

CANADA

COURT OF APPEAL

PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No:
No: **500-06-001057-203**

**CENTRE DE SANTÉ DENTAIRE
GENDRON DELISLES INC.**, a company
incorporated under the laws of the Province of
Québec and headquartered at 4870 Boulevard
des Forges Trois-Rivières (Québec), G8Y 1W9

APPELLANT - Applicant

v.

**LA PERSONNELLE ASSURANCES
GÉNÉRALES INC.**, a company incorporated
pursuant to the laws of Canada, headquartered
at 6300 Guillaume-Couture Boulevard, Lévis.
Québec G6V 6P9

and

**PROMUTUEL BAGOT, SOCIÉTÉ
MUTUELLE D'ASSURANCE GÉNÉRALE**,
a company incorporated pursuant to the laws of
Quebec, headquartered at 1840, RANG
SAINT-ÉDOUARD, SAINT-LIBOIRE QC
J0H 1R0

and

**PROMUTUEL BOIS-FRANCS, SOCIÉTÉ
MUTUELLE D'ASSURANCE GÉNÉRALE**,
a company incorporated pursuant to the laws of
Quebec, headquartered at 1400, RUE NOTRE-
DAME EST, VICTORIAVILLE QC G6P 0B4

and

**PROMUTUEL BORÉALE, SOCIÉTÉ
MUTUELLE D'ASSURANCE GÉNÉRALE**,
a company incorporated pursuant to the laws of
Quebec, headquartered at 282, 1RE AV E,
AMOS QC J9T 1H3

and

**PROMUTUEL CENTRE-SUD, SOCIÉTÉ
MUTUELLE D'ASSURANCE GÉNÉRALE**,
a company incorporated pursuant to the laws of
Quebec, headquartered at 3077, BOUL DE
PORTLAND, SHERBROOKE QC J1L 2Y7

and

**PROMUTUEL CHAUDIÈRE-
APPALACHES, SOCIÉTÉ MUTUELLE
D'ASSURANCE GÉNÉRALE**, a company
incorporated pursuant to the laws of Quebec,
headquartered at 126, RUE OLIVIER,
LAURIER-STATION QC , G0S 1N0

and

**PROMUTUEL DE L'ESTUAIRE,
SOCIÉTÉ MUTUELLE D'ASSURANCE
GÉNÉRALE**, a company incorporated
pursuant to the laws of Quebec, headquartered
at 149, RUE SAINT-GERMAIN EST,
RIMOUSKI QC G5L 1A9

and

**PROMUTUEL DEUX-MONTAGNES,
SOCIÉTÉ MUTUELLE D'ASSURANCE
GÉNÉRALE**, a company incorporated
pursuant to the laws of Quebec, headquartered
at 200, RUE DUBOIS, SAINT-EUSTACHE
QC J7P 4W9

and

**PROMUTUEL DU LAC AU FLEUVE,
SOCIÉTÉ MUTUELLE D'ASSURANCE
GÉNÉRALE**, a company incorporated
pursuant to the laws of Quebec, headquartered
at 951, BOUL MONSEIGNEUR-DE LAVAL,
BAIE-SAINT-PAUL QC , G3Z 2W3

and

PROMUTUEL LANAUDIÈRE, SOCIÉTÉ MUTUELLE D'ASSURANCE GÉNÉRALE, a company incorporated pursuant to the laws of Quebec, headquartered at 4100 - 1075, BOUL FIRESTONE, JOLIETTE QC J6E 6X6

and

PROMUTUEL MONTMAGNY-L'ISLET, SOCIÉTÉ MUTUELLE D'ASSURANCE GÉNÉRALE, a company incorporated pursuant to the laws of Quebec, headquartered at 124, BOULEVARD TACHÉ O, C.P. 355, MONTMAGNY QC G5V 3S7

and

PROMUTUEL PORTNEUF-CHAMPLAIN, SOCIÉTÉ MUTUELLE D'ASSURANCE GÉNÉRALE, a company incorporated pursuant to the laws of Quebec, headquartered at 257, BOUL DU CENTENAIRE, SAINT-BASILE QC G0A 3G0

and

PROMUTUEL RIVE-SUD, SOCIÉTÉ MUTUELLE D'ASSURANCE GÉNÉRALE, a company incorporated pursuant to the laws of Quebec, headquartered at 340, RUE PRINCIPALE, SAINT-GERVAIS QC G0R 3C0

