

Legal newsletter for business entrepreneurs  
and executives

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## YOUR INSURANCE CONTRACT ON THE WEB

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Did you shop for your last car insurance policy on the Web?

If you did, you are part of the growing number of people who now shop for their insurance online.

Online insurance sales are a rapidly growing phenomenon: publicity is omnipresent. According to available statistics, in Quebec only, online purchases of insurance products represented \$363 million in January 2010, which represents a 102% increase as compared to the same period in 2009, and all indications are that this will be a lasting tendency.

### THE CURRENT PICTURE

Car insurance sales are much more common on the Internet than sales of home insurance, life insurance or business insurance. Why is that? Some insurance policies, such as car insurance policies, are regulated while others, such as travel insurance, are mass-market products. The information required for taking out such policies may be contained in a simple form completed by the client. Other types of insurance, such as life insurance and business insurance, require more information, for example, the signature of the client, the communication of additional documents and information and sometimes even the visit of the broker.

Many insurers and insurance intermediaries currently offer the possibility of submitting a car insurance proposal online. Some of them offer home insurance.

However, very few of them offer the possibility of entering into the insurance contract online. The Internet mostly constitutes a privileged means of establishing communications with potential insurance purchasers but, generally, the more traditional means are still used to communicate and finalize transactions.

We also note the emergence of a trend among certain insurers who make the files of their clients available online. Such a practice allows the insured to make a claim and follow its processing online through access to his file on the Internet, much like online banking.

### THE NEW ACTORS

Before the occurrence of the online insurance phenomenon, the insurance quote was often made through a broker. The client answered the questions and provided all information relevant to the risk by phone. The broker then sent the quote request to the insurer, which issued the policy, the riders, the formal commitments and the declarations. Certain insurers received insurance requests directly.

Today, both the insurers, through direct sales, and the brokers are online. New players are also entering the market, such as the aggregators and website managers. The aggregators gather price quotations submitted by various brokers after the client has filled in his quote form online. Although the client is sometimes unaware of it, the information he discloses is forwarded to the websites of various brokers who generate price quotations. These quotes are then gathered in a comparative table, which appears on the aggregator's website and allows the client

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to rapidly compare the premiums quoted by the brokers for the insurance he wishes to buy. Lastly, the client generally receives calls from several brokers for the purposes of compiling the information received and entering into the insurance contract.

Direct insurers are increasingly present on the Internet. This phenomenon has a direct impact on brokers and makes the market more aggressive at the offer level. All these participants are part of the same environment and the client can easily and rapidly obtain several quotes for the insurance product he seeks, regardless of the intermediary he chooses.

However, what about the service and duties and obligations of each party involved?

### THE LEGISLATIVE FRAMEWORK

The forming of the contract, as well as the sale and distribution of insurance products online, are governed by several statutes, including the *Civil Code of Québec*, the *Act respecting insurance*, the *Act respecting the distribution of financial products and services*, the *Act to establish a Legal framework for information technology*, the *Act respecting the Protection of personal information in the private sector*, the

*Consumer Protection Act* and the *Charter of the French language*. These statutes apply generally, meaning that no statute specifically applies to online insurance sales. In practice, this situation creates certain grey zones. In view of the fact that this is a relatively new phenomenon, case law on the subject is also rather sparse.

### DUTY TO ADVISE AND INFORM

Both the broker and agent of the insurer have a duty to advise and inform their clients. Although online insurance sales promote easy and speedy access to insurance products, even outside business hours, the broker and the agent of the insurer are required to comply with their obligations to inform in respect of the product offered and ensure that it is suitable for the client. How can they manage to correctly discharge their duties?

In our opinion, an intervention by the broker or the insurer's agent is necessary at the time an online quote is provided in order for them to discharge their duties. In this regard, we suggest that the client contact the broker or insurance agent as soon as possible during the process of online insurance quotes submission.

How does one ensure that the client adequately declares the risk, understands correctly the questions asked and gives an enlightened consent respecting the insurance product sold?

Many possibilities and communication tools are available, including:

- ▶ following the transmission of the online quote request by the client, the review, by the broker or insurer's agent, of the completed form during a discussion with the client on the phone;
- ▶ an online chat with the insurance broker or the insurer's agent;
- ▶ the use of information bubbles;
- ▶ communication of the consent through a « click » and/or email and acknowledgment of receipt.

### "PAPERFREE" TREND

Although the functional equivalence of technological documents is now recognized and available technological means allow us to save virtually everything, insured parties should retain a hard copy of their insurance contracts and any other documents which led to the insurance contract being entered into. So, unless it is possible to prove the integrity of the electronic version of the insurance contract saved on one's computer and that it was securely saved and that it was not falsified, it is recommended that one retain a hard copy of these documents.

