insurance, under article 2393 of the *C.C.Q.* and section 13 of the *Regulation under the Act respecting insurance.*[272]

Under article 2393(2) of the *C.C.Q.,* life or fixed-term annuities provided by insurers are governed by the Chapter on Insurance and the Chapter on Annuities. In addition, the rules in the Chapter on Insurance that apply to unseizability (exemption from seizure) take precedence. The principles studied in Chapter 2 therefore apply to annuity contracts, adapted as required.

More specifically, individual and group annuity contracts are used as investment, tax, retirement, financial planning, estate planning and asset protection vehicles.

From a tax perspective, an annuity contract may be non-registered with the tax authorities, or it may be registered in an RRSP, RRIF, TFSA, RPP, LIRA, LIF, DPSP, VRSP, PRPP, etc. These plans, which are registered with the Canada Revenue Agency, are given special tax status.

It must also be determined what products (investment instruments or investment vehicles) are in (or are capitalized) the registered plan (for example, term deposit, mutual fund, annuity contract with a guaranteed interest account or segregated fund contract) and what rules apply to them. In this Chapter, we will study registered plans funded through an annuity contract purchased from an insurer.

Depending on the client's intentions, an annuity contract may be deferred or immediate.

3.2.1 Types of annuity contracts (life or fixed-term)

Life annuity contract

A life annuity is an annuity payable by the insurer, during the payment phase, to the annuitant throughout the lifetime of the person on whose lifetime the duration of the annuity is based.

The payments therefore end upon the death of the person on whose lifetime the duration of the annuity is based.

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271. *An Act respecting trust companies and savings companies*, CQLR, c S-29.01, s. 170, para. 4; *Trust and Loan Companies Act*, SC 1991, c 45, s. 416 (2) and (6).
272. *An Act respecting insurance*, CQLR, c A-32, r. 1.

Fixed-term annuity contract (annuity certain)

A fixed term annuity is an annuity payable by the insurer to the annuitant for a period of time determined by the parties in advance. It is also called an “annuity certain” Or fixed term annuity.

Life annuity contract with guarantee

A life annuity with guarantee is a contract according to which the insurer provides the annuitant with regular payments, during the payment phase, for the life of the person on whose lifetime the duration of the annuity is based (the life insured).

However, it also includes a guarantee ensuring the annuity payments are made for a minimum term, such as 10 years, as of the date the contract is issued.

As a result, if the life insured dies before the end of the guaranteed term, the insurer has an obligation to continue to make annuity payments to the annuitant (payee) for the remaining number of months in the guaranteed term.

Joint and survivor life annuity

A joint and survivor life annuity is a contract according to which the insurer pays the annuitant (who is generally the policyholder), during the payment phase, for the lifetime of the person on whose life the duration of the annuity is based (who is also generally the policyholder) and that of his or her spouse (until the death of the survivor). Therefore, for example, when the holder, annuitant and life insured of the annuity contract dies, its spouse becomes the new policyholder, annuitant and life insured of the annuity contract. After the death of a spouse, the insurer then ceases to pay annuities for that annuity contract.

3.3 Different parties to an annuity contract

There are several parties to an annuity contract. Most of the time, the same person plays different roles, as is stated in this chapter.

In the case of a registered annuity contract (RRSP, RRIF, TFSA, etc.), the policyholder is also always the person on whose lifetime the duration of the annuity contract is based (life insured) and the annuitant, and the policyholder of a registered annuity contract must be a natural person (i.e. an individual).

For non-registered annuity contracts, although in most cases the policyholder is also the person on whose lifetime the duration of the annuity contract is based and the annuitant, the person on whose lifetime the duration of an annuity contract is based and the annuitant may be different people. For example, a grandparent may purchase an annuity contract on the life of his son (the life insured) and designate his grandson as the annuitant. Also, a legal person, partnership, association or trust may hold (as client or policyholder) a non-registered annuity contract.

3.3.1 Policyholder and participant

The policyholder (or "participant," for group annuities) is the person who purchases an annuity from the insurer (or who becomes a member of a plan, for group annuities).

The policyholder (or certificate holder participant for group annuities) owns the annuity contract (or certificate for group annuities). He is the person who may designate one or more beneficiaries, an annuitant, a subrogated policyholder and a subrogated annuitant. The initial holder of the individual annuity contract is also called the "client." Note also that the policyholder is called the "subscriber" or "investor" in the annuity contracts of some insurers.

In the case of individual non-registered annuity contracts, the policyholder may choose the annuitant (the payee), provided he has an insurable interest in the life of the insured (see Chapter 2).

3.3.2 Subrogated policyholder

As in life insurance, when the life insured is not the same person as the holder of the non-registered annuity contract, the holder may designate a subrogated policyholder to replace him if he dies before the life insured (arts. 2393, 2445 and 2446 *C.C.Q.*).

There cannot be a subrogated policyholder for registered annuity contracts. However, for RRIFs and TFSAs only, the policyholder may designate his spouse in the policy as the successor holder, in the event of the holder's death.[273] The successor holder or survivor (under the *Income Tax Act*) is to a certain extent a subrogated policyholder within the meaning of the *Civil Code of Québec*.

3.3.3 Insured person or "person on whose lifetime the duration of the annuity contract is based"

In a life annuity contract, the life insured is the equivalent of the insured in life insurance, i.e. the person on whose lifetime the duration of the annuity contract is based (and whose lifetime determines the insurer's obligation). The life insured must be a natural person (arts. 2371 to 2376 *C.C.Q.*). The life insured may be the person who constitutes the annuity (the policyholder) or a third party, in which case the policyholder must have an insurable interest in the life of the third party (such as the person's spouse or child), or the third party's written consent.

EXAMPLE

Pierre would like to constitute an annuity on the life of the famous singer Céline Dion (whom he does not know) and designate a charity as the beneficiary. He must obtain Céline Dion's consent in order to subscribe to an annuity contract on her life.

273. Otherwise, in the case of a TFSA, CRA Form RC240 must be filled out. For more information, see https://www.canada.ca/en/revenue-agency/services/forms-publications/forms/rc240-designation-exempt-contribution-tax-free-savings-account-tfsa.html.

Although the phrase “person on whose lifetime the duration of the annuity is based” is not used per se in the C.C.Q. (the words “lifetime of one or several persons” are used in article 2371 of the C.C.Q.), the words are often used by insurers. The term “annuitant” is used in the English version of the Civil Code to refer to the payee, but in practice, this term is often used by insurers to refer to the person on whose life the annuity is based. In French, the word “rentier” is often used to mean “life insured,” even if it is not a word that is used in the *Civil Code of Québec*. In this chapter, the term “life insured” is used. It is therefore important for the advisor and the client to carefully read the definitions in every annuity contract. Finally, in the Income Tax Act, the word “annuitant” refers to the person who holds the registered contract (policyholder or participant).

3.3.4 Annuitant (Payee)

The annuitant is the person who is entitled to receive, for a certain period of time, payments (or periodic income) from the debtor during the annuity payment phase (art. 2367 *C.C.Q.*). Note that some contracts are using the term “payee” or “annuity grantee” to designate the annuitant. For the purpose of this book, the term “annuitant” will be used to refer to the person receiving (or who will receive) the annuity payments. Generally, the annuitant, the client and the life insured are the same person for non-registered products and always the same person for registered products.

3.3.5 Debtor

In an annuity contract, the debtor is generally an insurer or a trust company. It is the debtor who has the obligation to pay an annuity to the payee pursuant to the annuity contract. This manual will focus on annuity contracts issued by insurers.

3.3.6 Designated beneficiary

This person receives the death benefit (the market value of the rights of the holder of the annuity contract or the participant) upon the death of the life insured during the capitalization phase of the annuity (arts. 2393, 2445 and 2446 *C.C.Q.*). There can also be a beneficiary in the case of an immediate fixed-term annuity or an immediate life annuity with a guaranteed payout period.

3.3.7 Client in group annuities

As mentioned in the Chapter on group insurance, in a group annuity contract, the client is the legal person or entity (for example, the employer, the pension fund or association) who entered into a group annuity contract with an insurer for its employees or members. The employees or members are the participants in the group annuity contract. They have the same rights as the holders of an individual annuity contract (arts. 2392, 2393 and 2401 *C.C.Q.*).

3.4 Phases of an annuity contract

When an annuity contract is purchased from an insurer, the holder alienates capital to the insurer to constitute the capital of the annuity contract (i.e. the premiums or contributions become the property of the insurer). In exchange, the holder obtains the right to claim from the insurer, and certain other rights.

Annuities are immediate (to obtain a periodic income right away) or deferred (for investment purposes or with a view to retirement).

In the case of an immediate annuity contract, there is no accumulation phase. The contract starts with the payment phase.

In a deferred annuity contract, there is a capitalization phase and a payment phase. The alienation of the capital marks the beginning of the capitalization phase, and the start of the periodic payments by the insurer marks the beginning of the payment phase of the annuity.

3.4.1 Accumulation (capitalization) phase

In an immediate annuity contract, the capitalization phase to a certain extent constitutes the alienation of the capital to the insurer. The holder alienates capital (a sum of money) to the insurer in order to receive annuity payments (usually monthly). The holder does not choose an investment.

In a deferred annuity contract, there is a true capitalization phase (accumulation or investment phase). During this phase, the capital is invested in a variable capital product (for example, in one of the insurer's segregated funds) or in a product guaranteed by the insurer for which the capital is not variable (for example, in a guaranteed interest account (GIA)). Some deferred annuity contracts do not give an investment option. The periodic payments simply begin later, at a date indicated in the contract.

3.4.2 Payment phase of the annuity

When a person alienates capital to the insurer in order to receive an annuity right away, it is called an immediate annuity and the payment phase starts immediately.

An annuity contract in the capital accumulation phase begins paying out at a date (age) provided for in the contract or, in the majority of cases, when the holder asks the insurer to set up an immediate annuity. The insurer often issues another contract for the annuity being paid out. In group annuities, the insurer issues an annuity certificate. Since March 1, 2006, for annuity contracts in the capitalization phase, the amount of the annuity paid periodically must be either determined when the contract is signed or at least determinable based on variables and according to a formula indicated in the contract. Most annuity contracts have an expiry date (often at age 100) after which the life annuity will begin to be paid if the holder has not given instructions before then.

In a life annuity, during the payment phase, the annuity (generally payable each month) is payable until the life insured's death. Note that a life annuity may include a guaranteed minimum term (for example, 15 years) as of the effective date of the contract, or be payable to the surviving spouse.

In the case of a fixed-term annuity (or annuity certain), the payment phase ends on the date agreed to by the parties (at the end of the term).

3.5 Types of annuity contracts on the market

3.5.1 Annuity contracts with guaranteed interest: guaranteed interest account (GIA)

The amounts (called “contributions” or “premiums”) alienated by the holder to the insurer to purchase a non-variable annuity contract (for example, a guaranteed interest account (GIA) with 4% interest for 5 years) are paid into the insurer’s general funds.

This type of annuity contract resembles a guaranteed investment certificate (GIC) issued by banks or credit unions (*caisses populaires*). However, in Québec, a beneficiary cannot be designated for a GIC issued by a bank or credit union. Annuity contracts benefit from guarantees or additional protections in case of default by the insurer. This is discussed above.

In the case of a GIA, both the capital and interest are fully guaranteed by the insurer out of its own general funds.

3.5.2 Individual variable capital annuity contracts relating to a segregated fund

3.5.2.1 Segregated funds

Segregated funds (also called “seg funds”) are funds which belong to an insurer but must be separated from its general funds. The value of the amounts received from an investor by the insurer varies based on the value of a particular group of assets, hence the name “variable capital.” Only insurers with a licence to sell life insurance can issue annuity contracts relating to segregated funds.[274] This type of contract is also called an “individual variable insurance contract” (IVIC).

Under civil law, a segregated fund is not a legal entity; rather, it is a fund that belongs to the insurer. For accounting purposes, it contains the money paid by the holders of annuity contracts (or participants in group annuities) who have chosen to invest in the same fund. However, the holders of annuity contracts relating to one or more segregated funds have a right or claim against the insurer, which varies according to the fund’s performance and the proposed guarantees, not an ownership right to the content of the segregated fund or funds relating to the annuity contract.

274. *Autorité des marchés financiers*, “Segregated fund,” on-line document consulted August 28, 2014. Moreover, only financial security advisers are authorized by the *Autorité des marchés financiers* to sell annuity contracts issued by an insurer.
See https://lautorite.qc.ca/en/general-public/investments/investment-funds/segregated-funds/.

To be able to offer an individual variable insurance contract, the insurer is legally required to guarantee the payment at maturity of a benefit equal to at least 75% of the premiums paid before age 75.[275] Some insurers offer more generous capital guarantees than the minimum prescribed by law, as well as capital guarantees in the event of death, or even from other guarantees, such as guaranteed withdrawal benefit.[276]

For each fund selected, the representative must give his client an information folder, as well as the Fund Facts (overview) before the application is signed (the information folder, policy and Fund Facts are often printed together).[277]

According to the regulations,[278] when delivering documents to the client, a representative is required to present the contents and provide appropriate explanations so that the client has a proper understanding of the documents. In particular, he must bring to the client's attention the Fund Facts relating to the selected segregated funds, regardless of whether the Fund Facts are included within the information folder or delivered to the client separately.

He must also obtain from the client an acknowledgment of receipt of the proper delivery of each of these documents. A representative must also, no later than when the contract is entered into, inform the client that he may obtain from his insurer at any time a copy of the most current Fund Facts for all segregated funds. He must provide the client with the necessary information or instructions so that the client may obtain these documents from his insurer.

3.5.2.2 Protection for owners of individual variable capital insurance contracts (segregated funds) if the insurer fails

If an insurer fails,[279] its segregated funds are not part of its assets that could be liquidated for the benefit of its creditors. The insurer's assets related to its segregated funds are reserved in priority for holders of annuity contracts or variable capital annuity or insurance contracts.[280]

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275. *Securities Act,* CQLR, c V-1.1, s. 3, para. 13.
276. See CLHIA's Guideline G15 entitled *Guaranteed Withdrawl Benefit (GWB) Illustrations*. All the guarantees for which the insurer obligated itself, are guaranteed by the general funds of the insurer. In other words, when an annuity contract guarantee, relating to a segregated fund is made, the insurer must respect its obligations from its own general funds. In case of the insurer's default, the segregated funds benefit from additional guarantees or protections.
277. Regulation respecting information to be provided to consumers, CQLR, c D-9.2, r. 18, ss. 4.17, 4.18 and 4.19.
278. Regulation respecting information to be provided to consumers, CQLR, c D-9.2, r 18, s. 4.14 to 4.19. See also An Act respecting the distribution of financial products and services, CQLR, c D-9.2, s.s 27 and 28, and the Regulation respecting the pursuit of activities as a representative, CQLR, c D-9.2, r 10, ss. 6 and 16.
279. Since the definition of "corporation" in section 2 of the *Bankruptcy and Insolvency Act,* R.S.C., 1985, C B-3, explicitly excludes banks, insurance companies, trust companies and loan companies, the *Bankruptcy and Insolvency Act* does not apply to them. If an insurer incorporated under Québec law fails, sections 390.1 to 405 of *An Act respecting insurance,* CQLR, c A-32 and the *Winding-up Act,* CQLR, C L-4, apply.
280. An *Act respecting insurance,* CQLR, c A-32, ss. 280 and 402.

Since segregated funds are distributed through annuity contracts, it is important to analyze the features and uses of such contracts, especially those purchased from an insurer.

Like GIA annuity contracts, individual variable capital annuity contracts related to segregated funds also benefit from additional guarantees or protections. These are examined above.

3.5.3 Immediate annuity contracts

As mentioned above, an immediate annuity contract is a contract according to which the payment phase begins as soon as the constituting capital is paid to the insurer.

It may be a life annuity or a fixed-term annuity, and the annuity may or may not be payable to the surviving spouse.

The capital which constitutes the annuity is alienated to the insurer and placed in its general funds. In consideration thereof, the insurer agrees to pay the annuitant an annuity according to the terms agreed to by the parties. These annuities are guaranteed by the insurer from its own general funds.

Like GIA annuity contracts and individual variable capital annuity contracts related to segregated funds, immediate annuity contracts also benefit from additional guarantees or protections.

3.6 Non-registered and registered annuity contracts (RRSP, RRIF, TFSA, etc.)

3.6.1 Non-registered annuity contracts

Annuity contracts are often associated with pension plans and other plans given favourable tax status. However, annuity contracts are also an investment option for someone who is unable to contribute to an RRSP or other registered plans such as RRIF and TFSA (regardless of the reason), or who simply wishes to invest outside an RRSP or TFSA.

Non-registered annuity contracts also constitute an investment option for legal persons or entities wishing to invest money and take advantage of the insurer’s undertaking to pay an annuity.

3.6.2 Registered annuity contracts

It is important to recall that RRSPs, RRIFs, TFSAs, etc., are neither property nor an investment. Instead, they refer to the tax status of the investments held in them.

3.6.2.1 Registered retirement savings plan (RRSP)[281]

The RRSP was created under the *Income Tax Act* at the end of the 1950s. Insurers were the first to sell RRSPs.[282]

The *Income Tax Act* refers to a contract between a carrier within the meaning of the Act and an individual, according to which the individual or his spouse pays amounts in order to give the individual a retirement income at the end of the plan.

The amounts accrue tax-free until they are paid out. They can be transferred to another RRSP of the member for which he is the annuitant. The RRSP must be closed by the end of the year the annuitant turns 71.[283]

In tax law, the individual for whom the RRSP provides retirement income is called the "annuitant."[284] His spouse may also become the annuitant. Note that the term "annuitant" is used even if the product registered as an RRSP is not an annuity (for example, guaranteed investment certificates (GIC) of a bank).

At the close of the RRSP, the annuitant must make certain choices:

- A life annuity, payable to the surviving spouse or not;
- A fixed-term annuity (annuity certain) as prescribed by law;
- A registered retirement income fund (RRIF);
- The withdrawal of cash amounts (less tax).

However, when the RRSP is funded by an annuity contract by an insurer, the annuity must be paid by the insurer on maturity if no other choice has been made by the holder or participant before maturity.

From a tax perspective, the annual contribution to an RRSP is deductible from the individual's income. However, there are limits to the annual contributions that can be made.[285]

If the annuitant also participates in a supplemental pension plan (called a "registered pension plan" (RPP) in tax law) or a deferred profit sharing plan (DPSP), the pension adjustment (PA)[286]

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281. *Income Tax Act,* R.S.C., 1985, C 1 (5th Supp.), s. 146.
282. *Les Coopérants, Société mutuelle d'assurance vie (In re): Firstcliff Development Inc.* v. *Raymond, Chabot, Fafard, Gagnon inc.,* [1994] R.L. 268, p. 283.
283. *Income Tax Act*, RSC 1985, c 1 (5th Supp.), s. 146(2)(b.4).
284. *Income Tax Act,* R.S.C., 1985, C 1 (5th Supp.), s. 146 (1).
285. 18% of income earned during the previous year. However, there is a ceiling (18% of $144,500.00 in 2017, i.e. $26,010), which is indexed every year. For more information, see https://www.canada.ca/en/revenue-agency/services/tax/registered-plans-administrators/pspa/mp-rrsp-dpsp-tfsa-limits-ympe.html.
286. Canada Revenue Agency, Pension Adjustment Guide (on-line), modified on June 7, 2008 and consulted on July 21, 2017. See http://www.cra-arc.gc.ca/E/pub/tg/t4084/.

decreases the contribution ceiling and the pension adjustment reversal (PAR) increases it. Unused contribution room can be carried forward from one year to the next.

Under the *Income Tax Act,* three types of RRSPs are registered by the CRA:

- An RRSP with a licensed annuities provider (for example, an insurer);
- An RRSP with a trustee (for example, a self-directed RRSP with securities dealers through a trust company);
- An RRSP with a member of Payments Canada[287] (banks, credit unions).

An RRSP purchased from an insurer falls under the first category of RRSPs, i.e. an RRSP with a licensed annuities provider. To capitalize or fund the RRSP, the insurer offers its guaranteed funds (GIA) or its segregated funds which, for individual annuities, include a guarantee, as explained above.

The financial institution must have the annuity contract, the text of the plan and the subscription form approved by the CRA. The contract must contain the conditions set forth in the *Income Tax Act.*[288]

3.6.2.2 Spousal registered retirement savings plan (spousal RRSP)

In a spousal RRSP, spouse A (the payor) contributes to an RRSP taken out in the name of spouse B (spouse B owns the RRSP).

However, spouse A must have accumulated unused RRSP contribution room. In fact, his unused contribution room is impacted (spouse A's unused contribution room is reduced), not the unused contribution room of spouse B (who may not have any at all). Also, spouse A is the one who receives the tax credits.

This strategy is used to split the spouses' retirement income. That way, spouse B benefits from a lower tax rate when the money is withdrawn, during retirement, since spouse B normally earns the lower income of the two.

3.6.2.3 Registered retirement income funds (RRIF)[289]

Whereas an RRSP is an annuity product in the accumulation phase, a RRIF consists of a registered product in the payment phase. The amounts received from the insurer by the holder following a voluntary or mandatory withdrawal do not constitute annuity payments. Until the funds are depleted, the annuitant (owner of the RRIF) may make investments, in accordance with tax laws, and the annuity payments and withdrawals (voluntary or mandatory)are taxable.

287. See https://www.payments.ca/
288. *Income Tax Act,* R.S.C., 1985, c 1 (5th Supp.), s. 146(2).
289. *Income Tax Act,* R.S.C., 1985, c 1 (5th Supp.), s. 146.3.

The *Income Tax Act* defines a registered retirement income fund as an arrangement between an authorized carrier (i.e. the same as for an RRSP) and an annuitant according to which the carrier undertakes to pay amounts to the annuitant and, where the annuitant so elects, to the annuitant's spouse after the annuitant's death.

It is important to recall that, with an insurer, a RRIF is usually offered through an individual annuity contract; also, if segregated funds are available in an individual annuity contract, there must be a guarantee, as was discussed above.

The annuitant can ask for a refund of the amounts accumulated in the RRIF or ask an insurer for a life annuity or fixed-term annuity at any time. However, even in the case of a deferred annuity contract registered as a RRIF, i.e., without annuity payments, the holder must make a minimum withdrawal each calendar year, as prescribed by the *Income Tax Act.*[290] The amounts received by the holder in such a case are partial withdrawals, not annuity payments.

Such annuity payments or annual withdrawals, as the case may be, must be at least equal to the prescribed minimum amount (which varies according to the age of the annuitant or his spouse)[291] and begin no later than the first calendar year after the year in which the RIF was set up.[292] Until the fund has been depleted, the annuitant may make investments in accordance with tax law.

As for an RRSP, the financial institution must have the annuity contract, the text of the plan and the membership form approved by the Canada Revenue Agency. The contract must contain the conditions set forth in the *Income Tax Act.*[293]

The amounts in a RRIF generally come from an RRSP. As in the case of RRSPs, insurers can also issue RRIFs. The insurer offers its guaranteed funds (GIA) or segregated funds to fund the annuity contract.

3.6.2.4 Locked-in retirement account (LIRA)[294]

A locked-in retirement account (LIRA) is an account in which the funds derived directly or initially from a supplemental pension plan and the return (capital gains, dividends and interest) accrueThe funds are locked-in, i.e., no withdrawal is permitted other than in certain exceptional cases. A LIRA is in fact an RRSP subject to the provisions of tax laws and the *Regulation respecting supplemental pension plans*. It is proposed by a financial institution authorized to offer RRSPs.

290. *Income Tax Act,* R.S.C., 1985, c 1 (5th Supp.).
291. Canada Revenue Agency, Information Circular 78-18R6, March 6, 2002, No. 5, p. 1.
292. Canada Revenue Agency, Information Circular 78-18R6, March 6, 2002, *Income Tax Regulations*, s. 7308. As of age 71, the minimum annual withdrawals from a RRIF vary between 7% and 20% depending on the annuitant's age.
293. *Income Tax Act,* R.S.C., 1985, c 1 (5th Supp.), s. 146.
294. *Supplemental Pension Plans Act,* CQLR, c R-15.1, s. 98; *Regulation respecting supplemental pension plans,* CQLR, c R-15.1, r. 6, ss. 28 and 29.

At the close of the LIRA (not later than December 31 of the year the member turns 71), it must be converted into a life annuity, and therefore meet the conditions outlined in the LIRA, or into a LIF to receive income. However, if at any time the member wishes to receive income, he can ask for a life annuity from an insurer or transfer his LIRA into a LIF.

There are some exceptions to the funds being locked-in:

- If the member is over 65 years of age, he can withdraw the balance in cash if the total of the sums credited to locked-in retirement instruments does not exceed 40% of the maximum pensionable earnings for the year in which he applies for the payment;[295]
- If the member has not resided in Canada for at least two years;[296]
- If the member has a physical or mental disability that reduces his life expectancy.[297]

Moreover, the repayment cannot be before the investment term (e.g., a GIC with a 5-year term), except if the contract allows for it. In this case, redemption fees may apply.

In these cases only, the member may receive the total credited amounts as a lump-sum payment (after tax, where applicable).

EXAMPLE

Pierre held $52,000 in a LIRA; the money came from a supplemental pension plan with a former employer. He left Canada over two years ago to work in Africa. Since he has not lived in Canada since, he may withdraw the balance of his LIRA in cash, and the amount he withdraws will be taxable.

The equivalent of the LIRA under the *Pension Benefits Standards Act, 1985* (pension plans under federal jurisdiction) is the locked-in registered retirement savings plan.[298] In addition to being registered as an RRSP with the CRA, it is overseen by the Office of the Superintendent of Financial Institutions (OSFI), which is the regulator of pension plans under federal jurisdiction. The *Pension Benefits Standards Act, 1985* applies to employers of businesses under federal jurisdiction (see Chapter 1).

295. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 16.1. The maximum is $55,300 in 2017 under section 40 of *An Act respecting the Québec Pension Plan,* CQLR, c R-9. Therefore, the total sums accumulated in 2017 must not be more than $22,120, or 40% of $55,300.
296. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 66.1.
297. *Ibid.*, s. 93, para. 3.
298. *Pension Benefits Standards Regulations, 1985,* SOR/87-19, s. 20. There is also a similar plan called the "restricted locked-in savings plan" (s. 20.2 of the Regulations).

3.6.2.5 Life income funds (LIF)[299]

Like a LIRA, the sums in a life income fund come directly or initially from a pension plan. It is in fact a RRIF subject to the requirements of tax laws and those of the *Regulation respecting supplemental pension plans*. It may be opened at a financial institution offering a RRIF. Like a RRIF, a LIF requires the withdrawal of the minimum prescribed by tax laws. However, contrary to a RRIF, the member cannot withdraw more than the authorized maximum each year (calculated based on age, the balance and the reference rate for the year). This makes sense since the purpose of retirement legislation is to give members an income from the date they retire until death. If the financial institution pays more than the maximum calculated according to the Regulation, the member may require that the financial institution pay him, as a penalty, a sum equal to the surplus income paid.[300] The exceptions to the funds being locked in mentioned above also apply to LIFs, except in the case of a disability that reduces the person's life expectancy, which only applies to a LIRA (a LIF must therefore be transferred to a LIRA first, which is only possible before the end of the year in which the person turns 71).[301]

Each year, the financial institution must calculate the minimum and maximum amounts permitted. Some establishments offer the temporary income option in their life income fund contract. Temporary income is additional income offered to people under 65 years of age which may not exceed 40% of the maximum pensionable earnings for the year in which the application is made. Additional conditions apply to members who are less than 54 years of age.[302]

EXAMPLE

Marie-Anne is 45 years old. She has $40,000 in a life income fund with an insurer. Marie-Anne asks the insurer for the maximum LIF income, i.e. an amount of approximately $2,440 which the insurer calculated according to the applicable formula. This amount of $2,440 does not include temporary income.

A person who purchases a LIF may receive his life income until his death. However, he may ask the insurer for a life annuity which meets the conditions set forth in the LIF at any time.

A LIF under the federal *Pension Benefits Standards Act, 1985*, is a restricted life income fund.[303] In addition to being registered as a RRIF with the CRA, this plan is overseen by the Office of the Superintendent of Financial Institutions (OSFI).

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299. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 98; *Regulation respecting supplemental pension plans,* CQLR, C R-15.1, r. 6, ss. 18 and 28.
300. *Regulation respecting supplemental pension plans*, CQLR, c R-15.1, r. 6, s. 19, para. 10.1.
301. *Retraite Québec*, "A refund of your LIRA or LIF," on-line document consulted on July 21, 2017. See http://www.rrq.gouv.qc.ca/en/retraite/cri_frv/Pages/remboursement.aspx.
302. See: http://www.rrq.gouv.qc.ca/en/programmes/rcr/CRI_FRV/FRV/Pages/modalites_retrait.aspx.
303. *Pension Benefits Standards Regulations, 1985,* SOR/87-19, s 20.1. There is also the restricted life income fund (s. 20.3).

3.6.2.6 Tax-free savings account (TFSA)[304]

The federal government set up tax-free savings accounts (TFSA) in 2009.

All residents of Canada aged 18 years and over have the right to contribute to a TFSA. In order to do so, it is not necessary to earn income and there is no age limit, contrary to an RRSP (71 years old). The CRA monitors the contributions of all Canadian residents.

Each calendar year, a Canadian resident may contribute up to the TFSA limit for the current year, plus any unused contributions from previous years. The annual ceiling was $5,000 for 2009 to 2012, $5,500 for 2013 and 2014, $10,000 for 2015, $5,500 for 2016 and $5,500 for 2017.

Contrary to an RRSP, all income earned in a TFSA (capital gains, dividends and interest) as well as withdrawals are tax-free, but contributions to a TFSA are not tax deductible.

Moreover, also unlike an RRSP, withdrawals from a TFSA during the year are added to the holder's unused contribution room and may be paid back during the following or subsequent years.

The surviving spouse has the right to include the amounts of his deceased spouse in his own TFSA if he is the only beneficiary of his spouse's TFSA (or otherwise the only person who inherits the TFSA).

Insurers may issue TFSAs; they offer their guaranteed funds (GIA) or segregated funds in an individual or group annuity contract. The segregated funds offered in an individual annuity contract must include a guarantee, as discussed above.

As in the case of an RRSP and a RRIF, the financial institution must have its contract approved by the Canada Revenue Agency, and the contract must contain the conditions listed in the *Income Tax Act.*[305]

3.6.2.7 Individual pension plans (IPP)

An individual pension plan (IPP) is a registered pension plan (RPP) that has a defined benefit provision if, at any time in the year or a preceding year,

- The plan has fewer than four members and at least one of them is related to a participating employer in the plan; or
- Is a designated plan and it is reasonable to conclude that the rights of one or more members to receive benefits under the plan exist primarily to avoid the application of the preceding paragraph.[306]

304. *Income Tax Act,* R.S.C., 1985, c 1 (5th Supp.), s. 146.2.
305. *Ibid.*, s. 146.2(2).
306. See https://www.canada.ca/en/revenue-agency/services/tax/registered-plans-administrators/registered-pension-plans-glossary.html.

An IPP is therefore a defined benefit RPP from a tax perspective. Some insurers consider it an individual plan and others a group plan, depending on the circumstances. Given the special nature of this product, it is up to each insurer to describe this plan as individual or group in the materials given to the client. The permit required for the insurance representative is therefore based on how the product is described by the insurer.

3.6.2.8 Annuity contract purchased in an RPP[307]

The *Regulation respecting supplemental pension plans*[308] defines this type of annuity as follows:

> An annuity contract is a contract under which, in consideration for capital originating directly or initially from the fund of a supplemental pension plan, an insurer guarantees to the purchaser who is a former member, a member or the spouse thereof a life pension of which payment begins immediately after the transfer of the capital or is deferred to a later date.

This type of life annuity does not have to be registered with *Retraite Québec*, formally known as *Régie des rentes du Québec* (RRQ) but it must contain the terms prescribed by regulation.[309] It is issued in the context of a transfer from a supplemental pension plan (often upon the termination of employment), a locked-in retirement account (LIRA) or a life income fund (LIF). It must be 60% or more payable to the spouse (upon the annuitant's death) on the day payment of the annuity begins, unless the spouse has waived his rights.[310]

EXAMPLE

Arsène leaves his job after 20 years of service. He contributed to a defined contribution pension plan (DCPP). He is 60 years old and would like to receive equal monthly payments. He decides to transfer the amounts accrued in his pension plan to a life annuity, which must comply with the applicable regulations.

A life annuity may also be governed by the federal *Pension Benefits Standards Act, 1985.*[311]

307. *Regulation respecting supplemental pension plans,* CQLR, c R-15.1, r. 6, s. 30.
308. *Ibid.*
309. *Ibid*, s. 88.1.
310. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 88.1.
311. *Pension Benefits Standards Regulations, 1985,* SOR/87-19, s. 21.

3.7 Group annuity contracts: general principles

As discussed in Chapter 1, the Québec Pension Plan (QPP) of *Retraite Québec* is a public pension plan to which the employer and the employee must contribute during the employee's active lifetime.[312] Private pension plans must be used in order to receive other income during retirement (for example, RRSPs and employer supplemental pension plans (or RPPs)).

Of all the plans covered in this Chapter, we note in particular traditional supplemental pension plans (including simplified pension plans (SIPP)), group RRSPs, deferred profit-sharing plans (DPSP) and plans that are not registered for tax purposes that are funded or capitalized by life insurers in a group annuity contract. All these types of plans (other than defined benefit pension plans (DBPP)) belong to the large family of capital accumulation plans in which members can usually make investment choices.

3.7.1 Voluntary participation by businesses

Since July 1, 2014, employers under Québec jurisdiction with five employees or more who meet certain criteria must facilitate retirement savings within their organization. If they do not have a group RRSP or TFSA with payroll deductions or a supplemental pension plan on a given date, they must set up a voluntary retirement savings plan (VRSP).[313]

3.7.2 Notion of "group"

The word "group" refers to a set of people. As discussed in Chapter 2, under articles 2392 and 2393 of the *Civil Code of Québec* and sections 59 to 61 of the *Regulation under the Act respecting insurance,* the following policyholders are entitled to purchase a group annuity contract from an insurer on behalf of a determined group of persons:

- A current or former employer;
- A union;
- A professional association;
- A professional order;
- A financial services cooperative;
- A mutual insurance association;

312. Régie des Rentes du Québec, *Plan stratégique 2012-2016,* (in French only), on-line document published in 2012, consulted on July 21, 2017. See http://www.rrq.gouv.qc.ca/en/services/publications/regie/plans_strategiques/Pages/plan_strategique_2012-2016.aspx.
313. *Voluntary Retirement Savings Plans Act,* CQLR, c R-17.0.1 and *Regulation respecting voluntary retirement savings plans,* CQLR, c R-17.0.1, r. 3.