and

PROMUTUEL VALLÉE DE L'OUTAOUAIS, SOCIÉTÉ MUTUELLE D'ASSURANCE GÉNÉRALE, a company incorporated pursuant to the laws of Quebec, headquartered at 1400, BOUL GRÉBER, GATINEAU QC J8R 0E1

and

PROMUTUEL VALLÉE DU ST-LAURENT, SOCIÉTÉ MUTUELLE

D'ASSURANCE GÉNÉRALE, a company incorporated pursuant to the laws of Quebec, headquartered at 48, BOUL TASCHEREAU, LA PRAIRIE QC J5R 6C1

and

PROMUTUEL VAUDREUIL-SOULANGES, SOCIÉTÉ MUTUELLE D'ASSURANCE GÉNÉRALE, a company incorporated pursuant to the laws of Quebec, headquartered at 465, AV SAINT-CHARLES, VAUDREUIL-DORION QC , J7V 2N4

and

PROMUTUEL VERCHÈRES - LES FORGES, SOCIÉTÉ MUTUELLE D'ASSURANCE GÉNÉRALE, a company incorporated pursuant to the laws of Quebec, headquartered at 300, RTE MARIE-VICTORIN, BAIE-DU-FEBVRE QC

and

ROYAL & SUN ALLIANCE DU CANADA, SOCIÉTÉ D'ASSURANCES a company incorporated pursuant to the laws of Canada situated at 800-18 ST York Toronto Ontario M5J2T8 Canada

and

ECONOMICAL, COMPAGNIE MUTUELLE D'ASSURANCE a company incorporated pursuant to the laws of Canada, headquartered at 111, Westmount Road S. PO BOX 2000
Waterloo (Ontario) N2J4S4

and

LA CAPITALE ASSURANCES GÉNÉRALES INC. a company incorporated pursuant to the laws of Canada, headquartered

at 625, Jacques-Parizeau St Québec (Québec)
G1R2G5

and

**DESJARDINS GROUPE D'ASSURANCES
GÉNÉRALES INC.**, a company incorporated
pursuant to the laws of Canada, headquartered
at 6300 BOUL. Guillaume-Couture Lévis
Québec G6V6P9 Canada

RESPONDENTS - *Defendants*

NOTICE OF APPEAL
(Article 352 C.C.P.)

Appellant

Dated: September 13, 2021

FACTS AND GROUNDS OF APPEAL

1. The appellant appeals from a final judgment of the Superior Court of Quebec, rendered on August 18, 2021, by the Honourable THOMAS M. DAVIS (the “**Judge**”), District of Montreal, sitting in the class action chamber denying to the Appellant authorization to institute a class action;
2. The date of the notice of judgment is September 19, 2021;
3. The authorization hearing was held jointly with two other files:
 - *9306-6876 Québec inc. c. Intact compagnie d'assurance* (file 500-06-001056-205);
 - *Centre dentaire Boulevard Galeries d'Anjou inc. c. L'Unique assurances générales inc.* (file 500-06-001054-200)
4. The duration of the joint hearing of the same motions was for three (3) days (April 21, 22 and 23, 2021);

5. The appellant files with this notice of appeal, a copy of the first instance judgment (the “**Judgement**”) in **Schedule 1** and the court minutes of the authorization hearing in **Schedule 2**;
6. This file is not confidential;
7. The Appellant asks that the Judgment of the Superior Court be overturned and that the authorization be granted, the whole with costs in both Courts;

A. Summary of the Litigation History

8. On or about April 6th, 2020, the Appellant instituted the present proceedings and filed his original *for Authorization to Institute a Class Action and to Obtain the Status of Representative Plaintiff* (here after “**Promutuel Application**”) (**Schedule 2**) *on behalf of the following group*:

“All dentists (whether practicing individually or through a professional corporation) and dental offices in the Province of Québec who, as of March 16, 2020, were subject to a contract of insurance with one or more of the Defendants that included “business interruption” or “operating loss” coverage” (the “Class” or “Class Members”);

