



CONSULTATION OF THE WORKING GROUP ON THE INCIDENTAL SELLING OF INSURANCE (CCIR / CISRO)

Brief of the Chambre de la sécurité financière

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The Chambre de la sécurité financière (“the Chamber”) is a self-regulatory organization (“SRO”) established by the *Act respecting the distribution of financial products and services*¹ (“the Act”), whose purpose is to ensure the protection of the public by maintaining discipline among and supervising the training and ethics of its some 31,000 duly certified members who carry on business in the sectors of insurance of persons, group insurance of persons, group savings plan brokerage, financial planning and scholarship plan and investment contract brokerage.

In order to protect the public, the Chamber oversees the conduct of its members when they offer, advise and distribute the financial products and services they are authorized to offer. It also supervises, in the same manner, their continuing professional development².

The Chamber is pleased to respond to the invitation of the Canadian Council of Insurance Regulators (“CCIR”) and the Canadian Insurance Services Regulatory Organizations (“CISRO”) to participate in this consultation relative to the incidental selling of insurance (“ISI”).

Given that the ISI can include products in the fields of damage insurance and insurance of persons, the responses put forward by the Chamber to the questions submitted by the Working Group will focus on ISI products related to the insurance of persons³ and will reflect the self-regulatory regime that governs the mission of the Chamber and the legislative regime in force in Quebec.

INTRODUCTION

In Quebec, the legislation already contains provisions regarding the regulation of ISI or “distribution without a representative”. Sections 408 of the Act and the *Regulation respecting distribution without a representative*⁴ set out the framework for this type of distribution.

This legislative regime is the exception since, for the most part, the primary regime provides that insurance products must be distributed by duly certified representatives.

¹ R.S.Q. c. D-9.2.

² But not with respect to financial planners.

³ The Chamber points out to the Working Group that it took its position on the matter during a public consultation conducted by the Autorité des marchés financiers regarding the sale of insurance products by car dealerships. The brief submitted by the Chamber to the Authority is found on the Chamber’s site, online « www.chambresf.com ».

⁴ 1998, c. 37, s. 210.

Distribution without a representative must remain a method of distribution that is an exception and be limited to specific products that lend themselves to this method and present a minimal risk to consumers. Moreover, the Chamber is of the view that the certification of representatives and its requirements (compulsory professional development, inspection, ethics, etc.) are the best way of protecting and even promoting the protection of the public with respect to this type of insurance product. This is all the more true in today's world where companies tend to circumvent Quebec legislation so as to sell directly products that are similar to insurance, thus avoiding the obligation of certification⁵. In addition, recent Quebec case law speaks of the uncertainty surrounding the concept of ISI or distribution without a representative⁶.

1. **EXCLUSIONS, RESTRICTIONS AND LIMITATIONS (“ERL”)**

1.1 **Questions of the Working Group**

1.1.1 **Other than through the application form, are there other ways to ensure adequate consumer disclosure?**

In Quebec, within the primary regime, that is the regime under which holding a certificate is necessary to distribute insurance products, representatives in insurance of persons must, as members of the Chamber, comply with the ethical standards provided for in the *Code of Ethics of the Chambre de la sécurité financière*⁷ (“Code of Ethics”) and the Act. These legislative instruments contain provisions pertaining to the disclosure of information. For instance, section 12 stipulates that:

A representative must act towards his client or any potential client with integrity and as a conscientious adviser, giving him all the information that may be necessary or useful. He must take reasonable steps so as to advise his client properly.

⁵ The most telling example of this type of product is the replacement guarantee, a product created by car dealers under which they undertake, in the event of theft or total loss of a vehicle, to replace it with a new one.

⁶ See especially *Internationale v. Bureau des services financiers*, AZ-50166438 C.S. 500-05-073976-027, February 25, 2003, *Assomption v. Autorité des marchés financiers*, AZ-50329251, C.S. 200-17-005298-047, August 3, 2005 reversed by the Court of Appeal (2007 QCCA 1062) June 27, 2007, *Boudreau v. Caisse populaire*, AZ-50324320 C.S. 755-05-001926-029, July 19, 2005 and *Bonin v. Picard*, AZ-50257331 C.S. 700-05-011316-019, June 11, 2004.