### CONCLUSION

The insurance field is undergoing changes. The Internet is a very interesting marketing tool for brokers, direct insurers and other insurance industry participants. However, it must be used prudently in order to comply with the legislation governing the forming of the insurance contract and one must especially make sure that all parties agree on the same risk and the conditions of the insurance contract.

## BUSINESS DEVELOPMENT: THE ABORIGINAL ISSUE

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A significant part of Quebec's territory is the subject of claims by various aboriginal groups. Any business having a project, such as the exploitation of wind, halieutic or natural resources or simply establishing a real estate project, a golf course or a resort may face aboriginal law issues. What should the business be aware of? How should it act?

### LAND COVERED BY THE JBNQA OR NOT?

Signed in 1975, the James Bay and Northern Quebec Agreement is binding on the governments of Quebec and Canada as well as on the Cree and Inuit. It was signed in response to the territorial claims of these aboriginal groups, and the Naskapis' claims in 1978, on the designated region. Since then, the rights and obligations of each party are established and the framework for negotiations is defined respecting any development project on land covered by the agreement. However, the situation is different on the remainder of Quebec's territory.

### CLAIMS EVERYWHERE!

It is often mistakenly believed that if a business does not conduct activities in the High Arctic, it needs not to be concerned with aboriginal law issues. Now, the claims of the various aboriginal groups, which normally seek a more or less extended right of scrutiny over the development of the projects, cover a large part of the territory of Quebec. In addition, they often overlap. Therefore, one is well-advised to pay attention to those issues. A business located less than half an hour away from Montreal may find itself on a claimed territory and receive formal notices from aboriginal groups claiming the land or be the subject of legal proceedings by them seeking the cessation of its activities. Again, serious attention must be paid to these issues.

### WHERE TO BEGIN?

The fact that one is dealing with a territory that is the subject of proved claims or a territory on which aboriginal groups claim rights which are not yet officially recognized is not very important. Even if the claimed rights are yet to be proved, there is an obligation to consult the aboriginal groups concerning the project under consideration. This obligation derives from constitutional law particularly from section 35 of the *Constitution Act, 1982*.

Canadian courts have ruled that the duty to consult rests on the Crown. In theory, promoters themselves do not have the obligation to consult aboriginal groups each time they consider a project. However, in practice, the technical aspects of the

consultation are often assumed by the promoter, who has an interest in ensuring a certain level of acceptability of the project since he is the one who will suffer the consequences of the project being blocked by judicial means if the consultation between the Crown and the aboriginal groups present on the territory does not progress fast enough, is not settled to the promoter's satisfaction or simply fails. This is why most promoters or their shareholders consider that significant participation in the consultation of aboriginal groups constitutes a good business practice and ensures the viability of the project.

### ESTABLISHING CONTACT WITH THE ABORIGINAL GROUPS

The first thing a business should do is to verify with the various provincial and federal departments of aboriginal affairs if one or more aboriginal groups have expressed, in any way whatsoever, claims on the territory on which the contemplated project is to be carried out. Once the aboriginal groups having made claims are identified, it is essential to establish contact with them.

One of the most frequently asked questions when a promoter realizes that his project may be on an aboriginal territory is "when is it advisable to establish a contact with the aboriginal groups?" The answer is: "as soon as possible". Indeed, it is very important to establish good relations with the various groups based in the territory where the project is to be located. Aboriginal groups will not appreciate being the last to be informed of the existence of a project. This may create a sentiment of being ignored and poison right at the outset relations that otherwise could have been cordial and cooperative.

One must consider meeting the various groups and providing them with information on the project and especially listening to their concerns and keeping an open mind in respect of their claims. Much time must be devoted to this exercise and it is best to plan accordingly.

### WHAT THE PROMOTERS CAN DO

Aboriginal groups are not systematically opposed to industrial development. Quite the opposite, they welcome economic development when it is carried out with respect for their beliefs and culture and want to benefit from it. It is also important

for a promoter to profit from his relations with aboriginal communities, particularly by entering into service agreements with local businesses operated by aboriginals. These populations may also be easily hired by the promoter in the context of his operations. In such a case, the promoter will have to invest in training this work force and establish work schedules which are compatible with the culture and the way of life of the aboriginals, for example, by taking into account the hunting season. This will pay the promoter great benefits, among other things, greater acceptance of his project by the local community.

Such provisions may be the subject of a

contractual agreement defining the rights and obligations of each party, such an agreement being known as an « Impact and Benefit Agreement" or "IBA".

### CONCLUSION

Today, the implementation of a business project most often requires getting through a stage where negotiations with one or more aboriginal groups must be completed. It is important to contact these groups as soon as possible, be openminded and listen to their concerns. For any issues respecting your relations with any aboriginal group in Quebec, do not hesitate to contact the Lavery Aboriginal Law team.