9. The present Court file relates to a proposed class action in relation to the Respondents’ refusal to provide Business Interruption Insurance, hereinafter “BII”, due to the outbreak of COVID-19 Pandemic and the impact of that denial on dentists and dental clinics;
10. Two similar class actions were also commenced by other dentist petitioners for BII due to the Pandemic, being:
 - *Centre dentaire Boulevard Galeries d'Anjou inc. c. L'Unique Assurances Générales Inc.*, issued on or about March 31, 2020 (file 500-06-001054-200);
 - *9306-6876 Québec inc. c. Intact compagnie d'assurance* issued on or about April 3, 2021 (file 500-06-001056-205);
11. On or about April 9, 2021, the Appellant filed an *Amended Application for Leave to Amend* regarding the original motion for *Authorization to Institute a Class Action and to Obtain the Status of Representative Plaintiff* (adducing further particulars

regarding a change in language to the insurance policy of Promutuel to include an explicit exclusion of coverage to “*transmissible diseases*”), which was partially granted by the Superior Court of Quebec on April 21, 2021 (Schedule 2);

12. On August 18, 2021, the Honourable Justice Davis, J.C.S. issued three different judgements regarding the dentist BII class actions in Quebec. While denying to the Appellant’s motion to institute a class action (Schedule 1) as well as to *9306-6876 Québec inc.* (file 500-06-001056-205), His Honour authorized the class action against L’Unique (file 500-06-001054-200) on behalf of Quebec dentists insured by that insurer;

B. Summary of the relevant facts

13. The Respondents are authorized insurers in Quebec who undertake, effect, agree, and offer, for valuable consideration, insurance through a variety of different insurance products, including commercial insurance and business interruption policies;
14. Business Interruption Insurance, also known as, *inter alia*, Operating Loss Coverage, hereinafter “BII”, permits a business or business owner to insure against loss of income that the business would have expected to generate were it not for the intervention of an unexpected event (“BII Coverage”);
15. Beginning in March 2020, there was a global health pandemic resulting from the novel coronavirus (“COVID-19” or the “virus”);
16. On March 13, 2020, the Government of Québec declared a provincial public health emergency;
17. On March 16, 2020, dentists across Québec were advised by their Ordre to only accept and participate in emergency procedures;
18. On March 24, 2020, the Government of Québec ordered that all non-essential businesses be shut, and that dentists perform at most emergency procedures only;
19. In the context of the Appellant’s claim, the relevant “Business Interruptions” are those occasioned as a direct or indirect result of the COVID-19, due to loss of

revenue occasioned by the government orders and by the risk of release, discharge or contaminations by COVID-19 at his dental clinic;

C. Grounds of Appeal

20. The Honorable Judge erred in his judgment under Appeal for the reasons set forth below:

I. Errors of law:

21. The authorizing Judge erred in law in his interpretation of Promutuel insurance policy, in particular in respect of:

- a) the interpretation of “*physical damage*” (“*dommages matériels*”);
- b) concluding that the “*loss of use*” is not covered by the Business Interruption Insurance policy;
- c) affirming that contamination by the virus such as Covid-19 is excluded by the Business interruption coverage;
- d) failing to properly apply the governing principles of interpretation for contracts of insurance;

22. The Appellant intends to demonstrate at trial that the Business interruption Insurance of Promutuel is triggered as:

- the “*physical damage*” includes “*loss of use*”;
- COVID-19 constitutes a “*physical damage*” and is presented as a common question to be dealt with on the merits of the case;
- Contamination by the COVID-19 virus is not expressly excluded by the Business Interruption coverage; and/or
- Contamination by COVID-19 triggers Business Interruption coverage;

23. These errors of law are overriding because the outcome of the present class action relies on it;

II. Palpable and overriding errors in in findings of fact and error of law:

24. The authorizing Judge erred in concluding that the facts alleged by the Appellant do not appear to justify authorization, including:

- a. Breach of contract:

- By concluding that there is no allegation in the Appellant's Application for Authorization regarding contamination with COVID-19;
- By concluding that the Appellant's cause of action in regard to business interruption was based on government orders setting aside the allegations in regard to the contamination by COVID-19;

b. Breach of the *Competition Act*

- By disregarding the facts alleged and prematurely concluding no fault by the insurer at this stage of the proceedings, without allowing the judicial inquiry to be dealt with, on the merits of the case;

25. The Appellant intends to demonstrate that the facts alleged in his Application of Authorization justifies the conclusion sought and that the criteria of 575(2) C.c.P. is met;
26. These errors of facts and law are overriding given their effect on the Judge's assessment with respect to the criteria at the heart of this litigation that is of article 575(2) C.c.P.;
27. The Appellant reserves its right to add or amend any reason for appeal;

CONCLUSIONS

The appellant will ask the Court of Appeal to:

- **ALLOW** the appeal;
- **SET ASIDE** the first instance Judgment;
- **AUTHORIZE** the Applicant to institute a class action, and,