⁷ O.C. 1039-99, 1999 G.O. 2, 2930

Section 13 reads as follows:

A representative must fully and objectively explain to his client or any potential client the type, advantages and disadvantages of the product or service that he is proposing to him and must refrain from giving information that may be inaccurate or incomplete.

Accordingly, section 14 obliges the representative to provide a client with the explanations needed to understand or assess the product or services offered or rendered by him. Finally, section 16 provides that:

No representative may, by whatever means, make statements that are incomplete, false, deceptive or liable to mislead.

Section 28 of the Act stipulates that:

Insurance representatives must, before making an insurance contract, describe the proposed product to the client in relation to the needs identified and specify the nature of the coverage offered.

Insurance representatives must also indicate clearly to the client any particular exclusion of coverage, if any, having regard to the needs identified and provide the client with the required explanations regarding such exclusions.

Although they are an important means of ensuring the protection of the public, these ethical requirements apply solely to representatives who hold a certificate issued by the Autorité des marchés financiers (“the Authority”), but do not apply to those involved in ISI.

Although the Chamber is of the view that it is imperative not to marginalize the primary regime because it offers better protection for the public, the Chamber is of the view that the provisions of the Act regarding ISI could contain certain guidelines to cover situations where it would be acceptable to provide for a regime of exception. The provisions of the Act in this respect establish a series of requirements that insurers and distributors must abide by.

In particular, insurers must prepare and provide a distributor with a distribution guide containing a description of the product offered,

the nature of the guarantee and the exclusions from the guarantee⁸. This distribution guide must be drafted and presented in accordance with the regulatory requirements of the *Regulation respecting distribution without a representative*⁹ (“Regulation on distribution”). The guide is submitted to the Authority for review¹⁰.

The distributors and the individuals who are called upon to sell the insurance products, as applicable, under the regime of exception, must also fulfil duties as to the disclosure of information. Thus, they must describe to the client the proposed product, define the nature of the guarantee and state clearly all exclusions from the guarantee¹¹. Moreover, they must deliver a copy of the distribution guide to the client before the sale or enrolment is completed¹². Section 436 of the Act establishes the liability of the distributor with regard to any prejudice incurred by a client who has not been given the requisite information.

1.1.2 Should insurers be required to assess eligibility for coverage more extensively, and how long should insurers have to assess eligibility?

In addition to it being difficult for a consumer to determine on his own whether the product offered to him is appropriate, the Chamber is of the view that the eligibility for coverage of a consumer should ideally be assessed by the insurer beforehand and not by the consumer himself.

Given the difficulty for a consumer to have access in certain cases to the master contract and given the complexity of understanding the details contained in the exclusions, limitations and restrictions,

⁸ *Supra* note 1, s. 410-411.

⁹ *Supra* note 4.

¹⁰ *Supra* note 1, s. 414-416. Since March 28, 2008, the Authority requires, based on the “file and use” concept, that insurers provide along with their distribution guide a statement of compliance attesting that the guide meets applicable legal and regulatory requirements. The distribution guide is deemed to be in compliance which enables insurers to immediately offer their products. The Authority will give a summary review to the documents submitted. See the Authority’s bulletin of March 28, 2008, vol. 5, no. 12, pages 23 *et seq.*

¹¹ *Supra* note 1, s. 431, para. 1-2.

¹² *Supra* note 1, s. 435.

the Chamber believes that it would be appropriate to impose additional obligations on insurers with respect to eligibility for coverage. Such obligations would relieve consumers of ISI of the burden of assessing their eligibility for coverage on their own. Moreover, provincial regulatory authorities could conduct a campaign to raise the awareness as well as the accountability of the consumer of this type of product.

In addition, post-claim underwriting (“PCU”) hardly promotes the protection of consumers of ISI as it may lead to gaps in coverage if the insurer cancels the insurance contract *ab initio*. In this case, a consumer who finds himself without coverage could have difficulty in obtaining new insurance if, for example, since the time the initial policy was issued, his insurability has changed.

For all these reasons, the Chamber is of the view that it would be appropriate to set a reasonable time period during which the insurer, while it is assessing the eligibility of the consumer, must provide evidence of temporary coverage. For instance, a period of 60 to 90 days from the signature of the insurance application could be considered. The temporary coverage could end on the date the consumer receives written notice from the insurer to the effect that it has refused to cover the risk.

The Chamber agrees that such a process is more burdensome for insurers, but it certainly better protects the public.

