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memorandum

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To	**CAFII's Board of Directors**	**Your ref**	●
Copy	**Keith Martin** **Brendan Wycks**		

Dear CAFII's board members:

Subject : Application of the RRADM to credit card-embedded insurance benefits

You have asked for our opinion regarding various issues relating to the application of the *Regulation respecting Alternative Distribution Methods* (**RRADM**) to credit card-embedded insurance benefits.

More specifically, you have asked us to outline the legal arguments that the Canadian Association of Financial Institutions in Insurance (**CAFII**) or its individual members may raise in order to challenge the position of the Autorité des marchés financiers (**AMF**) that the provisions of the RRADM fully apply to credit card-embedded insurance benefits and that no exemption may be granted in that regard.

1. SUMMARY

CAFII may raise various types of arguments in order to challenge the position of the AMF. Firstly, CAFII may rely on the principles of statutory interpretation to propose a narrow and restrictive construction of the provisions of the RRADM.

More specicifically, CAFII may argue that the AMF should decline to apply certain provisions of the RRADM to credit card-embedded insurance benefits in order (i) to ensure that the object of the RRADM is attained, (ii) to avoid absurd and impracticable consequences, and (iii) to adopt an interpretation of the RRADM that does not conflict with other legislation purporting to protect Quebec consumers.

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This approach based on the application of the principles of legislative interpretation may be labelled as a "soft" approach in the sense that it does not entail an amendment of the RRADM, nor a direct challenge of its applicability to credit card-embedded insurance benefits.

Secondly, CAFII may also insist that the RRADM should be amended in order to either (i) adapt its provisions to the specific situation of credit card-embedded insurance benefits, or to (ii) grant the AMF with the discretionary power to exempt certain situations from its application. Being a mere regulation, the RRADM may indeed be amended by the AMF.

According to the relevant legislation, any amendment proposed by the AMF must be confirmed by the Quebec Minister of Finance. To the extent that the AMF is not willing to propose any amendment to the RRADM, we may try to contact representatives of the Minister of Finance in order to convince them that amending the RRADM is in the best interest of Quebec consumers.

The approach suggesting an amendement to the RRADM may be characterized as an "intermediary" position since the AMF would be required to take action in order to implement the requested changes.

Finally, CAFII may also claim that certain provisions of the RRADM are simply inoperative when it comes to credit card-embedded insurance benefits since their application would conflict with (i) the *Act respecting the distribution of financial products and services* (**ARDFPS**) i.e. RRADM's parent legislation and (ii) federal laws governing federally-regulated financial institutions distributing insurance products.

This last approach may be considered as the most "aggressive" position since it entails a direct challenge of the applicability of certain provisions of the RRADM to credit card-embedded insurance.

2. INTRODUCTION

Before examining the various arguments that CAFII may advance in order to challenge the position of the AMF, it appears relevant to briefly outline the factual and legislative context upon which the issue has arisen.

2.1 Credit card-embedded insurance benefits

Most credit cards provide for a wide variety of benefits, including insurance benefits. For example, cardholders may benefit from trip cancellation insurance, trip interruption insurance, lost baggage insurance, car rental insurance, purchase insurance, etc.

Such benefits are not offered as a separate product under a separate contract. The insurance benefits are rather *embedded* in the terms and conditions governing the use of the credit card.

Cardholders do not have the option to refuse the insurance benefits. Nor can they cancel or terminate the benefits once the credit card has been issued. The insurance benefits are automatically provided to cardholders as part of the benefits associated with the credit card. If the client is not interested in the insurance benefits, he or she may simply choose to decline the credit card or decide not to use the benefits.

Cardholders do not directly pay for the insurance benefits. The benefits are included in the terms and conditions governing the use of the credit card at no additional cost. The insurance coverage is provided by a third party insurance company under a group master policy. The credit card issuer is the policyholder. As such, it is solely responsible for the payment of the premium. The cardholder is a mere participant under the group policy. He or she is provided with an insurance certificate as a participant under the group policy.

2.2 The legislative scheme governing the distribution of insurance products

The distribution of insurance products is mainly governed by the provisions of the ARDFPS. As a general statement, the ARDFPS provides that insurance products are to be distributed *via* duly licensed representatives.[1]

Title VIII of the ARDFPS however provides for an exceptional regime allowing insurers to distribute insurance products without the assistance of a representative. Section 408 of the ARDFPS indeed provides that an insurer may, in accordance with the provisions of Title VIII, offer insurance products through a "distributor".

Title VIII of the ARDFPS provides for the scope of application of the distribution without a representative (**DWR**) regime and imposes various obligations on both insurers and distributors. The details of the DWR regime are provided for under the RRADM.

2.3 The RRADM

Before the adoption of the RRADM, the details of the DWR regime were provided for under the *Regulation respecting distribution without a representative* (**RRDWR**). The rules of the RRDWR were essentially similar to those contemplated under the RRADM. We, however, understand that the AMF never insisted that the provisions of the RRDWR were to be applied to credit card-embedded insurance benefits.

The RRADM was adopted by the AMF and subsequently approved by the Quebec Minister of Finance in 2019. It came into effect on June 13, 2019. This new regulation replaced the former RRDWR.

The scope of the RRADM is however wider than that of the RRDWR. The RRADM indeed applies to both the distribution of insurance products *via* Internet (chapter 2 of the RRADM) and to the distribution of insurance products through distributors (chapter 3 of the RRADM).