APPOINT the Applicant as the representative plaintiff on behalf of "all dentists (whether practicing individually or through a professional corporation) and dental offices in the Province of Québec who, as of March 16, 2020, were subject to a contract of insurance with one or more of the Defendants that included "business interruption" or "operating loss" coverage";

IDENTIFY the principle questions of fact and law to be addressed collectively at the trial, as the following:

- a) Does COVID-19 contamination, or the inherent risk of COVID-19 contamination, constitute a physical harm or damage to property?
- b) Did the March 16, 2020 recommendation from the *Ordre* that dentists cease practice except for emergency procedures on account of COVID-19 trigger the business interruption provision of the Policy issued to the Applicant and other Class Members, such that the Defendants are liable to provide BII Coverage in accordance with the applicable Policies?
- c) Did the March 24, 2020 closure of non-essential businesses and the consequential limitation that dentists cease practice (except for emergency procedures) on account of COVID-19 trigger the business interruption provision of the Policy issued to the Applicant and other Class Members, such that the Defendants are liable to provide BII Coverage in accordance with the applicable Policies?
- d) Did the Defendants act in concert or engage in anti-competitive behaviour contrary to the *Competition Act* through the coordination of their response to Claims made for Business Interruptions occasioned by COVID-19 Contaminations and, if so, are they liable to the Class for damages and costs pursuant to the *Competition Act*?

IDENTIFY the conclusions sought by the class action to be instituted as being the following:

GRANT the Applicant's action against the Defendants;

AUTHORIZE the Applicant to commence this action as a class action;

CONDEMN the Defendants to pay an amount in compensatory damages to every Class Member, in an amount to be determined by the Court through individual assessments, plus interest as well the additional indemnity;

GRANT the class action of the Applicant on behalf of all the Class Members;

ORDER the treatment of individual claims of each Class Member in accordance with Articles 599 to 601 C.C.P.;

THE WHOLE with interest and additional indemnity provided for in the *Civil Code of Québec* and with full costs and expenses including experts' fees and publication fees to advise members;

DECLARE that all Members of the Class that have not requested their exclusion from the Class in the prescribed delay to be bound by any judgment to be rendered on the class action to be instituted;

FIX the delay of exclusion at 30 days from the date of the publication of the notice to the Members;

ORDER the publication of a notice (the content and distribution of which is to be determined after authorization has been ordered and all applicable appeal periods have expired) to the Members of the Class in accordance with Article 579 C.C.P.;

- **CONDEMN** the respondent to pay the appellant legal costs both in first instance and on appeal.

This notice of appeal has been notified to the Respondents-Defendants :

La Personnelle Assurances Générales Inc.;

Promutuel Bagot, Société Mutuelle D'assurance Générale; Promutuel Bois-Francis, Société Mutuelle D'assurance Générale;

Promutuel Boréale, Société Mutuelle D'assurance Générale; Promutuel Centre-Sud, Société Mutuelle D'assurance Générale;

Promutuel Chaudière-Appalaches, Société Mutuelle D'assurance Générale;

Promutuel De L'estuaire, Société Mutuelle D'assurance Générale; Promutuel Deux-Montagnes, Société Mutuelle D'assurance Générale;
 Promutuel Du Lac Au Fleuve, Société Mutuelle D'assurance Générale;
 Promutuel Lanaudière, Société Mutuelle D'assurance Générale; Promutuel Montmagny-L'islet, Société Mutuelle D'assurance Générale;
 Promutuel Portneuf-Champlain, Société Mutuelle D'assurance Générale;
 Promutuel Rive-Sud, Société Mutuelle D'assurance Générale; Promutuel Vallée De L'outaouais, Société Mutuelle D'assurance Générale;
 Promutuel Vallée Du St-Laurent, Société Mutuelle D'assurance Générale;
 Promutuel Vaudreuil-Soulanges, Société Mutuelle D'assurance Générale;
 Promutuel Verchères - Les Forges, Société Mutuelle D'assurance Générale;
 Royal & Sun Alliance Du Canada, Société D'assurances, Economical, Compagnie Mutuelle D'assurance; La Capitale Assurances Générales Inc.,
 And,
 Desjardins Groupe D'assurances Générales Inc.