- Another entity whose members share common activities or interests before a group insurance plan is offered to them, including socio-economic or cultural interests. The industry recognizes in particular pension committees and joint employer/employee committees as such another entity.

Moreover, under section 60 of the *Regulation under the Act respecting insurance,* a specified group of persons may not be constituted for the sole purpose of entering into a group insurance contract. Therefore, group insurance may be offered to the members of the group only as a benefit complementary to membership. However, on April 20, 2016, the Québec government published a regulation project that seeks to modify section 60 of the Regulation under the Act respecting insurance in order to abolish this restriction.

3.7.3 Main distinctions with an individual annuity contract

The main differences between an individual annuity contract and a group annuity contract are the following:

- The capital is not guaranteed at maturity for variable capital contracts (segregated funds) in group annuity contracts;
- There is no information folder remitted to participants with respect to group annuity contracts. The *Guidelines for Capital Accumulation Plans* apply to the information provided to members concerning group annuity contract matters;
- Like group insurance, the group annuity contract involves a three-party relationship between an insurer, a policyholder and members;
- A group annuity contract must be distributed by a group insurance and group annuity advisor; a group annuity plans advisor or an actuary who is a fellow of the Canadian Institute of Actuaries, whereas an individual annuity contract must be distributed by a financial security advisor.
- However, like in group insurance, the group annuity contract regulates the tripartite relationship between the insurer, the policyholder and the participants.

3.7.4 Service agreement between the insurer and the policyholder

In addition to the group annuity contract, an agreement on costs and services is very common for capital accumulation plans (DCPP, RRSP or TFSA, DPSP or a non-registered plan). Its purpose is to set out the services the insurer agrees to provide concerning the plan and establish the related costs which may be assumed by the employer, the employee or the plan. The *Guidelines for Capital Accumulation Plans* (see the section on the parties' responsibilities in group plans) apply to this agreement, which is generally attached to the group annuity contract.

The nature of the services offered by the insurer and its responsibility vary depending on the type of plan (supplemental pension plan, group RRSP or TFSA, DPSP or non-registered plan, etc.), the

autonomy and expertise of the administrator, the size of the employer and whether or not there are other service providers (such as a consulting firm). The following is a brief description of the services provided by an insurer:

- Draft the text of the plan and submit it to the *Retraite Québec* (or the Office of the Superintendent of Financial Institutions (OSFI), as the case may be) and the Canada Revenue Agency (CRA);
- Draft the information folders for members;
- Hold information sessions for members;
- Prepare the cost certificates for the plan, annual disclosures and tax slips;
- Provide necessary information in the event of bankruptcy, seizures and marriage breakdowns of members;
- Provide tools to follow changes to available funds;
- Send statements to members and provide them with access to the insurer's website 24 hours per day and to a telephone hotline;
- Provide members with tools to help them make investment decisions;
- Produce information bulletins for members and the policyholder;
- Provide investment advisory services;
- Prepare various reports and statements, such as a report on the insurer's internal control procedures, statistics on website use, etc.

3.8 *Supplemental Pension Plans Act* (Québec) (SPPA) and *Pension Benefits Standards Act, 1985* (federal)

3.8.1 *Supplemental Pension Plans Act* (Québec) (SPPA)

3.8.1.1 Definition of supplemental pension plan

A supplemental pension plan is a contract under which retirement benefits are provided to the member, under given conditions and at a given age, the funding of which is ensured by contributions payable either by the employer only, or by both the employer and the member.[314]

A supplemental pension plan must involve contributions by the employer and, often, by the employee. Other than in the case of a simplified pension plan (SIPP) or a voluntary retirement savings plan (VRSP), member contributions (along with concurrent contributions by the employer) are almost always locked in so as to provide retirement income; the employee cannot therefore withdraw funds. Employer contributions are always locked in, other than in exceptional cases.

314. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 6, para. 1.

Various supplemental pension plans

A supplemental pension plan may be:

- A defined contribution plan (DCPP). A SIPP is a supplemental pension plan with defined contributions. A VRSP is a defined contribution pension plan but it is not governed by the *Supplemental Pension Plans Act*;
- A defined benefit plan (DBPP);
- Twofold, with both defined contributions and defined benefits (DC/DB).

Most money in pension funds is currently invested in defined benefit plans. However, most newly established plans are defined contribution plans. In the early 2000s, many employers closed their DBPP and offered new employees a DCPP[315] or converted their DBPP to a DCPP.

3.8.1.2 Plan features

Pension fund and pension committee

Unless it is guaranteed, every supplemental pension plan must have a pension fund into which contributions and the income derived therefrom are paid. The pension fund constitutes a trust patrimony appropriated mainly to the payment of the refunds and pension benefits to which the members and beneficiaries are entitled.[316]

Under the *Supplemental Pension Plans Act* (Québec), a pension plan may be guaranteed by an insurer when all the benefits are guaranteed by it.[317] As this type of plan is rarely seen in practice, it will not be discussed in this manual.

Legally, a pension fund is a trust. The trustee is the pension committee.[318]

Since a pension fund is a trust patrimony, the property of which it consists does not belong to either the employer, the members, the pension committee or the financial institution where the fund's assets are invested. The fund is therefore protected in the event the employer goes bankrupt, and it is sheltered from the employer's creditors.

Other features

The normal retirement age may not be greater than 65, but it may be less, provided the various age and years of service eligibility criteria are met. In reality, a member is free to stop working before or after that date. The normal retirement age simply determines when the full pension may be paid (i.e. without actuarial reduction in a defined benefit plan (DBPP)). Other types of pensions

315. "Mercer 2009 global defined contribution survey: Canadian results," December 2009.
316. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 6, para. 2.
317. *Ibid.*, s. 9.
318. *Ibid.*, ss. 147 to 167.

may also be paid. According to the *Income Tax Act,*[319] the pension must begin by the end of the year in which the member attains 71 years of age.

The plan members are generally employees and former employees who still have rights accumulated under the plan. According to the *Supplemental Pension Plans Act,* retirees may remain members of the plan, even if they receive a life annuity from an insurer.[320]

Two types of pension plans are governed by the *Supplemental Pension Plans Act*:

- The defined contribution pension plan (DCPP) in which the pension depends on the contributions by the members;
- The defined benefit pension plan (DBPP) in which the pension is usually calculated according to a percentage of the remuneration and the eligible years of service.

3.8.1.3 Registration of the plan with *Retraite Québec*

Application to register the text of a plan: required information

The text of the plan must be registered with *Retraite Québec* not later than 90 days after the day on which the plan becomes effective. It must indicate:[321]

- The name of the employer who is a party to the plan;
- The number of members required to constitute the pension committee responsible for the administration of the plan, together with the conditions and time limits applicable to the designation or replacement of the members;
- The requirements for membership and withdrawal;
- The contributory or non-contributory nature of the plan;
- The optional or compulsory nature of membership in the plan;
- In the case of a multi-employer pension plan, the conditions for participation and for withdrawal of an employer;
- The normal retirement age;
- Where the plan is guaranteed, the name of the insurer;
- The member and employer contributions, or the method used for calculating the contributions;
- In the case of a defined benefit plan (DBPP) or a defined benefit-defined contribution pension plan (DB/DCPP), the normal pension or the method used for calculating the normal pension;

319. *Income Tax Regulations,* C.R.C., c 945, s. 8506 (2) (C 1).
320. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 33.
321. *Ibid.*, s. 14.

- The nature of the refunds and pension benefits, the method used for calculating benefits or refunds, if any, and the conditions to be met to be entitled thereto;
- If applicable, the powers under which the pension committee is authorized to transfer benefits accumulated by a member under the plan or any asset of the plan to another plan, and the rules applicable to such a transfer;
- The effective date of the plan;
- The fiscal year of the plan;
- The conditions on which and the person or persons by whom the plan may be amended;
- Which of the employer only, the members and beneficiaries only or both the employer and the members and beneficiaries will be entitled to the surplus of assets determined upon the termination of the plan, and, in the latter case, the percentage of such a surplus due to them;
- In the case of certain plans, the employer's right to appropriate all or part of the surplus assets to the payment of its contributions.

Application to amend a plan: required information

Amendments made to a plan must also be registered with the RRQ and only take effect on the date they are registered.[322]

The application to register or amend a pension plan must include the following:[323]

- A copy of the plan or amendment, certified by the employer or by the committee;
- Where the application is for the registration of the plan, the name and address of the employer or, in the case of a pension committee, the names and addresses of the committee members;
- The employer's written acknowledgment of the obligations incumbent upon it under the plan or amendment, except in certain cases;
- The actuarial valuation report for the plan, in the case of a defined benefit plan (DBPP);
- Any other document or information prescribed by regulation;
- The fees prescribed by regulation.

322. *Ibid.*, s. 19.
323. *Ibid.*, s. 24.

3.8.1.4 Registration of a plan with the Canada Revenue Agency (CRA) and application of tax laws

A supplemental pension plan (called a "registered pension plan" or RPP in the *Income Tax Act*[324]) must also be registered with the CRA for the contributions and profits to accumulate tax-free until the benefits under the plan are paid to the member.

The *Income Tax Act* specifies a ceiling for contributions that may be paid into it.[325] Employer and employee contributions are deductible from the taxable income of the employer and the employee, respectively.[326]

3.8.1.5 Membership and member rights

The same employer can have several pension plans for different groups of employees (for example, unionized and non-unionized employees, senior management, employees in Québec and outside Québec, etc.).

To become a member, an employee must belong to the class of employees for whom the plan is established and meet the membership requirements, where applicable (for example, complete a certain number of years or months of service or hours worked). Workers whose employment is similar or identical to that of members belonging to the class of employees for whom the plan is established may also become a member of the plan if they meet either of the following requirements:

- Have received from the employer remuneration equal to or greater than 35% of the Maximum Pensionable Earnings (MPE) established under the Québec Pension Plan. The MPE for the Québec Pension Plan is the limit above which a person's employment earnings are no longer subject to contributions to the public pension plans. For 2014, that amount was $52,500;
- Have worked at least 700 hours.[327]

Membership in the plan may be optional or compulsory for an employee.

Within 90 days of the date on which the employee becomes eligible for membership, the employee must receive a summary of the pension plan[328] (often called an "explanatory brochure"), together with an annual statement within 9 months after the end of every fiscal year. Part of the statement must cover the member's benefits and part of the financial position of the pension plan.

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324. In Québec, the *Taxation Act,* CQLR, c I-3, c R-15 states that the plan must be registered at the federal level.
325. In 2017, the ceiling was $26,230 for a DCPP and $2,914.44 for a DBPP (i.e. 1/9 of the DCPP) to take account of the pension adjustment (PA). For more information, see http://www.rrq.gouv.qc.ca/en/flashretraiteqc/Pages/capsule_retraite_031.aspx.
326. *Income Tax Act*, RSC., 1985, c 1 (5th Supp.), ss. 147.1 to 147.4.
327. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 34.
328. *Ibid.*, s. 111.

A member is also entitled to a summary of the provisions of the pension plan that were amended during the last fiscal year.[329] Once a year (and upon request), members may examine documents relating to the plan in the establishment of the employer or the office of the pension committee, and may attend the annual meeting.[330]

3.8.1.6 Pension plan administrator: the pension committee

Pension committee's role

In Québec, there is a clear separation between the employer and the plan administrator.

Legally speaking, the employer is not responsible for administering the plan unless the pension committee has delegated some of its powers hereto. The employer is required to make contributions[331] and is responsible for deficiencies in the case of a defined benefit pension plan (DBPP).[332]

In Québec, every supplemental pension plan must be administered by a pension committee unless the plan has fewer than 26 members and beneficiaries[333] or in the case of a SIPP[334] or VRSP.[335]

In the case of a plan with fewer than 26 members and beneficiaries, the employer performs the duties of the pension committee. In the case of a SIPP or VRSP, the financial institution does.

In other provinces, some statutes provide that a pension committee may be set up at the request of plan members, but those committees usually only play an advisory role.

Pension committee members

The pension committee must be made up of at least three members:[336]

- One member designated by the active members at the annual meeting or, in the absence of such a designation, one plan member designated as and when provided in the plan;
- One member designated by the non-active members (retirees) and beneficiaries at the annual meeting or, in the absence of such a designation, one plan member or beneficiary designated as and when provided in the plan;

329. *Ibid.*, s. 112.
330. *Ibid.*, ss. 114 and 166.
331. *Ibid.*, ss. 37 to 50.
332. *Ibid.*, s. 39, unless the plan text provides otherwise.
333. *Regulation respecting the exemption of certain categories of pension plans from the application of provisions of the Supplemental Pension Plans Act,* CQLR, c R-15.1, r. 7, s. 1.
334. *Regulation respecting the exemption of certain categories of pension plans from the application of provisions of the Supplemental Pension Plans Act,* CQLR, c R-15.1, r. 7, s. 1.
335. *Voluntary Retirement Savings Plans Act*, CQLR, c R-17.0.1, s. 14.
336. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 147.

- One independent member who represents neither the employer nor the members and beneficiaries, designated as and when provided in the plan.

In addition to these three members, each of the two groups (active members and retirees/beneficiaries) may elect an additional member who does not have the right to vote (an observer).[337] The term of office of a member of a pension committee generally does not exceed three years (s. 148 SPPA).

EXAMPLE

Vidorée Inc. has a supplemental pension plan. The three members of the pension committee were designated at the annual meeting as follows:

- Aline was designated by the active members;
- Émile was designated by the retirees;
- Bernard, an accountant who works for a consulting firm, was designated by the employer as an independent member as provided in the plan.

The pension committee's duties

The pension committee's main duties are the following:[338]

- Ensure that contributions are paid into the pension fund;
- Draft the plan text and have it registered, along with any amendments (s. 14 and 24 SPPA);
- Develop an investment policy in accordance with the *Supplemental Pension Plans Act*;[339]
- Prepare and file information showing that the plan has adequate capital;
- Provide members with information about the plan (for example, a plan summary, an annual statement, a statement of termination of plan membership and a statement for the beneficiaries in the event of death; the content of these documents is prescribed by regulation);
- Organize an annual meeting to report on its administration, among other matters;[340]
- Pay the pensions as well as death and other benefits;

337. *Ibid.*, s. 147.1.
338. *Régie des rentes du Québec*, "The role and responsibility of a pension Committee," on-line document modified in 2008 and consulted on July 21, 2017, http://www.rrq.gouv.qc.ca/SiteCollectionDocuments/www.rrq.gouv.qc/Anglais/publications/rcr/recueil_bien_administrer_regime/RCR_Fascicule_2A.pdf.
339. *Supplemental Pension Plans Act*, CQLR, C R-15.1, ss. 169 and 170.
340. *Ibid.*, s. 166.

- Ensure that the fund's financial report and, in the case of a DBPP, that the actuarial valuation are prepared;
- Prepare and file the annual statement with *Retraite Québec*;[341]
- Adopt internal by-laws establishing its rules of operation and governance.

Liability of the pension committee and its members

Under the *Supplemental Pension Plans Act,* the pension committee has the duties and responsibilities of a "trustee"[342] toward the pension fund.

This means that the members of the pension committee may not act in their own interests; they must act with honesty and loyalty in the best interest of the members or beneficiaries.[343] The *Supplemental Pension Plans Act* requires that the pension committee exercise the prudence, diligence and skill that a reasonable person would exercise in similar circumstances.[344] Note that the pension committee is presumed to have acted with prudence where it acted in good faith on the basis of an expert's opinion (s. 151.1 SPPA).

The members of the pension committee are personally and solidarily liable[345] for any decision made by the committee unless they express their dissent.

The pension committee may delegate all or part of its powers or be represented by a third person (delegatee).[346] The notion of delegation in the SPPA is, however, different from that of mandate.

According to the rules of representation or mandate[347] studied in Chapter 1, the acts of the mandatary acting on behalf of the pension committee in accordance with the mandate are attributable to the pension committee, which is liable toward the members and third parties. However, the *Supplemental Pension Plans Act* provides that when the pension committee delegates certain duties to a third party (the delegatee), it is not responsible for the actions of the delegate, other than in exceptional cases, such as:

- When the pension committee may not delegate its duties according to the text of the plan (s. 152 SPPA);
- When the pension committee did not select the delegatee with care; this implies that it must select a delegatee with skills commensurate with the delegated powers (s. 154 SPPA);
- When the pension committee did not give the delegatee instructions with care (s. 154 SPPA).

341. *Ibid.*, s. 161.
342. *Ibid.*, s. 150.
343. *Ibid.*, s. 151.
344. *Ibid.*, s. 151.
345. *Ibid.*, s. 156.
346. *Ibid.*, s. 152.
347. *Civil Code of Québec*, CQLR, c C-1991, arts. 2130 and ff.

The delegate acts in his own name. He has the same liability and obligations as the pension committee.[348] He must act in the primary interests of the members and avoid placing himself in a conflict of interest with respect to the delegated acts. He incurs liability toward the members and third parties.

Although the pension committee may delegate its powers and claim to be released from liability,[349] it nonetheless remains the plan administrator and trustee of the pension fund. It therefore has a general duty to oversee the delegatee.

Lastly, the pension committee may enter into a service contract with a third party rather than delegate its powers to it. In such a case, the service provider is hired to perform specific work.[350] The parties are bound by the terms of the service contract. However, it may be important to determine whether, according to the services agreement entered into with the insurer, the insurer is a service provider whose role is to help the pension committee carry out some of its duties. Since December 13, 2006,[351] service providers who exercise a discretionary power belonging to the pension committee are considered to be delegatees (s. 154 SPPA) and therefore have fiduciary duties. Also, service providers may not exclude or limit their liability (s. 154.4 SPPA).

3.8.1.7 Contributions

General

An employer is required to contribute to the pension plan (s. 37 and 39 SPPA). Its contributions are called “employer contributions” (s. 37 SPPA). Although a member is also required to make contributions (called “member contributions” in the *Supplemental Pension Plans Act*), it is a contributory plan. The plan may also allow employees to make additional voluntary contributions (without a concurrent contribution by the employer) as well as transfers from other pension plans, RRSPs and DPSPs. As mentioned above, contributions other than voluntary contributions and their returns are generally locked in (i.e. withdrawals are not allowed) in order to provide retirement income.

Under the *Supplemental Pension Plans Act,* contributions (employer, member and voluntary) to a DCPP bear interest according to the return of the pension fund or the member’s account, as the case may be. In a DBPP, member contributions and voluntary contributions also bear interest according to the return of the pension fund. The applicable administration fees (including investment expenses) are deducted.

348. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 153.
349. *Ibid.*, s. 154.
350. *Civil Code of Québec*, CQLR, c C-1991, art. 2100.
351. *An Act to amend the Supplemental Pension Plans Act, particularly with respect to the funding and administration of pension plans*, SQ 2006, c 42.

Member or voluntary contributions must be paid to the pension fund by the last day of the month following the month in which they are received.[352] The employer contribution must be paid in as many instalments as there are months in the fiscal year of the plan, each being paid not later than the last day of the month following the month for which it is made[353] (s. 41 SPPA). Any contribution which has not been paid into the pension fund bears interest from the last day of the month following the month for which it should have been paid or, as the case may be, the last day of the month following the month in which it was collected (s. 48 SPPA). Contributions bear interest at the rates referred to in the previous paragraph unless the pension plan sets a higher interest rate.

EXAMPLE

Jean & Jean Inc. is in financial trouble. It did not pay the employer and employee contributions from last May into the pension fund for the defined contribution pension plan (DCPP).

The employer, employee and voluntary contributions bear interest as of June 30 at the rate of return of the member's account.

The administration fees (including investment expenses) of the plan are payable by the fund unless the plan text stipulates otherwise (for example, they may be paid by the employer).

Vesting of contributions

Under the *Supplemental Pension Plans Act,* since January 1, 2001, all contributions paid by the employer are vested in the member, i.e. a member who ceases to participate in the plan is entitled to a deferred pension[354] as soon as he becomes a member of the plan with respect to all his accrued rights (member and employer contributions and the return on them).

The rule may be different for pension plans under federal jurisdiction.[355]

EXAMPLE

Jules is a member of his employer's pension plan, which is governed by the Québec *Supplemental Pension Plans Act*. He left his job after one year of employment. All the amounts accumulated in his account, including employer contributions, are vested in him.

352. *Supplemental Pension Plans Act*, CQLR, C R-15.1, s. 43.
353. *Ibid.*, s. 41.
354. *Ibid.*, s. 69.
355. For benefits vested after 1986, the employer contributions only vest in the member after two years of plan membership (s. 16(3) of the *Pension Benefits Standards Act, 1985,* RSC, 1985, c 2 (2nd Supp.)).

Transfer of contributions

An employee who leaves his employer before he retires may generally transfer the benefits he has accumulated in the plan to authorized transfer instruments; all or part of the amounts transferred remain locked in until retirement.[356] Former employees may also leave the amounts in their former plan (s. 99 SPPA). The *Supplemental Pension Plans Act* provides that former employees usually have 90 days to ask for a transfer to another plan. However, the plan text may provide that transfers will be accepted after that time. Authorized transfer instruments are:[357]

- A pension plan of a new employer which accepts them;
- A deferred or immediate life annuity with an insurer;
- A locked-in retirement account (LIRA);
- A life income fund (LIF).

EXAMPLE

Robert has held several jobs. After three years of service, he leaves *Lamontagne Inc.*, where he was a member of a supplemental pension plan. He had already opened a locked-in retirement account (LIRA) with the insurer *Survie* to invest the benefits accrued in other supplemental pension plans with previous employers. He decides to also transfer all his benefits accumulated at *Lamontagne Inc.* to his LIRA.

Refund of contributions

Under certain situations, the value of the member's benefits can be refunded in cash (after tax) or transferred to an RRSP to postpone the payment of tax.

- A member who is no longer an active member may receive his accrued benefits if their value is less than 20% of the maximum pensionable earnings for the year.[358]
- A member who has not been residing in Canada for at least two years, who has ceased to be an active member and who has ceased working for his employer may also ask for a refund of his benefits.[359]

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356. There are exceptions for members of a defined benefit pension plan who cease to be active when they are less than 10 years under the normal retirement age (SPPA, s. 99).
357. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 98 and *Regulation respecting supplemental pension plans,* CQLR, c R-15.1, r. 6, s. 28.
358. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 66. The amount of MPE was $55,300 in 2017. See also: *Pension Benefits Standards Act, 1985*, RSC., 1985, c 2 (2nd Supp.), s. 18(2)c). See also: https://www.canada.ca/en/revenue-agency/services/tax/registered-plans-administrators/pspa/mp-rrsp-dpsp-tfsa-limits-ympe.html
359. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 66.1.

- A member who suffers from a physical or mental disability that reduces his life expectancy may, if the pension plan permits, apply for a refund of his benefits.[360]
- Voluntary contributions (i.e. without a concurrent contribution by the employer) as well as the income from them may be withdrawn on certain conditions.[361] Voluntary contributions as well as amounts from other plans that are not locked in and their investment income may generally be withdrawn.[362]

EXAMPLE

Linda has a supplemental pension plan with her employer *Bonne miche Inc.* She decides to retire. The amount accumulated in her account is $10,000, i.e. less than 20% of the maximum pensionable earnings (the amount of MPE was $55,300 in 2017). She can therefore withdraw the benefits she has accrued as cash.

3.8.1.8 Investment of contributions

This is where a group annuity contract comes into play. It can be used to provide all or part of the capital for a supplemental pension plan.

All investments in the pension fund must be made in the name of the pension fund or for its account.[363] When the pension committee makes investment decisions itself,[364] it must adopt a written investment policy,[365] which must set out:

- The expected rate of return;
- The degree of risk involved in the investment portfolio, particularly as regards price fluctuations;
- Liquidity requirements;
- The proportion of assets that may be invested in debt securities and equity securities, respectively;
- The permitted categories and sub-categories of investments;
- Investment portfolio diversification measures conducive to an overall reduction of the degree of risk;

360. *Ibid.*, s. 93, para. 4. See also: *Pension Benefits Standards Act, 1985*, RSC, 1985, c 2 (2nd Supp.), s. 18(2)b).
361. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 67.
362. *Ibid.*, s. 67
363. *Ibid.*, s. 171.
364. *Ibid.*, s. 168.
365. *Ibid.*, s. 169.

- Rules and a time schedule applicable to the valuation of the investment portfolio and to the monitoring of the management of the investment portfolio and those applicable to the review of the investment policy.

Under the policy, the assets of the pension plan may be invested in securities controlled by the employer, but must not be in a proportion greater than 10% of their book value.[366]

Under the *Supplemental Pension Plans Act*, the pension committee is not limited by a list of authorized investments. It may therefore make all types of investments, other than those prohibited or limited by law.[367] However, as mentioned above, the pension committee must act with prudence, diligence and skill, as a reasonable person would under similar circumstances. The pension committee must act with honesty and loyalty, in the greater interest of the members. In addition, the investments must comply with the investment policy established by the pension committee.

In plans not funded with an insurer, other parties may play a role in administering the pension fund and have individual contracts with the pension committee:

- A securities custodian or depositary (generally a trust company);
- Portfolio managers.

In the case of a plan funded with an insurer, the pension committee does not need to use these parties since their services are provided by the insurer.

We will now look at the two main types of pension plans, which may be funded by group annuity contracts. Note that locked-in retirement accounts (LIRA) and life income funds (LIF) that are instruments for transferring from a pension plan may also be funded through a group annuity contract.

3.8.1.9 Defined benefit pension plans (DBPP)

In this type of plan, the amount of the pension benefit (i.e. the annuity that is paid out) is determined in advance according to a formula outlined in the plan text and its explanatory brochure. The benefit does not depend directly on the contributions paid. The formula often takes account of the highest 3 or 5-year average salary (often the last few years of employment) before retiring, multiplied by the number of years of service and a percentage (for example 2%).[368] The employer's contributions are usually determined by an actuary.

366. *Ibid.*, s. 172.
367. *Ibid.*, ss. 171 to 182. This is not the case for supplemental pension plans governed by the 1985 Pension Benefits Standards Act, 1985, RSC 1985, c 32 (2nd Supp), (s. 8), for which investments must be admissible investments, as provided by Schedule III of the Pension Benefits Standards Regulations,1985 pursuant to s. 6 of this Regulation.
368. Under s. 8503(3)g)ii) of the *Income Tax Regulations,* CRC c 945, the maximum accrual rate under a defined benefit pension plan for a joint and survivor pension is 2% on a normalized basis. The non-taxable threshold for surplus pension funds was 110% but is 125% for contributions made as of 2010 pursuant to section 147.2(2)d) of the *Income Tax Act,* RSC, 1985, c 1 (5th Supp.).

EXAMPLE

Bon voyage Inc. has a defined benefit pension plan that pays a pension equal to 1.5% of the eligible salary per year of service. Jean has reached the normal retirement age under the plan and his highest 3-year average salary out of 15 years with *Bon voyage Inc.* was $45,000.

Jean's annual pension will be $45,000 × 1.5% (or 0.015) × 15 = $10,125.

The pension committee decides how to invest the pension funds in accordance with the investment policy. The goal is to have a funded plan, i.e. the value of the assets equals that of the commitments on the same date. Contrary to a defined contribution pension plan (DCPP), in a defined benefit pension plan (DBPP), the assets (the contributions and the income earned from them) are not necessarily equal to the liabilities (the pensions to be paid). This type of plan must be the subject of a complete actuarial valuation at least once every three years.[369] The actuary is also often the person who determines whether the employer may take contribution holidays, if the plan is not showing a deficit. The plan text may provide that the employer has the right to appropriate the surplus assets to the payment of its contributions according to certain rules.[370]

The employer bears the investment risks in the case of a DBPP, except in the case of member-funded pension plans, in which the employer pays a contribution determined in advance and the members bear the financial risk.[371] Due to low interest rates, increased life expectancy and lower than expected returns, the popularity of DCPPs and other types of capital accumulation plans is increasing to the detriment of DBPPs. Note that when a plan is in a deficit position, comes to a close or the employer goes bankrupt, certain benefits must be reduced.

3.8.1.10 Defined contribution pension plans (DCPP)

This type of plan is easier to administer since the amount of the pension benefit is based on the contributions and the income they produce as credited to the member's account. Moreover, in this type of plan, the member bears the investment risks.

369. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 118.
370. *Ibid.*, s. 146.4.
371. Member-funded pension plans have been allowed in Québec since February 14, 2007 through the *Regulation respecting the exemption of certain pension plans from the application of provisions of the Supplemental Pension Plans Act*, CQLR, c R-15.1, r.7, ss. 64.1 to 95.

EXAMPLE

Futur simple Inc. has a defined contribution plan. Its contribution is 3% of its employees' salary and the employee contributions are also 3%. Mireille has reached the normal retirement age under the plan. Over the years, $124,000 in contributions and income produced have been credited to her account. This amount is used to determine the amount of her pension. Mireille must make a choice when she retires since *Futur simple Inc.* has fulfilled its obligations toward its employee but is not required to pay her a fixed monthly or annual amount when she retires.

In the case of a contributory plan, the employer's and the employee's contribution often corresponds to a percentage of the salary.

In a DCPP, the pension committee decides what investments will be offered by the plan. When members can make their own investment choices (which is generally the case), the pension committee "must offer a minimum of three investment options which not only are diversified and involve varying degrees of risk and expected return but also allow the creation of portfolios that are generally well-adapted to the needs of the members."[372] The plan may also not give employees the option of choosing the investments or may do so only in the case of member contributions.[373]

3.8.1.11 Annuities in payment phase with capital from a defined benefit supplemental pension plan

In a defined benefit pension plan (DBPP), the pension may be an obligation under the plan or the pension committee may decide to purchase annuities from an insurer. In the case of annuities paid by the plan, the member does not receive an annuity certificate from the insurer since the annuity is not issued under a group annuity contract. However, the insurer may pay the annuities under the plan as a service provider. Several types of annuities may be paid by the plan.

Deferred pension

Any member who ceases to be active is entitled to a deferred pension once he reaches normal retirement age.[374]

Early retirement pension

Any member who ceases to participate in the plan within 10 years of the date on which he attains normal retirement age is entitled to an early retirement pension. Its value is equal to or greater

372. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 168.
373. *Ibid.*, s. 168 *a contrario*.
374. *Ibid.*, ss. 68 and 69.

than the value of the normal pension, discounted on the date on which payment of the early retirement pension begins (s. 71 and 72 SPPA).

EXAMPLE

The normal retirement age under the pension plan of *Générosité Inc.* is 60. Adrien stops working at the age of 55. He can ask for an early retirement pension. However, the amount of the normal pension he would have received at age 60 may be reduced.

Progressive retirement is allowed in Québec pursuant to an agreement with the employer to reduce the working time of members 10 years or less before normal retirement age.[375]

Temporary pension

A member who is less than 65 years old and is 10 years or less under normal retirement age may, on certain conditions, be entitled to a temporary pension rather than asking for an early retirement pension. The amount of the temporary pension may not exceed 40% of the maximum pensionable earnings.[376] A temporary pension is not for life; it ceases at the latest when the person attains 65 years of age. Since it is an advance on the pension owed on normal retirement age, the amount of the pension is reduced.

Postponed pension

If an employee works after normal retirement age, he is entitled to a postponed pension,[377] i.e., it will be paid to him later. The plan can therefore allow the employee to continue to accumulate benefits. The postponed pension is paid when the member stops working or at the latest when he turns 71.[378] However, the member may ask for his pension to be paid in whole or in part on certain conditions.

Normal pension

When a member reaches retirement age, he is entitled to his normal pension[379] (i.e. not reduced or without actuarial penalties) in a defined benefit plan (DBPP)). This pension must be a “joint and survivor” pension, i.e. upon the member’s death, it continues to be paid to the spouse if the deceased has a spouse[380] when he retires. However, the spouse may waive the joint and survivor

375. *Ibid.*, s. 69.1.
376. *Ibid.*, s. 91.1.
377. *Ibid.*, s. 75.
378. *Ibid.*, s. 80.
379. *Ibid.*, s. 73.
380. See the definition of “spouse” in the *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 85.

pension,[381] which may not be less than 60% of the amount of the member's pension. As a result, if 60% of the normal pension under the plan is not payable to the surviving spouse, the amount of the member's pension will be adjusted since the insurer takes account of the pension paid to the spouse in calculating the amount. Note also that the joint and survivor rule also applies to other pensions (temporary, postponed or early). However, in the case of a married couple, the right of a member's spouse to benefits under a joint and survivor pension is terminated by separation as to bed and board (by judgment), divorce or marriage annulment.[382] In the case of a *de facto* spouse (common-law spouse), the right is terminated by the cessation of the conjugal relationship.[383] In the case of spouses in a civil union, the right to the joint and survivor pension is terminated by dissolution or annulment of the civil union.

EXAMPLE

Louise is married to Jean-Pierre at the time of her retirement. She would be entitled to a pension of $1,000 per month if Jean-Pierre waived the survivor benefits. Since Jean-Pierre has not waived his right, the pension is joint and survivor (i.e. payable to the surviving spouse) and Louise will only receive $925 per month. If Louise dies, Jean-Pierre will receive a monthly pension of $555, which corresponds to 60% of the amount Louise received:

$925 × 60% = $555

Special rules (guarantee, indexation, integration, bridging benefit and disability pension)

The plan may also provide a guaranteed life annuity for a certain period (5, 10 or 15 years). If the member does not have a spouse or, in the case of a joint and survivor pension, if the deceased member's spouse dies before the end of the guaranteed term, the remaining payments may be made as a lump sum or the pension may continue to be paid by the insurer to the designated beneficiary or the succession (estate).

The member may generally choose a life annuity which will be increased based on the consumer price index or another rate specified in the plan.

Certain defined benefit pension plans take account of the pension paid by the Québec Pension Plan of *Retraite Québec* and CPP to determine the retirement benefits.[384] This is called "integration" of benefits, a concept also found in group disability insurance (see Chapter 2).

381. The spouse can revoke the waiver of the joint and survivor pension any time before the first payment of the member's pension (SPPA, s. 88.1).
382. *Supplemental Pension Plans Act*, CQLR, C R-15.1, s. 89.
383. *Ibid.*, s. 89.
384. *Ibid.*, s. 94.