2.4 The position advanced by the AMF

The AMF takes the position that the provisions of the RRADM dealing with the distribution of insurance products through distributors (i.e. chapter 3 of the RRADM) fully apply to credit card-embedded insurance benefits and that no exemption could be granted in that regard.

We understand that discussions have been held between the AMF and CAFII regarding the application of the RRADM to credit card-embedded insurance benefits, but that these discussions have not yet been fruitful.

More specifically, we understand that CAFII and some of its individual members have proposed practical solutions to adapt the obligations imposed by the RRADM to the specific context of credit card-embedded insurance benefits, but that these solutions have been rejected by the AMF which insists on a strict application of the RRADM.

2.5 The practical consequences flowing from the position of the AMF

It appears rather clear that the Quebec legislator did not have credit card-embedded insurance benefits in mind when it adopted the DWR regime and that many provisions of the RRADM are ill suited to the offering of such benefits.

[1] See sections 3 and 12 of the ARDFPS.

For example, section 22 of the RRADM provides that the distributor must, at the time it offers the product to a client, deliver a product summary outlining the main features of the insurance product, together with a mandatory fact sheet informing the client of its rights in that regard.

Some credit cards however offer more than ten (10) different embedded insurance benefits and it appears impracticable for card issuers - and potentially overwhelming and confusing for clients - to offer more than ten (10) product summaries and fact sheets to clients at the time they enroll for the credit card.

Section 29(9) of the RRADM also provides that the product summary that must be delivered to clients at the time they enroll with the credit card must inform them of their right to cancel the insurance coverage and of the procedures for exercising such a right.

The fact sheet that must be delivered to the client at the time that he or she enrolls with the credit card also provides for the following mandatory statements, which may confuse the consumer or which are simply false and misleading:

> "Even if you are required to be insured, you do not have to purchase the insurance that is being offered. You can choose your insurance product and your insurer."
>
> "A portion of the amount you pay for the insurance will be paid to the distributor as remuneration."
>
> "The Act allows you to rescind an insurance contract, at no cost, within 10 days after the purchase of your insurance. However, the insurer may grant you a longer period of time. After that time, fees may apply if you cancel the insurance. Ask your distributor about the period of time granted to cancel it at no cost."

We understand that, although the situation is far from ideal, some CAFII members have tried to comply with most of the provisions of the RRADM. We, however, understand that complying with all of the provisions of the RRADM may prove impracticable or would lead to false and misleading information being conveyed to clients.

3. PRELIMINARY COMMENTS REGARDING THE SCOPE OF THE DWR REGIME

The RRADM was adopted pursuant to the provisions of the ARDFPS. Being subordinated to the ARDFPS, the RRADM cannot apply to contractual situations which are not covered by the ARDFPS. In other words, if the provisions of Title VIII of the ARDFPS do not apply to credit card-embedded insurance benefits, the provisions of the RRADM cannot apply to such benefits either.

In our view, a serious argument could be made that the provisions of Title VIII of the ARDFPS do not apply to credit card-embedded insurance benefits. Section 408 of the ARDFPS indeed defines the term "distributor" as follows:

> 408. An insurer may, in accordance with this Title, offer insurance products through a distributor.
>
> A distributor is a person who, in pursuing activities in a field other than insurance, offers, as an accessory, for an insurer, an insurance product which relates solely to goods sold by the person or secures a client's adhesion in respect of such an insurance product.

As discussed above, credit card-embedded insurance benefits are not offered "as an accessory" to another good sold by the credit car issuer. These benefits are an integral part of the credit card and the cardholder does not have the option to decline the insurance benefits.

An argument could also be made that the credit card-embedded insurance benefits do not "relate solely" to goods sold by the credit card issuer. The benefits may indeed relate to goods sold by third parties. For example, the credit card-embedded insurance benefits may include purchase insurance with respect to goods sold by other merchants.

Our interpretation of the scope of the DWR regime appears to be confirmed by the examples of contractual situations contemplated by Title VIII of the ARDFPS. Section 424 of the ARDFPS indeed provides that the following products are deemed to be insurance products which relate solely to goods sold by the distributor:

> 424. For the purposes of this Title, the following types of products are deemed to be insurance products which relate solely to goods:
>
> (1) travel insurance;
>
> (2) vehicle rental insurance, where the rental period is less than four months;
>
> (3) credit card and debit card insurance;
>
> (4) funeral insurance;
>
> (5) replacement insurance, that is, property insurance under which the insurer guarantees the replacement of the insured vehicle or insured parts and the form and conditions of which are approved by the Authority pursuant to section 71 of the Insurers Act (chapter A-32.1).

In our view, the above examples show what kind of contractual situations the legislator had in mind when it adopted the provisions of Title VIII of the ARDFPS i.e. situations where a separate and optional insurance product is being offered to the client in relation to a product which he or she acquires.

Although serious arguments could be advanced to support the position that the DWR regime does not apply to credit card-embedded insurance benefits since credit card issuers do not fit the definition of "distributor", this approach is, however, unlikely to prove of any assistance in the present case.

As discussed above, the DWR regime is an exception to the general regime. To the extent that credit card issuers cannot benefit from this exceptional regime, they will necessarily fall back into the general regime which provides that insurance products are to be distributed *via* duly licensed representatives.[2]

In that sense, challenging the applicability of the DWR regime to credit card-embedded insurance benefits may not be optimal from a strategic perspective. As more fully discussed below, CAFII may however raise other arguments to support the position that the application of the RRADM must be adapted to the specific circumstances of credit card-embedded insurance benefits.