1.1.3 If post-claim underwriting was deemed acceptable in specific situations, how should consumers be informed of it?

According to the Chamber, PCU cannot be deemed acceptable in cases where the insurance of persons covers a significant risk because of the potentially harmful impact that could result from a gap in coverage.

That being said, in cases of minimal risk where it could be deemed on an exceptional basis acceptable to use PCU, insurers could be required to include in their distribution guide, as well as in their insurance application form, a warning explaining PCU and its potential impact. For example, the distributor could be obliged, as part of the disclosure obligation mentioned above, to explain to the consumer what PCU entails. Consequently, the insurer would have to see that the distributors of the insurance products are properly trained with respect to those products where PCU could be used.

1.1.4 How should exclusions, restrictions and limitations (“ERLs”) applicable to group insurance policies be disclosed to consumers?

As with our suggestion regarding the use of PDU, we are of the view that a clear, detailed and specific description of the ERLs in the distribution guide of the insurer would better inform consumers. It could be required that the distributor read, with the consumer, the ERLs and obtain his signature attesting that they were explained to him. Section 431, paragraph 2 of the Act provides that the person distributing the product must clearly explain the exclusions under the guarantee to enable the client to decide whether he is in a situation of exclusion under the guarantee. We feel that this requirement is justified since simply handing out the distribution guide is not sufficient if it is not accompanied by proper explanations provided by an individual duly trained to do so.

1.2 Other comments of the Chamber

The Chamber would like to add some comments regarding the situation where the proposal of an incidental product by a seller brings about the replacement of an existing contract of a client.

These sellers are not obliged to make a comparison between the suggested product and the product held by the consumer and they are not obliged to question the consumer about the contents of his insurance portfolio¹³. In this context, the consumer could lose vested rights acquired under the insurance policies he already holds.

Therefore, we are of the view that the ISI regime could put in place obligations aimed at overseeing the replacement of existing policies, so as to reduce possible risks for the public.

2 MANAGING POTENTIAL CONFLICTS OF INTEREST

2.1 Questions of the Working Group

2.1.1 What is the most effective way to disclose any potential conflicts of interest?

There is a conflict of interest when an individual is in a position where he may or must choose between his personal interest or that of an entity with which he has a relationship and the interest of his clients.

As part of the primary regime applicable to certified representatives, certain provisions regulate the management of conflicts of interest originating from various sources. We could look to provisions based on principles (“principle-based”) in order to introduce their gist in the management of potential conflicts of interest in ISI.

To that end, section 18 of the *Chamber’s Code of Ethics* provides that:

A representative must, in the practice of his profession, always remain independent and avoid any conflict of interest.

Section 20 goes on to state that:

A representative must be objective when his client or any potential client asks him for information. He must express opinions and make recommendations

¹³ Certified representatives are subject to statutory obligations as regards the notice of replacement. We refer you to sections 18 *et seq.* of the Regulation respecting the pursuit of activities as a representative (c. D-9.2, r. 1.3).

objectively and impartially, without considering his personal interest.

In addition, the Act establishes requirements as to the disclosure of conflicts of interest that certified insurance representatives must satisfy. Section 26 of the Act stipulates that:

Insurance representatives must, when placing a risk with an insurer with which they have, or with which the independent partnership or firm for which they act has, a business relationship, disclose that relationship to the person with whom they are transacting business.

Any direct or indirect interest held by an insurer in the ownership of a firm or held by a firm in the ownership of an insurer, and the granting by an insurer of any benefit or other interest determined by regulation, constitutes a business relationship.

Similarly, section 32 of the Act provides that:

Insurance representatives acting for a firm that is an insurer or that is bound by an exclusive contract with a single insurer must disclose that fact to the person with whom they are transacting business.

However, the Quebec regime is not that demanding in connection with distributions without a representative. In fact, only section 431, paragraph 3 and section 433 of the Act establish requirements, but these requirements are limited to the disclosure of remuneration. There is no provision stipulating that an individual selling incidental insurance should avoid conflicts of interest with his client.

Paragraph 3 of section 431 of the Act reads as follows:

The person distributing the product must also, if the remuneration received by the distributor for the sale for the product exceeds 30% of its sale price, disclose that remuneration to the client.