To counsels of the Respondents-Defendants:

Me Marc-André McCann
 Me. Stéphane Pitre
 BORDEN LADNER GERVAIS LLP
Counsels of Respondent Groupe Promutuel Fédération De Sociétés Mutuelles D'assurance Générale

Me Vincent de l'Étoile
 Me Valérie Lemaire
 LANGLOIS AVOCATS, S.E.N.C.R.L.
Counsels of Respondent of Desjardins and La Personnelle

Me Céline Legendre
 Me Jessica Harding
 Me Julien Hynes-Gagné
 OSLER, HOSKIN & HARCOURT LLP
Counsels of Respondent of Economical, Compagnie Mutuelle D'assurance

Me Vincent Rochette
 NORTON ROSE FULBRIGHT CANADA S.E.N.C.R.L., s.r.l.
Counsels of Respondent La Capitale Assurances Générales Inc

Me Louis-Philippe Constant
CLYDE & CIE CANADA S.E.N.C.R.L.
Counsels of Respondent Royal & Sun Alliance Du Canada, Société D'assurances

and to the Office of the Superior Court of Quebec, District of Montreal.

Montreal, **September 13, 2021**

Merchant Law LLP

MERCHANT LAW GROUP LLP
Attorneys for the APPELLANT-
Applicant

AFFIDAVIT OF ME CHRISTINE NASRAOUI

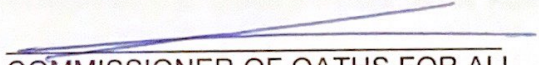
I, the undersigned CHRISTINE NASRAOUI, lawyer, practicing my profession with the law firm Merchant Law Group LLP, at the business address 10 Notre-Dame Est, Suite 200, Montréal, Québec, H2Y-1B7, solemnly affirm that:

1. I am one of the attorneys representing the *Appellant-Applicant* in the present action;
2. All the facts alleged in this *Notice of appeal* are true to the best of my knowledge.

AND I HAVE SIGNED,


CHRISTINE NASRAOUI

SOLEMNLY AFFIRMED TO BEFORE ME
AT Laval, this Sept 13, 2021


COMMISSIONER OF OATHS FOR ALL
THE PROVINCE OF QUEBEC

Victor Mensah-Dzraku g.a.c.s.

CANADA

**PROVINCE OF QUEBEC
DISTRICT OF MONTREAL**

No:

No: **500-06-001057-203**

COURT OF APPEAL

**CENTRE DE SANTÉ DENTAIRE
GENDRON DELISLES INC.**

APPELLANT - *Applicant*

v.

**LA PERSONNELLE ASSURANCES
GÉNÉRALES INC,**

and *AL.*

RESPONDENTS - *Defendants*

LIST OF SCHEDULES IN SUPPORT OF NOTICE OF APPEAL

Appellant

Dated September 13, 2021

SCHEDULE 1: Judgment rendered by the Honourable THOMAS M. DAVIS, of the Superior Court of Quebec rendered on August 18, 2021;

SCHEDULE 2: Court minutes of the Authorization hearing held on April 21, 22 and 23, 2021.

No:
No: **500-06-001057-203**

Within 10 days after notification, the respondent, the intervenors and the impleaded parties must file a representation statement giving the name and contact information of the lawyer representing them or, if they are not represented, a statement indicating as much. If an application for leave to appeal is attached to the notice of appeal, the intervenors and the impleaded parties are only required to file such a statement within 10 days after the judgment granting leave or after the date the judge takes note of the filing of the notice of appeal. (Article 358, para. 2 C.C.P.).

COURT OF A PPEAL OF QUEBEC
DISTRICT OF MONTGREAL

CENTRE DE SANTÉ DENTAIRE GENDRON DELISLES INC.

APPELLANT - Applicant

v.

**LA PERSONNELLE ASSURANCES GÉNÉRALES INC,
and AL.**

RESPONDENTS- Defendants

NOTICE OF APPEAL

Appellant

Dated September 13, 2021

ME CHRISTINE NASRAOUI
MERCHANT LAW GROUP LLP
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Montreal, Quebec H2Y 1B7
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BC 3841

The parties shall notify their proceedings (including briefs and memoranda) to the appellant and to the other parties who have filed a representation statement by counsel (or a non-representation statement). (Article 25, para. 1 of the Civil Practice Regulation)

If a party fails to file a representation statement by counsel (or non-representation statement), it shall be precluded from filing any other pleading in the file. The appeal shall be conducted in the absence of such party. The Clerk is not obliged to notify any notice to such party. If the statement is filed after the expiry of the time limit, the Clerk may accept the filing subject to conditions that the Clerk may determine. (Article 30 of the Civil Practice Regulation)