[2] See in that regard the letter from the AMF dated March 30, 2021:

> The AMF takes note of your concerns but cannot grant any exemption under its regulations. As already mentioned to CAFII, insurance products must be offered as provided for by the *Act respecting the distribution of financial products and services* ("Distribution Act"), that is, through duly certified insurance representatives or via the distribution without a representative ("DWR") regime. For the remainder of this letter, the AMF will assume that insurers who distribute insurance products embedded in credit cards chose the DWR regime.

4. APPLICATION OF THE PRINCIPLES OF STATUTORY INTERPRETATION

We have examined the case law and the legal doctrine dealing with the RRDWR, the RRADM and the relevant provisions of the ARDFPS. We were, however, unable to identify any doctrine or judicial or administrative decisions which may be of assistance to our analysis.

We have also examined the legislative debates preceding the adoption of the ARDFPS and the various documents issued by the AMF and other interested stakeholders during the consultation process leading to the adoption of the RRADM. Those debates and documents were of no assistance either.

In our view, CAFII may however invoke the various principles of statutory interpretation in order to convince the AMF that that the provisions of the RRADM must be interpreted in such a way as to ensure that its object is attained, that absurd and impractical results are being avoided, and that the RRADM does not conflict with other legislation purporting to protect Quebec consumers.

The application of the principles of statutory interpretation may be labelled as a "soft" approach in the sense that the AMF does not need to take action in order to adapt the provisions of the RRADM to the specific situation of credit card-embedded insurance benefits.

4.1 Application of the principles of statutory interpretation to regulations

The RRADM is not a statute adopted by the Quebec legislative assembly. It is a regulation adopted by the AMF i.e. a regulatory body with supervisory and administrative powers. Canadian courts have however held that the principles of statutory interpretation which usually apply to legislation also apply to subordinated legislation such as by-laws and regulations.

For example, in *Perez (Litigation Guardian of) v. Salvation Army*, 1997 CanLII 12206 (ON SC), the Ontario Superior Court mentioned the following:

> Clearly a hospital with a similar name to the actual one in question is listed in the regulation. The court has jurisdiction to correct minor drafting errors in statutes. Professor Ruth Sullivan in *Driedger on the Construction of Statutes*, 3rd ed. (Toronto: Butterworths, 1994) notes at p. 106 that, while the court should not fill legislative gaps, it does have the authority to correct obvious drafting errors. In this instance, the error in the regulation can be characterized as a drafting error, not a legislative gap. The misnomer of a corporation appearing in a statute does not necessarily avoid the Act: see *Oxford v. Bishop of Coventry* (1615), 10 Co. Rep. 53b. Moreover, the same principles that apply to the interpretation of legislation also apply to the interpretation of regulations: […]

In *Martin v. Beef Stabilization Appeal Committee (Sask.)*, 1986 CanLII 2888 (SK QB), the Saskatchewan Court of Queen's Bench also confirmed that regulations are subject to the same rules of interpretation as legislation enacted by legislative bodies:

> [8] We are concerned with a matter of statutory interpretation. Regulations passed under statutory authority are subject to the same rules of interpretation as the statute itself: *Union Gas Co. of Canada Ltd. v. Township of South Cayuga*, [1952] O.W.N. 201.

It is therefore clear that the provisions of the RRADM are to be interpreted in light of the same principles of interpretation that are applicable to statutes adopted by the legislative assembly.

4.2 Purposive analysis

Canadian courts have held on numerous occasions that statutes are to be construed in accordance with their purpose. For example, in *Novak v. Bond*, [1999] 1 SCR 808, the Supreme Court of Canada held that the cardinal

principle of statutory interpretation is that legislative provisions should be construed in a way that best furthers their objects. The Court explained that courts must first identify the purpose of the statute and then determine what is the interpretation that best furthers that goal:

> 63 Although the judicial debate about the proper interpretation of s. 6(4)(b) has assumed an independent life in British Columbia legal circles, it remains a question of statutory interpretation. The cardinal principle of statutory interpretation is that a legislative provision should be construed in a way that best furthers its objects: see *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paras. 21-22, per Iacobucci J., and *Interpretation Act*, R.S.B.C. 1996, c. 238, s. 8. Subsidiary rules of statutory interpretation provide that each part of an enactment must be given meaning, and that statutes must be construed in such a way that absurdities are avoided: see *Rizzo Shoes*, supra, at para. 27, per Iacobucci J. The task faced by the Court on this appeal is therefore to first identify the scheme and purpose of the Limitation Act and then identify the interpretation of s. 6(4)(b) that best furthers its goals.

In *Sidmay Ltd. et al. v. Wehttam Investments Ltd.*, 1967 CanLII 24 (ON CA) (confirmed by the Supreme Court of Canada in *Sidmay Ltd. et al. v. Wehttam Investments Ltd.*, [1968] SCR 828), the Ontario Court of Appeal relied on the relevant legal doctrine to conclude that the ordinary meaning of a provision may be modified in order to achieve the purpose of the statute or to avoid absurdity, hardship or injustice:

> It becomes apparent that, in order to give scope to the Act, without sweeping away otherwise legitimate activities sanctioned under other legislation, a strictly literal interpretation cannot be demanded. Such an approach to the interpretation of a statute is not unknown. In Maxwell on the Interpretation of Statutes, 9th ed. at p. 236, appears the following passage:
>
> "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the apparent purpose of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence. . . . Where the main object and intention of a statute are clear, it must not be reduced to a nullity by the draftsman's unskilfulness or ignorance of the law, except in a case of necessity, or the absolute intractability of the language used. The rules of grammar yield readily in such cases to those of common sense."