A defined benefit plan may provide for the payment of a bridging benefit,[385] i.e., an additional amount paid until benefits are paid under the public plans at age 65. The pension plan may also provide for the payment of a disability pension. Its value must be equal to or greater than the value of the benefits to which the member would have been entitled had he not become disabled.[386]

3.8.1.12 A special type of defined contribution pension plan: the simplified pension plan (SIPP)

In 1994, the QPP created the simplified pension plan (SIPP) to better serve small and medium-sized businesses through less complicated administration rules.

According to the SIPP rules, the plan administrator is not a pension committee but an insurer, bank, credit union or trust company (the "financial institution"). The list of financial institutions that offer SIPPs is available on the *Retraite Québec* website.[387]

The financial institution that administers a SIPP has the same obligations as a pension committee and therefore has the obligations of a trustee of the pension fund.

Definition: simplified pension plan

A SIPP is a defined contribution pension plan (DCPP) in which the members choose their investments. The investments are offered by the financial institution which administers the plan (at least three investment choices, as in the case of traditional DCPPs). The rules governing SIPPs are found in the *Regulation respecting the exemption of certain categories of pension plans from the application of provisions of the Supplemental Pension Plans Act*.[388]

General

SIPPs have been even more attractive since June 3, 2004 because member contributions may no longer be locked in if the plan text so provides. However, this change is not retroactive. Also, SIPPs allow members to make voluntary contributions that are not locked in, in addition to the compulsory member contributions.[389] Members may therefore ask for a lump-sum refund from their non locked-in account any time while they are employed. Since 2006, an employer can decide to defer refunds of member contributions from a non locked-in account at the end of active membership or when the member reaches age 55, whichever event occurs first.[390]

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385. *Ibid.*, s. 58.
386. *Ibid.*, s. 82.
387. For more information, see http://www.rrq.gouv.qc.ca/en/employeur/offrir_regime/regime_retraite_simplifie/Pages/etablissements_financiers.aspx.
388. *Supplemental Pension Plans Act*, CQLR, c R-15.1, r. 7, ss. 8 to 19.
389. *Regulation respecting the exemption of certain categories of pension plans from the application of provisions of the Supplemental Pension Plans Act,* CQLR, c R-15.1, r. 7, s. 10, para. 25.
390. *Ibid.*, s. 11.0.1.

The employer contributions are locked in until retirement. The SIPP is therefore similar to a group RRSP. The financial institution must keep two accounts for each member: a locked-in and a non locked-in account. No transfer is permitted between them.

Retraite Québec has published a document that includes a table entitled *Les comptes immobilisé et non immobilisé* which is reproduced in table 3.1. It summarizes whether or not contributions are locked in.[391]

TABLE 3.1

Contributions: locked-in or not locked-in

	LOCKED-IN	NOT LOCKED-IN
Employer contribution	√	
Employer's additional contribution	√	
Member's contribution	Employer's choice	Employer's choice
Member's voluntary contribution		√
Transfer from a deferred profit sharing plan (DPSP)	Employer's choice	Employer's choice
Transfer from non locked-in source		√
Transfer from locked-in source	√	

When the number of members in the SIPP exceeds 50, they can set up a retirement information committee whose role is to ensure the plan is understood.[392] The information committee therefore has access to certain documents from the financial institution and may also provide other information about retirement.

The financial institution must register its SIPP with the *Retraite Québec* and the CRA (as a RPP). The same SIPP can be offered to several businesses.

There are two portions to the text of a SIPP: one setting out the general provisions of the plan and the other setting out the provisions specific to each employer.[393] Members receive a summary of the plan (s. 111 SPPA). The financial institution must also:

391. *Régie des rentes du Québec, RRS le régime de retraite simplifié; un régime de retraite sur mesure pour les PME,* p. 11 (in French only) See https://www.rrq.gouv.qc.ca/SiteCollectionDocuments/www.rrq.gouv.qc/Francais/publications/rcr/BrochureRRS_f.pdf.
392. *Regulation respecting the exemption of certain categories of pension plans from the application of provisions of the Supplemental Pension Plans Act,* CQLR, c R-15.1, r. 7, s. 10, para. 18.
393. *Ibid.*, s. 10. para. 18.

- Open and maintain two accounts—one locked in and the other not locked-in—on behalf of each member, and allocate the contributions made among the different investments chosen;
- Notify the RRQ and the members, directly or through the retirement information committee, if there is one, within 60 days after any unpaid contribution becomes due;
- Give each employer a copy of the annual statement and, upon request, a copy of any document relating to the administration of the plan;
- Forward an annual statement to each member.

As for the employer, it must:

- Choose the financial institution;
- Decide on the conditions for eligibility and membership and the conditions for withdrawal, and whether membership in the plan is optional or compulsory;
- Determine who will assume the costs it must pay;
- Decide on the contribution rate and whether or not the contributions are locked in;
- Pay the contributions.

An employee who ceases to be an active member (due to resignation or dismissal, for example) must transfer his accounts out of the SIPP within 90 days following the sending of the statement required in the event of cessation of active membership. He may:

- Ask that his locked-in account be transferred to a LIRA or LIF, a life annuity as prescribed by regulation or another supplemental pension plan.[394] If no instructions are received within the specified time, the amounts are transferred to a plan chosen by the financial institution;
- For an account that is not locked-in, the member may also ask that the funds be transferred to the same transfer instruments mentioned above or to an RRSP or RRIF. He may also cash in the amounts in his non locked-in account (less tax). If no choice is made within the time limit, the financial institution chooses whether the amounts are refunded in cash or transferred to an authorized instrument, such as an RRSP with the same financial institution.[395]

Like traditional pension plans, if a member dies, the balance of his account is paid to his spouse or, if he does not have a spouse, to his designated beneficiary or, if he has neither a spouse nor a designated beneficiary, to his succession (estate).

A DCPP can be converted to a SIPP on certain conditions.[396]

394. *Ibid.*, s. 10, para. 6(a).
395. *Ibid.*, s. 10, para. 6(b).
396. *Ibid.,* ss. 19.1 to 19.4.

EXAMPLE

Bon augure is a small business with 50 employees. It would like to offer a pension plan with several investment options but it does not have the resources to manage it (pension committee, annual meeting, etc.). It would like its contributions to be set aside for employee retirement. It therefore opts for a SIPP and chooses a financial institution which offers and administers this type of plan.

3.8.1.13 Transfer instruments (LIRA, LIF and immediate life annuity)

The transfer instruments are those indicated in section 98 of the *Supplemental Pension Plans Act*. They are authorized to receive locked-in amounts from pension plans and, once they do, the person surrenders his membership benefits and is no longer a member of the pension plan. A member who leaves his pension plan (DBPP or DCPP) may transfer the value of his benefits to:

- A locked-in retirement account (LIRA);[397]
- A life income fund (LIF);[398]
- Another pension plan not governed by the SPPA (*Supplemental Pension Plans Act*);[399]
- A locked-in VRSP account;[400]
- An RRSP or a non locked-in VRSP account for sums that can be repaid to the participant or paid in one payment, with interest incurred;[401]
- An annuity.[402]

3.8.1.14 Pension plans with members in more than one province

A pension plan is registered in the province where most of the employees live.

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397. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 98 and *Regulation respecting supplemental pension plans,* CQLR, c R-15.1, r. 6, s. 29.
398. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 98 and *Regulation respecting supplemental pension plans,* CQLR, c R-15.1, r. 6, s. 18.
399. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 98 and *Regulation respecting supplemental pension plans,* CQLR, c R-15.1, r. 6, s. 28. For example, a VRSP, a federal supplemental pension plan, a Québec public sector supplemental pension plan or a supplemental pension plan from another province (either public or private sector).
400. Supplemental Pension Plans Act, CQLR, c R-15.1, s. 98 (3) and Regulation respecting supplemental pension plans, CQLR, c R-15.1, r. 6, s. 28(1) para 2.1.
401. Supplemental Pension Plans Act, CQLR, c R-15.1, s. 98 and Regulation respecting supplemental pension plans, CQLR, c R-15.1, r. 6, s. 28 (1) para 3.
402. Supplemental Pension Plans Act, CQLR, c R-15.1 and s. 98 and *Regulation respecting supplemental pension plans,* CQLR, c R-15.1, r. 6, s. 30.

The SPPA gives *Retraite Québec* the power to enter into agreements with other authorities so the SPPA will apply to Québec members when the plan is registered in another province.

In 2011, Québec signed the Agreement respecting Multi-jurisdictional Pension Plans (the Agreement). It covers pension plans with members in more than one province.[403] In practice, the Agreement applies as follows: administrative and procedural issues (aspects which apply to all plan members, such as registration, inspection, solvency and investments) are governed by the laws of the province in which the plan is registered (the province in which most of the members live). This supervisory authority has jurisdiction over the plan itself. However, regarding the individual rights of members, it must apply the law of the province where they are employed.

3.8.1.15 Pension plans in other provinces

There are currently 10 supervisory authorities for pension plans in Canada, one for each province (other than Prince Edward Island), and the Office of the Superintendent of Financial Institutions (OSFI) for plans under federal jurisdiction and for the Yukon, the Northwest Territories and Nunavut.[404] Although the laws have the same objectives, their provisions may be very different (such as the minimum period for accruing benefits under the plan, the definition of spouse, transfer instruments and the rules for unlocking funds).

3.8.2 *Pension Benefits Standards Act, 1985* (federal)

The *Pension Benefits Standards Act, 1985* applies to pension plans for the benefit of employees who work for a federally regulated business according to the Canadian constitution (such as Crown corporations, banks, airlines, railways, ships and navigation, businesses declared to be for the general interest, interprovincial transportation, telecommunications and Indian affairs).[405] The Act also applies to employees of the Yukon, the Northwest Territories and Nunavut.[406]

This statute differs from the SPPA in certain respects. The following are a few differences between them:

- There is no pension committee;[407]
- Contributions vest after two years of service;[408]

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403. For more information, see http://www.capsa-acor.org/en/init/mulit_juris_plans/ and http://www.rrq.gouv.qc.ca/en/services/publications/rcr/loi_reglements/lois_reglements/Pages/entente_quebec_ontario_2011.aspx.
404. *Pension Benefits Standards Act, 1985*, R.S.C., 1985, c 32 (2nd Supp.), s. 4(4).
405. *Ibid*, s. 4(4). See also Chapter 1.
406. *Ibid.*, s. 4(4)i).
407. The plan administrator is generally the policyholder, who is usually the employer.
408. For benefits accrued after 1986, the employer's contributions only vest in the member after two years of membership in the plan (*Pension Benefits Standards Act, 1985*, R.S.C., 1985, c 32 (2nd Supp.), s. 16(3)).

- Cash refund of contributions under different circumstances from those under the SPPA;
- Different rules for the pre-retirement death benefit;
- Different definition of spouse;
- Transfer instruments[409] (no LIRA, but a locked-in RRSP);
- Permitted investments.[410]

This ends our study regarding the rules applicable to pension plans and authorized transfer instruments, such as LIRAs and LIFs.

3.9 Voluntary Retirement Savings Plan (VRSP) and Pooled Registered Pension Plan (PRPP)

3.9.1 Voluntary retirement savings plan (VRSP)

Since July 1, 2014, all employers in Québec (other than employers governed by the *Pension Benefits Standards Act, 1985*)[411] who have five eligible employees or more must, in accordance with the schedule outlined in Table 3.2, offer a voluntary retirement savings plan (VRSP) to employees who do not have the opportunity to make contributions, through payroll deductions, to an RRSP or a TFSA, or do not benefit from a supplemental pension plan (RPP) offered by their employer.[412]

An eligible employee is an employee who is 18 years of age or over with one year of uninterrupted service and who:

- Works in Québec; or
- Performs work both in Québec and outside Québec for an employer whose residence, domicile, undertaking, head office or office is in Québec; or
- Is domiciled or resident in Québec and who performs work outside Québec for an employer whose residence, domicile, undertaking, head office or office is in Québec.

An employer may enter into an agreement with a professional order or association that allows the employer's employees to become members of the VRSP subscribed to by the professional order or association.

A VRSP is a voluntary pension plan: employers are not required to contribute to it, contrary to a supplemental pension plan (including the SIPP). Eligible employees do not have to do anything in

409. *Pension Benefits Standards Regulations 1985,* SOR/87-19, ss. 19.1 and 20(1).
410. *Ibid.*, s. 6 and Schedule III.
411. R.S.C., 1985, c 32 (2nd Supp.), s. 4(4).
412. *Voluntary Retirement Savings Plans Act,* CQLR, c R-17.0.1, s. 45.

particular to become a member: enrollment is automatic. A default contribution rate, which will reach 4% of gross salary in 2019,[413] and a default investment option apply. However, employees can opt out of the plan within 60 days of the date the plan administrator sends a notice.[414] Self-employed workers and workers whose employer has not subscribed to a VRSP (workers called "individuals") can subscribe to a VRSP voluntarily.[415]

The plan must not cost much: a maximum 1.25% management fee for the default option and 1.50% for the other options. The administrator can only charge the fees allowed under the *Regulation respecting voluntary retirement savings plans*,[416] which may also not be greater than those charged by the administrator for a pooled registered pension plan (PRPP) (see the next section). Also, it must offer between three and five investment options in addition to the default option (which must be a "lifecycle" option).[417]

Contrary to a pooled RRSP, the employer's contributions do not automatically involve contributions through payroll deductions. An employee's contributions to a VRSP are deductible from his taxable income, like contributions to an RRSP, and they reduce the amount that may be paid into an RRSP, and vice-versa. The accumulated amounts are not taxable until they are withdrawn. Unlike employer contributions, member contributions are not locked-in.[418] A member can ask for refunds or transfers from his non locked-in account at the intervals determined in the plan but never less than once per year.[419]

Contrary to the SIPP, a member whose employment is terminated can leave the funds in the VRSP. Like a member over age 55, he can also ask for a refund (after tax) or a transfer from his non locked-in account to the VRSP of another administrator or to another registered plan such as an RRSP. A locked-in account must be transferred to a locked-in product such as a LIRA or LIF.[420]

Note that there are a few exceptions, such as for members who have not resided in Canada for at least two years, members suffering from a physical or mental disability certified by a physician and members whose balance is less than a certain percentage of the maximum pensionable earnings. In these cases, the funds held in a locked-in account may be refunded.[421]

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413. From July 1, 2014 to December 31, 2017, the default contribution rate is set at 2% of gross salary; from January 1, 2018 to December 31, 2018, 3% of gross salary; and as of January 1, 2019, 4% of gross salary. *Regulation respecting voluntary retirement savings plans,* CQLR, c R-17.0.1, r. 3, s. 22.
414. *Voluntary Retirement Savings Plans Act,* CQLR, c R-17.0.1, ss. 47(3) and 19, para. 2(1).
415. *Ibid.*, s. 2.
416. *Regulation respecting voluntary retirement savings plans,* CQLR, c R-17.0.1, r. 3.
417. *Voluntary Retirement Savings Plans Act,* CQLR, c R-17.0.1, s. 25 and *Regulation respecting voluntary retirement savings plans,* CQLR, c R-17.0.1, r. 3, s. 13.
418. *Voluntary Retirement Savings Plans Act,* CQLR, c R-17.0.1, s. 65.
419. *Voluntary Retirement Savings Plans Act*, CQLR, c R-17.0.1, s. 69 and *Regulation respecting voluntary retirement savings plans*, CQLR, c R-17.0.1, r. 3, s. 28.
420. *Voluntary Retirement Savings Plans Act*, CQLR, c R-17.0.1, s. 67 and *Regulation respecting voluntary retirement savings plans*, CQLR, c R-17.0.1, r. 3, s. 27.
421. *Voluntary Retirement Savings Plans Act,* CQLR, c R-17.0.1., ss. 67, 68 and 69.

The employer's responsibilities are very limited. It must choose an administrator authorized by the AMF (the register is available on the AMF's website[422]), notify the employees that a VRSP has been set up, enroll them and then deduct contributions from payroll and give them to the administrator. It must also offer the VRSP again every 2 years to employees who have opted out or who have set their contributions at 0%.[423]

Otherwise, all the obligations fall on the plan administrator: an insurer, trust company or investment fund manager.[424] The administrator may only offer one VRSP.[425] Also, other than in exceptional cases, it may not refuse the application of an employer or an individual to subscribe to its plan. The text of the plan must be approved by *Retraite Québec* and registered with the CRA.

The employer may decide to set up a non-VRSP plan. Otherwise, it must follow the schedule indicated in Table 3.2:[426]

TABLE 3.2

VRSP Implementation Schedule

NUMBER OF ELIGIBLE EMPLOYEES	DEADLINE FOR OFFERING A VRSP
20 or more on June 30, 2016	December 31, 2016
From 10 to 19 on June 30, 2017	December 31, 2017
From 5 to 9	To be determined, but not before January 1, 2018

In the case of an employer who already offers its employees a supplemental pension plan, an RRSP or TFSA with payroll deductions but whose employees are not all covered (for example, in the case of part-time employees), those employees, if they have at least one year of uninterrupted service, must be covered by a VRSP (or by the existing plan). Note that if the RRSP or TFSA offered by the employer is optional, the employer does not have to set up a VRSP if all employees are eligible.

The *Commission des normes du travail* supervises compliance with the employer's obligation to set up a VRSP.[427] Like a traditional pension plan, if a member dies, the balance of his account is paid to his spouse or, if he does not have a spouse, to his designated beneficiary.

Exceptional right to offer VRSPs

Like all group annuity products, group annuity plan advisors and group insurance and annuity advisors may distribute an insurer's VRSP. However, since the number of small businesses

422. For more information, see https://lautorite.qc.ca/en/general-public/registers/register-vrsps/.
423. *Voluntary Retirement Savings Plans Act,* CQLR, c R-17.0.1, s. 48.
424. *Ibid.*, s. 14.
425. *Ibid.*, s. 22.
426. *Ibid.*, s. 140.
427. *Ibid.*, ss. 110 and 111.

covered by the first phase is high, financial security advisors and group insurance plan advisors may offer a VRSP to an employer until January 1, 2016, or any later date determined by the Minister of Finance and the Economy.[428] The AMF has been designated to issue authorizations to VRSP administrators and to ensure the criteria for maintaining the authorization are met.[429]

However, only actuaries who are Fellows, group annuity plan advisors and group insurance and annuity advisors may give advice to policyholders about insurers' VRSPs. However, financial security advisors or group insurance advisors only (who are not licensed for group annuities) may offer VRSPs to policyholders (groups) until December 31, 2017[430] (limited to a business's initial VRSP) but they cannot offer other types of group plans or make transfers from another type of plan (such as a SIPP) to a VRSP, which would require providing advice on products for which they are not registered. They also cannot transfer a VRSP from one administrator to another authorized administrator.[431]

Note also that only financial security advisors may give advice to self-employed workers or individuals (participants). The administrator may offer the VRSP directly (on-line or otherwise) if no advice is given.[432]

3.9.2 Pooled Registered Pension Plans (PRPP)

The federal government enacted the *Pooled Registered Pension Plans Act*[433] after a Canada-wide task force reviewed the retirement income system.

This statute covers employers under federal jurisdiction (banks, interprovincial carriers, etc.) as well as self-employed workers in the territories (Yukon, Northwest Territories and Nunavut). The purpose of the Act is similar to that of Québec's *Voluntary Retirement Savings Plans Act*.

However, there is one major difference from VRSPs: employers are not required to offer a PRPP. Also, all contributions, even members' contributions, are locked in for retirement.
The provinces are free to approve legislative measures equivalent to the PRPP. So far, Alberta, Saskatchewan and British Columbia have adopted their own statute governing PRPPs but have not issued any regulations. Ontario has adopted a bill, but the latter is not yet in force. Note that Québec businesses under federal jurisdiction are not required to set up a VRSP since the PRPP applies to them.

428. *Ibid.,* s. 139.
429. *Ibid.*, s. 14.
430. See: M.O., 2014-13, (2015) 217 G.O. II, 73, available in section 9.2 of the AMF Bulletin dated February 5, 2015, vol. 12, no. 5).
431. *Ibid.*, s. 42.
432. *Ibid.*, s. 42.
433. *Pooled Registered Pension Plans Act,* SC 2012, c 16 and *Pooled Registered Pension Plans Regulations,* SOR/2012-294.

3.10 Other plans which may be subscribed to through a group annuity contract

Now that we have studied the rules applicable to supplemental pension plans and VRSPs, we will discuss other plans that may be subscribed to through a group annuity contract.

3.10.1 Group registered retirement savings plan (group RRSP)

Features

A group RRSP may be a good alternative to a traditional defined contribution pension plan due to its flexible rules (for example, no pension committee, no annual meeting and the funds are, in theory, not locked-in).

A group RRSP is sometimes used as a complement to a deferred profit sharing plan (DPSP). In that case, the employer's contributions go to the DPSP and the employee contributions go to the RRSP.

A group RRSP may also be offered in addition to a supplemental pension plan. However, a group RRSP is deemed to be a pension plan where membership in it is a condition precedent to membership in another plan,[434] which is rare.

The *Income Tax Act* does not specifically cover group RRSPs. However, the concept is mentioned in an information circular issued by the CRA.[435] Despite its name, from a tax perspective a group RRSP is in fact a group of individual RRSPs of which each plan is registered with the CRA for each member (see the section on RRSPs).

In an RRSP, the annuitant may generally withdraw the accumulated funds before the plan expires, in which case they become taxable. However, in a group RRSP, the employer, sometimes called the plan sponsor, can make refunds conditional: refund only of the contributions an employee made during employment, penalties, contribution holiday during a specific period or no refunds to employees during employment. The plan may also require that a member transfer the accumulated funds if he ceases to be an employee.

The employer's role is to act as the member's mandatary to transfer the member's contributions, generally deducted from his salary (the member portion and employer's portion, where applicable) to the financial institution. The plan text may also provide for a spouse's membership in the group RRSP and the possibility of a member contributing to his spouse's RRSP ("spousal RRSP").

Like an individual RRSP, an insurer has the plan text, the group annuity contract and the enrolment form for the group RRSP registered with the CRA, which must approve any change. Members subscribe to the plan (and the group annuity contract) through the enrolment form. A

434. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 2.
435. Canada Revenue Agency, Information Circular 72-22R9, June 17, 1996.

group RRSP is a capital accumulation plan in which the member usually makes his own investment choices. The employer chooses the investment options (guaranteed funds or segregated funds) available to members with the insurer as part of the group annuity contract.

Fringe benefits (payroll taxes)

An employer which contributes to an employee's group RRSP must add that contribution to the employee's income, along with its own contribution (such as salary) to fringe benefits (such as parental benefits,[436] employment insurance,[437] the Québec Pension Plan of *Retraite Québec*[438] and CNESST[439]) in proportion to the amount of its contribution to its employee's RRSP. This is not the case for DCPPs (including SIPPs), DBPPs, VRSPs and PRPPs. However, when the group RRSP provides that contributions cannot be withdrawn during employment, the employer's contributions are not subject to the employment insurance deduction.[440]

3.10.2 Deferred Profit Sharing Plan (DPSP)[441]

General

Like RRSPs, deferred profit sharing plans (DPSP) were created under the *Income Tax Act.*[442] According to the arrangement, an employer may share with its employees the profits from the employer's business or the business of the employer and one or more corporations with which the employer does not deal at arm's length (a group of businesses).

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436. In 2017, the maximum insurable earnings taken into account to calculate the amount of benefits is $72,500 and the maximum amount the employee and the employer may contribute is $397.30 (0.559%) for the employee and $556.08 (0.782%) for the employer. See: http://www.revenuquebec.ca/fr/enterprises/ras/calculer-ras/rqap/maxrevenuassurables.aspx.
437. In 2017, the maximum insurable earnings taken into account to calculate the amount of benefits is $51,300. The maximum amount the employee may contribute is $836.19 (except in Québec: $651.51) and the maximum amount for the employer is $1,170.67 (except in Québec: $912.11).
See: http://www.cra-arc.gc.ca/tx/bsnss/tpcs/pyrll/clcltng/ei/hstrc-eng.html.
438. In 2017, the maximum amount the employee and the employer may contribute is $2,797.20 for the employee and $2,797.20 for the employer, i.e. a total of 10.8% of $55,300, applied to the portion of employment earnings between the basic exemption (the first $3,500) and the maximum pensionable earnings ($55,300).
See: http:www.rrq.gouv.qc.ca/en/employeur.role_rrq/Pages/role.rrg.aspx.
439. The CSST is now known as the CNESST (Commission des nomes, de l'équité, de la santé et de la sécurité au travail), following an amalgamation of the CSST, the Commission de l'équité salariale and of the Commission des normes du travail. In 2013, the average premium rate payable by an employer is $2 per $100 of payroll. The rate varies from one company to another. In 2017, the annual maximum earnings are $72,500. See http://www.csst.qc.ca/glossaire/Pages/salaire_maximum_annuel_assurable.aspx (available only in French).
440. Canada Revenue Agency, "*Employers' Guide: Taxable Benefits and Allowances,"* on-line document modified on January 23, 2017 and consulted on July 21, 2017 at https://www.canada.ca/content/dam/cra-arc/migration/cra-arc/E/pub/tg/t4130/t4130-16e.pdf.
441. *Income Tax Act,* R.S.C., 1985, c 1 (5th Supp.), s. 147.
442. *Ibid.,* ss. 147 and 198 to 207.2.

The employer contributions are taken out of the employer's profits. Since 1991, only the employer may contribute to a DPSP. The contributions usually correspond to a percentage of an employee's salary (subject to a ceiling). Profits are defined either as profits of the year or as undistributed profits of the year and previous years[443] of the business or group of businesses. The contributions therefore vary from one year to the next.

This type of plan is non-contributory, i.e., the member cannot contribute to it. The contributions vest when the member has completed 24 months as a member of the plan, unless the plan provides for a shorter period. The contributions and their income accumulate in the plan, and no tax is payable until the sums accumulated by the member are withdrawn.

The amounts credited to a plan member become payable within 90 days of the day on which the employee ceases to be employed (dismissal, retirement), the death of the member, the day on which the member turns 71 or the end of the plan. In this case, the member receives the amount in cash (less applicable taxes) or transfers the amount tax-free to an RRSP if he is under age 71. If the employee elect and if permitted by the plan, the amounts payable to the employee can be used to purchase an annuity, and an annuity certain or life annuity (with a maximum 15-year guaranteed term) will be paid to the member.

The *Income Tax Act*, which governs DPSPs, requires them to be in trust with a trust company or at least three trustees (individuals). In the case of a trust company, there is therefore a trust deed. The plan must only include qualified investments according to tax laws.[444]

Under the *Income Tax Act*, beneficiaries must be informed of their rights in the plan. In practice, this is done through an explanatory brochure. Many employers offer a DPSP for the employer's contributions and a group RRSP for member contributions. Some employers do not allow withdrawals during employment, like a group RRSP.

Registration and contract

The deferred profit sharing plan of an employer (or group of employers) must be approved by the CRA and meet certain conditions.[445] The trust deed must also be approved by it. In the case of a plan funded with an insurer, the trustee of the DPSP purchases a group annuity contract for the benefit of plan members (the beneficiaries of the trust). The insurer is generally the trustee's mandatary to administer the DPSP.

Some features of pension plans, SIPPs, group RRSPs and DPSPs

Table 3.3 sets out a few of the differences between supplemental pension plans, SIPPs, group RRSPs and DPSPs.

443. Canada Revenue Agency, Information Circular 77-1R5 DPSP, August 17, 2007.
444. *Income Tax Act,* R.S.C., 1985, c 1 (5th Supp.), s. 204.
445. *Ibid.*, s. 147(2).

TABLE 3.3

Some differences between pension plans, SIPPs, group RRSPs and DPSPs

	SUPPLEMENTAL PENSION PLAN (DCPP AND DBPP)	SIPP	VRSP	GROUP RRSP	DPSP
Plan administrator	Pension committee	Financial institution	Life insurer, trust company, investment fund manager	Insurer (the employer is the sponsor)	Trustee
Employer contributions	Compulsory	Compulsory	Not compulsory	Not compulsory	Compulsory
Member contributions	Sometimes	Sometimes	Yes	Yes	No
Contributions locked in or cannot be withdrawn during employment	Yes	Yes for employer contributions Sometimes for member contributions	Yes for employer contributions No for member contributions	Sometimes withdrawals limited	Sometimes withdrawals limited

3.10.3 Employees Profit Sharing Plan (EPSP)[446]

Some employers allow employees to participate in the growth of their business by paying amounts into a plan. The plan is said to be “non-registered” and the amounts paid into it do not grow tax-free. The employer sometimes makes additional contributions equal to a percentage of the employees’ contributions. An employee may also contribute to the EPSP.

Under an EPSP, the employer shares a portion of its profits with the employees designated by the plan. The amounts are paid to a trustee who holds them on behalf of the employees. Sometimes the contributions are invested in shares of the employer (share purchase plan). The employer’s contributions are deductible.

Employees must pay tax on contributions made on their behalf and the investment income earned is taxable each year as regular income. The employer’s contributions constitute a taxable benefit for members and if members withdraw money from the plan, they incur capital gains or losses.

In the case of a plan funded with an insurer, the trustee of the EPSP purchases a group annuity contract on behalf of the plan members. Sometimes the insurer is the trustee’s mandatary to administer the EPSP.

446. *Ibid.*, s. 144.

EXAMPLE

Valeur Inc. is a publicly traded company. It gives its staff the opportunity to participate in its success by investing money in shares through payroll deductions. This share purchase plan allows employees to participate in the company's profits. The company has committed to paying 50% of the amount employees pay into the plan, up to $1,500 per year per employee. Contributions to the EPSP are not deductible from the employee's income and the investment income does not grow tax-free.

3.10.4 Non-registered plans

Some employers want to give members the option of saving more through the financial institution which funds the pension plan or group RRSP by taking advantage of lower management fees charged in a group situation.

Commonly called "non-registered plans," the investment income is treated as regular income and member contributions (in practice, an employer rarely contributes to such a plan) are not deductible from income. Sometimes a non-registered plan is used for contributions by executives that exceed the permitted contribution limit.

In this case, the insurer enters into a group annuity contract with a sponsor through which guaranteed funds (GIA) and segregated funds may be offered.

Withdrawing amounts from the plan leads to capital gains or losses for members. The same applies to transfers between funds.

3.10.5 Excess Benefit Plan (EBP)

This type of plan is also known as a "top hat" plan or a supplemental executive retirement plan (SERP). As its name indicates, an excess benefit plan is meant to supplement the retirement income from a supplemental pension plan without regard to the tax limits that apply. It is generally suited to high-income and key employees. It can come in the form of a retirement compensation arrangement,[447] a letter of credit other than a retirement compensation arrangement, an employer resolution, or any other promise (written or not) of retirement income by the employer.[448]

Excess benefit plans can be funded (contributions are paid in advance and set aside), usually through a retirement compensation arrangement. They can also be non-funded, which entails a risk of non-payment if, for example, the employer faces financial difficulties or sells the company's assets.

447. *Ibid.*, s. 248(1), "retirement compensation arrangement;" *Income Tax Regulations*, CRC, c 945, s. 6802; *Taxation Act*, CQLR, c I-8, s. 890.1. Canada Revenue Agency, "Retirement compensation arrangements," on-line document modified on January 19, 2017 and consulted July 21, 2017. See https://www.canada.ca/en/revenue-agency/services/tax/businesses/topics/payroll/payroll-deductions-contributions/special-payments/retirement-compensation-arrangements.html.
448. See http://www.rrq.gouv.qc.ca/en/flashretraiteqc/Pages/capsule_retraite_008.aspx#2.

3.10.6 Other plans (TFSA, RRIF, LIRA and LIF)

To conclude this section, note that it is possible to set up and fund, through a group annuity contract, a group TFSA, group RRIF, group LIRA or group LIF.

3.11 Responsibilities of the parties to a group plan according to the *Guidelines for Capital Accumulation Plans*

In 1999, the Joint Forum of Financial Market Regulators (the "Joint Forum") set up an industry task force to determine whether members of defined contribution pension plans and other capital accumulation plans where members are permitted to make investment decisions (defined as capital accumulation plans) are sufficiently informed and assisted. In addition to the Canadian Life and Health Insurance Association (CLHIA), the Joint Forum is made up of the Canadian Association of Pension Supervisory Authorities (CAPSA), the Canadian Council of Insurance Regulators (CCIR), the Canadian Securities Administrators (CSA) and the Canadian Insurance Services Regulatory Organizations (CISRO).

On May 28, 2004, the Joint Forum published the *Guidelines for Capital Accumulation Plans*.[449] The Board of Directors of the CLHIA subsequently adopted Guideline G12 entitled "Capital Accumulation Plans" in December 2004. Guideline G12 sets out regulators' expectations regarding the operation of tax-assisted group savings products (DCPPs, group RRSPs, DPSPs, VRSPs, PRPPs, etc.) in which members exercise investment choices. Those expectations relate to the activities of plan sponsors, administrators, members, and service providers.

Although the practices described in Guideline G12 only apply to tax-assisted plans, life and health insurance companies who are CLHIA members are expected to administer non-tax-assisted plans based on such practices.

The intent of the Guidelines is to:

- Outline and clarify the rights and responsibilities of sponsors (such as employers), service providers (insurers) and members;
- Ensure that members are provided the information and assistance that they need to make investment decisions in a capital accumulation plan.

These Guidelines therefore set out uniform principles, regardless of the legislative framework applicable to the plan. Legislation affecting insurance, securities, pension plans and taxes continues to govern, as applicable.

The sponsor is therefore responsible for setting up the plan and providing investment information and decision-making tools to members. It must also choose a default fund (when members do not

449. For more information, the Guidelines are available on the following websites: www.capsa-acor.org, http://www.securities-administrators.ca/?&LangType=1033 and https://www.jointforum.ca/en/Default.asp.

make investment decisions). It introduces the plan to members and provides them with on-going communication. It may delegate its responsibilities to a service provider (generally an insurer), which must follow the Guidelines. In this situation, the sponsor must choose the service provider carefully and in the members' interest. According to the Guidelines, members are responsible for making investment decisions using the information and decision-making tools made available to assist them in making those decisions.

Since the Guidelines are not legally binding, they constitute a voluntary code; however, it should be noted that the above-mentioned regulatory organizations have approved them. In legal proceedings, a court is not required to consider them but it will be more amenable to a sponsor who has followed them.