Along the same line, section 433 of the Act provides that:

A distributor offering more than one insurance product for the same goods must disclose to the client the remuneration paid by the insurer for the sale of each insurance product.

The Chamber is of the view that, in the case of products and services for which a regime of exception specific to ISI is deemed

acceptable, the mere existence of obligations such as those found in section 431, paragraph 3, and section 433 of the Act is not sufficient nor will it afford adequate protection to consumers of this type of products. Provisions like those of sections 18 and 20 of the *Chamber's Code of Ethics* and sections 26 and 32 of the Act could be made applicable to distributors of ISI.

2.2 Other comments of the Chamber

The Chamber is concerned with respect to a current practice among incidental sellers that gives rise to conflicts of interest between the interests of consumers and those of the incidental sellers.

The premiums for incidental insurance paid, for example when a vehicle is purchased, are, if the consumer so wishes, added to the capital and then financed in the same way as the capital itself. In the case where the property to which the insurance is attached is sold before the financing term has ended, consumers forget, more often than not, to recover the premiums paid in advance. The distributors and their sellers are not inclined to inform consumers about this fact, since they get to keep the acquired commissions.

We are of the view that clear disclosure obligations, both at the time the property is purchased and at the time it is resold, could promote the adequate management of conflicts of interest and give consumers a better understanding of their rights and the insurance products they purchase.

3 ROLE AND RESPONSIBILITIES OF INCIDENTAL SELLERS AND INSURERS

3.1 Questions of the Working Group

3.1.1 What is the most effective mechanism for ensuring an appropriate level of product knowledge by sellers?

In Quebec, representatives in insurance of persons subject to the primary regulatory regime have the responsibility and the obligation to keep current their knowledge and skills in the different subjects related to their practice, and especially in

compliance matters. These obligations are set out in the *Regulation of the Chambre de la sécurité financière respecting compulsory professional development*¹⁴ (“Regulation governing compulsory professional development”).

The regime of exception for distribution without a representative found in the Act does not provide for any training requirements to enable entry into the business nor any ongoing training requirements for the distributors and the individuals to whom they entrust the distribution of insurance products. The Act contains only a few provisions, insufficient in our eyes, intended for insurers and distributors and aimed at ensuring that the above-mentioned persons have sufficient knowledge of the incidental insurance products that they sell. Section 420 of the Act stipulates:

Depending on the complexity of the product concerned, the insurer must, in addition to preparing a distribution guide, take all other appropriate steps to ensure that its distributors are sufficiently familiar with the product.

Under section 421 of the Act, the insurer must also maintain a « *consultation service to answer any inquiries from a distributor or from a client concerning the distribution guide* ».

Similarly, section 429 of the Act, intended for distributors, provides:

A distributor must, before offering an insurance product, take all necessary steps to ensure that every person responsible for distributing the product is sufficiently familiar with the distribution guide relating to the product.

The problem with these provisions is that they limit the obligations to a good understanding of the distribution guide. Although a good understanding of the product by the distributor and the persons it appoints is a vital and essential component of consumer protection, we are of the view that the skills of the individuals involved in ISI should be more developed. The abilities, skills and knowledge needed to determine the needs of the client are also, if

¹⁴ O.C. 1010 – 2006, 2006 G.O. 2,3580

not more so, essential to the selection of an insurance product that suits those needs¹⁵.

For this reason, we are of the view that to better protect the public, initial basic training should be provided covering at least the FNA, compliance and ethics and should be made compulsory for ISI.

Without making this training as comprehensive as the one certified representatives in insurance of persons must undergo in Quebec, it could be desirable to require a regular updating of basic knowledge. Such a training program could be provided by provincial insurance regulators or by the insurers themselves. In the latter case, the insurers could be called upon to have the contents of these training programs approved by the relevant regulatory entity.

3.1.2 Are consumers in a position to be adequately informed about their decision to purchase ISI products? Consumers may rely on information provided by ISI sellers to make these decisions. What form of regulatory environment would be the most appropriate to enforce acceptable standards of practice?

As stated above, we are of the view that the complexity of life, health and loss of employment insurance products requires that the client be able to benefit from an analysis of his needs as well as having access to sound advice given by a person who holds a certificate, who is properly trained and whose actions are governed by recognized ethical standards. Certification allows for greater protection for the public and allows the public to have a recourse if necessary, such as discipline by peers, indemnification, mediation, etc.