Section 41 of the Quebec *Interpretation Act* also provides that the provisions of a statute "shall receive such fair, large and liberal construction as will ensure the attainment of its object and the carrying out of its provisions, according to their true intent, meaning and spirit".

In the present case, it is clear that the purpose of the RRADM is to protect consumers by ensuring that they receive true, sufficient and relevant information about the insurance coverage and their rights in that regard. In the *Notice relating to the application of the Regulation respecting alternative distribution methods* published by the AMF[3], the latter indeed makes the following remarks:

> The premise of the regime governing distribution without a representative is that adequate, accurate and complete information is given to the client.
>
> The Regulation provides that information be disclosed through more than one document. The information specific to distribution without a representative is provided in a fact sheet, the content of which is prescribed by the Authority. The information on the product offered,

[3] Available at : https://lautorite.qc.ca/fileadmin/lautorite/reglementation/distribution/avis/2019mai15-avis-applicatif-rmad-en.pdf

> which helps the client make an informed decision about the product, is presented in a summary prepared by the insurer.

The strict application of the RRADM advanced by the AMF however defeats that purpose. As discussed above, the RRADM provides that the product summary that must be delivered to clients must inform them of their "right of cancellation, its duration and the procedures for exercising it" while the mandatory fact sheet that must also be delivered to clients informs them that they are allowed to "rescind the insurance contract, at no cost, within 10 days".

In reality, clients are, however, not allowed to cancel the credit card-embedded insurance benefits without also cancelling the credit card. Informing them that they are allowed to cancel the insurance benefits is false and misleading. Such an application of the RRADM completely defeats the purpose of the regulation which is to provide clients with "adequate, accurate and complete information".

In *Driedger on the construction of statutes*, Professor Ruth Sullivan explains that the purpose of a statute may be invoked to avoid the application of its provisions to facts which may otherwise be captured by an ordinary understanding of its words:

> Rule-avoidance. Legislative purpose is also relied on by courts to justify an outright refusal to apply a provision to facts that are within any ordinary understanding of its words. […][4]

For example, in *Canadian Pacific Air Lines Ltd. v. British Columbia*, [1989] 1 SCR 1133, the British Columbia's *Social Service Tax Act* provided for a tax on goods purchased outside of the province and brought into the province by companies carrying on business in the province. The Province took the position that aircrafts coming into the province were captured by the words of the legislation and that, therefore, airlines companies were bound to pay the tax.

The Supreme Court of Canada acknowledged that aircrafts were goods purchased outside the province and brought into the province within the terms of the statute, but refused to apply the tax to aircrafts by relying on the true purpose of the act which was to impose a retail tax payable by the ultimate consumer of the goods:

> While I would not, in the absence of a detailed examination, wish to categorize the Act as being solely intended to impose a retail tax payable by the ultimate consumer of the goods, there can be no doubt, as I mentioned before, that this is its predominant purpose. The Act, in its general structure and intent, closely resembles the type of enactment originally approved by the courts in *Atlantic Smoke Shops, Ltd. v. Conlon*, [1943] A.C. 550, and later generalized to include all tangible personal property; see *Cairns Construction Ltd. v. Government of Saskatchewan*, [1960] S.C.R. 619. This predominant purpose, in my view, is of considerable assistance in understanding the import of s. 2(4). […]

In our view, a similar approach should prevail in the instance. The AMF must interpret the scope the RRADM in harmony with its predominant purpose i.e. to provide Quebec customers with adequate, accurate and complete information regarding the insurance benefits and their rights in that regard.

To the extent that the application of the RRADM to a specific set of facts results in the purpose of the regulation being frustrated, the AMF should refrain from applying it to such facts even though they may fall within the purview of the regulation under a strict reading of its provisions.

[4] R. Sullivan, *Driedger on the construction of statutes*, 3rd edition, Toronto, Butterworths, 1994, p. 72.

4.3 Avoidance of absurd or impracticable consequences

Another cardinal rule of statutory interpretation is that legislation should be construed in such a way as to avoid absurd consequences. In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 RCS 27, the Supreme Court of Canada explained that a specific interpretation may be labelled as "absurd" if it is incompatible with the object of the legislative enactment or if it defeats the purpose of the statute:

> 27 In my opinion, the consequences or effects which result from the Court of Appeal's interpretation of ss. 40 and 40a of the ESA are incompatible with both the object of the Act and with the object of the termination and severance pay provisions themselves. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, supra, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, supra, at p. 88).

It is to be noted that the concept of "absurdity" is not limited to illogical consequences, but that it also encompasses impractical or inconvenient results. For example, in *Lavis Contracting Co. Limited v. Coores Construction Inc*. et al, 2014 ONSC 5479, the Ontario Superior Court of Justice made the following observations in that regard:

> [16] In *Wicken (Litigation Guardian of) v. Harssar*, [2004] O.J. No. 1935 (Div. Ct.), the Court reviewed certain basic principles of statutory interpretation. At paras. 27 and 28, the Court said this:
>
> "If a statute is susceptible of two interpretations, the interpretation that avoids absurdity is to be preferred (*Datacalc Research Corp. v. Canada*, [2002] T.C.J. NO. 99, 2002 D.T.C. 1479 (Tax Ct.), at para. 54).
>
> According to F. Bennion, *Statutory Interpretation*, 4th ed., (London: Butterworths, 2002), the concept of "absurdity" actually encompasses several components. The presumption against an "absurd" interpretation means the avoidance of (1) an unworkable or impractical result, (2) an inconvenient result, (3) an anomalous or illogical result, (4) a futile or pointless result, (5) an artificial result, or (6) disproportionate counter-mischief.