3.12 Designation of beneficiaries in an annuity contract and death benefits

3.12.1 Designation of beneficiaries in annuity contracts other than annuity contracts governed by the *Supplemental Pension Plans Act*

The rules regarding the designation of beneficiaries as studied in Chapter 2 apply to annuity contracts under article 2393 of the *Civil Code of Québec,* which assimilates annuity contracts purchased from an insurer to life insurance.

It is important to note that where a person other than the spouse[450] is a designated beneficiary under an annuity contract registered as a RRSP or RRIF, the insurer will pay the entire amount to the designated beneficiary, and the succession (estate) will be responsible for the tax payable for the RRSP or RRIF, as the case may be. Under the *Income Tax Act*, the annuitant under an annuity contract registered as a RRSP or RRIF is deemed to have received, immediately before his death, an amount equal to the fair market value of all his property.[451]

However, where the annuitant's succession (estate) is in a deficit, the designated beneficiary is solidarily liable for the succession's tax debt to the CRA if the annuity contract was registered as a RRSP or RRIF.[452]

450. *Income Tax Act,* RSC, 1985, c 1 (5th Supp.), s. 60(l). A spouse is entitled to "roll over" the RRSP or RRIF into his name without tax consequences.
451. *Income Tax Act*, RSC,, 1985, c 1 (5th Supp.), ss. 146(8.8) and 146.3(6). See also *Slater* v. *Klassen Estate*, 2000 DTC 6336 (Man. S.C.); *Curley et al.* v. *MacDonald et al*., 2001 DTC 5141 (Ont. S.C.).
452. *Income Tax Act*, RSC, 1985, c 1 (5th Supp.), s. 160.2(1)(2). However, for contracts not registered as an RRSP or a RRIF, the CRA cannot hold the designated beneficiary solidarily liable with the estate, even under section 160(1) of the *Income Tax Act*. See in this regard: *Higgins* v. *The Queen*, 2013 TCC 194 (CanLII). However, see *Morrison Estate (Re)*, 2015 ABQB 769.

3.12.2 Death benefits, designation of beneficiaries and spouse's prior rights under the *Supplemental Pension Plans Act*

3.12.2.1 Death benefit before retirement

Under the *Supplemental Pension Plans Act,* a beneficiary may be designated for the plan (in practice, it is the same person as for the group annuity contract). The *Civil Code of Québec* rules regarding the designation of a beneficiary apply.[453]

However, when the *Supplemental Pension Plans Act* applies, the member's spouse, if he has one when he dies, is paid in priority, not the designated beneficiary. If the member has a spouse, which includes a *de facto* spouse and a spouse of the same sex according to the definition below, where the member dies before retirement the benefit is payable to that person (in cash, less applicable tax) even if he has designated another beneficiary.[454]

Definition: spouse

In the *Supplemental Pension Plans Act*,[455] the term "spouse" is defined as follows.

> The spouse of a member is the person who:
>
> (1) is married to or in a civil union with the member;
>
> (2) has been living in a conjugal relationship with a member who is neither married nor in a civil union, whether the person is of the opposite or the same sex, for a period of not less than three years, or for a period of not less than one year if
>
> - At least one child is born, or to be born, of their union;
> - They have adopted, jointly, at least one child while living together in a conjugal relationship; or
> - One of them has adopted at least one child who is the child of the other, while living together in a conjugal relationship.

453. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 64.
454. *Ibid.*, s. 86. The rule is the same for LIFs, LIRAs and annuity contracts subscribed entered into with sums that stem from a supplemental pension plan. See sections 16, 19(4, 29(3) and 30(3) of the *Supplemental Pension Plans Act*, CQLR, c R-15.1,r. 6. Therefore, in these cases, the spouse (if applicable) will receive the death benefit even if the beneficiary is someone else.
455. *Ibid.*, s. 85.

EXAMPLE

Jean named his sister Mireille as the beneficiary of his pension plan when he became a member a few years ago. Some time later, he met Céleste, with whom he lived for five years before he died. Although Mireille was designated as his beneficiary by Jean, the death benefit will be paid to Céleste, his spouse at the time of his death.

Special rules

The spouse may always waive the right to the death benefit by sending the pension committee a statement containing the information prescribed by regulation.[456] The spouse may also revoke the waiver provided the committee is notified in writing before the member's death.[457] If there is no spouse when the person dies or if the spouse has waived his rights, the insurer or the pension committee must pay the beneficiary or the succession in the absence of a beneficiary according to the applicable rules of the *Civil Code of Québec*.

In the case of a married couple, the right of the member's spouse to the death benefit is terminated by separation from bed and board (by judgment), divorce or marriage annulment.[458] In the case of a *de facto* spouse, the right is terminated by cessation of the conjugal relationship. Where the spouses are in a civil union, the right is terminated by the dissolution or annulment of their civil union. However, the member may notify the pension committee to pay the pension to his former spouse, but this must be done in writing.[459]

It is important to note that if a married spouse is also named as beneficiary, his right as spouse to the death benefit is terminated through separation from bed and board (by judgment), but not as beneficiary[460] (see Chapter 2).

3.12.2.2 Death benefit after retirement

When a member dies after he has retired while he was receiving a pension and if he had a spouse when he retired, the spouse is entitled to a pension;[461] the amount of the spouse's pension must not be less than 60% of the amount of the pension received by the member.[462] However, the spouse may waive the right to the pension by sending the pension committee a statement containing the information prescribed by regulation[463] before the first payment of the member's pension.

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456. *Ibid.*, s. 88.1
457. *Ibid.*, s. 88.1.
458. *Ibid.*, s. 85, para. 4 (*in fine*).
459. See online: http://rrq.gouv.qc.ca/en/.
460. Unless the judgment granting the separation from bed and board provides otherwise. *Supplemental Pension Plans Act*, CQLR, C R-15.1, s. 89; *Civil Code of Québec*, CQLR, c C-1991, art. 2459.
461. If he retired before January 1, 1990, a joint and survivor pension was an option.
462. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 87.
463. *Ibid.*, s. 88.1. Under the same provision, the spouse may also revoke the waiver.

If the member does not have a spouse when he retires, even if he has one later,[464] the remaining pension payments (or the discounted value of the pension upon request) become payable upon his death to the beneficiary or the succession (as the case may be) if the pension included a guaranteed term which has not ended.

EXAMPLE

Catherine, who is single, had been retired from *Beausoleil Itée* for two years when she died. She received a 15-year guaranteed life annuity for which the beneficiary was her niece Émilie, who will receive the same annuity payments as her aunt for 13 years.

3.12.3 Partition of family patrimony and partnership of acquests

In addition to the situations involving partition of the family patrimony for couples who are married or in a civil union, the *Supplemental Pension Plans Act* provides that, where the conjugal relationship ceases, the benefits accumulated in a pension plan during the conjugal relationship must be partitioned.

Although *de facto* spouses are not covered by the family patrimony rules,[465] they have certain rights under the *Supplemental Pension Plans Act*.

The family patrimony rules as they relate to supplemental pension plans do not apply when the member dies, since the *Supplemental Pension Plans Act* provides that the surviving spouse is entitled to a death benefit. The definition of spouse includes a *de facto* spouse who meets the requirements to be considered a “spouse” under section 85 of the *Supplemental Pension Plans Act*.

Basic principles of matrimonial law

It is essential for pension plan administrators to be aware of the basic principles of matrimonial law since they may be asked to fulfill certain duties relating to the partition of benefits in a pension plan. Those basic principles namely involve:

- Valuating assets;
- Partitioning property;
- The rights of *de facto* spouses;
- The rights of spouses in a civil union.

464. *Ibid.*, s. 85, para. 2.
465. *Quebec (Attorney General)* v. *A,* [2013] 1 S.c.R. 61, McLachlin, LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis, JJ.

Relationship ends during the capitalization phase

Members going through a divorce, separation from bed and board, annulment of marriage, dissolution or annulment of a civil union or even family mediation, or their spouse, may apply to the pension committee for a statement of the value of the benefits accumulated by the member under the plan during the marriage or civil union.[466] For *de facto* spouses, their application for a statement of benefits must be accompanied by an attestation of the dates on which their conjugal relationship began and ended. The statement must be provided within 60 days of receiving the application (s. 35 of the *Regulation respecting supplemental pension plans*). It must indicate the value of the benefits on a specific date, namely, the date the proceedings were instituted (for spouses who are married or in a civil union) or the date the conjugal relationship ended. In the case of defined-benefit pension plans, this value is calculated according to a specific formula.

After obtaining the judgment, the member or his former spouse must submit a written application for partition along with the required documents. For *de facto* spouses whose conjugal relationship has ended, the benefits may only be partitioned if they have agreed in writing to do so during the year following their separation (s. 110 SPPA).

Note that following partition, the spouse cannot receive his share in cash, other than in certain circumstances (if the value to be partitioned is less than 20% of the maximum pensionable earnings for the year in which the partition takes place, or if the former spouse has not lived in Canada for at least two years).[467] In certain cases, the amounts may remain in the spouse's name in the plan or be transferred to another pension plan or a locked-in retirement account (LIRA), life income fund (LIF) or life annuity in the spouse's name.

Partition of a supplemental pension plan cannot confer on the spouse more than 50% of the benefits of the initial holder (including locked-in retirement accounts and life income funds).[468]

EXAMPLE

Jean and Pierre break up after living together for 10 years. Jean has been a member of his employer's defined contribution pension plan for 20 years and the value of his benefits is $400,000.

According to the statement, the value accumulated by Jean during the period they lived together is $140,000. Less than one year after their break-up, the spouses enter into an agreement according to which Pierre is entitled to 50% of the value accumulated by Jean during their conjugal relationship, i.e. $70,000.

466. *Supplemental Pension Plans Act*, CQLR, c R-15.1, s. 108.
467. *Ibid.*, s. 109.
468. *Civil Code of Québec,* CQLR, c C-1991, art. 426. See also *Supplemental Pension Plans Act*, CQLR, c R-15.1, ss. 109 and 110, as well as arts. 553, para. 1, subpara. 4, and 553, para. 2 *in fine* of the *Code of Civil Procedure,* CQLR, c C-25 (and article 696, para. 3 (*in fine*) of the new *Code of Civil Procedure,* which came into force on January 1, 2016).

Table 3.4 summarizes the circumstances authorizing the partition of a plan under the *Supplemental Pension Plans Act* or according to the family patrimony rules.

TABLE 3.4

Partition of benefits among spouses during capitalization phase

	PENSION PLAN	RRSP	DPSP, TFSA, NON-REGISTERED PLANS
Married spouses: separation from bed and board, dissolution (divorce or death), annulment of the marriage	Can be partitioned – 50% limit but 100% upon death	Can be partitioned	Does not form part of the family patrimony but the parties can agree to partition. Can form part of partnership of acquests.
Spouses in a civil union: dissolution (judgment, joint declaration before a notary or death), annulment	Can be partitioned – 50% limit but 100% upon death	Can be partitioned	Does not form part of the family patrimony but the parties can agree to partition. Can form part of partnership of acquests.
De facto spouses: cessation of conjugal relationship	Can be partitioned – 50% limit but 100% upon death	The family patrimony rules don't apply but the parties can agree to partition.	The family patrimony and partnership of acquests rules don't apply but the parties can agree to partition.

Relationship ends during the payment phase

If the relationship ends after retirement, i.e. when the member is receiving a pension, the former spouse loses his right to the joint and survivor pension[469] (unless the judgment indicates otherwise); the member can ask for a redetermination of his pension as if he had never had a spouse.[470] The member's payments will be higher than they were before the relationship ended. Note also that a pension that is in the payment phase may be partitioned.

The rule mentioned in the section above on the partition of the family patrimony and the partnership of acquests whereby partition of a plan may not confer on the spouse more than 50% of the value of a member's benefits applies to pension plans governed by the SPPA (including locked-in retirement accounts and life income funds (LIF)).

469. *Supplemental Pension Plans Act*, CQLR, C R-15.1, s. 89.
470. *Ibid.*, s. 89.1.

3.13 Unseizability (exemption from seizure) of certain annuity contracts

3.13.1 Unseizability under the *Civil Code of Québec*

An annuity contract meeting the five conditions listed in the section on the legal nature of an annuity contract may be exempt from seizure in the event of bankruptcy or seizure by a creditor where the holder or member (as the case may be) has designated as the beneficiary his married or civil union spouse (this also covered same-sex couples from 2002 to 2005), a descendant or an ascendant. The designation of one or more of these persons as beneficiaries, even if the designation is revocable, makes the rights under contract exempt from seizure.[471] However, the designation of a *de facto* spouse as the revocable beneficiary does not protect them from seizure.

The designation of any person (including a *de facto* spouse, friend, etc.) as the irrevocable beneficiary also makes the rights under contract exempt from seizure.[472]

The capital of an annuity contract may also be unseizable under article 2378 of the *C.C.Q.*, even if no beneficiary is designated. However, in this case, only that part of the capital is unseizable which would be necessary, for the duration fixed in the contract, for the payment of an annuity which would meet the requirements of the annuitant for support.[473]

Sections 33.4 and 33.5 of *An Act respecting insurance* also govern the exemption from seizure of an annuity contract.

3.13.2 Unseizability under the *Code of Civil Procedure*

Under article 553, paragraph 1, subparagraph 7 of the former *Code of Civil Procedure* (in force until December 31, 2015) benefits payable under a supplemental pension plan to which an employer contributes on behalf of his employees, other amounts declared unseizable by an Act governing such plans and contributions paid or to be paid into such plans are exempt from seizure.[474]

471. *Civil Code of Québec,* CQLR, c C-1991, arts. 2393 and 2457.
472. *Ibid.*, arts. 2393 and 2458.
473. See *Québec (Sous-ministre du Revenu)* v. *Fercal inc.,* EYB 2006-100380 (C.A.), paras. 35 to 37.
474. However, under the last paragraph of article 553 of the former *Code of Civil Procedure*, the amount mentioned in subparagraph 7 of that article is unseizable, in the case of effecting partition of a family patrimony or of a debt for support or a compensatory allowance between married or civil union spouses, to the extent of 50%.

Since January 1, 2016, the date on which the new *Code of Civil Procedure* came into force, the relevant provision of article 553, mentioned above, was replaced by article 696, paragraph 2, subparagraph 3 of the new Code. Under that article, contributions paid or to be paid into a supplemental pension plan to which an employer contributes on behalf of employees, or into another pension plan established or governed by law are exempt from seizure. Under article 696 paragraph 2, subparagraph 4 of the new *Code of Civil Procedure*, the capital accumulated for the payment of an annuity or accumulated in a retirement savings instrument if the capital has been alienated or is under the control of a third person and satisfies the other prescriptions of law is also exempt from seizure.[475] Courts have not yet decided how to interpret this section.

3.13.3 Unseizability under the *Supplemental Pension Plans Act*

Supplemental pension plans, LIRAs and LIFs are exempt from seizure, regardless of the designation of beneficiaries.[476]

The amounts paid into a LIRA or LIF (with the exception of voluntary contributions) as well as the resulting benefits cannot be seized[477] except in the following cases: partition of the family patrimony and seizures for a claim for support, to execute a judgment.

However, since January 1, 2016, the date on which the new *Code of Civil Procedure* came into force, pension benefits paid to the member are not subject to seizure by the financial institution that pays them to the participant, but would become so, in part, when they were deposited into the member's bank account.[478]

475. However, the property that is exempt from seizure under article 696, para. 2 subparagraphs 3 and 4 of the new *Code of Civil Procedure* may be seized up to a limit of 50% to execute partition of a family patrimony, a claim for support payment or a compensatory allowance. Moreover, a creditor of support payment obligations may not seize the same payments that could surpass 50% of the accumulated capital, a second time. Therefore, if a spouse has already obtained 50% of the supplemental plan payments from its spouse's pension pursuant to the partition of family patrimony, he may not later seize the 50% remaining for an unpaid support payment (support payment obligation creditor). Subsequent contributions made afterof the partition of the family patrimony will then be partly seizable. See: Droit de la famille – 06671, 2006 QCCS 6961.
476. See, for example, sections 64, 98 and 264 of the *Supplemental Pension Plans Act*, CQLR, c R-15.1, sections 18, 28 and 29 of the *Regulation respecting supplemental pension plans,* CQLR, c R-15.1, r. 1 and section 18 of the *Pension Benefits Standards Act, 1985,* RSC, 1985, c 32 (2nd Supp.).
477. *Supplemental Pension Plans Act*, CQLR, R-15.1, ss. 64, 98 and 264.
478. See the new *Code of Civil Procedure*, CQLR, c C-25.01, s. 698. We are unaware of any relevant decisions having interpreted this new provision.

EXAMPLE

Marilyn had a pension plan with her former employer. Several of her creditors are demanding to be paid. She transferred her accrued benefits to a life income fund (LIF) with a mutual fund manager. Since these amounts come from a pension plan, they are exempt from seizure. This also applies to the annual maximum paid to Marilyn out of the LIF.

Pension plans governed by the *Pension Benefits Standards Act, 1985,* are exempt from seizure according to that statute.[479]

3.13.4 Unseizability under the *Bankruptcy and Insolvency Act*

Since July 7, 2008, all RRSPs, RRIFs and DPSPs[480] are exempt from seizure (whether or not a preferred beneficiary has been designated) in the case of individuals who are bankrupt as of that date, other than contributions made in the 12 months before the date of bankruptcy, further to the coming into force of the new section 67(1) of the *Bankruptcy and Insolvency Act*.

479. R.S.C., 1985, c 32 (2nd Supp.), s. 18. See also the *Pension Benefits Standards Regulations, 1985,* SOR/87-19, s. 21(1).
480. *Bankruptcy and Insolvency Act,* RSC, 1985, c B-3, s. 67(1)b.3) and *Bankruptcy and Insolvency General Rules,* CRC, C 368, s. 59.2.

TABLE 3.5

Unseizability by member's creditors in a bankruptcy context: general rules*

BANKRUPTCY	SUPPLEMENTAL PENSION PLANS, LIRA AND LIF	RRSP, RRIF AND DPSP	NON-REGISTERED ANNUITY CONTRACTS AND TFSA
Annuity contract in capitalization phase	Exempt from seizure	Exempt from seizure, other than contributions made in the 12 months preceding bankruptcy	Exempt from seizure for preferred beneficiaries (married or civil union spouse, descendants and ascendants)[481] However, under the new *Code of Civil Procedure*, capital that is accumulated from an annuity contract, without there being a privileged designated beneficiary, could be unseizable[482]
Annuity contract in payment phase	Exempt from seizure (capital) Annuity payments (benefits) would be subject to seizure, but not in the hands of the insurer[483]	Capital exempt from seizure and payments subject to seizure according to jurisprudence[484]	Annuity capital (contributions plus return) generally cannot be refunded under the annuity contract so the capital is exempt from seizure. Annuity payments can be seized according to jurisprudence[485]

***** Some exceptions apply. An insurance representative should refer its client to a lawyer or a notary when the client asks for advice regarding seizure exemptions.

However, there is an exception to the exemption from seizure where property is seized to execute the partition of a family patrimony,[486] a claim for support or a compensatory allowance.

481. *Civil Code of Québec,* CQLR, C C-1991, arts. 2393, 2457 and 2458. In some cases, it is also possible to rely on article 2378 of the *C.C.Q.,* even where no beneficiary or preferred beneficiary has been designated: *Québec (Sous-ministre du Revenu)* v. *Fercal inc.*, 2006 QCCA 68.
482. There has not yet been any decision regarding this subject rendered by a tribunal. Moreover, it is also possible, in certain cases, to invoke exemption of seizure stemming from section 2378 of the *Civil Code of Québec*, even when no privileged beneficiary has been named: *Québec (Sous-ministre du Revenu) c. Fercal inc*., 2006 QCCA 68.
483. Since January 1, 2016, the date on which the new *Code of Civil Procedure* came into force, retirement benefits paid to a participant would not be subject to seizure in the hands of the financial institution paying them to the participant, but would become seizable in part once deposited in the participant's bank account. We are unaware of any relevant decisions having interpreted this new provision. This would constitute a change in relation to the applicable law prior to January 1, 2016.
484. *SMRQ* v. *Bromage,* [1986] R.R.A. 664; *Procureur général du Québec* v. *Santilli,* J.E. 97-199; *Tardif (Syndic de)*, J.E. 98-1990 (C.A.); *Boisvert (Syndic de)*, J.E. 98-42 (S.C.).
485. *SMRQ* v. *Bromage,* [1986] R.R.A. 664 (S.C.); *Procureur général du Québec* v. *Santilli,* J.E. 97-199 (C.A.); *Tardif (Syndic de)*, J.E. 98-1990 (C.A.); *Boisvert (Syndic de)*, J.E. 98-42. However, see: *Québec (Sous-ministre du Revenu)* v. *Fercal inc*., 2006 QCCA 68.
486. *Civil Code of Québec*, CQLR, c C-1991, art. 426.

Article 553 of the former *Code of Civil Procedure* limited the portion which is exempt from seizure to 50% of the value of the benefits under a supplemental pension plan and the contributions.

Now, in the case of a seizure regarding a support payment claim, section 696 of the new *Code of Civil Procedure* also limits to 50% the exemption from seizure of the capital accumulated for payments regarding supplemental pension plans, but also to the same limit of 50% for from all annuity contracts (even if there is a privileged beneficiary), while this accumulated capital (from annuity contracts with a privileged beneficiary, that do not stem from supplemental pension plan payments) were, under the former *Code of Civil Procedure*, exempt from seizure up to 100% in the case of a seizure regarding a support claim.[487] Moreover, pension payments and annuity payments would remain seizable, in part, in all cases.[488]

When the former spouse carries out a seizure for a claim for support (or for unpaid alimony, according to one's point of view), he may receive the amount from the pension plan in cash.

Lastly, note that the trustee in bankruptcy has no more rights over the bankrupt's property than the bankrupt himself.[489]

3.13.5 Some exceptions to unseizability

3.13.5.1 Withdrawal and change of beneficiary in an annuity contract in capitalization phase

When a member asks to withdraw part of his group RRSP, deferred profit sharing plan or non-registered plan, the property enters the member's patrimony and therefore becomes subject to seizure. The same applies when a member changes from a preferred beneficiary to become an ordinary beneficiary.

EXAMPLE

Aimée named her husband Antoine as the beneficiary of her non-registered savings plan funded with the insurer *Le bon vent* through a group annuity contract.

Aimée went bankrupt. The non-registered savings plan forms part of the property of which the trustee takes possession but the trustee cannot use it to pay the creditors. Shortly after, Aimée decides to name her sister as her beneficiary. Since her sister does not fall into the category of preferred beneficiaries, the trustee can ask for Aimée's plan to be cashed in for the benefit of the creditors.

487. See the new *Code of Civil Procedure*, CQLR, c C-25.01, s. 696(3).
488. See the new *Code of Civil Procedure*, CQLR, c C-25.01, s. 698.
489. *Lefebvre (Trustee of)*; *Tremblay (Trustee of)*, [2004] 3 S.c.R. 326, para. 37.

Some court decisions state that property that is exempt from seizure can be seized if specific events occur, for example if the member receives his annuity payments, asks for a withdrawal or changes beneficiary (to a non-preferred beneficiary).[490] This type of seizure is sometimes referred to as "binding."

3.13.5.2 Rights of the trustee in bankruptcy

In 1996, a Supreme Court decision established the following principle: upon bankruptcy, the trustee takes possession of all the bankrupt's property, even property exempt from seizure under provincial law.[491] However, he cannot sell property that is exempt from seizure to repay the member's creditors unless he can show that the beneficiary designation was intended to defraud the creditors.

When the trustee is released from his administration of the bankruptcy, he must return the protected property to the member. The above example is relevant with respect to the rights of the trustee in bankruptcy.

3.13.5.3 Federal Crown

The federal Crown (for example, the CRA) can claim that it is not subject to the seizure rules prescribed by provincial law.[492] However, the provincial government must comply with provincial laws governing seizure.

3.13.5.4 Spouse's rights

A married or civil union spouse is entitled to his share of the family patrimony in his spouse's RRSP and pension plans and, to this end; he can have them seized if the relationship ends. [493]

490. *Droit de la famille-2176,* [1995] R.J. Q. 1056; *Droit de la famille-2153,* J.E. 96-1006; *Edward* v. *Ellis,* 97 B.E. 72.
491. *Royal Bank of Canada* v. *North American Life Assurance Co.,* [1996] 1 SCR 325 (known as the "Ramgotra case").
492. *Sun Life Assurance Company of Canada* v. *Young* [1992], 4 W.W.R. 504. See also: *Marcoux* v. *Attorney General of Canada,* 2001 FCA 92, Noël, Décary and Létourneau, JJ. and *Quebec (Attorney General)* v. *Canada (Human Resources and Social Development)*, [2011] 3 S.C.R. 635; *London Life Insurance Co.* v. *Canada,* 2014 FCA 106, leave to appeal to the Supreme Court of Canada granted (Docket No. 35961); *M.N.R.* v. *Anthony*, (1995) 32 C.B.R. (3d) 109 (Nfld. C.A.); *M.N.R.* v. *Ross*, [1997] F.C.J. 1765 (F.C.A.); *Red Development Corporation* v. *Triman Industries Ltd*., [1991] 6 W.W.R. 481 (Man. C.A.). See the difference in the wording between sections 224(1.2) and 225(5) of the *Income Tax Act*.
493. See also *G*. v. *C*., [1996] R.L. 562.

3.14 Assuris guarantees

Assuris is a not-for-profit organization that protects Canadian policyholders if their life insurance company should fail. It is funded by its members, who are life insurance companies doing business in Canada.

Its role is to protect policyholders by minimizing the loss of benefits and ensuring a quick transfer of their policies to a solvent company, where their protected benefits will continue.

Assuris plays, for life insurance companies, a role similar to the role the Canada Deposit Insurance Corporation (CDIC) plays for Canadian banks.

Assuris's Supplementary Rules relating to coverage dated December 10, 2009, replaced the Supplementary Rules relating to coverage dated September 2001.

Under these rules, other than the coverage applicable to life, health and accident insurance, Assuris has set up guarantees (or "protection") for annuities in the payment phase, individual variable capital annuity contracts (individual segregated funds), annuities in the capitalization phase and pension plans. A summary of these guarantees is given on the Assuris website.[494]

For example, if a life insurance company that is a member of Assuris becomes insolvent, that insurer's annuity contracts are transferred to a solvent company (following the combined efforts of Assuris and the liquidator of the insolvent insurance company). The clients of the insolvent insurance company (or their assigns) obtain the following protection, among others:

- Annuity in payment phase — Upon the transfer, Assuris guarantees that the client will retain up to $2,000 per month or 85% of the monthly income he was promised, whichever is higher;
- Individual variable capital annuity contract (segregated funds) — Assuris guarantees that the client will retain up to $60,000 or 85% of the promised guaranteed amounts, whichever is higher;
- Non-variable capital annuity contract (GIA) — Assuris guarantees that the client will retain 100% of the accumulated value up to $100,000.

494. For more information, see http://www.assuris.ca/client/assuris/assuris_lp4w_lnd_webstation.nsf/welcome_en.html?ReadForm.

CHAPTER 4

RULES RELATING TO THE ACTIVITIES OF REPRESENTATIVES

Competency component

- Integrate into practice the rules governing the activities of representatives in insurance of persons.

Competency sub-components

- Explain the role of the organizations that protect consumers for insurance of persons;
- Integrate into practice the duties and obligations set out in the *Code of ethics of the Chambre de la sécurité financière* for representatives in insurance of persons and representatives in group insurance of persons;
- Integrate into practice the obligations and responsibilities of representatives set out in the other legal sources applicable to their practice.

Note: In this Chapter, as in *An Act respecting the distribution of financial products and services*, the word "representative" is used to refer to an insurance representative and the expression "insurance representative" is used to refer to an insurance of persons representative and a group insurance representative.

In order to round out their studies, readers should consult the collection of texts entitled *An Act Respecting the Distribution of Financial Products and Services, its Regulations and Codes of Ethics* (A100-T1).

4
RULES RELATING TO THE ACTIVITIES OF REPRESENTATIVES

Chapter 4 deals first with the consumer protection organizations and the other relevant organizations for insurance of persons, then with *An Act respecting the distribution of financial products and services* (the "Distribution Act") and its regulatory framework. Next, it analyzes the certification procedure, i.e., the conditions of eligibility for obtaining a representative's certificate and the conditions for reinstating a certificate. The different types of practice and the duties of a representative in the performance of his activities are also discussed.

The provisions relating to the registration procedure and the obligations of firms, independent partnerships and independent representatives, the various rules governing distributions without a representative and the sale of insurance in deposit institutions are also examined.

The different types of liability applicable to representatives and the recourses available to consumers when they feel they have been wronged are briefly discussed.

Finally, this Chapter examines the rules of ethics and professional conduct, i.e., the conduct which representatives must adopt in their daily practice when dealing with the public, clients, other representatives, firms and independent partnerships, and the profession.

4.1 Consumer protection organizations for insurance and other relevant organizations for insurance of persons

The following is a list of the organizations studied in this section:

- The *Autorité des marchés financiers* (the Authority or the AMF);
- The *Chambre de la sécurité financière* (CSF);
- Assuris;
- The Canadian Life and Health Insurance Association (CLHIA);
- *Retraite Québec*;
- The Canadian Association of Pension Supervisory Authorities (CAPSA);
- The Canadian Council of Insurance Regulators (CCIR);
- The Canadian Insurance Services Regulatory Organizations (CISRO);

- The Joint Forum of Financial Market Regulators (Joint Forum);
- The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC);
- The OmbudService for Life & Health Insurance (OLHI);
- The *Commission d'accès à l'information* (CAI); and
- The Canada Revenue Agency (CRA).

Among their goals, they all have one in common: to protect consumers of financial products and services. However, each of them has a specific mission and different duties and protective powers or mechanisms.

4.1.1 *Autorité des marchés financiers* (the "Authority" or the "AMF")

4.1.1.1 Mission

The *Autorité des marchés financiers* (the "Authority" or the "AMF") is accountable to the Minister of Finance and is financed by those working in the financial industry.

The AMF, which was established on February 1, 2004, is the regulatory body which oversees financial industry regulation in Québec.

The AMF therefore administers all the laws governing financial sector regulation in the areas of insurance, securities, deposit institutions (other than banks, which are governed by the federal government) and the distribution of financial products and services in Québec.

4.1.1.2 Functions

The main functions of the AMF under the Distribution Act are the following:

- Determine regulations;
- Keep and maintain the register of representatives and registrants;
- Issue or renew certificates;
- Authorize registrations, cancel or suspend the registration of a firm, independent partnership or independent representative, or impose conditions or restrictions thereon;
- Take action against illegal practice;
- Examine complaints;
- Act as an insurance information centre;
- Set up a professional liability insurance fund;
- Inspect firms, independent partnerships and independent representatives; and
- Publish a bulletin to inform the industry and the public about its activities.

The Distribution Act divides the industry of insurance representatives and firms into five sectors according to the type of activity; these are further subdivided by the regulations into seven sector classes of specific disciplines. These sectors and sector classes are shown in Table 4.1. However, this Chapter only examines the sectors and sector classes related to insurance of persons (See also Table 4.2).

TABLE 4.1

Sectors and sector classes under *An Act respecting the distribution of financial products and services*

SECTORS	SECTOR CLASSES
Insurance of persons	▪ Accident and sickness insurance
Group insurance of persons	▪ Group insurance plans
	▪ Group annuity plans
Damage insurance	▪ Personal-lines damage insurance
	▪ Commercial-lines damage insurance
Claims adjustment	▪ Claims adjustment in personal-lines damage insurance
	▪ Claims adjustment in commercial-lines damage insurance
Financial planning	

We also refer you to Table 4.2.

4.1.2 *Chambre de la sécurité financière* (CSF)

The *Chambre de la sécurité financière* (CSF) is the regulatory body which oversees the discipline and ethics of its members, including insurance of persons representatives and group insurance representatives.[495]

4.1.2.1 Mission

The mission of the CSF is to protect consumers by maintaining discipline among and supervising the training and ethics of its members (s. 312 Distribution Act).

4.1.2.2 Functions

The CSF maintains discipline among its members and establishes rules governing their training and ethics (s. 312 Distribution Act).

495. *Code of ethics of the Chambre de la sécurité financière*, CQLR, c. D-9.2, r. 3, s. 2.

The CSF also performs the following functions (ss. 313, 315 and 317 Distribution Act):

- Develops the criteria for obtaining the professional titles of chartered life underwriter (C.L.U.) and registered life underwriter (R.L.U.) and authorizes their use;
- Offers services to its members, such as professional development sessions for the insurance of persons and group insurance of persons sectors; and
- Offers its members advisory services in quality control and compliance with professional requirements.

An insurance of persons representative may consult, among other references, the section “Info-deonto” and an Code of Ethics of the Chambre de la sécurité financière with annotations on the CSF website.[496]

4.1.2.3 Syndic

The duties of the syndic involve investigating insurance of persons representatives and group insurance representatives who have committed an offence under a provision of the Distribution Act or its regulations. He inquires into matters on his own initiative or on receiving information (ss. 327, 329 and 330 Distribution Act).

The investigator designated by the syndic may have access to any establishment and examine the books, registers, accounts, records and other relevant documents. He may also verify access rights for any computer system to ensure that only authorized representatives have access to information (ss. 340 and 341 Distribution Act).

Where a syndic has reasonable grounds to believe that an offence has been committed, a complaint is filed before the discipline committee against the insurance of persons representative or the group insurance representative concerned (s. 344 Distribution Act).

4.1.2.4 Discipline committee

A discipline committee has been established within the CSF. It is composed of lawyers and representatives. A complaint is heard by three members of the discipline committee, including a lawyer who chairs the hearing. A decision made by the discipline committee may be appealed to the Court of Québec (ss. 352-355, 371 and 379 Distribution Act).

496. For more information, see http://www.chambresf.com/en/home/.

4.1.3 Assuris

4.1.3.1 Mission

The mission of Assuris is to provide a certain amount of protection against the loss of coverage in insurance policies in the event a life insurance company defaults (becomes insolvent), when the insurer is a member of Assuris.[497] "Every life insurance company authorized to sell insurance policies in Canada is required, by the federal, provincial and territorial regulators, to become a member of Assuris."[498]

4.1.3.2 Role of Assuris: guarantee fund

Assuris acts as a guarantee fund for life and health insurers and their Canadian insureds. It strives to minimize costs for members and insureds while preserving the life and health insurance industry's reputation of financial stability. Efforts are also made to quickly identify problems, find solutions and intervene rapidly when necessary.