¹⁵ In Quebec, certified representatives in insurance of persons must do a written FNA and justify the products and services offered and sold to the client.

Cases where the primary regime could be set aside are, as practice has shown, exceptional and should only pertain to simple, very specific products which serve to satisfy an *ad hoc* insurance need presenting a negligible risk. In this sense, it could be appropriate to establish a series of criteria that a product must meet before it is distributed outside of the primary regime.

Moreover, for ISI cases where the regime of exception would apply, it may be pertinent to assess the possibility to adapt the rules to allow for the presence, at commercial establishments, of a certified representative responsible for the underwriting of products. Such representative could, for example, act through the contract administrator. Moreover, this administrator could be made subject to some additional obligations. These additional obligations could, for example, be based upon the responsibilities borne by firms which are duly registered under the Act. This evaluation will have to balance and consider the risks of conflicts of interest that could occur. We refer you to the solutions proposed by the Chamber in its brief on the distribution of insurance products by car dealerships¹⁶. In this brief, we expressed the opinion that registering car dealerships as insurance firms was not advisable given the risks of conflicts of interest and tied selling that could arise.

Finally, we wish to point out that a regulatory framework such as that specified in sections 408 *et seq.* of the Act provide minimal protection for consumers and should serve as a starting point for any related regulatory initiatives. Most of these provisions, if not complied with, result in penal sanctions such as fines. Although these sanctions could constitute a means of regulation, they are not a means of prevention or improvement of the skills of those involved in ISI. We are of the view, as mentioned earlier, that a regime based on defined skills and ethics such as the one which governs duly certified representatives, provides adequate

¹⁶ The pertinent comments can be found on pages 5 to 9 of this brief, online: « www.chambresf.com ».

protection of consumers of complex incidental insurance products that cover risks which are not negligible.

3.1.3 Should ISI sellers be subject to supervision by the insurers? If not, by whom?

The supervision of individuals who sell ISI should be carried out in a concerted manner by the insurers and the dealerships-distributors, all under the supervision of the relevant provincial regulatory entities.

For instance, insofar as we are suggesting the implementation of a minimal basic training requirement for persons working under a regime of exception for ISI, insurers could be required to develop training programs that distributors will have to provide to these individuals. Thus, insurers would be obliged to get approval from the regulatory entities for the training content and to provide appropriate training to their distributors who in turn would be obliged to provide such training to their ISI sellers. Finally, if insurers use the services of contract administrators¹⁷, we are of the view that these contract administrators should bear some responsibility with respect to the supervision of ISI sellers.

4 AVAILABILITY OF STATISTICAL INFORMATION

4.1 Questions of the Working Group

4.1.1 What is the best way for insurers to report information pertaining specifically to ISI?

The Chamber agrees with the Working Group that gathering statistical information on ISI is pertinent and desirable.

Use could be made of the managers of insurers as well as of ISI distributors in this regard.

¹⁷ In Quebec, Vision Avant-Garde, Préluc, MécaGroupe, Voyer Marketing and HPS are some of the companies offering ISI contract administration services.

However, we leave it to the insurers who are mainly concerned with the issue to suggest to you the best ways of collecting this information.

4.1.2 What challenges would insurers face in having to comply with a new reporting requirement pertaining specifically to ISI?

We defer to the insurers since they are better able to answer the question of the Working Group.

CONCLUSION

As stated throughout this brief, the Chamber is of the view that appropriate consumer protection is achieved first and foremost through the primary regime which governs the distribution of insurance products and that it would be unwise to broaden, by regulatory means, the regime of exception. This position is justified, by among other things, the fact that in Quebec, despite the existence of a legislative framework for ISI, ongoing activities in this sector have led to uncertainty and abuses.

It would be advantageous to carry out an assessment of the products involved to determine whether it is appropriate for the protection of the public that these products be governed by a regime of exception for ISI. We suggest the creation of a working group which would be entrusted to make such an assessment together with the relevant regulatory entities.

For these products, a regulatory regime which offers increased guarantees of protection for consumers would be desirable. Thus, we are of the view that such a regime could be based upon the primary regime, namely as regards disclosure obligations, the management of conflicts of interest and the acquisition of the required knowledge and skills. The success of the primary regime that we have witnessed when carrying out our mission allows us to believe that a regime based on it can only be beneficial for the protection of the public.