Therefore, any interpretation of the RRADM which leads to absurd or impracticable results ought to be avoided. For example, if a strict application of the RRADM may result in clients being misled regarding the nature and extent of their rights, it may be considered as leading to an absurd result since the RRADM purports to ensure that consumers are provided with adequate, accurate and complete information regarding the insurance benefits.

Similarly, if an interpretation of the RRADM leads to the client being "buried" with piles of documents, such an interpretation may be set aside on the ground that it leads to an impractical result.

In *Driedger on the construction of statutes*, Professor Ruth Sullivan explains that the rule against absurd results may serve to justify a restrictive interpretation of the legislative text:

> Justifying a restrictive interpretation. Absurdity is often relied on to justify giving a restricted application to a provision. […]
>
> Unacceptable absurdity. Sometimes it is possible to give meaning to a provisions, but that meaning is so absurd that, in the view of the court, it cannot have been intended. If there is no way to interpret the provision so as to avoid the absurdity, the court has no choice but to redraft. […]

> It is easy to narrow the scope of a provision; the court simply declines to apply it to particular facts, even though the facts are within the ordinary meaning of the provision. This result is accomplished in a variety of ways : (i) by notionally introducing qualifications or exceptions into the provision; by creating legal "tests" for its application; by applying a presumption or special rule. In the end, the effect is the same: the provision is not applied to facts within its ordinary meaning. […][5]

In our view, the RRADM must be construed in such a way as to avoid absurd consequences i.e. consequences which are incompatible with its object. To the extent that a rigid interpretation of the RRADM may result in absurd consequences, the AMF has the obligation to adopt a narrow and restrictive interpretation which avoids such absurd consequences.

More specifically, the AMF must decline to apply certain provisions of the RRADM to credit card-embedded insurance benefits if such an application results in absurd consequences and the purpose of the RRADM being defeated.

4.4 Adding qualifying terms

Another principle of statutory interpretation provides that courts are allowed to add qualifying terms to the text of a statute in order to avoid absurd consequences and to ensure that the object of the legislation is being attained. In *Driedger on the construction of statutes*, Professor Ruth Sullivan explains that courts may rely on the purpose of the legislation to add certain qualifying features to the text of the statute:

> Adding qualifying features to definition. Even where legislation is written in language that is not particularly vague, the courts may rely on purpose to justify their preference for a narrow rather than broad interpretation. […]
>
> Restrictive reading – conclusion. In *R v. Kudlip* the court notionally incorporated the legislative purpose into the provision to be interpreted by introducing a qualifying phrase. In the *Hills* case, it added a couple of qualifying features to the dictionary meaning of a word used in the provision. In *Canadian Pacific Airlines*, it simply declined to apply the provision to the facts of the case. Although these methods are formally distinguishable, the impact in all three cases is the same. The scope of the legislation is narrowed to exclude the inappropriate application. Once a court is satisfied that a proposed application of a provision is inadequately related to its purpose, it has a legitimate reason to reject the ordinary meaning, by re-formulating the provision, in effect, or refusing to apply it in this case.[6]

In the present case, the RRADM should be read as if the qualifying terms "where appropriate" or "where applicable" were included in the text of the provisions in dispute in order to avoid any inappropriate consequences and to ensure that the purpose of the regulation is attained.

4.5 Statute paramountcy

As mentioned above, the RRADM is a regulation i.e. a subordinate legislation. As such, it cannot conflict with its parent legislation. According to the relevant case law, subordinate legislation cannot conflict with other acts of the legislature either.

[5] R. Sullivan, *Driedger on the construction of statutes*, 3rd edition, Toronto, Butterworths, 1994, p. 94, 108, 125.

[6] R. Sullivan, *Driedger on the construction of statutes*, 3rd edition, Toronto, Butterworths, 1994, p. 70, 72-73.

In *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 SCR 3, the Supreme Court of Canada mentioned that the provisions of a statute adopted by the legislative assembly must prevail over those of a regulation:

> The basic principles of law are not in doubt. Just as subordinate legislation cannot conflict with its parent legislation (*Belanger v. The King* (1916), 1916 CanLII 87 (SCC), 54 S.C.R. 265), so too it cannot conflict with other Acts of Parliament (*R. & W. Paul, Ltd. v. Wheat Commission*, [1937] A.C. 139 (H.L.)), unless a statute so authorizes (*Re George Edwin Gray (1918)*, 1918 CanLII 533 (SCC), 57 S.C.R. 150). Ordinarily, then, an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation. However, as a matter of construction a court will, where possible, prefer an interpretation that permits reconciliation of the two. "Inconsistency" […].

In the present case, sections 219 of the *Consumer Protection Act* (**CPA**)[7] provides that merchants are prohibited from making false or misleading representations to consumers:

> 219. No merchant, manufacturer or advertiser may, by any means whatever, make false or misleading representations to a consumer.

If card issuers were to follow the position adopted by the AMF, they would automatically violate section 219 of the CPA since they would provide clients with false and misleading information about the nature of the insurance benefits and the extent of their rights.