We have already addressed the coverage provided by Assuris at Chapters 2 and 3.

4.1.4 Canadian Life and Health Insurance Association (CLHIA)

4.1.4.1 Mission

The Canadian Life and Health Insurance Association (CLHIA), which was established in 1894, is a voluntary non-profit association. Its member companies account for 99% of Canada's life and accident and sickness insurance business.

The mission of the CLHIA is to serve its members in areas of common interest, need or concern. In carrying out this mission, the CLHIA ensures that the views and interests of its diverse membership and of the public are equitably addressed.[499]

4.1.4.2 CLHIA Guidelines

> One of the CLHIA's strategic objectives is to foster sound and equitable principles in the conduct of the business of member life and health insurers that carry on business in Canada. CLHIA Guidelines are designed to promote consistent practices and

497. *Regulation under the Act respecting insurance*, CQLR, c. A-32, r. 1, s. 31.
498. See the *Regulation under the Act respecting insurance*, CQLR, c. A-32, r. 1, s. 31.
499. For more information, see http://www.clhia.ca/domino/html/clhia/CLHIA_LP4W_LND_Webstation.nsf/index.html?readform.

> standards for the life and health insurance industry and to reinforce the best interests of consumers and the industry.[500]

The CLHIA has adopted 18 Guidelines which are in effect for its members.[501]

All member companies are expected to comply with the Guidelines, having regard to the company's structure, products and business processes, including distribution channels. They must also incorporate the Guidelines into their ongoing compliance program.

4.1.5 *Retraite Québec*

In Québec, the *Retraite Québec* has several roles and mandates. For purposes of this manual, it is important to know that *Retraite Québec* acts somewhat as a regulator for supplemental pension plans, transfer instruments arising under the statute (locked-in retirement accounts (LIRAs), life income fund (LIFs) and life annuity contracts which have been funded by amounts from pension plans) and voluntary retirement savings plans (VRSPs). *Retraite Québec* is also responsible for monitoring their management.[502]

4.1.6 Office of the Superintendent of Financial Institutions (OSFI)

The Office of the Superintendent of Financial Institutions (OSFI) is an independent agency of the Government of Canada, established in 1987 to contribute to the safety and soundness of the Canadian financial system. OSFI supervises and regulates federally registered banks and insurers, trust and loan companies, as well as private pension plans subject to federal oversight[503] (See Chapter 1).

OSFI is not involved with Québec-chartered insurers or with the distribution of financial products and services in the provinces and territories. Moreover, it is not concerned with supplemental pension plans in Québec or in the other provinces. However, it does have jurisdiction over private sector supplemental pension plans in the three Canadian territories and supplemental pension plans for private sector firms under federal jurisdiction.

4.1.7 Canadian Association of Pension Supervisory Authorities (CAPSA)

The Canadian Association of Pension Supervisory Authorities (CAPSA) is a national interjurisdictional association of pension regulators. Its mission is to facilitate an efficient and

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500. Canadian Life and Health Insurance Association, CLHIA Guidelines, on-line document [Cited July 21, 2017]. See https://www.clhia.ca/domino/html/clhia/CLHIA_LP4W_LND_Webstation.nsf/page/E0DABC49378B65DE85257A5B0062D156!OpenDocument.
501. *Ibid.*
502. For more information, see http://www.rrq.gouv.qc.ca/en/professionnels/Pages/professionnels.aspx.
503. For more information, see http://www.osfi-bsif.gc.ca/eng/Pages/default.aspx.

effective pension regulatory system in Canada. It develops practical solutions to further the co-ordination and harmonization of pension regulation.[504]

In Québec, *Retraite Québec* and OSFI are CAPSA members.

4.1.8 Canadian Council of Insurance Regulators (CCIR)

The Canadian Council of Insurance Regulators (CCIR) is an interjurisdictional association of insurance regulators.

The mandate of the CCIR is to facilitate and promote an efficient and effective insurance regulatory system in Canada to serve the public interest. Its members work together to develop solutions to common regulatory issues.[505]

In Québec, the AMF and OSFI are CCIR members.

4.1.9 Canadian Insurance Services Regulatory Organizations (CISRO)

The Canadian Insurance Services Regulatory Organizations (CISRO) is an interjurisdictional group of regulating authorities who are dedicated to developing consistent standards of qualifications and practice for insurance intermediaries dealing in insurance of persons and property. Its goals and objectives include creating a common voice to deal with issues that may be of interest to other financial services regulators, consumers and intermediaries, while increasing its own visibility. Since CISRO's image, profile and reputation and its internal and external communications are central to its credibility and effectiveness, it is essential to establish a protocol for disseminating information about its policies and decisions.

CISRO consists of the regulatory authorities for insurance intermediaries from all Canadian jurisdictions. The appropriate authorities from all jurisdictions in Canada are regularly invited and are welcome to participate in CISRO's activities.

The principal responsibility of members of CISRO is to administer the regulatory system applicable to insurance intermediaries under their authority. Though CISRO members cannot enact legislation, they are key advisors to their governments on regulatory issues related to insurance intermediaries.

CISRO accomplishes its mission through meetings, conference calls and on-going communication among its members providing opportunities for sharing of information and working together in collaboration in the development of co-ordinated solutions to common regulatory issues.

504. For more information, see http://www.capsa-acor.org/en/.
505. For more information, see http://www.ccir-ccrra.org/en/about/.

CISRO's vision is to establish harmonized or mutually recognized qualifications and practice standards for insurance intermediaries to provide appropriate levels of consumer protection throughout Canada.[506]

In Québec, the AMF, the *Chambre de la sécurité financière* and the *Chambre de l'assurance de dommages* are CISRO members.

4.1.10 Joint Forum of Financial Market Regulators (Joint Forum)

The Joint Forum of Financial Market Regulators (Joint Forum) was founded in 1999 by the Canadian Council of Insurance Regulators (CCIR), the Canadian Securities Administrators (CSA), and the Canadian Association of Pension Supervisory Authorities (CAPSA).

The Joint Forum is a mechanism through which pension, securities and insurance regulators co-ordinate, harmonize and streamline the regulation of financial products and services in Canada. Its goal is continuous improvement of the financial services regulatory system through greater harmonization and co-ordination of regulatory approaches.[507]

In particular, the Joint Forum was the initiator of the Joint Forum *Guidelines for Capital Accumulation Plans* and the *Proposed Framework 81-406 - Point of sale disclosure for mutual funds and segregated funds*.

4.1.11 Financial Transactions and Reports Analysis Centre of Canada (FINTRAC)

The Financial Transactions and Reports Analysis Centre of Canada (FINTRAC), Canada's financial intelligence unit, was created in 2000. It is an independent agency, reporting to the Minister of Finance, who is accountable to Parliament for the activities of the Centre. It was established and operates within the ambit of the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA) and its regulations.

FINTRAC's mandate is to facilitate the detection, prevention and deterrence of money laundering and the financing of terrorist activities, while ensuring the protection of personal information under its control. It fulfills its mandate through the following activities:

- receiving financial transaction reports in accordance with the PCMLTFA and regulations and safeguarding personal information under its control;
- ensuring compliance of reporting entities with the PCMLTFA and regulations;
- producing financial intelligence relevant to investigations on money laundering, terrorist activity financing and threats to the security of Canada;

506. For more information, see http://www.cisro-ocra.com/index.html.
507. For more information, see http://www.jointforum.ca/en/Default.asp.

- researching and analyzing data from a variety of information sources that shed light on trends and patterns in money laundering and terrorist financing;
- maintaining a registry of money services businesses in Canada; and
- enhancing public awareness and understanding of money laundering and terrorist activity financing.[508]

4.1.12 OmbudService for Life & Health Insurance (OLHI)

The OmbudService for Life & Health Insurance (OLHI) is a national independent complaint resolution and information service for consumers of Canadian life and health insurance products and services, including life, disability, employee health benefits, travel, and insurance investment products such as annuities and segregated funds.

It was established in 2002 as a not-for-profit corporation and operated under the name "Canadian Life and Health Insurance OmbudService" until August 17, 2009. OLHI is a member of the Financial Services OmbudsNetwork (FSON), a Canada-wide dispute resolution service supported by Canada's financial services regulators and financial services firms.

The mission of the OmbudService for Life & Health Insurance is to provide Canadian consumers with free, prompt and impartial assistance with enquiries and complaints pertaining to Canadian life and health insurance products and services.[509]

4.1.13 *Commission d'accès à l'information du Québec* (CAI)

The mission of *Commission d'accès à l'information du Québec* is to foster and monitor access to documents held by public bodies and the protection of personal information in the public and private sectors, and to rule on applications for review or for the examination of disagreements submitted to it.

The Commission exercises the functions and powers set forth in its 1982 constituting act, *An Act respecting access to documents held by public bodies and the protection of personal information* (the "Access Act"). It is primarily responsible for the application of the Access Act and *An Act respecting the protection of personal information in the private sector* ("APPIPS"). To allow the Commission to carry out the mandates entrusted to it, the *Access Act* has established two divisions within the Commission: an oversight division and an adjudicative division.

Within the scope of its oversight functions, the Commission ensures compliance with the rights and obligations set out in the Access Act and the APPIPS, namely, investigations, inspections and requests from individuals or bodies asking to receive communication of personal information for study, research or statistical purposes, without the consent of the persons concerned.[510]

508. For more information, see http://www.fintrac.gc.ca/intro-eng.asp.
509. For more information, consult: http://www.olhi.ca/.
510. For more information, see http://www.cai.gouv.qc.ca/english/.

Outside Québec, the organization which has a mandate equivalent to that of the CAI is the Office of the Privacy Commissioner of Canada. This organization provides on its website a Q&A document entitled: *PIPEDA and the Proceeds of Crime (Money Laundering) and Terrorist Financing Act (PCMLTFA) Detailed questions and answers.*[511]

4.1.14 Canada Revenue Agency (CRA)

The Canada Revenue Agency (CRA) administers tax laws for the Government of Canada and for the provinces and territories, and it administers various social and economic benefit and incentive programs delivered through the tax system. In Québec, the *Revenu Québec* and the CRA have jurisdiction over tax matters. However, it is the CRA that handles the registration of tax-assisted plans.

RRSPs, RRIFs, supplemental pension plans (or registered pension plans (RPPs)), DPSPs, TFSAs, RESPs of issuers (banks, financial services cooperatives, trust companies, insurers, pension funds, etc.) and other registered tax-assisted plans must be registered with the CRA,[512] even those from Québec.

The Canada Revenue Agency is an associate member of CAPSA.

4.2 Various financial products on the market, their regulators and the persons authorized to distribute them

It is useful to differentiate financial products according to their issuers and distributors. The following brief summary is designed to help insurance representatives understand the products likely to compete with or complement insurance or annuity products. The following are the principal financial products on the market:

- Deposits of money;
- Insurance and annuity contracts;
- Securities;
- Mutual funds; and
- Scholarship plans.

511. For more information see: https://www.priv.gc.ca/information/pub/faqs_pcmltfa_01_index_e.asp. See also the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5 (PIPEDA).
512. For more information, see https://www.canada.ca/en/services/taxes.html and https://www.canada.ca/en/revenue-agency/services/forms-publications/document-type.html.

4.2.1 Deposits of money

A deposit of money is defined as the "unpaid balance, including interest thereon, of funds received by an institution or a bank in the normal course of receiving cash deposits from the public for investment purposes, where the obligation of the institution or bank to repay is evidenced by a credit to the depositor's account, by a deposit certificate or by any other document issued by the institution or bank."[513] The definition includes guaranteed investment certificates (GICs).

In Québec, banks, financial services cooperatives (credit unions) and trust companies can receive deposits.[514] They are exempt from the application of sections 11 to 236.1 of the *Securities Act*,[515] which means, among other things, that they do not need to issue a prospectus generally required by the AMF for distribution to the public.

Banks are governed by the *Bank Act*[516] and federally chartered trust companies by the *Trust and Loan Companies Act*.[517] Financial services cooperatives (credit unions) are governed by *An Act respecting financial services cooperatives*[518] and Québec chartered trust companies are governed by *An Act respecting trust companies and savings companies*.[519]

Pursuant to *Regulation 31–103 respecting registration requirements, exemptions and ongoing registrant obligations*,[520] no licence is required to distribute deposits. Therefore, employees of banks and financial services cooperatives are not required to be licensed in order to sell deposits to clients or advise them about deposits.[521] Moreover, the Distribution Act provides that a firm may, through an insurance representative, collect deposits for a deposit institution.[522]

Banks and federally chartered trust companies are regulated by the Office of the Superintendent of Financial Institutions (OSFI), while financial services cooperatives and Québec chartered trust companies are regulated by the AMF.

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513. *Regulation respecting the application of the Deposit Insurance Act*, CQLR, c. A-26, r. 1, s. 1. See also s. 3(9) of the *Securities Act*, CQLR, c. V-1.1.
514. Insurers can also be authorized to receive deposits of money in Québec, but only by the AMF, pursuant to section 28 of the *Deposit Insurance Act*, CQLR, c. A-26.
515. CQLR, c. V-1.1, s. 3(9).
516. S.C. 1991, c. 46.
517. S.C. 1991, c. 45.
518. CQLR, c. C-67.3.
519. CQLR, c. S-29.01.
520. CQLR, c. V-1.1, r. 10. See also sections 2.34 and 2.41 of *Regulation 45-106 respecting prospectus and registration exemptions*, CQLR, c. V-1.1, r. 21.
521. Pursuant to section 24 of the *Deposit Insurance Act*, CQLR, c. A-26, no institution may solicit or receive deposits of money from the public unless it is a registered institution. Similarly, pursuant to section 23 of the *Deposit Insurance Act*, no individual may solicit deposits of money from the public. However, pursuant to section 4 of the *Regulation respecting the application of the Deposit Insurance Act*, CQLR, c. A-26, r.1, a deposit is deemed to be made at the place where the funds are received by the depositary, but where the funds are remitted to a branch or agent of the depositary, the deposit is deemed to be made at the place where such branch or agent received the funds.
522. *An Act respecting the distribution of financial products and services*, CQLR, c. D-9.2, s. 95.

4.2.2 Insurance and annuity contracts

Insurance contracts are discussed in Chapter 2 and annuity contracts in Chapter 3.

In Québec, a person must hold a certificate issued by the AMF in the insurance of persons sector in order to distribute individual life insurance contracts. In the case of group insurance contracts, the person must hold a certificate from the AMF in the group insurance of persons sector or in the "group insurance plans" sector class.[523] As regards individual accident and sickness insurance contracts, the person must hold a certificate from the AMF in the insurance of persons sector or in the "accident and sickness insurance" sector class.

The financial security advisor (the insurance representative holding a certificate in insurance of persons (thus an individual insurance of persons)) can advise a participant in a group insurance plan or a participant in group annuity plan and provide an analysis of the needs for this participant.[524] In fact, the representative in group insurance of persons (whether an advisor in group insurance and annuities, an advisor in group insurance or an advisor in group annuity plans) can advise or analyze the needs of participants.[525]

With respect to annuities, in order to distribute individual annuity contracts, the person must hold a certificate from the AMF in the insurance of persons sector. In the case of group annuity contracts, the person must hold a certificate from the AMF in the group insurance of persons sector or in the "group annuity plans" sector class. In Québec, only insurers holding a licence from the AMF in the "life insurance" class can issue life insurance policies (individual or group) and life annuity contracts (individual or group). Only insurers holding a licence from the AMF in the "accident and sickness insurance" class can issue accident and sickness policies (individual or group). This applies to Québec chartered insurers and federally chartered insurers as well as insurers with a charter from another province or insurer with a foreign charter.

As for deposits, annuity contracts are exempt from the application of Sections 11 to 236.1 of the *Securities Act*.[526]

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523. However, an Actuary who is a Fellow of the Canadian Institute of Actuaries does not need to hold a certificate for group insurance of persons representatives when, as part of his activities, he offers group insurance of persons products or group annuities (*An act respecting the distribution of financial products and services*, RLRQ c D-9.2, art. 4 para. 2).
524. *An act respecting the distribution of financial products and services*, RLRQ c D-9.2, s. 3 al. 2. However, the one who, on behalf of an employer, a union, a professional order or an association or a professional syndicate constituted under the *Professional Syndicates Act* (chapter S- 40), make an employee of that employer or a member of that union, professional order or association or professional syndicate adheres to the group insurance of persons contract or group annuities does not need a certificate of insurance of persons representative to do this (*An act respecting the distribution of financial products and services*, RLRQ c D-9.2, art. 3 para. 3).
525. *An act respecting the distribution of financial products and services*, RLRQ c D-9.2, s. 4. However, a representative in group insurance of persons may provide information to the members of a group.
526. CQLR, c V-1.1, s. 3 paragr. 13.

4.2.3 Securities

In Québec, securities are governed by the *Securities Act*[527] and the regulations thereunder,[528] the *Derivatives Act*[529] and the regulations thereunder[530] and *An act respecting the transfer of securities and the establishment of security entitlements*.[531]

Investment dealer representatives can distribute any security to the public (shares of publicly-traded companies, mutual funds, scholarship plans, etc.).[532] The definition of security is very broad.

The AMF regulates reporting issuers (entities that distribute securities to the public) and the securities of reporting issuers that can be distributed in Québec. The Investment Industry Regulatory Organization of Canada (IIROC), a self-regulatory organization (SRO) recognized by the AMF, oversees and disciplines investment dealer representatives and investment dealers (more commonly referred to as “securities dealers” or “securities brokers”).

However, certain securities (such as mutual funds and scholarship plans) may be distributed by other persons.

4.2.4 Mutual funds

Mutual funds are one of the two types of investment funds[533] referred to in the *Securities Act*.[534] More specifically, a mutual fund is “an issuer whose primary purpose is to invest money provided by its security holders and whose securities entitle the holder to receive on demand or within a specified period after demand an amount computed by reference to the value of a proportionate interest in the whole or in part of the net assets, including a separate fund or trust account, of the issuer.”[535] This value is often referred to as the unit value or net asset value. Mutual funds

527. *Securities Act*, CQLR, c. V-1.1.
528. For more information, see http://www.lautorite.qc.ca/en/regulation-vm-pro.html.
529. *Derivatives Act*, CQLR, c. I-14.01.
530. For more information, see http://www.publicationsduquebec.gouv.qc.ca/store.cfm?&ckey=CA&lang=eng.
531. *An act respecting the transfer of securities and the establishment of security entitlements*, CQLR, c. T-11.002.
532. *Regulation 31-103 respecting registration requirements, exemptions and ongoing registrant obligations*, CQLR, c. V-1.1, r. 10, ss. 2.1(1)(a), 2.1(2)(a), 7.1(1)(a) and 7.1(2)(a). However, it is possible for a person to purchase securities through a securities dealer, directly on the website of the securities dealer, without the advice of a representative. This is possible when the investment dealer has been exempted by the AMF from the obligation to provide advice. This is referred to as “discount brokerage.”
533. Section 5 of the *Securities Act* defines an “investment fund” as follows: a mutual fund or a non-redeemable investment fund. Section 5 of the *Securities Act* defines a “non-redeemable investment fund” as follows: an issuer whose primary purpose is to invest money provided by its security holders, that does not invest for the purpose of exercising or seeking to exercise control of an issuer or of being actively involved in the management of any issuer in which it invests and that is not a mutual fund. Only investment representatives are entitled to distribute non-redeemable investment funds.
534. *Securities Act*, CQLR, c. V-1.1.
535. *Ibid.*, CQLR, c. V-1.1, s. 5.

generally buy the shares or bonds of a number of companies and pool them in accordance with the mutual fund's investment policy.

In Québec, mutual funds can only be distributed by mutual fund dealer representatives[536] and investment dealer representatives.[537] Mutual fund dealer representatives act on behalf of mutual fund dealers. Investment dealer representatives act on behalf of investment dealers.

The AMF regulates mutual funds in Québec. The *Chambre de la sécurité financière* ensures the discipline and supervision of mutual fund dealer representatives while, in Québec, the AMF ensures the discipline and supervision of mutual fund dealers.

Investment fund managers, who manage the day-to-day activities of mutual funds, must be registered with the AMF as investment fund managers.[538]

An entity registered as an advisor (portfolio manager) can act as an advisor in respect of any security.[539] This entity acts through individuals registered as advising representatives.[540]

Mutual fund dealer representatives, investment dealer representatives and advising representatives cannot distribute insurance of persons contracts (life insurance and accident and sickness insurance) or annuity contracts, unless they also hold the required insurance licence.

4.2.5 Scholarship plans

Scholarship plans are not defined by statute or regulation.[541] They are securities which are issued as units by reporting issuers, without being investment funds,[542] and which are registered with the Canada Revenue Agency (CRA) as registered education savings plans (RESPs).[543]

In Québec, scholarship plans can only be distributed by scholarship plan dealer representatives[544] and by investment dealer representatives.[545] Scholarship plan dealer representatives act on behalf of scholarship plan dealers.[546] Investment dealer representatives act on behalf of investment dealers.

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536. *Regulation 31-103 respecting registration requirements, exemptions and ongoing registrant obligations*, CQLR, c. V-1.1, r. 10, ss. 7.1(1)(b), 7.1(2)(b), 3.5 and 1.1.
537. *Ibid.*, CQLR, c. V-1.1, r. 10, ss. 7.1(1)(a), 7.1(2)(a), 1.1 and 3.15(1).
538. *Ibid.*, CQLR, c. V-1.1, r. 10, ss. 7.3, 2.3 and 3.14.
539. *Ibid.*, CQLR, c. V-1.1, r. 10, ss. 7.2(1)(a) and 7.2(2)(a).
540. *Ibid.*, CQLR, c. V-1.1, r. 10, ss. 2.1(1)(b), 2.1(2)(b), 7.2(1)(a), 7.2(2)(a), 1.1 and 3.11.
541. However, a description of scholarship plans can be found in *Regulation 41-101 respecting general prospectus requirements*, CQLR, c. V-1.1, r. 14, in Form 41-101F3, p. 262, Item 5.2 of Part B.
542. *Regulation 41-101 respecting general prospectus requirements*, CQLR, c. V-1.1, r. 14.
543. It should be noted that RESPs can also exist as mutual funds or annuity contracts. However, in such a case, they are not scholarship plans. See also: Stéphanie GRAMMOND, "Les bourses d'études à l'examen," in *La Presse*, September 8, 2007.
544. *Regulation 31-103 respecting registration requirements, exemptions and ongoing registrant obligations*, CQLR, c. V-1.1, r. 10, ss. 7.1(1)(b), 7.1(2)(b), 3.5 and 1.1.
545. *Ibid.*, CQLR, c. V-1.1, r. 10, ss. 2.1(1)(a), 2.1(2)(a), 7.1(1)(c), 7.1(2)(c), 3.7 and 1.1.
546. *Ibid.*, CQLR, c. V-1.1, r. 10, ss. 7.1(1)(c), 7.1(2)(c) and 1.1. See also: http://www.respdac.com/.

The AMF regulates scholarship plans in Québec. The *Chambre de la sécurité financière* ensures the discipline and supervision of scholarship plan dealer representatives while, in Québec, the AMF ensures the discipline and supervision of scholarship plan dealers.

4.2.6 Real estate brokerage and hypothecary loan (mortgage) brokerage

The *Real Estate Brokerage Act*[547] applies to any person or partnership that, for others and in return for remuneration, engages in a brokerage transaction relating to:

> (1) the purchase or sale of immovable property, a promise to purchase or sell immovable property, or the purchase or sale of such a promise;
>
> (2) the lease of immovable property, when the person or partnership acting as an intermediary carries on an enterprise in that field;
>
> (3) the exchange of immovable property;
>
> (4) a loan secured by an immovable hypothec (mortgage); or
>
> (5) the purchase or sale of an enterprise, a promise to purchase or sell an enterprise, or the purchase or sale of such a promise, under a single contract, if the enterprise's property, according to its market value, consists mainly of immovable property.[548]

Subject to certain exceptions, only natural persons (i.e., individuals) who hold a real estate broker's licence from the *Organisme d'autoréglementation du courtage immobilier du Québec* (OACIQ) can engage in real estate brokerage transactions.[549] Similarly, subject to certain exceptions, only natural persons who hold a real estate broker's licence from the OACIQ or a mortgage broker's licence can engage in brokerage transactions relating to loans secured by immovable hypothec (mortgage).[550]

Real estate brokers act on their own behalf or on behalf of a real estate agency.[551] Mortgage brokers act on their own behalf or on behalf of a mortgage agency.[552]

Real estate brokers and agencies and mortgage brokers and agencies may share their commission with a firm, an independent representative or an independent partnership within the

547. Real Estate Brokerage Act, CQLR, c. C-73.2.
548. *Ibid.*, s. 1.
549. *Ibid.*, s. 4.
550. *Ibid.*, s. 4.
551. *Ibid.*, ss. 11, 13 and 14.
552. *Ibid.*, ss. 11, 13 and 14.

meaning of *An Act respecting the distribution of financial products and services*, or with a dealer or advisor governed by the *Securities Act* or the *Derivatives Act*.[553]

The OACIQ oversees and disciplines real estate and mortgage brokers and real estate and mortgage agencies.[554] A commission may be shared, for example, when an independent representative refers a client to a real estate broker or, for a hypothecary (mortgage) loan, to a mortgage broker. However, the representative cannot engage in activities reserved for real estate brokers.

A table setting out the types of legal persons, the titles used by natural persons (i.e., individuals), the number of representatives and the products they are authorized to distribute is presented in Appendix A.

4.3 Obligations of persons involved in the distribution of financial products and services

We will now examine the legislative and regulatory rules concerning the obligations of persons involved in the distribution of financial products and services.

4.3.1 Certification of representatives

Definition and role of insurance of persons representatives

The Distribution Act provides that an insurance of persons representative is a natural person who, acting as an independent representative or acting for a firm or an independent partnership, offers individual insurance of persons products or individual annuities from one or more insurers. He also acts as an advisor in the field of individual insurance of persons (s. 3 Distribution Act). He is also authorized to secure the adhesion of a person to a group insurance or group annuity contract, which includes analyzing and advising on investment needs with respect to annuity contracts, for example.

Definition and role of group insurance representatives

The Distribution Act provides that a group insurance representative is a natural person who, acting as an independent representative or acting for a firm or an independent partnership, offers group insurance of persons products or group annuities from one or more insurers. He also acts as an

553. *Regulation respecting brokerage requirements, professional conduct of brokers and advertising*, CQLR, c. C-73.2, r.1, s. 37.

554. *Real Estate Brokerage Act*, CQLR, c. C-73.2, ss. 31 to 53. Discipline is handled through the syndic of the *Organisme d'autoréglementation du courtage immobilier du Québec* and the syndic decision review committee: *Regulation respecting disciplinary proceedings of the Organisme d'autoréglementation du courtage immobilier du Québec*, CQLR, c. C-73.2, r.6.

advisor in the field of group insurance of persons (s. 4 Distribution Act). Important: When the law refers to a group insurance representative, this includes group annuities.

4.3.1.1 Eligibility requirements for the issuance of a representative's certificate

Under section 12 of the Distribution Act, no person may act as or purport to be a representative without holding the appropriate certificate (s. 12 Distribution Act). The AMF issues certificates to persons who satisfy the following conditions:

1. Hold the minimum qualifications;
2. Pass the examinations required by the AMF;
3. Complete a 12-week probationary period;
4. Complete and submit an application for a certificate (within 30 days following the end of the probationary period);
5. Pay the required fees; and
6. Comply with all the other requirements and rules pertaining to the issuance of the certificate (e.g. not be the subject of disciplinary sanctions and have paid all fines imposed under certain laws) (ss. 13 and 55–62 *Regulation respecting the issuance and renewal of representatives' certificates*).

4.3.1.2 Exemptions

There are also exemptions from the eligibility conditions when a person wishes to return to his career after a certain period of time. The following exemptions are available:

- Minimum qualifications (ss. 17 and 18 *Regulation respecting the issuance and renewal of representatives' certificates*);
- Certain examinations (ss. 21–23 *Regulation respecting the issuance and renewal of representatives' certificates*); and
- Probationary period (ss. 41–43 *Regulation respecting the issuance and renewal of representatives' certificates*).

These exemptions depend on a number of circumstances and on the length of time the person had stopped practising. For example, the conditions will be less onerous if the length of time in question was less than one year.

Renewal of a certificate

A representative must renew his certificate before it expires. He may also do so within 30 days following its expiry, but in such case, he must demonstrate that he was unable to take action sooner (s. 64 *Regulation respecting the issuance and renewal of representatives' certificates*). To renew his certificate, a representative must meet several conditions set forth in the *Regulation*

respecting the issuance and renewal of representatives' certificates. For example, he must satisfy certain compulsory professional development requirements (s. 63 *Regulation respecting the issuance and renewal of representatives' certificates*).

4.3.1.3 Choice of type of practice

Merely holding a certificate from the AMF is not enough to carry on business as a representative. The representative must also choose how he will carry on business, that is, whether he will work:

1. For a firm, in which case he will be a representative attached to (or acting on behalf of) one or more firms;
2. For an independent partnership; or
3. As an independent representative.

These three ways to carry on business represent three types of registrants (firm, independent partnership or independent representative). A representative may have incorporated his own firm, in which case it must be registered as a firm to which he is attached.

A representative who chooses a way to carry on business must make the same choice for all the sectors indicated on his certificate (for example: insurance of persons, group insurance) (s. 14 Distribution Act).

The decision of an insurance representative as to the way to carry on business is often a taxation decision (company (firm), partnership (independent partnership) or sole proprietorship (independent representative)).

4.3.1.4 Qualification rules

Persons who apply for a licence to carry on activities in life insurance or accident and sickness insurance must have passed the examination of the Life Licence Qualification Program (LLQP). There are two types of programs:

- The full LLQP; and
- The LLQP in accident and sickness insurance.

The full LLQP combines training in life insurance and accident and sickness insurance. The accident and sickness LLQP deals only with accident and sickness insurance. An accident and sickness insurance representative does not have the right to advise on or sell other types of insurance, unless he obtains the required full licence.

In addition to having passed the LLQP examinations, an applicant must submit an application to the appropriate licensing body. The application must be approved before a licence is issued. Obviously, an applicant cannot engage in life insurance activities if he does not have a current and valid licence.

A representative who has completed all LLQP exams may eventually obtain a full licence from the AMF allowing him to distribute the following products:

- Life insurance;
- Sickness insurance;
- Disability insurance;
- Group life insurance;
- Group disability insurance;
- Insurance-based investment products, including group or individual annuities and segregated funds.

The list is not exhaustive, because the licence allows representatives to advise on and sell a large number of life and accident and sickness insurance products. Insurers may innovate and create new products which are then offered to individuals or groups (e.g., group registered retirement savings plans).

4.3.1.5 Obligations of representatives

General provisions

Representatives are bound to act with honesty and loyalty in their dealings with clients. They must act with competence and professional integrity and comply with the Distribution Act and its regulations; they must also respect the provisions of the *Code of ethics of the Chambre de la sécurité financière*. They pursue their activities by being attached to one or more firms, by being a partner or employee of only one independent partnership, or as an independent representative.

Representatives acting for several firms must disclose the name of the firm for which they are acting to the client with whom they are transacting business (s. 14 Distribution Act).

A representative must fulfil the following obligations, among others:

- The obligation not to perform occupations that are incompatible with the pursuit of activities as a representative. Certain occupations (or, in some cases, merely performing the activities of an occupation) are considered by the Distribution Act to be incompatible with the activities of a representative. A representative may not carry on such activities, even incidentally. The following is a list of the occupations (or, in some cases, the activities associated with that occupation) that are incompatible with the activities of a representative (s. 202 (1) Distribution Act; s. 2 *Regulation respecting the pursuit of activities as a representative*):
  - Performing the duties of a judge;
  - Performing the duties of a police officer;
  - Performing the duties of a minister of religion;

- Performing the duties of a funeral director or any other similar duties in the funeral services industry;
- Pursuing activities as a bankruptcy trustee;
- Pursuing the activities of a health-care profession governed by the *Professional Code*;
- Exercising the profession of lawyer or notary, except for claims adjusters and financial planners;
- Exercising the professional activity of public accountancy, except for claims adjusters and financial planners;
- Managing a union (other than a union formed of representatives) or being employed by a union; and
- Exercising the activities of a real estate broker, except in connection with brokerage activities relating to loans secured by immovable hypothec (mortgage loans).

- The obligation, when pursuing activities as a representative, not to take part directly or indirectly in a contest or a promotion providing benefits (including privileges and gifts), as an incentive to promote or sell a product that does not meet the specific needs of his clients (s. 5 *Regulation respecting the pursuit of activities as a representative*). This is designed to ensure that a representative does not recommend a specific product for the purpose of deriving a personal benefit. A contest to sell specific products is deemed to influence the advice given by a representative.[555] However, a representative may be reimbursed for the direct costs incurred by attending a conference or a convention, provided that the main purpose of the event is to provide training on activities governed by the Distribution Act. A representative can accept non-pecuniary benefits of low value if they are not likely to influence his work. However, such benefits, if offered every day, can have an influence.[556]
- The obligation to personally gather the information that is necessary to assess a client's needs and propose the insurance product that best meets those needs (s. 27 Distribution Act).
- The obligation to respect the territorial restrictions of his certificate. An insurance representative's certificate issued by the AMF authorizes the representative to distribute insurance products and advise clients only in Québec. Thus, an insurance representative cannot cross the Québec border to give advice or offer insurance products to a person in Ontario, even if the person is a Québec resident. The insurance representative must have his client sign the insurance application in Québec. In theory, an Ontario client can come to Québec to sign an insurance application, but this practice is not recommended. An insurance representative should refer a client residing outside Québec to an insurance representative licensed in the client's jurisdiction. Moreover, an insurance representative can obtain an insurance representative's licence in several Canadian jurisdictions at the same time.[557]

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555. *Regulation respecting firms, independent representatives and independent partnerships*, CQLR, c. D-9.2, r. 2, s. 11.1.
556. See the AMF's *Avis relatif à l'application du Règlement sur l'exercice des activités des représentants* dated July 25, 2013 (available only in French): https://lautorite.qc.ca/en/professionals/regulations-and-obligations/distribution-of-financial-products-and-services/notices/.
557. Canadian Council of Insurance Regulators, "Reciprocal Licensing Standards Committee," on-line document consulted on July 21, 2017. See http://www.ccir-ccrra.org/en/init/Reciprocal_Licensing/ReciprocalLicensing.asp.