## FROM THE FAMILY DINNER TO THE ANNUAL MEETING OF THE SHAREHOLDERS: THE BEST FAMILY BUSINESS GOVERNANCE PRACTICES

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Family businesses represent more than 80% of enterprises in Quebec. In 2006, more than a third of the prestigious Fortune 500 businesses in the United States were "familycontrolled" and "familyowned businesses". However, only 30% of these corporations will pass into the hands of the second generation. Thereafter, the percentage is 17% for the third generation, 7% for the fourth and 5% for the following generations. Why so few? The answer lies in the fact that family businesses are managed in a particular manner and their transmission raises special problems.

Although internal conflicts pose a significant threat to family businesses and their survival, few of them have implemented processes to counter their effects. Only one family business out of three has chosen to put preventive measures in place. So, the purpose of this bulletin is to raise your awareness of the subject and provide you with some practical advice aimed at ensuring the sustainability of your family business.

### A SOLID BOARD OF DIRECTORS

Many things must be considered to optimize the composition and functioning of the board of directors. Depending on the size and complexity of the business, a board of directors composed of five (5) to nine (9) members is ideal. Each member of the board must understand his or her role as a director and be able to distinguish between that role and his or her duties as an executive, if he or she also acts in that capacity. It is important that there are family members on the board of directors; however, the presence of external independent directors may also be beneficial. A study conducted in the United States on family businesses in operation for three generations or more demonstrated that the most important factor that helped those businesses survive and thrive was an active board of directors predominantly composed of independent members.

### TO EACH HIS OR HER ROLE

In order to ensure sound management of the business and promote judicious selection of its executives, it is important to define the skills, training and experience required for each position and carefully

describe the duties related to each position. While it is entirely normal to give priority to a family member with equal competence over another candidate, this choice must be objectively justifiable to avoid internal conflicts with officers and employees who are not family members. Doing this makes it easier to distinguish between management of the business and family matters. Moreover, defining the duties will prevent family members who are shareholders but are not involved in the business operations from interfering in its management, thus leaving this role to the appointed executives.

### SUCCESSION PLANNING SHOULD BE DEALT WITH NOW

The transfer of a business is carried out over a long period of time and several stages. It is in the best interests of the family business to begin the process as soon as possible – some even suggest that it should begin as soon as a new executive is appointed. The first step is to create career development systems aimed at improving employees' skills by providing them with the necessary training to become suitable candidates to become executives. In this respect, the business should rely on advice from both inside and outside the family. As for the actual choice of a candidate, it is in the best interests of the business to favour a candidate who is acceptable to all the parties involved (board of directors, family members, senior management, etc.) to facilitate his or her integration.

### THE SHAREHOLDERS

A shareholder agreement is an extremely effective tool for preventing conflicts between shareholders and integrating the next generation as shareholders. For this reason, the agreement should be reviewed as the business grows to ensure that it still reflects the values of the business and meets its needs.

### INCLUDING THE FAMILY

According to researchers John A. Davis and Renato Tagiuri of the prestigious Harvard Business School, the complexity of managing a family business stems from the fact that there are family interests on top of the interests of the shareholders and the business normally present in nonfamily businesses. Messrs. Davis and Tagiuri even suggest formally integrating the family in the internal rules of the business. It may be appropriate to create a family council to deal with family issues, thus leaving the board of directors free to deal with all issues pertaining to the management of the business. The council would help clarify the roles and responsibilities of family members and integrate them in business discussions. Family meetings, to which all family members, including inlaws and children of a certain age, would be invited, would be held over one or two days on an annual basis.

It goes without saying that this type of approach does not suit all families. It is important to think it over, discuss it and reach an agreement within the family respecting the role it should play within the business.

### EXTERNAL HELP

In the event of a conflict that makes communication difficult between family members, management and the directors, the business should never hesitate to seek external help. Involving a mediator or an adviser may cool down tempers, especially when the conflict originates from past injuries.

### CONCLUSION

Many issues can cause significant tensions within a family business. Let us mention discussions pertaining to the future of the business (which, in almost 50% of cases, cause problems), the role of the inlaws in the business, and the performance of family members and their compensation. All these subjects constitute ticking time bombs.

Proper governance undoubtedly constitutes a guarantee of sustainability and ensures a better transfer of the business. The challenge for any entrepreneur is to ensure the profitability and sustainability of his business. This is even more complex for an executive of a family business since he or she must also ensure the serenity of family relationships.

Where to start? By initiating the discussion. Implementing such practices is not accomplished overnight. Gradual and consensual implementation of the practices most appropriate for your business is the best guarantee of success and sustainability.

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