Following the rule to the effect that subordinate legislation cannot conflict with statutes adopted by the legislature, the AMF must adopt an interpretation of the RRADM which is in harmony with section 219 of the CPA.

4.6 Conclusion regarding the application of the principles of statutory interpretation

The RRADM must be interpreted by the AMF in accordance with the principles of statutory interpretation. These principles provide that the AMF must adopt a narrow interpretation of the RRADM and decline to apply certain of its provisions to credit card-embedded insurance benefits since:

(i) such a narrow and restrictive interpretation ensures that the objects of the RRADM are being attained;

(ii) any other interpretation would result in absurd and impracticable consequences, and

(iii) such a narrow and restrictive interpretation would not conflict with section 219 of the CPA.

In our view, the application of the principles of statutory interpretation discussed above should be sufficient to conclude that the rigid interpretation adopted by the AMF is ill-founded in law.

In addition to arguments based on principles of statutory interpretation, the AMF may also simply amend the RRADM in order to adapt its provisions to the specific context of credit card-embedded benefits or to grant the AMF with the discretionary power to grant exemptions in that regard.

This approach may be said to represent an “intermediary” position since the AMF would be required to take action in order to implement the requested changes.

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[7] The CPA applies to credit card issuers. See in that regard the decision of the Supreme Court of Canada in *Bank of Montreal v. Marcotte*, [2014] 2 SCR 725.

5. AMENDMENTS TO THE RRADM

As discussed above, the RRADM is not a statute adopted by the Quebec legislative assembly, but a mere regulation adopted by the AMF pursuant to the provisions of the ARDFPS. The RRADM may thus be amended by the AMF *via* the adoption of an amending regulation.

The amending regulation may purport to either (i) adapt the provisions of the RRADM to the specific context of credit card-embedded insurance benefits, or (ii) provide the AMF with the power and discretion to exempt certain specific situations from the application of the RRADM.

Section 440 of the ARDFPS indeed grants the AMF with the power to adopt a regulation prescribing the content of the notice that must be remit to the client at the time the insurance contract is entered into:

> 440. A distributor that, at the time a contract is made, causes the client to make an insurance contract must give the client a notice, drafted in the manner prescribed by regulation of the Authority, stating that the client may rescind the insurance contract within 10 days of signing it.

Section 485(1) of the *Insurers Act* also provides that the AMF may adopt regulations determining the standards applicable to authorized insurers in relation to their commercial practices and their management practices:

> 485. In addition to other regulations that it may make under this Act, the Authority may, by regulation, determine the standards applicable
>
> (1) to authorized insurers in relation to their commercial practices and their management practices; and
>
> (2) to federations of mutual companies in relation to their management practices.

Section 194 of the ARDFPS provides that the regulations adopted by the AMF must be published in order to allow any interested person to submit comments regarding the draft regulation:

> 194. The Authority shall publish its draft regulations in the information bulletin and the draft regulation made by a Chamber under the fourth paragraph of section 312.
>
> Every draft regulation must be published with a notice stating the time that must elapse before the draft regulation may be made or be submitted for approval, and stating the fact that any interested person may, during that time, submit comments to the person designated in the notice.
>
> The Authority shall also publish in the information bulletin all the regulations approved by the Minister or the Government under this Act.

Once published, the draft regulation must be approved, with or without amendment, by the Minister of Finance pursuant to section 217 of the ARDFPS and section 486 of the *Insurers Act*.

To the extent that the AMF is not interested in initiating an amendment process, we may contact representatives of the Minister of Finance in order to convince them that amending the RRADM is in the best interest of Quebec consumers.

According to the provisions of the *Lobbying Transparency and Ethics Act*, we would need to register as lobbyists.[8] The fact that CAFII is lobbying the Quebec Minister of Finance in order to obtain amendments to the RRADM would thus become public.

6. INAPPLICABILITY OF THE RRADM

In addition to the above arguments, CAFII may also claim that certain provisions of the RRADM are simply inoperative when it comes to credit card-embedded insurance benefits since the application of such provisions directly conflicts with (i) the provisions of the ARDFPS dealing with the right to rescind an insurance contract and (ii) the provisions of federal legislation governing the distribution of insurance products by federally regulated entities.

This approach may be considered as more "aggressive" since it entails a direct challenge of the applicability of the RRADM to credit card-embedded insurance benefits.

6.1 Conflict with the provisions of the ARDFPS

It is a well-established principle of law that a regulation cannot conflict with the provisions of the statute under which it was enacted.

As mentioned by the Supreme Court of Canada in the above cited case of *Friends of the Oldman River Society v. Canada (Minister of Transport)*: "subordinate legislation cannot conflict with its parent legislation". In *FFM Holdings Ltd. v. Lilydale Co-operative Ltd*., 2001 ABCA 90, the Alberta Court of Appeal also expressed the rule as follows:

> [25] However, there is a well-known presumption that an Act allowing one to pass subordinate legislation does not permit subordinate legislation which conflicts with an Act, especially that same Act. […]

In the present case, the AMF takes the position that card issuers are required, under the provisions of the RRADM, to inform their clients of their right to cancel the insurance coverage and of the procedures for doing so.

Section 22 of the RRADM indeed provides that card issuers must deliver to the client (i) a product summary, and (ii) a fact sheet in the form set out in Schedule 2. Section 29(9) of the RRADM provides that the summary must inform the clients of their right of cancellation and of the procedures for exercising it while Schedule 2 of the RRADM provides that the fact sheet must inform clients of their right to rescind the insurance contract without penalty, within 10 days of its signature.