- The obligation to demonstrate availability and diligence in the pursuit of his activities (s. 4 (1) *Regulation respecting the pursuit of activities as a representative*). Ultimately, a representative may work part-time in another field if he has a small number of clients, provided he remains available to them. A representative who has a second occupation should inform the AMF. According to the AMF, the second occupation should be declared when the representative applies for the issuance or renewal of a certificate, or when the representative's situation changes. If the representative works for a call centre, he must be available for each client. All the call centre's representatives, as a group, must provide an appropriate service.

  Continuity of service to clients is another important concept. On May 23, 2013, the AMF published a *Notice relating to obligations of representatives and insurers with respect to service offered to clients under insurance of persons contracts – Orphan clients*. Its purpose is to specify the obligations of representatives and insurers. The AMF states, among other things, that when the relationship between a client and a representative ends, regardless of the reason (e.g., retirement):

  > For as long as a policy is in force, it must be assigned to a qualified representative (duly certified) to ensure service to the client.
  >
  > Representatives have obligations with respect to the continuity of the service to be provided to clients. Certified representatives must demonstrate diligence and availability with respect to their clients. In addition, they must promptly carry out any mandate given to them. Therefore, a representative who no longer meets his obligations pertaining to the follow-up on a policy he sold must ensure that another certified representative assumes these obligations and, more particularly, provides service to the client.

  The Notice also specifies the type of commission a former representative can continue to receive.

  As for the obligation of diligence, it must be adapted to the type of product sold; certain more complex products, such as those that offer investment options, require specific follow-up to ensure the overall product is still appropriate for the client.

- The obligation to deposit amounts received in a separate account (s. 4 (2) *Regulation respecting the pursuit of activities as a representative*). A separate account must be an account opened at a financial institution. It must only contain the amounts received by the representative on behalf of another person (such as a client) in the pursuit of his activities.[558]

558. *Autorité des marchés financiers, Avis relatif à la gestion des comptes séparés en application de la Loi sur la distribution de produits et services financiers* (available only in French), on-line document modified on January 13, 2012 and consulted on July 21, 2017. See https://lautorite.qc.ca/en/professionals/regulations-and-obligations/distribution-of-financial-products-and-services/notices/.

4.3.1.6 Client representation and solicitation: general

Upon first meeting a client, a representative must give the client a document (usually a business card) which indicates the following (s. 202 (3) Distribution Act; s. 10 *Regulation respecting the pursuit of activities as a representative*):

- His name, principal address, and e-mail address;
- The titles under the distribution act which he is authorized to use in respect of the firm or independent partnership or as an independent representative, as the case may be (see the following section); and
- The name of the firm or independent partnership on whose behalf he pursues his activities or the words "independent representative." Moreover, a representative who places a risk with an insurer with which he has a business relationship must disclose that relationship.[559]

This document, or any other written representation (including in social media), may also contain other information, provided such information is not likely to cause confusion, is related to the pursuit of his activities and is not incompatible with those activities, including the following:

- His education and qualifications and the related titles;
- His years of experience in each sector in which he pursues activities; and
- The description of the products and services he offers.

Where a representative works remotely, that is, he does not meet a client personally (but by phone, for example), he must disclose his name, the name of the firm he represents or the fact that he is an independent representative, and his titles. At the client's request, when first sending documents to the client, he must give the client his business card or another document containing all the required information (s. 12 *Regulation respecting the pursuit of activities as a representative*).

Finally, before offering an insurance product, the representative must disclose to the client the name of the insurers whose products he is authorized to offer.[560] Where he is acting for a firm that is an insurer or that is bound by an exclusive contract with a single insurer, he must disclose that fact to the client.[561]

Written representations and marketing

In his written representations (such as advertising), a representative must comply with the preceding rules. He may use statistics to support his claims, provided the source is clearly indicated (s. 13 *Regulation respecting the pursuit of activities as a representative*). A representative must refrain at

559. *An Act respecting the distribution of financial products and services*, CQLR, c. D-9.2, s. 26.
560. *An Act respecting the distribution of financial products and services*, CQLR, c. D-9.2, s. 31.
561. *An Act respecting the distribution of financial products and services*, CQLR, c. D-9.2, s. 32.

all times from engaging in any client solicitation or representation that may cause confusion or that:[562]

- States his income or financial performance;
- Appears to promise results that he is not reasonably able to obtain; or
- Uses a visual image or phrase, such as a trademark, slogan or symbol, that is likely to cause confusion.

To this end, the *Guide respecting rules for business cards and other representations* published by the AMF is a very useful resource.[563]

Authorized titles

The *Regulation respecting the issuance and renewal of representatives' certificates* indicates the titles and abbreviations authorized for each sector and sector class.

Table 4.2 shows the authorized titles of representatives working in the sectors referred to in the Distribution Act (ss. 1–12*Regulation respecting the issuance and renewal of representatives' certificates*).

As regards the title of financial planner, only a person holding a financial planner's certificate issued by the AMF can use this title.[564] Moreover, no one may use a similar title or purport to offer financial planning services without holding a financial planner's certificate issued by the AMF.[565] A financial planner must also comply with the obligations imposed by section 8 (prepare a written mandate dated and signed by the financial planner and give it to the client) and section 9 (prepare a written financial planning report and forward it to his client) of the *Regulation respecting the pursuit of activities as a representative.*

However, the financial planner may not distribute insurance products nor may he provide advice related to a specific insurance product unless he holds the required insurance representative licence from the AMF.

562. *Regulation respecting the pursuit of activities as a representative*, CQLR, c. D-9.2, r. 10, s. 14.
563. *Autorité des marchés financiers, "*Rules for business cards and other representations," on-line document modified in 2013 and consulted on July 21, 2017. See https://lautorite.qc.ca/fileadmin/lautorite/professionnels/obligations/guide-cartes-affaires-an.pdf.
564. *An Act respecting the distribution of financial products and services*, CQLR, c. D-9.2, ss. 1, 11, 56 and 57.
565. *An Act respecting the distribution of financial products and services*, CQLR, c. D-9.2, ss.1, 11, 56 and 57. See also *Regulation respecting titles similar to the title of financial planner*, CQLR, c. D-9.2, r.20. To obtain the title of financial planner, a person must obtain a financial planning diploma issued by the *Institut québécois de planification financière* (IQPF). For more information, see http://www.iqpf.org/index.en.html.

TABLE 4.2

Titles representatives may use under the Distribution Act

SECTORS (BOLD) AND SECTOR CLASSES	TITLES
Insurance of persons – 1a	Financial security advisor
Accident and sickness insurance – 1b	Accident and sickness insurance representative
Group insurance of persons – 2a	Group insurance and group annuity plans advisor
Group insurance plans – 2b	Group insurance plans advisor
Group annuity plans – 2c	Group annuity plans advisor
Financial planning	Financial planner (Fin. Pl.)[566]
Damage insurance	Damage insurance agent or damage insurance broker, as the case may be
Personal-lines damage insurance	Personal-lines damage insurance agent or broker
Commercial-lines damage insurance	Commercial-lines damage insurance agent or broker
Claims adjustment	Claims adjuster
Claims adjustment in personal-lines damage insurance	Claims adjuster in personal-lines damage insurance
Claims adjustment in commercial-lines damage insurance	Claims adjuster in commercial-lines damage insurance

Professional liability insurance

A representative who works on behalf of a firm (attached to a firm) without being an employee must be covered by professional liability insurance. The same applies to independent representatives.

Tied sales/sales made under pressure

A representative may not engage in tied selling, that is, subject to the making of a contract to the requirement that the client make another insurance contract.[567] Moreover, no representative may exert pressure on a client or use fraudulent tactics to induce a client to purchase a financial product or service (s. 18 Distribution Act).

4.3.2 Registration

We will now examine the issues involved with the registration of a firm, an independent partnership or an independent representative with the AMF, as well as the related obligations.

566. See the *Regulation respecting titles similar to the title of financial planner*, CQLR, c. D-9.2, r. 20.
567. *An Act respecting the distribution of financial products and services*, CQLR, c. D-9.2, s. 18.

4.3.2.1 Registration of a firm

Constitution

A firm is a legal entity set up as a corporation, also referred to as a company. It is a legal person (as opposed to a natural person, i.e. an individual). In order to register as a firm, the corporation must have an establishment in Québec (s. 72 Distribution Act).

Activities

A firm pursues its activities through at least one certified representative who is attached to it. A firm may be a single-sector firm (e.g., only insurance of persons) or a multi-sector firm.

Distribution network

A firm may do business with:

- Representatives who are attached only to it;
- Representatives who are attached to it and to other firms at the same time through a distribution agreement;
- Independent representatives;
- Independent partnerships; and
- Other firms.

In such a case, the independent representatives, independent partnerships or other firms are entities that work on their own behalf but which have access to products through the firm, which acts towards them as a wholesaler or general agent.

The concept of general agent is important in practice, even if *An Act respecting the distribution of financial products and services* makes no mention of general agents. In order to allow the distribution of their insurance of persons and annuity products, most insurers require insurance representatives to have signed an agreement with a general agent who usually handles the selection and supervision of the insurance representatives. In summary. while general agents are always firms, not every insurance firm has distribution agreements or satisfies the standards imposed by insurers to act as general agents.

Commission sharing

Pursuant to section 100 of the Distribution Act, a firm may share a commission it receives only with another registrant[568], i.e., another firm, an independent partnership or an independent representative. It may also share its commission with a broker or agency governed by the *Real*

568. See: https://lautorite.qc.ca/en/professionals/firms-and-representatives/obligations-and-administrative-procedures/sharing-of-commissions/.

Estate Brokerage Act,[569] a securities dealer or advisor governed by the *Derivatives Act*[570] or the *Securities Act*,[571] a deposit institution, an insurer or a federation within the meaning of *An Act respecting financial services cooperatives*.[572]

Titles

According to the sectors in which it is registered, a firm may present itself using the following titles (s. 11 *Regulation respecting the registration of firms, independent representatives and independent partnerships*):

- Firm in insurance of persons;
- Firm in group insurance of persons;
- Firm in financial planning;
- Firm in damage insurance; or
- Firm in claims adjustment.

However, if the firm is registered in at least two sectors (multi-sector firm), it may use the title of "financial services firm" (s. 13 *Regulation respecting the registration of firms, representatives and independent partnerships*).

Other titles may also be used if the firm meets the criteria of sections 14.2 and 14.6 of the *Regulation respecting the registration of firms, independent representatives and independent partnerships*:

- Firm in the brokerage of insurance of persons;
- Firm in the brokerage of group insurance of persons; or
- Firm in the brokerage of financial services.

Franchising

A firm that wishes to act as franchiser must send the AMF a list of the firms to which it intends to give a franchise as well as their registration numbers. It must also advise the AMF of its trademarks, graphic symbols, logos and names that it will allow its franchisees to use. The franchiser must also send the AMF an amended list if it grants another franchise or if a firm ceases to operate as a franchise (s. 224 Distribution Act; ss. 30–32 *Regulation respecting firms, independent representatives and independent partnerships*).

569. *Real Estate Brokerage Act*, CQLR, c. C-73.2.
570. *Derivatives Act*, CQLR, c. I-14.01.
571. *Securities Act*, CQLR, c. V-1.1.
572. *An Act respecting financial services cooperatives*, CQLR, c. C-67.3.

Franchising is more frequent with damage insurance brokerage than it is with insurance of persons brokerage.

4.3.2.2 Registration of an independent partnership

An independent partnership is made up of representatives acting through a general partnership. A general partnership differs from a corporation (or company) discussed in the section on “firms.” The representatives of an independent partnership must carry on their activities as employees or partners of the general partnership. All the partners must be representatives. An independent partnership is not a group of independent representatives (ss. 14 and 128 Distribution Act).

Activities

An independent partnership may be a single-sector partnership or a multi-sector partnership.

Distribution network

An independent partnership may do business with:

- Representatives who are partners;
- Representatives who are employees;
- Independent representatives;
- Other independent partnerships; and
- Firms.

Independent representatives, other independent partnerships and firms work on their own behalf but have access to products offered through the independent partnership, which acts towards them as a wholesaler or general agent.

Commission sharing

An independent partnership may share its commissions only with an independent representative, another independent partnership, a firm that is not a deposit institution, or a broker or agency governed by the *Real Estate Brokerage Act* (s. 143 Distribution Act).

Titles

According to the sectors in respect of which it is registered, an independent partnership may present itself using the following titles (s. 12 *Regulation respecting the registration of firms, representatives and independent partnerships*):

- Independent partnership in insurance of persons;
- Independent partnership in group insurance of persons;

- Independent partnership in damage insurance;
- Independent partnership in claims adjustment; or
- Independent partnership in financial planning.

However, if the independent partnership is registered in at least two sectors, it may use the title of "independent partnership in financial services" (s. 14 *Regulation respecting the registration of firms, representatives and independent partnerships*).

Note that very few registrants have chosen to establish themselves as an independent partnership.

4.3.2.3 Registration of an independent representative

Constitution

An independent representative is a natural person (i.e. an individual) who is certified and registered with the AMF. He constitutes a sole proprietorship and may therefore use other trade names to pursue activities.

An independent representative carries on business without being attached to a firm or an independent partnership as a partner or employee (s. 128 Distribution Act).

Activities

An independent representative acts as a representative in all sectors mentioned in his certificate.

Distribution network

An independent representative may do business with:

- Firms; and
- Independent partnerships.

In this case, such firms or independent partnerships are wholesalers or general agents.

An independent representative may hire trainees, but not representatives.

Commission sharing

An independent representative may share his commissions only with another independent representative, an independent partnership, a firm that is not a deposit institution, or a broker or agency governed by the *Real Estate Brokerage Act* (s. 143 Distribution Act).

Titles

An independent representative uses the titles of the sectors or sector classes mentioned in his certificate.

4.3.2.4 Registration conditions for firms and independent partnerships

To register as a firm or independent partnership, a legal person or partnership must apply in writing to the AMF and designate a person to act as a correspondent with the AMF (ss. 1 and 5 *Regulation respecting the registration of firms, independent representatives and independent partnerships*).

Required forms and documents

A firm or independent partnership must also send the AMF the forms, documents and declarations required for registration as well as the name of the officer or partner in charge. If the officer in charge of the firm is not a certified representative, he must have the necessary competence to perform such duties. He must provide the AMF with a description and confirmation of his competence (ss. 1, 2 (13) and 6 *Regulation respecting the registration of firms, representatives and independent partnerships*).

The same person can fill the positions of correspondent and officer (or partner in the case of partnership) in charge.

4.3.2.5 Registration conditions for independent representatives

An independent representative who registers as such must also hold a certificate issued by the AMF. To register, he must apply in writing, indicating the address of his establishment in Québec. He must send the AMF the forms, documents and declarations required for registration and act as the person in charge and correspondent with the AMF. He has the same obligations as the officer or partner in charge, in particular with respect to the keeping of client files, books and records and the handling of complaints (ss. 3 and 4 *Regulation respecting the registration of firms, representatives and independent partnerships*).

4.3.2.6 Common registration conditions

Whenever the AMF refuses to register a firm, independent partnership or independent representative, it must notify the applicant in writing, specifying the reasons for the refusal (s. 7 *Regulation respecting the registration of firms, representatives and independent partnerships*).

Registration validity period

Registration is valid until the firm, independent partnership or independent representative is struck off the AMF's roll. To maintain its registration, the firm, independent partnership or independent

representative must send annually, within 45 days of a request by the AMF, the declarations and documents required by section 10 of the *Regulation respecting the registration of firms, representatives and independent partnerships* (ss. 78 and 132 Distribution Act; ss. 7, 8 and 10 *Regulation respecting the registration of firms, independent representatives and independent partnerships*).

4.3.2.7 Obligations of registrants

In carrying on business, a firm, independent partnership and independent representative must comply with certain obligations prescribed by the Distribution Act and the *Regulation respecting firms, independent representatives and independent partnerships*.

General obligations of firms and independent partnerships

The Distribution Act sets out a general obligation for firms and independent partnerships to act with honesty, loyalty, care and competence (ss. 84 and 146 Distribution Act). Firms and independent partnerships must ensure that their representatives act in accordance with the Distribution Act and its regulations. Firms must oversee the activities of their representatives, as the Distribution Act provides that they are responsible for any injury caused to a client by the fault of one of their representatives in the performance of his functions (ss. 80, 85 and 137 Distribution Act).

Furthermore, a firm wishing to terminate its association with one of its representatives, an independent representative or an independent partnership for reasons relating to his or its activities must inform the AMF of those reasons in writing, without delay. A firm that informs the AMF of such reasons will not be held civilly liable in respect of those activities. For this reason, firms must be careful when selecting their business and distribution networks (ss. 104 and 105 Distribution Act).[573]

EXAMPLE

The financial services firm *Assuretout Inc.* notices that Louis, its representative, has not given the insurer the premium paid by an insured, as prescribed by section 102 of the Distribution Act. Asked about it by Maryse, the officer in charge of the firm, Louis admits that he used the money to pay off some personal debts. He also admits that he stole money from the firm's petty cash from time to time. Under these circumstances, Maryse terminates her association with Louis and informs the AMF of the situation, stating that Louis's conduct was the reason for her decision.

573. See CLHIA Guideline G8 ("Screening Agents for Suitability and Reporting Unsuitable Agents") and CLHIA Guideline G18 ("Insurer-MGA Relationships").

To register, a firm must show that it has professional liability insurance covering its faults and those of its employees. Every representative attached to a firm without being an employee must also be covered by insurance (s. 76 Distribution Act).

A firm will only be allowed to register on certain conditions, including whether the directors or officers show, in the opinion of the AMF, the required honesty, competence and solvency (s. 79 Distribution Act).

A representative who acts alone and has a corporation must attach himself to his own firm in order to carry on business and must be able to comply with the requirements imposed on an officer, as he is deemed to have the necessary competence to act as such.

The AMF may refuse registration for a given sector or impose restrictions or conditions for registration (s. 78 Distribution Act), where:

- The applicant's registration has previously been cancelled;
- The registration of a director or officer of the applicant has previously been cancelled; or
- A partner in an independent partnership or a director or officer of a firm has previously had his registration cancelled.

General obligations of independent representatives

An independent representative has the same obligations as firms and independent partnerships with respect to the keeping of records and files, the keeping of a separate account and the terms and conditions of registration, among other things. He answers directly to the AMF with respect to maintaining his registration as an independent representative. Moreover, he answers for his actions before the discipline committee of the *Chambre de la sécurité financière* with respect to the ethical aspects of his practice. He may therefore be sanctioned both by the discipline committee for a breach of professional ethics and by the AMF for the same action. An independent representative may not be bound by an exclusive contract to a single insurer.

Lastly, the AMF may refuse to register an applicant as an independent representative or impose restrictions or conditions for registration where the applicant's registration for that sector has previously been cancelled (s. 132 Distribution Act).

4.3.3 Advertising, representations and client solicitation

4.3.3.1 Mandatory information

Firms, independent partnerships and independent representatives must, in all advertising, representations or client solicitation, use their names or, where applicable, the other names they use in Québec in the pursuit of their activities. They must also use the title under which they carry on business. They may not use a trademark, slogan, symbol or any other thing that is likely to cause confusion or purport that their actions performed in the pursuit of their activities are approved or recognized by the AMF. Thus, they may not falsely, by any means whatsoever, claim

that a particular service or product is recognized by a particular organization or appear to promise results that they are unable to provide. The financial products sold and the financial services rendered by firms, independent partnerships or independent representatives must comply with their representations and advertising. False, misleading or deceptive representations are prohibited (s. 223 (6) and (7) Distribution Act; ss. 1–5 *Regulation respecting firms, independent representatives and independent partnerships*).

It should also be noted that, pursuant to the *Regulation respecting information to be provided to consumers*, insurance representatives who claim fees from their clients must so inform the client in writing before or at the time services are rendered[574]. When claiming fees, the insurance representative must specifically disclose the fees claimed and the fact that they are receiving a commission or sharing a commission (and, in such a case, the name of the person with whom they are sharing the commission). Pursuant to the same regulation, they must, when so requested by the client, disclose the name of insurers whose products they are authorized to offer.

Activities not governed by the Distribution Act

Where, in respect of an activity not governed by the Distribution Act (such as a contest), a firm or independent partnership, through a representative, engages in advertising or client solicitation for the purpose of selling a financial product or providing a financial service, it must indicate its title and the fact that it distributes financial products and services (s. 11 *Regulation respecting firms, independent representatives and independent partnerships*).

4.3.3.2 Written representation

A written representation (such as a sales or advertising brochure) must describe the service or product without emphasizing its advantages to the detriment of its disadvantages (s. 8 *Regulation respecting firms, independent representatives and independent partnerships*).

4.3.3.3 Approval

The advertisement of a financial product must be approved in advance by the person who markets it (e.g., the insurer) (s. 10 *Regulation respecting firms, independent representatives and independent partnerships*).

4.3.3.4 Statistics

The use of statistics is allowed in advertising and written representations provided their source is clearly identified. In advertising, the financial products, services or methods of competitors may not be criticized (ss. 6 and 9 *Regulation respecting firms, independent representatives and independent partnerships*).

574. CQLR, c. D-9.2, r.18, s. 4.2. See also s. 17 of An Act respecting the distribution of financial products and services, CQLR, c. D-9.2.

4.3.4 Keeping of books, registers and records

All independent partnerships, firms and independent representatives must keep the following up to date, in an establishment in Québec (ss. 88 and 139 Distribution Act):

- Accounting books and registers necessary to record transactions carried out in connection with their activities (s. 1 *Regulation respecting the keeping and preservation of books and registers*);
- A register of the separate account in which the sums received on behalf of others are deposited (s. 1 *Regulation respecting the keeping and preservation of books and registers*);
- Client records (ss. 17 to 21 *Regulation respecting firms, independent representatives and independent partnerships*);
- A commissions register which contains information on the sharing of commissions (ss. 22 and 23 *Regulation respecting firms, independent representatives and independent partnerships*);
- A register of the incentives they introduce for representatives which includes a description of the terms and conditions of each incentive introduced (its duration, related benefits, applicable products or services, a description of the group of representatives concerned and the names of the winners, if any). Incentives do not include pay programs, but they include contests, sales clinics and promotional items (s. 28.1 *Regulation respecting firms, independent representatives and independent partnerships*).

4.3.4.1 General

4.3.4.2 Use of computers

Computers, or any other data processing method, may be used to keep books, registers and files, provided that reasonable steps are taken to prevent the loss, destruction or falsification of information. Moreover, a firm, independent partnership or independent representative must be able to provide the information contained in each client record within a reasonable time and in a precise form that is comprehensible to any person authorized under the Distribution Act to audit the records. To the extent permitted by the Distribution Act, such books and records may be consolidated in one document or file, provided that all required information is recorded in that document and that the client records prescribed by the *Regulation respecting firms, independent representatives and independent partnerships* can be separated from it (s. 89 Distribution Act; s. 3 *Regulation respecting the keeping and preservation of books and registers*; ss. 13–16 *Regulation respecting firms, independent representatives and independent partnerships*).

4.3.4.3 Retention period for books and records

All firms, independent representatives and independent partnerships must preserve the books and records prescribed by the *Regulation respecting the keeping and preservation of books and registers* (s. 13) for five years as of their closing.

Client records and the supporting documents used to prepare them must be preserved for at least five years from the last of the following events (ss. 15 and 16 *Regulation respecting the keeping and preservation of books and registers*):

- The final closing of the client record;
- The date the last service was rendered to the client; and
- The expiry without renewal or the replacement of the last product sold to the client, as the case may be.

The information regarding the separate account contained in the accounting books and registers must also be retained for at least five years after the last registration (s. 14 *Regulation respecting the keeping and preservation of books and registers*).

Subject to the provisions of other acts or regulations, sales, service or accounting transactions dating back more than five years may be removed from such books and registers.

In addition, in accordance with the *Tax Administration Act*, any business or person who operates a business must hold books and records which contain the information which enables one to establish any amount which must be deducted, withheld, withdrawn, or paid to comply with tax legislation.[575]

4.3.4.4 Destruction of accounting books and registers and client records: personal information

The destruction of accounting books and registers containing personal information and the destruction of client records must be done in a manner which keeps the information confidential (ss. 13 and 18 *Regulation respecting the keeping and preservation of books and registers*).[576]

Rules respecting the protection of personal information

There are also specific rules relating to the protection of personal information, in particular with respect to the keeping of client records, and access to records and the information contained in them. Personal information is information which allows a natural person (i.e., an individual) to be identified (e.g., his name and address, which may be an electronic address).[577]

575. CQLR, c A-6.002, s. 34. Every person required to keep registers shall preserve them, together with any supporting document that supports the information contained therein, for six years after the last year to which they relate (s. 35.1).
576. Also consider *An Act to Establish a Legal Framework for Information Technology*, CQLR, c C-1.1 s. 6 (2) and (20).
577. An Act to Establish a Legal Framework for Information Technology, CQLR, c C-1.1, s. 2.

4.3.4.5 Client records

Firms, independent representatives and independent partnerships must keep client records for each of their clients. They may keep the information in a file in various locations on the condition that the information is recorded with the firm or the independent partnership and that every client record can be provided within a reasonable time and in a precise form that is comprehensible to any person authorized under the Distribution Act to audit such records. When there is an inspection or inquiry following a complaint, client records must be accessible to the AMF inspector (s. 109 Distribution Act; ss. 12 and 15 *Regulation respecting firms, independent representatives and independent partnerships*).

Client records: mandatory content for the insurance of persons and group insurance of persons sectors

In the insurance of persons and group insurance of persons sectors, a client record must include the following information for each client (s. 17 *Regulation respecting firms, independent representatives and independent partnerships*):

- The client's name;
- The client's address, telephone and fax numbers, and e-mail address, if any;
- Where the client is a natural person (i.e., an individual), his date of birth where such information has been obtained by the insurance representative;
- The amount, object and nature of the product sold or service rendered, as the case may be;
- The policy number, contract issue dates and the date of signature of the application or request for services, as the case may be;
- The name of the insurance representative involved in the transaction and the method of remuneration for each product sold or service rendered to the client;
- The method and date of payment of the products sold or services rendered;
- A copy, in any medium, of the needs analysis; and
- A copy of the form completed at the time of replacement of an insurance policy, where applicable.

In the group insurance of persons sector, a client record must contain the following information, in addition to the information mentioned above:

- The name of the holder of the group insurance policy;
- The name of the policyholder's contact person;
- The calls for tenders and the bids submitted; and
- A copy of the mandate and the written report of the representative's recommendations to the policyholder (s. 20 *Regulation respecting firms, independent representatives and independent partnerships*).

The record may also contain any other information collected from the client and documents relating to the products sold or services rendered to him.

4.3.4.6 Register for separate account

A separate account is a distinct account opened with a financial institution. The firm, independent representative or independent partnership must deposit in it all amounts received or collected on behalf of others (s. 10(1) *Regulation respecting the registration of firms, independent representatives and independent partnerships*). The firm, independent partnership or independent representative must fill out a declaration relating to the opening of a separate account and send it to the AMF.

Separate account: mandatory content

The register relating to the separate account must contain the following information (s. 7 *Regulation respecting the keeping and preservation of books and registers*):

- The client's name;
- The number of the insurance contract or any other contract in respect of which the representative has received an amount, as the case may be;
- The amount and object of the transaction; and
- In the case of a separate account kept by a firm or an independent partnership, the name of the representative involved in the transaction when he may be identified.

4.3.4.7 Commissions register

Firms, independent partnerships and independent representatives must keep a register of the commissions received.[578] Payment of a shared commission must not be made in cash and must be promptly entered in the commissions register (ss. 22, 24 and 25 *Regulation respecting firms, independent representatives and independent partnerships*).

The commissions register kept by a firm, independent representative or independent partnership must contain the following information (s. 22 *Regulation respecting firms, independent representatives and independent partnerships*):

- The contract number or client name, as the case may be;
- The name of the client, the insurer or any other person who has paid a commission to the firm, independent representative or independent partnership; and
- The statement pertaining to each commission or other remuneration received by the firm, independent representative or independent partnership.

578. *Autorité des marchés financiers, "*Payment of Remuneration – Representatives and Registrants". See: https://lautorite.qc.ca/en/professionals/firms-and-representatives/obligations-and-administrative-procedures/payment-of-remuneration/.

If the statement contains the information indicated in the first two items above, the filing of the statement in the commissions register is sufficient.

Where commissions are shared, the register must contain the following information (s. 23 *Regulation respecting firms, independent representatives and independent partnerships*):

- The name and business address of each person sharing the commission and the sectors, if applicable, for which they are registered with the AMF;
- The names of the parties to the transaction and the object and date of the transaction; and
- The percentage of the commission or the fixed amount resulting therefrom and the manner in which the commission is allocated between the persons sharing it.

See the preceding sections (sections 4.3.2.1, 4.3.2.2 and 4.3.2.3) which indicate with whom a commission can be shared.[579]

4.3.5 Complaint examination

Firms, independent partnerships and independent representatives must have a complaint examination and dispute resolution policy. A standard policy is available on the AMF website[580] for use by firms, independent partnerships and independent representatives as a basis for their own policies.

4.3.5.1 Definition of "complaint"

A complaint is the expression of one of the following three elements which persists after having been considered and examined by a person with the authority to make a decision:

- A reproach against a firm, independent partnership or independent representative;
- The identification of potential or real harm a consumer has suffered or may suffer; or
- A request for remedial action.

A complaint is generally expressed in writing by letter, e-mail, fax, or by any other form which allows it to be kept on file. If a consumer lodges his complaint by phone or in person and the complaint is handled and examined by the person responsible for examining complaints who is designated as such in the policy of the firm, independent partnership or independent representative, it must be documented so that it can be kept on file.

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579. *Autorité des marchés financiers,* "Sharing of Commissions – Rules," on-line document consulted on July 21, 2017. https://lautorite.qc.ca/en/professionals/firms-and-representatives/obligations-and-administrative-procedures/sharing-of-commissions/.
580. *Autorité des marchés financiers*, "Your complaint examination obligations," on-line document consulted on July 21, 2017. See https://lautorite.qc.ca/en/professionals/obligations-and-administrative-procedures/complaint-examination/your-complaint-examination-obligations/ and https://lautorite.qc.ca/fileadmin/lautorite/professionnels/obligations/Complaint-examination-policy.pdf.

It should be noted that an initial expression of dissatisfaction by a consumer, whether written or not, is not a complaint when such dissatisfaction is dealt with in the normal course of business of the firm, independent partnership or independent representative.

4.3.5.2 Complaint procedure

A consumer who believes he has been harmed may use the complaint examination and dispute resolution procedure set up by the firm, independent partnership or independent representative. To do so, the consumer must submit a complaint in writing. The person responsible for complaint examination and dispute resolution must acknowledge receipt of the complaint within five business days of receiving it. The AMF website provides a sample acknowledgment of receipt.[581]

A consumer who is dissatisfied with the settlement offered may ask the firm, independent partnership or independent representative to send a copy of his file to the AMF, which will examine the complaint and possibly offer the parties mediation.

4.3.5.3 Semi-annual complaints report

Twice a year, firms, independent partnerships and independent representatives must declare to the AMF the complaints they have received from consumers of financial products and services. The following information must be provided for each complaint:

- The complaint reference number assigned by the firm, independent partnership or independent representative;
- The business sector (type of industry);
- The complaint categories (reasons for the complaint);
- The date the file was opened;
- The date the file was closed;
- The postal code (at least the first three characters);
- How the complaint was resolved (outcome of the complaint);
- Whether the complaint will result in legal proceedings (if known);
- Whether the complaint will have a broad impact or systemic application;
- Whether the subject of the complaint is covered by the policies and procedures of the firm, independent partnership or independent representative; and
- Whether or not the complaint was transferred to the AMF.

581. Autorité des marchés financiers, “Example: Acknowledgement of receipt including notice.” See: https://lautorite.qc.ca/fileadmin/lautorite/professionnels/obligations/Accuse-de-reception-A.pdf.

4.3.6 Protection of personal information: Application of *An Act respecting the protection of personal information in the private sector*

The Distribution Act contains certain provisions relating to the confidentiality of personal information, its control and use. However, it is important to remember that matters of confidentiality fall primarily under *An Act respecting the protection of personal information in the private sector*,[582] which establishes core principles, such as the need for a clearly expressed consent for the collection, use and communication of personal information to third parties. *An Act respecting the protection of personal information in the private sector* must therefore be referred to when the Distribution Act does not answer questions which may arise. Furthermore, the information must be collected only from the person concerned, i.e., the client/insured (unless the latter consents to collection from third persons). The information must be up-to-date and accurate at the time the representative uses it.

Nonetheless, the Distribution Act sets out certain rules with respect to the keeping of client records and access to them and the information they contain.

4.3.6.1 Keeping of client records: rules respecting the collection of personal information

A representative who acts on behalf of a firm or independent partnership must, when collecting personal information, transmit it to that firm or independent partnership. If he is acting on behalf of several firms, he must transmit the information to the relevant firm. Unless he has obtained the client's consent, he may only disclose the information to a person authorized by law, including a body responsible for preventing crime and statutory offences, an AMF inspector or the syndic of the *Chambre de la sécurité financière* if, in such a case, a complaint has been made against another representative (s. 23 Distribution Act).

4.3.6.2 Rules respecting access to client records by representatives

Firms and independent partnerships must ensure that their representatives only have access to the information necessary for the performance of their duties (ss. 89, 91, 92 and 146 (2) Distribution Act).

4.3.6.3 Obligation to obtain consent

When a firm wishes to give a representative access to information for purposes other than those for which it was collected, it must obtain the client's specific consent allowing the use of personal information about him.[583] Generally, at the outset, the representative obtains the client's consent to advise him on his overall financial situation.

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582. *An Act respecting the protection of personal information in the private sector*, CQLR, c. P-39.1.
583. *Regulation respecting information to be provided to consumers*, CQLR, c. D-9.2, r. 18, s. 4.

4.3.6.4 Medical or lifestyle-related information: specific rules

Specific rules apply to the collection and use of medical and lifestyle-related information, regardless of whether such information is collected at the time an insurance product is purchased or when a claim form is submitted. In these cases, the insurer must record the information on a separate form (ss. 25 and 33 Distribution Act).

When an insurance product is purchased, an insurance representative acting for a firm offering both credit and insurance (but which is not an insurer) must forward the form containing information of a medical or lifestyle-related nature only to the insurer concerned, notwithstanding section 23 of the Distribution Act, which provides that the information must be disclosed to the firm. The representative may not keep a copy of the form, and may not disclose any information contained in the form to any other person (s. 35 Distribution Act).

4.3.6.5 Rules regarding claims

When an insured files a claim containing personal information of a medical or lifestyle-related nature with a firm that offers both credit and insurance, rather than with the insurer, his insurance representative cannot disclose to any other person the information that was brought to his attention, even if the client has given his authorization. The insurance representative must send the claim only to the insurer, and may not keep a copy of the claim. (ss. 36 and 37 Distribution Act).

4.3.7 Professional liability insurance

4.3.7.1 Mandatory coverage

To cover his professional liability arising from faults, errors, negligence or omissions, a representative must have liability insurance with coverage of not less than $500,000 per claim and, for each 12-month period (s. 29 (1) *Regulation respecting firms, independent representatives and independent partnerships*); (s. 17 (1) *Regulation respecting the pursuit of activities as a representative*):

- $1,000,000 for an independent representative and a representative acting on behalf of a firm without being employed by it;
- $1,000,000 for a firm or independent partnership with three or fewer insurance representatives acting on its behalf; or
- $2,000,000 for a firm or independent partnership with more than three representatives acting on its behalf.

It should be noted that pursuant to the ruling in *Souscripteurs du Lloyd's* v. *Alimentation Denis & Mario Guillemette inc.*,[584] this insurance also covers gross faults committed by an insurance

584. 2012 QCCA 1376.

representative. However, professional liability insurance does not cover fraud or misappropriation. In cases of fraud or misappropriation, consumers can file a claim for compensation with the *Fonds d'indemnisation des services financiers* (financial services compensation fund) administered by the AMF.[585]

4.3.7.2 Deductible

If a contract has a deductible, it may not exceed (s. 29(2) *Regulation respecting firms, independent representatives and independent partnerships*; s. 17(2) *Regulation respecting the pursuit of activities as a representative*):

- $10,000 for an independent representative and a representative acting on behalf of a firm without being employed by it;
- $10,000 for a firm or independent partnership with three or fewer insurance representatives acting for it; or
- $25,000 for a firm or independent partnership having more than three representatives acting for it.

In all cases, the insurance must cover the professional liability of the representative, the firm and its employees, the independent representative or the partners and representatives of the independent partnership, arising from the fault, errors, negligence, or omissions committed in pursuing their activities, or those committed by their mandataries, employees or trainees, regardless of whether or not such persons are still so engaged on the date of the claim.[586]

In the case of the cessation of the activities of a representative, firm, independent representative or the partners and representatives employed by an independent partnership (struck from the membership rolls, retirement, death, suspension or change of career), the professional liability insurance contract must be maintained beyond the insurance period provided for in the contract for a further term of five years from the date of cessation of the activities.[587]

The insurer must advise the AMF of its intention not to renew the professional liability insurance contract of one of its clients or to cancel the contract 30 days prior to the date of non-renewal or cancellation. It must also advise the AMF upon receiving notice of non-renewal or cancellation of an insurance contract and upon receiving any claim, whether or not the insurer decides to honour the claim.

Professional liability insurance protects representatives, firms, independent representatives, or partners and representatives employed by an independent partnership against a claim made by a client or beneficiary when there is any fault, error, negligence or omission committed in pursuing their activities, regardless of whether or not such persons are still so engaged on the date of the claim. A fault, an error, negligence or an omission may consist in the commission of an unnecessary

585. See: https://lautorite.qc.ca/en/general-public/assistance-complaints-and-compensation/submit-a-claim/.
586. CQLR, c. D-9.2, r.2, s. 29 par. 3 c).
587. CQLR, c. D-9.2, r.2, s. 29 par. 3 d).

act or the failure to perform an essential act which could have monetary consequences or which could result in the loss of a right for the client or beneficiary. When a client or beneficiary exercises a recourse against a representative at fault, the representative must notify his professional liability insurer of the action taken against him. Under the professional liability insurance policy, the insurer protects the interests of the person who benefits from the coverage (the insurance representative) and defends him before the courts when the act is covered by the policy.

4.3.8 Distribution without a certified representative

The Distribution Act provides that certain insurance products may be offered on behalf of an insurer through distributors who are not certified by the AMF as representatives. The distributor is a person who, in pursuing professional activities in a field other than insurance, offers, as an accessory, an insurance product which relates to goods sold by the person or secures a client's adhesion in respect of such an insurance product (s. 408 Distribution Act).

4.3.8.1 Insurance products relating to goods

Mortgage life insurance is an example of an insurance product relating to goods. Banks and credit unions (which, here, act as the distributor) offer life insurance in connection with their mortgage loans (the goods in question being the mortgage loans).[588]

Another example is the distribution of life or disability insurance at the time a car or other motor vehicle is purchased or leased through a dealer (distributor).

A distributor may also offer other types of insurance related to a product, such as: disability insurance, mortgage debtor employment insurance, credit card and debit card insurance, travel insurance, and vehicle rental life insurance, if the rental period is less than four months (ss. 424 and 426 Distribution Act).

588. In a notice entitled *Avis relatif à la distribution de produits d'assurance par les courtiers en prêts hypothécaires (art. 408 et suivants de la Loi sur la distribution de produits et services financiers)* (available only in French), dated December 9, 2005, the AMF indicated that a mortgage broker cannot act as distributor pursuant to sections 408 and ff. of *An Act respecting the distribution of financial products and services* (see: https://lautorite.qc.ca/en/professionals/regulations-and-obligations/distribution-of-financial-products-and-services/notices/). However, a mortgage broker can refer clients to an insurance firm and receive a share of the insurance firm's commission pursuant to section 100 of *An Act respecting the distribution of financial products and services*. In this regard, see the AMF notice entitled *Avis relatif à l'indication de clients en application de la Loi sur la distribution de produits et services financiers* (available only in French), dated October 8, 2010. See https://lautorite.qc.ca/en/professionals/regulations-and-obligations/distribution-of-financial-products-and-services/notices/.

4.3.8.2 Distribution guide

The distributor must, however, have on hand a guide, prepared by the insurer and submitted in advance to the AMF for analysis. He must give it to the client to whom he offers an insurance product. The guide must describe the product offered, the nature of the guarantee and all exclusions. It must specify the way in which claims are to be made and the time limit for doing so. It must also indicate the time period available to the insurer to pay the insured amounts and the time period the insured has within which to act when the insurer refuses to pay the indemnities (ss. 411, 414 and 435 Distribution Act).

The AMF has prepared a Distribution guide drafting manual.[589]

Distributors do not have to be certified to offer these insurance products.

4.3.9 Sale of insurance in deposit institutions

Under the Distribution Act, the following financial institutions that maintain an establishment in Québec can register as a firm and, therefore, can theoretically offer insurance in their branches through the representatives attached to them (s. 72 Distribution Act):

- Banks governed by the *Bank Act*;
- Provincial trust companies;
- Trust and loan companies (federal); and
- Financial services cooperatives (credit unions).

4.3.9.1 Legislative jurisdiction

Banks fall under federal jurisdiction, and their incorporation acts only allow them to carry out insurance transactions which are accessory to a loan or mortgage and to offer travel insurance. [590] Therefore, banks may not distribute insurance products through a representative. [591]

589. *Autorité des marchés financiers*, “Distribution guide drafting manual,” on-line document modified in 2008 and consulted on July 21, 2017. See https://lautorite.qc.ca/fileadmin/lautorite/professionnels/distribution-sans-rep/Manuel-redaction-guide-distribution_ang.pdf.
Also see https://lautorite.qc.ca/en/professionals/insurers/distribution-without-a-representative/
590. Bank Act, SC 1991, c 46. See also the Insurance Business (Banks and Bank Holding Companies) Regulations, SOR/92-330. See also the Mortgage Insurance Disclosure (Banks, Authorized Foreign Banks, Trust and Loan Companies, Retail Associations, Canadian Insurance Companies and Canadian Societies) Regulations, SOR/2010-69 and the Mortgage Insurance Business (Banks, Authorized Foreign Banks, Trust and Loan Companies, Retail Associations, Canadian Insurance Companies and Canadian Societies) Regulations, SOR/2010-68.
591. Bank Act, SC 1991, c. 46, s. 416(2). See also DORS/92-330, ss. 6, 7. 7.1, 8, 8.1, 9 et 10.

4.3.9.2 Distribution rules in deposit institutions

Only a representative attached to a firm can work in a deposit institution. An insurance representative cannot be assigned to current over-the-counter deposit and withdrawal transactions, or credit operations. He can however (ss. 29 and 129 Distribution Act):

- Make credit referrals;
- Provide credit advice (client's financial situation and needs); and
- Grant credit for the purchase of an insurance product or for an investment.

4.4 Liability of representatives in connection with their mandate

In this section we will look at all the rules relating to the liability of representatives in connection with their mandate. We will begin by analyzing the characteristics of the mandate. People unfamiliar with the law would undoubtedly like to know with certainty whether a representative is the mandatary of the insurer or the client. In reality, there is no single answer, because it depends on the circumstances. Consequently, the concept of mandate will be analyzed from a more practical perspective for the insurance of persons and group insurance sectors.

4.4.1 Mandate

The word "mandate" refers to a type of special contract governed by the rules set out in articles 2130 to 2185 of the *Civil Code of Québec*. In short, a mandate is a contract by which a person—called the mandator—gives another person—called the mandatary—the authority to represent him in the performance of a juridical act.

Mandate is therefore a legal fiction contractually binding the mandator to a third party with whom he has not dealt directly.

Special or general nature of mandate

The contract of mandate may be special or general. The mandator determines the scope of the mandate he wishes to give.

The contract of mandate is special if the power of representation is given for a particular act, such as to sell a house. On the other hand, a contract of mandate is general if the power of representation is given for a series of actions.

EXAMPLE 1

Special mandate

Lisa gives Anne the mandate to look after her house while she is on vacation in Florida.

EXAMPLE 2

General mandate

Julie and Antoine run a bicycle manufacturing company. To break into the foreign market, they set up in Provence for one year. They give their daughter Isabelle the mandate to represent them here, in their absence, with respect to both their business and their personal affairs.

Nature of mandates

A mandate is a contract for the representation of the mandator (the individual who gives the mandate). However, for such a contract to be entered into, the mandatary must accept the power given by the mandator to represent him. In his role, the insurance representative sometimes acts as mandatary of the insurer (he delivers the policy), of the firm to which he is attached, as the case may be, and of the client as well, with respect to certain acts. In the practice of his profession, the insurance representative may also deal with his clients' mandataries, including mandataries in the event of incapacity. Therefore, it is important for a representative to understand the concept of mandates. Sometimes, the document establishing a mandate is called a power of attorney.

Gratuitous or onerous mandate

A mandatary may act with or without payment. A mandate with payment is called a mandate by onerous title. An insurance representative is usually remunerated for the services he renders, either through a salary, commission, performance bonus or other payment.

Obligations of the mandatary towards the mandator

The mandatary has obligations towards the mandator. He is bound to fulfil the mandate he has been given and to act in good faith, with prudence and diligence, within the limits of the contract. He must also inform the mandator of his progress in the performance of the mandate. He must act in the best interests of the mandatary and avoid placing himself in a situation of conflict of interests (art. 2138 *C.C.Q.*).

Obligations of the mandator towards the mandatary

The mandator also has obligations towards the mandatary, the most important of which is to co-operate with him and facilitate the performance of the mandate.

Obligations towards third parties

The mandatary is not personally liable towards the third party, as he is only representing the mandator.

However, if the mandatary exceeds the powers given to him, by acting beyond the agreed-upon scope of the mandate, he will be personally liable towards the third party, unless the mandator has ratified these acts. The mandator is liable towards the third party for all acts performed by the mandatary within the scope of his mandate.

4.4.1.1 Real mandate

According to article 2132 of the *Civil Code of Québec*, acceptance of a mandate may be express or tacit. Acceptance is express when the mandatary clearly expresses his intention to act for the mandator. It is tacit when it may be inferred, often from the acts carried out. How the mandatary acts therefore allows the mandator to assume that his offer was accepted. This is the case where the person designated as mandatary begins to act on behalf of the mandator, even if he says nothing about it to the mandator.

4.4.1.2 Apparent mandate

Under other circumstances, a mandate may only be apparent. There is an apparent mandate when no contract binds the alleged mandator to the alleged mandatary, but the facts suggest to third parties that there is a mandate. This specific case requires that the third party be protected; he must not suffer harm as a result of the apparent mandate. Thus, even if the mandatary acts without any real power, the mandator may have obligations towards the third party as if the mandatary had actually had the power to represent him.

However, in order to bind the mandator, the apparent contract must have certain characteristics (art. 2163 *C.C.Q.*).

Characteristics of an apparent mandate

There is an apparent mandate only if the mandatary has acted without the authority to represent the mandator.

Firstly, the third party must have acted in good faith. Remember that good faith is always presumed.

Secondly, the third party must have had reasonable grounds to believe that there was a mandate.

Finally, the mandator must have allowed the third party to believe that a person was his mandatary and, in circumstances in which the error was foreseeable, he must have failed to take appropriate measures to prevent it (art. 2163 *C.C.Q.*).

Even if the mandate was never entered into, if there is an apparent mandate, it nonetheless has effects: the mandator is bound towards the third party.

The presumption of an apparent mandate does not apply without good reason. Indications consistent with such a mandate must suggest that it exists. However, it should be noted that the client, for example, does not have to verify the extent of the powers of a representative who gives him his business card.

The client often does not know what limits are in the representation contract. The client cannot know that the representative in insurance of persons does not have the power to bind the insurer for all types of products. An insured who may have been misled must be protected.

In the case of an apparent mandate, it is possible that a contract has in fact been entered into between the insurer and the client, even if the representative has accepted a risk exceeding the powers set out in his representation contract.[592] Note that the rules of apparent mandate apply if the client is in good faith. Of course, the insurer has a recourse against the representative.

The following are three examples in which a client is led to believe there is a mandate:

EXAMPLE 1

Lucas took out life insurance on the life of his son, Max. A few years later, he wants to increase the coverage, so he meets with Jean, the insurance of persons representative who had him take out the life insurance eight years earlier. Jean gives Lucas a document printed on the letterhead of the insurer that issued the life insurance policy for Max. It contains all the conditions relating to the increase in coverage under the policy. In this situation, the client has every reason to believe that the representative is still acting on behalf of the same insurer and that he therefore has a real, or at the very least, an apparent mandate. Nothing suggests that such a mandate has been withdrawn.

592. Only if the mandator has ratified the mandatary's acts that exceed the limits of his mandate (art. 2160 *C.C.Q.*).

EXAMPLE 2

To renew the master group insurance policy for the employees of the confectionery company *Les sucreries de l'Est Inc.*, Marc, who is in charge of human resources and benefits, meets with the group insurance plan advisor who has been doing business with the *Assuretout Inc,* insurance company for three years. The advisor gives Marc a mandate and a document on the insurer's letterhead which contains all the conditions respecting the renewal of the group insurance master policy for the company. In this situation, the policyholder (the employer) has every reason to believe that the group insurance representative is still acting on behalf of the same insurer and that he therefore has a real mandate or, at the very least, an apparent mandate. Nothing suggests that such a mandate has been withdrawn.

EXAMPLE 3

At the time he renews his insurance policy, the client has every reason to believe that the insurance representative is still acting on behalf of the same insurer and that he therefore has a real, or at the very least, an apparent mandate. Sometimes, there is nothing to suggest that such a mandate has been withdrawn.

4.4.1.3 Representation contract

Role of the representation or distribution contract

The relationship between the insurer and the insurance representative is generally set out in a document called a "distribution contract" (also referred to as a "representation contract"). Other terms may also be used to refer to the same type of contract. Usually, the insurer has a contract with a firm (which may be a general agent) and a contract with the independent representatives. The firm will also have a contract with the representatives acting on its behalf.

In general, the distribution contract sets out the extent of the powers given to the insurance representative. It sets out the responsibilities of the insurer, the firm and the representative towards the client. In this regard, the insurance representative may be the mandatary of the insurer or the client (the policyholder in group insurance). Under a representation contract, the insurance representative may be authorized to bind the insurer for specific acts or classes of insurance, up to certain predetermined amounts.

The distribution contract sets out the limits of the authority given by the insurer and, thus, the power of representation. The insurance representative may not exceed these limits. The insurer generally has no obligation towards the client, the policyholder or the member if the insurance representative exceeds the bounds of the authority conferred by the insurer.

Consequently, when an insurance representative exceeds the limits of the distribution contract, he is personally liable. He must therefore notify his liability insurer. As previously mentioned, it is not always easy to know whether a representative is the mandatary of the insurer or the client. The answer varies depending on the circumstances.

4.4.2 Insurance of persons representative: mandatary

An insurance of persons representative, whether or not he represents an insurer exclusively, will be required at some point to act as mandatary of the insurer, and as mandatary for the client.

4.4.2.1 Insurance of persons representative: mandatary of the insurer

In general, an insurance of persons representative who offers products on behalf of a single insurer acts as mandatary of that insurer.

A representative who acts on behalf of several insurers is the mandatary of one of them when he carries out acts on behalf of that insurer. Such acts may be one of those described below.

When ascertaining the client's identity

The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*[593] is important. Its purpose is to detect individuals and companies involved in criminal activities, and to deter money laundering.

Insurance representatives are part of the process, because permanent and universal life insurance products as well as non-registered annuity contracts can be used as a means to create, accumulate and transfer wealth.

Pursuant to the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*,[594] the *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*[595] and FINTRAC's guidance,[596] a representative must ascertain a client's identity when the client purchases an immediate or deferred annuity or a life insurance policy which is not an exempt product[597] and for which the client may pay $10,000 or more over the duration of the annuity or policy, regardless of the means of payment. The following are exempt: registered individual or group annuity contracts (RRSPs, RRIFs, LIRAs, LIFs, DPSPs, RPPs and TFSAs), exempt life insurance contracts[598] and accident and sickness insurance contracts without a cash surrender value. The representative must record the information required by this legislation in the client information record.

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593. *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, S.C. 2000, c. 17.
594. S.C. 2000, c. 17.
595. SOR/2002-184.
596. FINTRAC reorganized its guidelines by business sector. Thus, FINTRAC Guideline 6A was replaced by various guidance documents. See http://www.fintrac-canafe.gc.ca/guidance-directives/recordkeeping-document/record/li-eng.asp.
597. *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, ss. 62(2) and 19(1).
598. *Income Tax Regulations*, C.R.C., c. 945, s. 306.

Even if client identification is not required for certain products under the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, an insurer (who also has obligations under this legislation) may nevertheless require an insurance representative to ascertain a client's identity. This may also be useful to confirm the client's age or to ensure the insurer abides by its obligations under the United States *Foreign Account Tax Compliance Act* (FATCA), legislation intended to fight tax evasion by American taxpayers (American citizens and residents) who hold accounts outside the United States.[599]

Accordingly, for non-registered contracts, a representative must ascertain the client's identity when meeting the client (in person) by relying on a document that contains a unique identifier number and is issued by a provincial, territorial, or federal government. The representative must do so for each policyholder or owner, including co-policyholders. Certain originals of common documents are acceptable for proving a client's identity:

- Act of birth;
- Driver's licence;
- Passport;
- Permanent residence card;
- Certificate of Indian status; and
- Record of Landing.

In Québec, a health insurance card can be used to ascertain a client's identity only if the client offers it.

In theory, the insurance representative may use a social insurance card to verify the identity of a client. However a social insurance number may not be used in a declaration made to FINTRAC. As such, several insurers refuse that insurance representatives use a social insurance card to verify the identity of a client.[600] Also consider that the social insurance number may be required by most insurance of persons contracts to comply with the tax obligations related to such products.

Other requirements apply to large cash transactions, such as the deposit of an amount of $10,000 or more in a single transaction, or two or more cash deposits of less than $10,000 each, but totalling $10,000 or more, within a 24-hour period. However, it should be noted that insurers rarely accept cash payments.

599. On February 5, 2014, Canada and the United States signed an intergovernmental agreement (IGA) under the *Canada-United States Convention with Respect to Taxes on Income and on Capital* for the purpose of enhancing the exchange of information and integrating FATCA provisions into the Canadian legislative framework. See http://www.fin.gc.ca/treaties-conventions/notices/fatca-eng.asp.

600. The Privacy Commissioner (https://www.priv.gc.ca) has published useful information on the use of S.I.N.s. See: https://www.priv.gc.ca/resource/fs-fi/02_05_d_21_e.asp.

When a client deposits $100,000 or more, in any form, for a contract, the representative must ascertain whether the client is a politically exposed foreign person (except if the product is an exempt product).[601] The determination that someone is a politically exposed foreign person must be done within 14 days of the transaction. In general, a politically exposed foreign person is someone who has held a government position or a judicial position in a foreign country, or who is the person's spouse or a member of the person's family. Insurance forms contain information on this subject.

In individual and group insurance, if the client is a corporation or other type of entity, the representative must also ascertain its identity. The client must provide acceptable proof of identity, such as the articles of incorporation and the names of the directors. The client must also provide the name, date of birth and identifying information for the authorized signatories of the corporation, company, partnership, non-profit organization or entity without juridical personality, including successions (estates) and trusts. [602]

For an entity, other than a succession (estate) or trust, the client must provide the name, residential address and occupation of every person who holds an interest in the entity and of every person who controls 25% or more of the entity. If such a person is also an entity, additional information is required. Insurance forms generally set out the information to be obtained in this regard.

When the client is a juridical person (company) or another form of entity, the insurance representative must also confirm and retain the information on the ultimate beneficiaries of the entity, or, in other words, the identity of the individuals who ultimately control the juridical person or other form of entity. This cannot be another juridical person or entity.[603]

Third party determination

The representative must be absolutely sure that the person named in the identity documents is the one making the application[604]. If the applicant is acting on behalf of a third party (for example, when there is a mandatary or nominee), the representative must make a third party determination. A third party is a person or entity that gives instructions regarding the contract. In such a case, the insurance representative must establish a third party determination record which contains the following information about the third party:[605]

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601. See footnotes 552 and 553, and also *Guideline 6A*, Section 8 (under "Exceptions") and Subsection 4.2. See *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, ss. 67.2, 56.1 and 62(2).
602. http://www.fintrac-canafe.gc.ca/guidance-directives/recordkeeping-document/record/li-eng.asp.
603. http://www.fintrac-canafe.gc.ca/guidance-directives/recordkeeping-document/record/li-eng.asp.
604. For instance, in the case of a son acting through a power of attorney on behalf of his mother, the insurance representative would have to verify the identity of the son, and not the identity of the mother, even though the mother is the true owner of the account. See *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, ss. -56(1).
605. *Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations*, SOR/2002-184, ss.10(2) and 52(1).

a) The name, address and date of birth and the nature of the principal business or occupation of the third party, if the third party is an individual;

b) If the third party is an entity, the third party's name and address and the nature of its principal business; if the entity is a legal person, the entity's incorporation number and the place of issue of its certificate of incorporation; and

c) The relationship between the third party and the client.

Where the insurance representative is not able to determine that the client is acting on behalf of a third party, but he has reasonable grounds to suspect that this is the case, the representative must keep a record that:

a) Indicates whether, according to the client, the transaction is being conducted on behalf of a third party; and

b) Describes the reasonable grounds to suspect that the client is acting on behalf of a third party.

Determination of purpose

Since February 1, 2014, clients must indicate the purpose of the product and its use.

Obligation to report suspicious transactions

Any actual or attempted suspicious transaction must be reported to FINTRAC within 30 days of the moment a doubt arises. These are the most common indicators of a suspicious transaction:

- The client refuses to produce personal identification documents, wants to establish identity through means other than his personal identification document or inordinately delays presenting corporate documents;
- The client is accompanied and watched, secretive, nervous or overjustifies himself;
- The client displays uncommon curiosity about internal controls or unusual knowledge about legislation regarding suspicious transaction reporting;
- The client deposits large third-party cheques;
- The client shows more interest in the cancellation than in the long term benefits of the product;
- The transaction is unnecessarily complex for its stated purpose;
- The transaction seems to be inconsistent with the client's apparent financial situation or usual pattern of activities; or
- The client gives a post office box address rather than a street residence address.

Failure to comply with this reporting requirement can lead to serious criminal charges. Suspicious transaction reports are confidential. Representatives are protected from legal proceedings when submitting such reports in good faith.

In June 2017, the Risk-based approach workbook – Life insurance companies, brokers and agents, drawn up by FINTRAC,606 came into effect. FINTRAC also prepared its Guidance on the risk-based approach to combatting money laundering and terrorist financing.[607]

On June 17, 2017, amendments to the Proceeds of Crime (Money Laundering) and Terrorist Financing Regulations came into force to reflect the fact that insurance representatives must keep a record of the reasonable measures taken that proved to be unsuccessful. A reasonable measure is unsuccessful if the insurance representative does not obtain an answer, such as a yes or a no, and the insurance representative is not in a position to draw a firm conclusion. When reasonable measures are unsuccessful, the insurance representative must record the following information:

- The measures taken;
- The date on which each of the measures in question was taken; and
- The reasons why they were unsuccessful.[608]

When information about the product is provided

When providing information about a product, insurers rely to a great extent on representatives to distribute their products and inform the public. The insurer's duty or obligation to inform is the cornerstone of an insurance representative's responsibility. Indeed, according to the Distribution Act,[609] a representative must describe the proposed products to the client in relation to the needs identified during the needs analysis and specify the nature of the coverage offered. He must clearly indicate to the client any particular exclusion of coverage and provide the client with an explanation.

He must also provide a disclosure document about the products.[610] Where an insurance of persons representative sells an individual insurance of persons product or an individual annuity to a client, the representative must give the client, no later than on the date the policy is delivered, a legible document (in plain language) indicating the following:

606 See: http://www.fintrac-canafe.gc.ca/guidance-directives/compliance-conformite/rba/rba-li-eng.asp
607 See: http://www.fintrac-canafe.gc.ca/guidance-directives/compliance-conformite/rba/rba-eng.asp
608 See the FINTRAC guidance entitled "Record keeping requirements for life insurance companies, brokers and agents": http://www.fintrac-canafe.gc.ca/guidance-directives/recordkeeping-document/record/li-eng.asp
609. *An Act respecting the distribution of financial products and services*, CQLR, c. D-9.2, s. 28.
610. *Regulation respecting the pursuit of activities as a representative*, CQLR, c. D-9.2, r. 10, s. 16.

- Whether the insurance costs payable under the contract are guaranteed and, where applicable, for how long, and whether such amounts may fluctuate;
- Whether the return on the amounts invested through the insurance product is guaranteed or not;
- Whether the face amount of the insurance is guaranteed or may fluctuate;
- Any specific exclusions contained in the contract; and
- If a surrender fee or a penalty is payable if the contract is surrendered.

This document, which is usually prepared by the insurer, can be an explanatory brochure about the product or an illustration.

As regards individual variable insurance contracts (IVICs), pursuant to the AMF *Guideline on Individual Variable Insurance Contracts Relating to Segregated Funds*, *the Regulation respecting information to be provided to consumers*[611] and CLHIA *Guideline G2 (Individual Variable Insurance Contracts Relating to Segregated Funds)*, the insurance representative must give the client the following documents:

- The application form (proposal);
- The annuity contract;
- The information folder;
- The key facts; and
- A fund facts summary.

When the proposal is drawn up

An insurer must always be meticulous when drawing up an insurance proposal. It needs this document to make an informed decision as to whether or not to insure the risk related to the health or age of the insured. An insurance of persons representative must ask the questions exactly as they are drafted in the insurance proposal and refrain from interpreting them. He must provide the insurer with all the information given by the insured even if some of it seems unnecessary. The decision is up to the insurer, as it is the only one able to determine the importance to be given to the information provided.

When an immediate or conditional cover note is given

For certain life insurance products, an immediate or conditional cover note takes effect when the proposal is signed if certain conditions are met. The cover note will be in effect for a period which varies from one insurer to another. When this document is given, the insurance of persons representative must follow the insurer's instructions, because he is effectively binding the insurer. Generally, the insurer will authorize the insurance of persons representative to give a cover note

611. CQLR, c D-9.2, r 18, s. 4.14 to 4.20.

only to those persons who, according to their answers to the questions asked, appear to be in good health. An insurance of persons representative does not have the authority to change the terms of a cover note.

Upon payment of a sum of money

Section 102 of the Distribution Act states that any insurance premium paid to a firm or to one of its representatives for the account of an insurer is deemed to have been paid directly to the insurer. It also states that the obligations of an insurer who pays sums of money to a firm for the account of a client or the beneficiary of a client are discharged only when the client or beneficiary receives the money. The effect of section 102 is that, for this administrative act, the insurance of persons representative is acting as mandatary of the insurer.

This has significant practical consequences. The client will be released from the payment owed to the insurer upon delivery of the amounts owed to the firm or to one of its representatives

When the policy is delivered

When the insurance policy is delivered, the insurance of persons representative must check whether the insured is still in good health. If he notices significant changes in the client's insurability since the proposal was signed, he must not give him the policy. Instead, he must notify the insurer and wait for instructions. If, under such circumstances, the insurance of persons representative was to give the policy to the client, the client would have reason to assume that the insurance came into effect. However, the representative would be liable towards the insurer.

4.4.2.2 Insurance of persons representative: mandatary of the client

The previous section described the situations in which an insurance of persons representative acts as mandatary of the insurer. However, in certain circumstances, the insurance of persons representative acts as mandatary of the client. This may occur in the following situations.

When the needs of the client are analyzed

An insurance of persons representative must personally gather the information that is necessary to assess a client's insurance needs (s. 27 Distribution Act). This requirement prevents him from asking another person (such as a non-certified assistant) to gather the information for him. If, once his analysis is completed, an insurance of persons representative finds that the client does not need insurance, he must refrain from proposing insurance to him. To do otherwise would constitute an infringement of the *Code of ethics of the Chambre de la sécurité financière*. In a similar fashion to the obligations of a mandatary under the *Civil Code of Québec* (art. 2138),the *Code of ethics of the Chambre de la sécurité financière* requires that an insurance of persons representative subordinate his personal interests to those of the client and avoid any conflict of interest (ss. 18 and 19).

Before completing an insurance proposal or offering an insurance of persons product containing an investment component (such as universal life insurance), including an individual variable

insurance contract (segregated funds), the insurance of persons representative must analyze the needs of the purchaser or those of the insured. Such obligation of analyzing the needs of the client is required from all insurance representatives, and for all types of insurance products.[612]

Therefore, depending on the product, the insurance of persons representative must analyze with the client purchasing the policy, in particular, the policies or contracts in effect held by such purchaser (or by the insured, if he is not the purchaser), as the case may be, the features thereof, the name of the issuing insurers, the purchaser's investment objectives, risk tolerance and financial knowledge, and all other necessary elements such as the income, financial situation, number of dependants, and personal and family obligations of the purchaser.

With respect to annuity contracts relating to segregated funds, the insurance of persons representative must comply, where applicable, with the AMF notice entitled *Avis de l'Autorité des marchés financiers concernant les prêts à effet de levier lors de l'achat de titres d'organismes de placement collectif et de fonds distincts* (available only in French).[613] The insurance of persons representative must be prudent when recommending this strategy, because it carries risks for the client. Indeed, a number of disciplinary files before the *Chambre de la sécurité financière* and client complaints to the AMF relate to recommendations to use this strategy by insurance representatives.

Moreover, the insurance of persons representative must record the information gathered for such analysis in a dated document and provide a copy thereof to the purchaser no later than on the date the policy is delivered (s. 6 Regulation respecting the pursuit of activities as a representative).[614] According to the AMF, the representative must not merely send the document; he must ensure that the client has received it.

In the judgment, *London Life Insurance Company v. Long*,[615] the Québec Court of Appeal concluded that the insurer was not liable for a fault committed by the insurance representative (poor management of investments) with respect to his client, and the insurance representative's client[616] could not invoke the theory of an apparent mandate against the insurer.

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612. See the AMF's Avis relatif à l'application du Règlement sur l'exercice des activités des représentants, R.R.Q. c 9.2, r. 10 (Loi sur la distribution de produits et services financiers), dated July 25, 2013, more particularly Section IV entitled «L'analyse de besoins – article 6».
613. See https://www.lautorite.qc.ca/files/pdf/reglementation/valeurs-mobilieres/0-avis-amf/2009/2009oct09-avis-effetlevier-fr.pdf.
See also https://lautorite.qc.ca/fileadmin/lautorite/grand_public/salle-de-presse/communiques/2010/com18fev2010-levier-ang.pdf
614. See the AMF's *Avis relatif à l'application du Règlement sur l'exercice des activités des représentants*, R.R.Q., c. 9.2, r. 10 (*Loi sur la distribution de produits et services financiers*) (available only in French).
https://lautorite.qc.ca/fileadmin/lautorite/reglementation/distribution/avis/2013juil25-avis-interpretation-exerciceRep-fr.pdf
615. 2016 QCCA 1434.
616. The insurance representative was acting on behalf of his own firm, and had entered into an exclusive distribution agreement with the insurer. The insurance representative was not an employee of the insurer, nor an employee of a subsidiary of the insurer.

When insurance is purchased

If, after analyzing the client's insurance needs, the insurance of persons representative concludes that they are not being adequately met, he may recommend that the client purchase insurance. He must always propose the product that best meets those needs (s. 27 Distribution Act). From a legal point of view, if the client agrees with this suggestion, it means he is giving the insurance of persons representative the mandate to find the best insurance policy for his situation based on the products he distributes.

When there is a discrepancy between the proposal and the policy

From time to time, an insurer prepares a policy for an insured, but with terms that are different from those mentioned in the proposal, usually after an evaluation of the insured's medical information. In such a case, the insurance of persons representative must indicate to the client where there is a discrepancy, in order to comply with the mandate given to him by the client.

When a claim is filed with the insurer

When the representative helps the policyholder, the policyholder's assigns or the beneficiaries with a claim filed with the insurer, he acts as the client's mandatary.

EXAMPLE

Lucia would like to purchase life insurance with a double indemnity in the event of accidental death. She meets Pierre, an insurance of persons representative. After having analyzed her needs, he determines that she needs $1,000,000 of coverage. Lucia gives Pierre the mandate to find her an insurance policy with the desired features. However, the insurer ABC Inc. draws up a $1,000,000 insurance policy on the life of Lucia, but without the double indemnity in the event of accidental death. To comply with his mandate, Pierre must point out to Lucia that the policy does not offer a double indemnity in the case of accidental death. The mandate given by Lucia could not be fulfilled, given the insurer ABC Inc.'s refusal to fully accept the proposal.