In our view, the application of sections 22 and 29 of the RRADM to credit card-embedded insurance benefits directly conflicts with the provisions of the ARDFPS dealing with the right to rescind an insurance contract.

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[8] Sections 2(1) and 4(1) of the *Lobbying Transparency and Ethics Act* provide as follows:

> 2. Any oral or written communication with a public office holder in an attempt to influence or that may reasonably be considered by the initiator of the communication as capable of influencing a decision concerning :
>
> (1) the development, introduction, amendment or defeat of any legislative or regulatory proposal, resolution, policy, program or action plan, […]
>
> 4. The following persons are considered to be public office holders for the purposes of this Act:
>
> (1) government ministers and members of the National Assembly, as well as persons on their staff;

Section 440 of the ARDFPS indeed provides that distributors are bound to deliver a notice stating that the client may rescind the insurance contract within 10 days of signing it:

> 440. A distributor that, at the time a contract is made, causes the client to make an insurance contract must give the client a notice, drafted in the manner prescribed by regulation of the Authority, stating that the client may rescind the insurance contract within 10 days of signing it.

The scope of application of section 440 must, however, be determined by reference to the following provision i.e. section 441 of the ARDFPS which provides that a client may rescind an insurance contract made at the same time as "another contract" within 10 days of signing it:

> 441. A client may rescind an insurance contract made at the same time as another contract, within 10 days of signing it, by sending notice by registered mail.
>
> Where such an insurance contract is rescinded, the first contract retains all its effects.
>
> The first paragraph and section 440 do not apply to an insurance contract expiring within 10 days of its being signed.

Section 442 of the RRADM implicitly confirms that the right to cancel the insurance contract strictly applies where two distinct contracts are being signed. Section 442 indeed provides that the "principal" contract may not be amended for the sole reason that the "accessory" insurance contract is being cancelled. The second paragraph of section 442 even refers to the existence of "more than one contract":

> 442. No contract may contain provisions allowing its amendment in the event of rescission or cancellation by the client of an insurance contract made at the same time.
>
> However, a contract may provide that the rescission or cancellation of the insurance contract will entail, for the remainder of the term, the loss of the favourable conditions extended because more than one contract was made at the same time.

In our case, the "insurance contract" is not made at the same time as "another contract". As discussed above, there is only one contract since the insurance benefits are embedded in the terms and conditions governing the use of the credit card.

A serious argument could thus be made that the application of sections 22 and 29 of the RRADM to credit card-embedded insurance benefits directly conflicts with the provisions of the ARDFPS dealing with the right to rescind an insurance contract and that, therefore, sections 22 and 29 of the RRADM are inoperative in that regard.

It is to be noted that the above position may also be fashioned as an interpretative argument justifying a narrow and restrictive construction of the RRADM. More specifically, CAFII may argue that the scope of application of the RRADM must be determined in light of the relevant provisions of the ARDFPS and that, since those provisions strictly apply to situations where two distinct contracts are being signed, sections 22 and 29 of the RRADM cannot be applied to credit card-embedded insurance benefits.[9]

[9] See in that regard *Ebert Howe and Assoc. v. B.C. Optometric Assn.*, 1985 CanLII 576 (BC CA):

> [62] My second observation is that the benevolent interpretation that is to be given is a benevolent interpretation of the subordinate legislation, not a benevolent interpretation of the empowering legislation. That is, it should be presumed that the subordinate body that makes the subordinate legislation was taking a correct view of its powers and acting within its powers. So, if two alternative constructions of the subordinate legislation are available, one that is within those powers and one that is not, then the alternative construction that is within the powers of the subordinate body should be preferred. And If the subordinate legislation is perhaps too

6.2 Federal paramountcy

The doctrine of federal paramountcy is well entrenched into Canadian law. This doctrine is engaged where an operative conflict exists between provincial and federal law. In such a scenario, federal law must prevail.

In *Bank of Montreal v. Marcotte*, [2014] 2 SCR 725, the Supreme Court of Canada explained that the conflict between provincial and federal law may be established by (i) the impossibility for a party to comply with both laws, or (ii) if the application of provincial law frustrates the purpose of federal law[10] :

> [70] The Banks additionally argue that ss. 12 and 272 of the CPA are inoperative with respect to banks as a result of the doctrine of federal paramountcy. Paramountcy is engaged where there is a conflict between valid provincial and federal law. In such cases, the federal law prevails, and the provincial law is rendered inoperative to the extent of the conflict. Conflict can be established by impossibility of dual compliance or by frustration of a federal purpose (*Canadian Western Bank*, at para. 73). The Banks argue that the provisions of the CPA frustrate the purpose of the federal banking scheme.

We have examined the legislative scheme established by federal law in order to determine whether an argument based on the doctrine of federal paramountcy may be raised by CAFII in the instance. More specifically, we have examined the provisions of the *Bank Act* and of the various regulations adopted under it.[11] We have also examined the provisions of the *Insurance Companies Act* and the various regulations enacted under it.[12]

As more fully discussed below, we are of the view that serious arguments could be advanced to support the position that the application of the RRADM to credit card-embedded insurance benefits leads to a conflict between provincial and federal legislation.