4.4.2.3 Policy replacement

A representative must replace a policy only if the client's interests justify it, and he must be able to provide the justification.[617] Where the purchase of an insurance contract, including a critical illness or long-term care contract (annuity contracts that include segregated funds are excluded), is likely to result in cancellation, termination (annulment) or reduction of benefits of an existing individual insurance contract, the insurance of persons representative must complete, prior to or at the same

617. *Regulation respecting the pursuit of activities as a representative*, CQLR, c. D-9.2, r. 10, s. 20.

time as the insurance application, the notice of replacement form prescribed by the AMF.[618] This requirement also applies when an insurance of persons representative secures the adhesion of a person to a group insurance contract and this is likely to result in the cancellation, termination (annulment) or reduction of benefits of an individual insurance contract. Of course, the representative must explain the content of the form by comparing the contracts and describing the advantages or disadvantages of the replacement.

In 2013, the form prescribed by the AMF changed significantly. The new version (available on the AMF website) must be used as of October 22, 2014. The form may be filled out electronically.[619] The representative must sign it and remit a copy to the client; he must also keep in his file proof that the form was remitted to the client. Moreover, he must send the original of the duly completed form to the head office of a insurer who issued a contract likely to be cancelled (i.e. the former insurer) within five working days of the signing of the insurance application. He must send it by any means providing proof of the date of sending. The representative must also send a copy of the form, within the same time period, to the insurer with whom he intends to place the new contract (the new insurer).[620] The form must be completed even if the contract is to be replaced with a contract from the same insurer.

4.4.3 Representative in group insurance of persons

4.4.3.1 Group insurance representative: mandatary of the insurer

A group insurance representative may be the mandatary of the insurer. This may occur in any one of the following situations.

When the premium is paid to a group insurance representative

As with individual insurance of persons, section 102 of the Distribution Act states that any insurance premium paid to a firm or to one of its representatives for the account of an insurer is deemed to have been paid directly to the insurer. It also states that the obligations of an insurer who pays sums of money to a firm for the account of a member or the beneficiary of a member are discharged only when the member or beneficiary receives the money. The effect of section 102 of the Distribution Act is that, for purposes of this administrative act, the group insurance representative is acting as mandatary of the insurer.

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618. *Ibid.*, s. 18.
619. See the AMF's *Avis relatif à l'application du Règlement sur l'exercice des activités des représentants*, R.R.Q., c. 9.2, r. 10 (*Loi sur la distribution de produits et services financiers*) (available only in French). See https://lautorite.qc.ca/en/professionals/regulations-and-obligations/distribution-of-financial-products-and-services/notices/
See the form https://lautorite.qc.ca/fileadmin/lautorite/formulaires/professionnels/assurance-personnes/preavis-remplacement-contrat-assurance-personnes_an.pdf
See also https://lautorite.qc.ca/en/professionals/firms-and-representatives/obligations-and-administrative-procedures/procedure-for-the-replacement-of-insurance-contracts/.
620. *Regulation respecting the pursuit of activities as a representative*, CQLR, c. D-9.2, r. 10, s. 22.

This has significant practical consequences. The policyholder will be released from the payment required by the insurer upon delivery of the amounts owed to the representative.

At the time of presentation, by the insurer, of the terms for renewing the master policy

Within a reasonable period of time prior to the renewal of the master policy, the policyholder under the group insurance contract (the employer or association) must be informed of the renewal terms. To ensure that the policyholder is well aware of the terms, the insurer usually mandates the group insurance representative to explain them to the policyholder. Very often the information is technical. Under these circumstances, given the mandate entrusted to him by the insurer, the group insurance representative is considered to be the insurer's mandatary.

When various information is provided

As discussed in the section on individual insurance of persons, insurers rely to a great extent on their mandataries to distribute their products and inform the public. The insurer's duty or obligation to inform is the cornerstone of a representative's responsibility.

As with individual insurance of persons, when a group insurance representative commits an error in the performance of his mandate, the firm or independent partnership to which he is attached must bear the consequences of the error committed towards third parties. If a group insurance representative, as the insurer's mandatary, commits a fault within the limits of the mandate, the insurer may also be liable towards third parties and may therefore be sued for the fault of the group insurance representative. The insurer may in turn sue the representative who is not its employee. In such a case, the representative will rely on his professional liability insurance. The insurer may also attempt to escape liability by proving that it could not reasonably have prevented the fault.[621]

In principle, the insurer is not liable if its mandatary exceeds his authority, unless it has ratified the mandatary's actions or unless there is an apparent mandate.

4.4.3.2 Group insurance representative: mandatary of the policyholder

A group insurance representative who is not employed by the insurer is almost always the mandatary of the policyholder (other than the situations mentioned above where he is the insurer's mandatary) as of the beginning of his relationship with the client. A group insurance representative who offers products directly to a client must give a document called a "mandate" to the client.[622] Note that this requirement does not apply to the employee who holds an insurance representative licence of a registered insurer when the employer itself does business with an insurance representative other than the employee of the insurer. This mandate allows him to, among other things, examine the file, negotiate the terms of the master policy and, subsequently, its renewal, and monitor the setup and administration of the master policy.

621. *Civil Code of Québec*, CQLR, c. C-1991, art. 2164.
622. *Regulation respecting the pursuit of activities as a representative*, CQLR, c. D-9.2, r. 10, s. 8.1.

The mandate must also authorize any insurer to give the necessary information to the client's insurance representative.

The mandate must specify the following:

- The identification of the policyholder and the person designated as the policyholder's contact person;
- The nature and scope of the mandate specifying, as a minimum, the following:
  - The needs analysis;
  - In the case of calls for tenders pertaining to one or more insurance products, a comparison of guarantees, including costs and any differences noted; and
  - Where an insurance contract is renewed, the description of the existing plan and an analysis of group experience.

The mandate cannot oblige the policyholder to purchase a financial product or service.

The mandate must be dated and signed by the representative. The representative must always give a copy of the mandate to the policyholder or the person designated as his contact person.[623]

It should be noted that a group insurance representative must give a written report of his recommendations to the person designated as the policyholder's contact person (s. 9.1 *Regulation respecting the pursuit of activities as a representative*).

When selecting the insurer and coverage

The duty to advise requires that the group insurance representative present objectively all information which is relevant to the policyholder's situation. A group insurance representative must, when rendering services or offering products in that capacity, give a written report of his recommendations to the person designated as the policyholder's contact person.[624] He must also tell the contact person which submission is the best suited to the group (association or company), at the best possible cost given the coverage and services offered.

When negotiating the terms of the master policy

When negotiating the terms of the master policy and its renewal, the group insurance representative's obligation is to advise. The scope of this obligation is very broad. After analyzing the client's insurance needs, he must inform him of the group coverage and the group insurance or annuity services that best suit the group's situation (company or association). The duty to advise requires that the client's interests take priority over those of the group insurance representative and the insurer.

623. *Ibid.*
624. *Regulation respecting the pursuit of activities as a representative*, CQLR, c. D-9.2, r. 10, s. 9.1.

Once the client's needs have been determined, the group insurance representative negotiates with the insurer regarding the premium rate or fees for each type of coverage or service. Certain factors affect the premium rate, including the nature and scope of the risk covered as well as the administrative aspects taken on by the policyholder, the insurer or a third-party administrator or third-party manager (who, at times, may be a representative or a firm). The more responsibility the policyholder has for managing the master policy, the less the insurer has to do in this regard and it may reduce the amount of the premium as a result. Given the mandate written and signed by the client, the group insurance representative is the mandatary of the client, who becomes the policyholder when the master policy takes effect.

When the group insurance policy is delivered

When the group insurance policy is given to the policyholder, the group insurance representative must act to preserve his client's interests. He must first ensure that the insurance policy complies with the proposal. He must then take the appropriate precautions to explain the particular clauses to the policyholder. This is inherent in his duty to inform, which involves communicating the relevant facts to his client.

When setting up the group insurance plan: membership or waiver of membership and information session

In this situation, given the significant number of employees liable to subscribe to the master policy, depending on the size of the company, the group insurance representative may help the policyholder to get the entire group to fill out the group insurance or group annuity membership forms as well as the waiver of membership forms for those who do not wish to be covered by the group insurance. Refusal is possible when the master policy allows employees to decide whether or not to subscribe to the insurance, except, in general, for prescription drug insurance. In this case, the group insurance representative acts as a mandatary of the policyholder when he explains the coverage offered under the master policy or when he asks for proof of insurability (e.g., obtaining proof, for prescription drug insurance, that the member is in fact covered by his spouse's master policy). The group insurance representative's role of explaining the optional coverage in the master policy is important, as it allows the member to make an informed decision. The policyholder may also ask for the group insurance representative's help in holding an information session with the employees or group members. In certain cases however, the insurer offers this service.

We can see from the foregoing that, when a group insurance representative helps a member fill out the membership or waiver form or when he explains the conditions related to the coverage offered by the insurer, he becomes the mandatary of the policyholder. For group annuities, he may provide explanations on the choice of investments offered under the insurer's group annuity policy (guaranteed funds / segregated funds).

Management of the master policy

A group insurance representative may be considered the mandatary of the policyholder with respect to the management of the master policy. Sometimes, the representative is referred to as a "third-party manager" or "third-party administrator." As the policyholder, the employer is given certain duties under the law[625] and by the insurer with respect to the management of the master policy. As a result of these various management duties, the group insurance representative may be asked to give the policyholder explanations or simply inform the policyholder about the various documents required by the insurer, such as when an employee is laid off.

The group insurance representative's assistance and co-operation may be sought with respect to the following:

- Compliance by the policyholder with its obligations under the contract and the law;
- The manner in which to keep members' files up-to-date as well as the information required for calculating the premium;
- The manner in which to deal with members' claims; and
- The notices to the insurer with respect to any changes liable to affect the status of an employee, including a salary increase or decrease, the arrival of new employees eligible for insurance, retirement, the beginning of a disability period, layoffs and dismissals.

Given that the policyholder makes the requests, the group insurance representative's role to help and provide technical assistance could result in him being considered the policyholder's mandatary.

When negotiating renewal terms for the master policy

When negotiating the renewal terms of the master policy with the insurer, the group insurance representative acts as a mandatary of the policyholder. At times, he obtains a mandate from the policyholder to obtain bids from other insurers. The group insurance representative looks after the interests of the policyholder. He reviews with him the types of coverage provided by the master policy to determine whether they still meet his needs. He negotiates the premium rate, when required, by informing the insurer that the group's experience is good, for example. This means, among other things, that the average age of the group is low and there are few claims. The group insurance representative's role at this stage of the process confirms that he is the mandatary of the policyholder.

4.4.3.3 Group insurance representative: mandatary of the member

Given that the member has a very limited role, he rarely communicates with the group insurance representative. His dealings with the group insurance representative are generally limited to group meetings and, most of the time, it is highly likely that there will not be an individual meeting

625. *Regulation under the Act respecting insurance*, CQLR, c. A-32, r. 1, s. 61.

between the representative and the member. Consequently, the representative almost never acts as the mandatary of the member vis-à-vis the insurer.

4.5 Liability of representatives and the rights of consumers

A representative may be liable in various ways. This section deals with the following:

- The civil and professional liability of representatives;
- The ethical and disciplinary liability of representatives;
- The penal liability of representatives; and
- The criminal liability of representatives.

4.5.1 Civil and professional liability of representatives

4.5.1.1 General conditions of civil liability

The purpose of an action in civil (or professional) liability is to obtain damages (financial compensation) for the injury suffered.

For an action in civil (or professional) liability to succeed, three elements must be proven:

- Fault;
- Damage (also referred to as an injury); and
- The causal link between the fault and the damage.

4.5.1.2 Fault

Definition of "fault"

In Québec, there are two civil liability regimes:

- Extra-contractual liability; and
- Contractual liability.

In extra-contractual liability, fault is a breach of the rules of conduct which a prudent and diligent person would follow in similar circumstances; it does not stem from the terms of a contract. In contractual liability, fault arises when a person fails to perform his contractual obligations or performs them improperly. The *C.C.Q.* bases extra-contractual liability on the notion of fault and contractual liability on the obligation to comply with undertakings made in a contract.

Types of fault: simple, intentional, gross

There are three types of fault:

- Simple fault;
- Voluntary or intentional fault, that is, a fault committed with the intent to harm another; and
- Gross fault.

Any fault, regardless of the type, leads to civil liability.

Fault may result from a person's act, negligence, carelessness, recklessness or incompetence, or from a person's failure to comply with an obligation imposed by law (such as the *C.C.Q.* or the Distribution Act (or a regulation made thereunder)) or by contract.

4.5.1.3 Injury

Definition of "bodily injury"

Bodily injury is any physical harm suffered by the victim.

Definition of "material injury"

Material injury is harm caused to the property of the victim.

Definition of "moral injury"

Moral injury is any pain, suffering or inconvenience suffered by the victim, such as the loss of enjoyment of life or damage to one's reputation as a result of insults or defamatory words or writings.[626]

Under article 1607 *C.C.Q.*, the victim of an injury is entitled to damages to compensate and repair the harm he has suffered or the profit of which he has been deprived (art. 1611 *C.C.Q.*).

Definition of "exemplary (or punitive) damages"

These are damages awarded following any unlawful interference with any right or freedom recognized by the *Charter of Human Rights and Freedoms* (CQLR, c. C-12, s. 49), or pursuant to another law expressly granting the victim the right to seek exemplary or punitive damages. They are not intended to compensate the victim, but are meant as a deterrent measure to prevent a repetition of such misconduct.

626. Jean-Pierre Archambault and Marc-André Roy, *Initiation au droit des affaires,* 2nd ed., Laval, Éditions Études vivantes, 1995, pp. 170 and 171.

4.5.1.4 Causal link

In order for liability to arise, there must be a direct link, referred to as the "causal link," between the fault and the harm or injury suffered.

Burden of proof

It is up to the victim of the injury to prove that the harm he suffered is the immediate and direct result of the debtor's fault. The fault may result from a breach of a contractual obligation or conduct inconsistent with that of a reasonable person.

4.5.1.5 Principal (Employer)

With respect to the civil liability of the principal, i.e., the employer, article 1463 *C.C.Q.* states: "The principal is liable to reparation for injury caused by the fault of his agents and servants in the performance of their duties; nevertheless, he retains his recourse against them."

Thus, in addition to suing the representative who committed the fault, the victim can sue the representative's employer, if necessary (financial institution, firm or independent partnership).

Of course, for the employer to be liable, the fault of his employee must occur in the performance of his duties. Otherwise, the employer will not be liable for reparation. It should be noted that the employer retains his rights against the employee at fault.

4.5.1.6 Civil action

A person who believes that a representative has committed a fault personally, as a mandatary or as the agent or servant of an employer, and who has suffered harm as a result of the fault, may take an action according to the rules prescribed by the *Code of Civil Procedure*.[627]

The recourse must be instituted in Superior Court if the damages claimed are equal to or greater than $70,000, in the Court of Québec, Civil Division, if the damages claimed are greater than $15,000 but less than $70,000 and in the Court of Québec (Small Claims Division) if the damages claimed are $15,000 or less.

4.5.1.7 Parties

A client who wishes to be compensated for the harm suffered due to the fault of a representative must institute his action against the representative, personally or as mandatary, or against the representative's employer, where applicable (or both). This is referred to as a civil action. Its goal is to obtain compensation for the harm suffered.

627. New *Code of Civil Procedure*, CQLR, c, C-25.01.

When the fault, error or negligence was committed in connection with the activities of the representative, his insurer (or the firm's insurer, as the case may be) will be called upon to intervene in the action as a guarantor, given the professional liability insurance coverage of the representative (or the firm, as the case may be).

Liability insurance: representatives who act for a firm without being an employee

It is primarily to protect the public, but also to protect representatives themselves from possible professional liability claims, that the Distribution Act requires representatives to carry professional liability insurance (ss. 83(1) and 196 Distribution Act; s. 17 *Regulation respecting the pursuit of activities as a representative*).

The liability to be covered is the fault, error, negligence or omission committed by a representative in the performance of his activities on behalf of a firm. It is important to note that, under the Distribution Act, all firms must ensure that representatives who act for them without being employees are covered by liability insurance.

Firms, independent representatives and independent partnerships

The professional liability of firms, independent representatives and independent partnerships results from any fault, error, negligence or omission committed in the pursuit of their activities or those committed by their employees, including representatives and trainees (except claims adjusters), whether or not they are still so engaged on the date the claim is made. Coverage for such liability must be maintained for five years as of the date they cease pursuing their activities (ss. 83, 136 and 196 Distribution Act). Firms, independent representatives and independent partnerships must have professional liability insurance to protect themselves against possible lawsuits (s. 29 *Regulation respecting firms, independent representatives and independent partnerships*).

4.5.2 Ethical and disciplinary liability

An ethical breach stems from non-compliance with the obligations imposed by the *Code of ethics of the Chambre de la sécurité financière*. If a representative breaches his obligations, he becomes liable, and a complaint may be filed against him with the discipline committee of the *Chambre de la sécurité financière*. The provisions of the Professional Code[628] relating to the filing and hearing of a complaint, and to the decisions and penalties arising from the complaint, apply to a hearing before the discipline committee of the *Chambre de la sécurité financière* (s. 376 Distribution Act).

Unlike an action in civil liability, an action for a breach of ethics does not lead to financial compensation. Its purpose is to protect the public, particularly through the levying of fines or the withdrawal of the representative's right to pursue activities.

628. *Professional Code*, CQLR, c. C-26.

4.5.2.1 Disciplinary action

The section dealing with the *Chambre de la sécurité financière* (CSF), above, described the mission and duties of the syndic and the discipline committee of the *Chambre de la sécurité financière*.

4.5.2.2 Syndic: information provided by a client

A representative who has breached a provision of the Distribution Act or its regulations may be reported to the syndic. A client who believes that an offence has been committed may report it to the syndic, who will conduct an inquiry into the matter (s. 329 Distribution Act). The syndic may have access to the establishment in question and examine all books, registers, accounts, records and other relevant documents (s. 340 Distribution Act).

4.5.2.3 Discipline committee

Once the inquiry is complete, if the syndic has reason to believe that an offence has been committed, he files a complaint before the discipline committee against the representative in question. The committee, which is made up of three members, one of whom is a lawyer, hears the complaint. Any decision made by the discipline committee of the *Chambre de la sécurité financière* concerning a representative may be appealed to the Court of Québec, Civil Division (ss. 344, 355 and 379 Distribution Act).

4.5.2.4 Parties

A disciplinary action against a representative is instituted by the syndic of the *Chambre de la sécurité financière*. However, the client remains the most important witness as he is the one claiming to be the victim of an offence committed by the representative.

4.5.3 Penal liability

4.5.3.1 Definition of “penal law”

Before discussing penal liability, we must define the concept of penal law. The purpose of penal law is to punish conduct which is harmful to all of society by prescribing penalties in the case of non-compliance with a person’s obligations relating to life in society (contrary to public order and the general well-being). The provinces have the power to determine new penal offences. For example, Québec legislates in insurance matters as regards the issuance of certificates to representatives. Thus, as a complement to the exercise of the power to issue certificates, the legislator has defined offences for failure to comply with the provisions of the Distribution Act and its regulations. Criminal liability will be discussed later.

4.5.3.2 Basic elements: offence and sentence

The basic elements of penal law are the offence and the sentence, or sanction.

4.5.3.3 Definition of "offence"

An offence is a conduct prohibited by statute (or applicable regulation) which must be punished, either because it is unacceptable to society or because it is dangerous to the life and safety of other individuals.

Types of offences

There are three types of offences: offences set out in a statute or regulation, called "statutory offences," offences punishable on summary conviction (summary offences) and indictable offences.

In this section, we will discuss statutory offences. The two other types of offences, namely, summary offences and indictable offences, which are set out in the *Criminal Code*,[629] will be discussed in the following section dealing with criminal liability.

4.5.3.4 Description of the offence

An offence in a statute must be described specifically so that everyone knows exactly what conduct is prohibited by the provision setting out the offence. A person cannot be prosecuted for a criminal or penal matter unless, according to law, the act in question constitutes an offence.

4.5.3.5 Definition of "sanction"

The sanction for an offence is generally a fine and in certain rare occurrences the sanction may be imprisonment. The penalty must be proportional to the severity of the offence. The circumstances of the offence and the elements specific to each accused must be taken into consideration. A repeat offender therefore risks receiving a harsher punishment than a person who commits a first offence.

Penal liability arises when a person commits an offence and is found guilty. He is responsible for his actions and is thereby liable.

4.5.3.6 Penal provisions of the Distribution Act

The offences with respect to which an insurer, a representative, a firm or an independent partnership may be found guilty are set out in sections 461 to 483 of the Distribution Act. The following are some of those offences: illegal practice as a representative, illegal sharing of commissions and hindering an inspection.

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629. *Criminal Code*, R.S.C., 1985, c. C-46.

4.5.3.7 Sanctions

Sanctions are set out in sections 485 to 490 of the Distribution Act. They are fines of $2,000 to $150,000 for a natural person and $3,000 to $200,000 for a legal person. For certain offences, the fine may go up to $1,000,000. An insurer found guilty of an offence can be fined up to $200,000.

4.5.3.8 Penal proceedings

For offences set out in the penal provisions of the Distribution Act, the AMF will institute proceedings against the person who committed the offence before the Court of Québec, Criminal and Penal Division. If the action is well-founded, the person found guilty of the offence will have to pay the prescribed fine.

4.5.3.9 Parties

In this type of action, the parties are the AMF and the person who committed the offence. The client who is the victim of the offence is not involved in this action; he only acts as a witness (s. 492 Distribution Act).

4.5.4 Criminal liability

Before discussing criminal liability, we must understand the concept of “criminal law.”

4.5.4.1 Definition of “criminal law”

Criminal law is based on the *Criminal Code*, which generally applies to offences such as murder, sexual assault, theft and fraud. The *Criminal Code* applies to all Canadians aged 12 or over. Only the federal government has the power to determine criminal offences, i.e., offences affecting the fundamental values of society. The Government of Québec does not have these powers.

4.5.4.2 Elements of criminal law: offence and sentence

Like penal law, the offence and the sanction, or sentence, are the basic elements of criminal law.

4.5.4.3 Definition of “criminal liability”

A person is criminally liable when he commits and is found guilty of a serious offence, such as murder, theft, fraud or embezzlement. He is responsible for his actions and is thereby liable. Thus, a representative may be found guilty of theft, fraud or embezzlement by a court under the *Criminal Code*.[630]

630. *Criminal Code*, ss. 322, 330, 331, 334 and 380.

4.5.4.4 Criminal proceedings

A criminal proceeding is a proceeding instituted due to the commission of an offence under the *Criminal Code*. A client who believes he is the victim of theft, fraud or embezzlement must file a complaint with the police, which conducts an investigation and gathers evidence. Once its investigation is complete, the police submits the matter to the Crown prosecutor, who determines whether there is enough evidence to charge the person who committed the offence.

In criminal proceedings, the sanction is generally imprisonment, a fine, or confiscation.[631]

4.5.4.5 Court of Québec, Criminal and Penal Division, or Superior Court

Theft and fraud are the most common offences. If the object of the theft or fraud does not exceed $5,000, it is a summary offence which is heard before the Court of Québec, Criminal and Penal Division.[632]

If the object of the theft or fraud is greater than $5,000, it is an indictable offence. The accused can choose between three types of trial:[633]

- Trial by a judge with a jury made up of 12 citizens, in Superior Court, preceded by a preliminary inquiry;
- Trial by a judge without a jury, preceded by a preliminary inquiry before the Court of Québec, Criminal and Penal Division; and
- Trial by a single judge of the Court of Québec, Criminal and Penal Division, without a jury and without a preliminary inquiry.

The Superior Court has jurisdiction in criminal matters in the case of a trial by jury.

4.5.4.6 Parties

In the case of a criminal offence, the plaintiff is the Crown prosecutor, not the victim of the offence. It is not the victim who institutes proceedings against the accused, but he is an important witness as he is claiming to be the victim of the criminal offence.

Proceedings initiated by indictment (indictable offence) or by summary conviction (summary offence) do not financially compensate the victim for the harm suffered, as is the case with an action before the civil courts. However, exceptionally, the court may make a restitution order.[634] This measure orders that the offender pay the victim a sum of money to make restitution for the losses

631. *Criminal Code*, RSC (1985), c. C-46, ss 718.3, 734 and 743.
632. *Ibid*., ss. 334(b)(ii), 380(1)(b)(ii) and 553(a).
633. *Ibid*., ss. 555(2) and 536(2).
634. *Criminal Code*, R.S.C., 1985, c. C-46, s. 738.

suffered which are related to the offence. The assessment of the harm will take into account the convicted person's ability to pay.

Table 4.3 summarizes these notions.

TABLE 4.3

Liability regimes and existing recourse

LIABILITY REGIMES	EXISTING RECOURSE
Civil and professional liability	Action against the perpetrator of the harm to compensate the victim
Ethical and disciplinary liability	Complaint by the syndic to the discipline committee of the *Chambre de la sécurité financière*
Penal liability	Penal proceedings by the AMF (fines)
Criminal liability	Criminal proceedings seeking a prison sentence or a fine. If found guilty, the accused will have a criminal record.

4.6 Ethics and professional conduct of representatives

In this section we will examine the provisions respecting the ethics and professional conduct of representatives. We will begin by looking at professional ethics and then move on to the *Code of ethics of the Chambre de la sécurité financière*.

4.6.1 Professional ethics

Definition of "ethics"

In general, "ethics" refers to moral principles. The concept of "professional ethics," however, refers to all rules of conduct relating to a professional activity. In this sense,"ethics" is synonymous with "professional conduct."

Rules applicable to the activities of representatives

The duties of a representative are very diverse. Sometimes, he acts as the mandatary of the insured. In other circumstances, he acts as the mandatary of the insurer. However, all these roles have a common denominator. A representative must always act with diligence, prudence, honesty, loyalty, competence and professionalism. This obligation is found in the Chapter on mandate in the *Civil Code of Québec* (art. 2138) Section 16 of the Distribution Act also states that representatives must act with competence and professional integrity.

4.6.2 Professional conduct of representatives

Definition of "professional conduct"

The concept of "professional conduct" refers to all the duties and obligations a representative has towards the public, his clients and insurers in the practice of his profession.

4.6.2.1 General provisions

Purpose of a code of ethics

The *Code of ethics of the Chambre de la sécurité financièr*e (CECSF) was enacted by the *Chambre de la sécurité financière*. The general purpose of a code of ethics is to promote the protection of the public and the honest and competent practice by a professional of his activities.

The *Code of ethics of the Chambre de la sécurité financière* applies to all insurance of persons representatives, group insurance and annuities representatives and financial planners, regardless of the sector classes in which they pursue their activities (s. 2 CECSF).

All representatives must ensure that their employees and mandataries comply with the provisions of the Distribution Act and its regulations (s. 3 CECSF).

4.6.2.2 Duties and obligations of representatives

Duties and obligations towards the public

A representative must promote improvement of the quality and availability of the services that he offers to the public (s. 4 CECSF). He must also promote measures to provide education and information in the field in which he practises (s. 5 CECSF). His conduct must be characterized by dignity, discretion, objectivity and moderation (s. 6 CECSF). A representative must therefore refrain from practising in conditions or in a state liable to compromise the quality of his services (s. 7 CECSF). He must also refrain from persistently or repeatedly urging a person to use his professional services or purchase a product (s. 8 CECSF).

Duties and obligations towards clients

In the practice of his profession, a representative must take into account the limits of his knowledge and the means available to him. Accordingly, he must not undertake or continue a mandate for which he is not sufficiently prepared without obtaining the necessary assistance (s. 9 CECSF).

A representative must not make any misrepresentations as to his level of competence or the quality of his services, or those of his firm or his independent partnership (s. 10 CECSF). He must act towards his clients with integrity and in a conscientious manner, giving them all the information that may be necessary or useful in order to advise them properly (s. 12 CECSF).

An insurance of persons representative must refrain from giving inaccurate or incomplete information. He must provide his clients with the explanations they need to understand and evaluate the products or services that he is proposing or that he provides to them (ss. 12–14CECSF).

An insurance of persons representative must always remain independent and avoid any situation of conflict of interest. He must subordinate his personal interests to those of his client. Accordingly, he may not, among other things (ss. 18 and 19 CECSF):

- Advise a client to invest in a legal person, partnership or property in which he has, directly or indirectly, an interest;
- Conduct any transaction or enter into any agreement or contract whatsoever with a client who, manifestly, is unable to manage his affairs, unless the decisions to conduct these transactions or enter into these agreements or contracts are made by persons who may legally decide in lieu of this client; or
- Conduct any transaction or enter into any agreement or contract whatsoever in the capacity of insurance of persons representative with respect to a client for whom he acts as a dative tutor, curator or advisor to a person of full age within the meaning of the *Civil Code of Québec*. This could also refer to a person for whom he is the mandatary pursuant to a power of attorney or a mandate given in anticipation of incapacity signed by the client, depending on the circumstances.

A representative must not pay or undertake to pay to a person who is not a representative any remuneration, compensation (fees) or other advantage, except where permitted by the Distribution Act (s. 22 CECSF).

Confidential information which a representative obtains from a client must only be used for the purposes for which it was obtained, unless the representative is relieved of that obligation by a provision of law or by order of a competent court. He must not use that information to the detriment of his client or to obtain an advantage for himself.

Finally, a representative must not dissuade his client or any potential client from consulting another representative or another person of his choosing. He must promptly give to his client the books and documents belonging to the client, even if the client owes him sums of money (ss. 28 to 29 CECSF).

Duties and obligations towards other representatives, firms, independent partnerships, insurers and financial institutions

A representative must not, directly or indirectly, make comments of any kind which are false, inaccurate or incomplete about another representative, a firm, an independent partnership, an insurer, a financial institution or one of their representatives, products or services (s. 30 CECSF). He must use fair methods of competition and solicitation (s. 31 CECSF). Accordingly, he must not denigrate, belittle or discredit another representative, a firm, an independent partnership, an insurer or a financial institution (s. 32 CECSF).

An insurance representative must not fail to pay an insurer, upon request or within the prescribed time, the sums of money that he has collected on its behalf (s. 33 CECSF).

Duties and obligations towards the profession

A representative must not practise dishonestly or negligently (s. 35 CECSF).

A representative must not pay a person to act in the capacity of representative if that person does not hold a certificate (s. 37 CECSF). Conversely, he must not accept payment from a person who does not hold a certificate and who acts or attempts to act as a representative (s. 38 CECSF). A representative also must not receive payment from a person other than the person who retained his services (s. 39 CECSF). When he receives a commission, he may only share it within the limits permitted by the Distribution Act (s. 40 CECSF). Moreover, he must not pay or promise to pay compensation for his services to be retained (s. 41 CECSF).

In his dealings with the *Chambre de la sécurité financière*, a representative must, without delay, reply in full and courteously to any letter from the syndic or an assistant of the syndic of the *Chambre de la sécurité financière* or a member of their staff acting in their capacity (s. 42 CECSF). In particular, he must attend any meeting they ask him to attend (s. 43 CECSF). Furthermore, he must not interfere with their work or that of the AMF, the *Chambre de la sécurité financière* or the discipline committee of the *Chambre de la sécurité financière* (s. 44 CECSF).

A representative who is informed that an inquiry is being conducted about him or who is the subject of a disciplinary complaint under section 132 of the *Professional Code*[635] must not contact the person who requested the inquiry (s. 46 CECSF).

Conclusion

As seen in this Module, insurance representatives are subject to various professional and ethical obligations imposed by legislation, contracts, codes of ethics, and the like. Ethics and compliance with the rules of professional practice are fundamental concepts for insurance representatives and are essential for the fulfilment of the common objective of insurance regulators to promote professional excellence for the ultimate benefit of the public. Public confidence in the insurance industry and all its representatives depends on maintaining high standards of ethics. Representatives may be subject to severe financial sanctions or have their licences revoked if they fail to comply with the rules and principles to which they are subject.

635. CQLR, c. C-26.

APPENDIX A

TABLE OF LEGAL PERSONS

LEGAL PERSONS	NUMBER	TITLES OF THE NATURAL PERSON (I.E. INDIVIDUAL)	NUMBER[636]	PRODUCTS THAT MAY BE OFFERED BY THE NATURAL PERSON
Firm in insurance of persons	5,912	Financial security advisor	13,510	Individual life insurance, individual accident and sickness insurance, individual annuity contracts (segregated funds, guaranteed interest accounts (GIAs))
		Accident and sickness insurance representative	702	Individual accident and sickness insurance
Firm in group insurance of persons	2,298	Group insurance and group annuity plans advisor	2,690	Group life insurance, group accident and sickness insurance, group annuity contracts (segregated funds, GIAs)
Firm in group insurance plans	–	Group insurance plans advisor	949	Group life insurance, group accident and sickness insurance
Firm in group annuity plans	–	Group annuity plans advisor	173	Group annuity contracts (segregated funds, GIAs)
Firm in financial planning	1,144	Financial planner (Fin. Pl.)	4,579	Cannot distribute any products.
Advisor (portfolio manager)	416	Advising representative	2,223	Cannot distribute any products. Acts as a manager
Investment dealer	146	Investment dealer representative	11,115	Can sell all types of securities, including mutual funds

636. Data as of 2017-08-17. A natural person can hold a licence in a number of sectors and/or sector classes.

LEGAL PERSONS	NUMBER	TITLES OF THE NATURAL PERSON (I.E. INDIVIDUAL)	NUMBER[637]	PRODUCTS THAT MAY BE OFFERED BY THE NATURAL PERSON
Mutual fund dealer	75	Mutual fund dealer representative	22,989	Mutual funds
Scholarship plan dealer	11	Scholarship plan dealer representative	551	Scholarship plans
Exempt market dealer	405	Exempt market dealer representative	1,634	Products exempt from the obligation to prepare a prospectus (e.g.: products sold through an offering memorandum)
				Products sold to accredited investors
Restricted dealer	8	Restricted dealer representative	19	According to the terms, conditions, restrictions or requirements applied to his registration
Real estate agency	1,095	Real estate broker	11,074	Real estate brokerage and hypothecary (mortgage) brokerage
Mortgage agency	45	Mortgage broker	739	Hypothecary (mortgage) brokerage

637. Data as of 2017-08-17. A natural person can hold a licence in a number of sectors and/or sector classes.

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