For example, section 452(2)b) of the *Bank Act* provides that where a bank has issued a credit card, it must disclose the particulars of the client's rights and obligations:

> (2) Where a bank issues or has issued a credit, payment or charge card to a natural person, the bank shall, in addition to disclosing the costs of borrowing in respect of any loan obtained through the use of the card, disclose to the person, in accordance with the regulations,

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broadly worded, then the beneficial construction should be one that would operate to read down the scope of the subordinate legislation to give it the same scope as the power conferred. […].

[10] See also *Canadian Western Bank v. Alberta*, [2007] 2 SCR 3:

> 73 Nevertheless, there will be cases in which imposing an obligation to comply with provincial legislation would in effect frustrate the purpose of a federal law even though it did not entail a direct violation of the federal law's provisions. The Court recognized this in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, in noting that Parliament's "intent" must also be taken into account in the analysis of incompatibility. The Court thus acknowledged that the impossibility of complying with two enactments is not the sole sign of incompatibility. The fact that a provincial law is incompatible with the purpose of a federal law will also be sufficient to trigger the application of the doctrine of federal paramountcy. This point was recently reaffirmed in *Mangat* and in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, [2005] 1 S.C.R. 188, 2005 SCC 13.

[11] Including the *Insurance Business (Banks and Bank Holding Companies) Regulations*, the *Cost of Borrowing (Banks) Regulations*, the *Disclosure of Charges (Banks) Regulations* and the *Credit Business Practices (Banks, Authorized Foreign Banks, Trust and Loan Companies, Retail Associations, Canadian Insurance Companies and Foreign Insurance Companies) Regulations*.

[12] Including the *Cost of Borrowing (Canadian Insurance Companies) Regulations*, the *Credit Business Practices (Banks, Authorized Foreign Banks, Trust and Loan Companies, Retail Associations, Canadian Insurance Companies and Foreign Insurance Companies) Regulations*, the *Credit Information (Insurance Companies) Regulations.*

> (a) any charges or penalties described in paragraph (1)(b);
>
> (b) particulars of the person's rights and obligations;
>
> (c) any charges for which the person , becomes responsible by accepting or using the card;
>
> (d) at the prescribed time and place and in the prescribed form and manner, any prescribed changes respecting the cost of borrowing or the loan agreement; and
>
> (e) any other prescribed information, at the prescribed time and place and in the prescribed form and manner.

In our view, a bank cannot validly fulfill its obligation to disclose the particulars of the client's rights and obligations under section 452 of the *Bank Act* if it falsely informs that client that he or she may cancel the insurance.

The disclosure contemplated under section 452 must be accurate and not misleading. Otherwise, the bank would violate section 980.1 of the *Bank Act*:

> 980.1. Every person who knowingly provides false or misleading information in relation to any matter under this Act or the regulations is guilty of an offence.

It is interesting to note that an identical argument may be made under the provisions of the *Insurance Companies Act* since sections 482(2) and 1023.1 of this act respectively provide as follows:

> 482 (2) Where a company issues or has issued a credit, payment or charge card to a natural person, the company shall, in addition to disclosing the costs of borrowing in respect of any loan obtained through the use of the card, disclose to the person, in accordance with the regulations,
>
> (a) any charges or penalties described in paragraph (1)(b);
>
> (b) particulars of the person's rights and obligations;
>
> (c) any charges for which the person becomes responsible by accepting or using the card;
>
> (d) at the prescribed time and place and in the prescribed form and manner, any prescribed changes respecting the cost of borrowing or the loan agreement; and
>
> (e) any other prescribed information, at the prescribed time and place and in the prescribed form and manner.
>
> 1023.1 Every person who knowingly provides false or misleading information in relation to any matter under this Act or the regulations is guilty of an offence.

Based on the above provisions of the *Bank Act* and of the *Insurance Companies Act*, we are of the view that serious arguments could be made to support the position that the application of certain provisions of the RRADM to credit card-embedded insurance benefits results in a conflict between provincial and federal legislation and that such conflict must be resolved in favour of the federal legislation in accordance with the doctrine of federal paramountcy.

7. PROCEDURAL ISSUES

To the extent that CAFII decides to challenge the position of the AMF before the courts, it may do so by following two distinct procedural paths.

Firstly, CAFII may wait for the AMF to issue a statement of offence in relation to a potential violation of the RRADM and challenge the penal charges before the Court of Quebec.

This approach is, however, not optimal since the statement of offence would not be issued to CAFII but to one of its members. At this stage, it remains unclear whether CAFII would be allowed to intervene before the Court in order to side with its member and challenge the AMF's position. Furthermore, the issuance of a statement of offence may draw unwanted negative publicity towards the issue.

In our view, the second approach is more appropriate in the circumstances. This second approach would consist in the filing by CAFII of a motion to obtain a declaratory judgement before the Quebec Superior Court under section 142 of the *Code of civil procedure*:

> 142. Even in the absence of a dispute, a judicial application may be instituted to seek, in order to resolve a genuine problem, a declaratory judgment determining the status of the plaintiff, or a right, power or obligation conferred on the plaintiff by a juridical act.

The declaratory judgement approach would allow CAFII to be "in the driver's seat". Although we did not conduct exhaustive research in that regard, we are confident that CAFII would have the proper standing to bring such a motion and that the dispute between CAFII and the AMF would be considered as a "genuine problem" within the meaning of article 142 of the *Code of civil procedure*.

8. FINAL COMMENTS REGARDING SECTION 12 OF THE ARDFPS

You have asked us to consider whether the second paragraph of section 12 of the ARDFPS may be of assistance in challenging the position of the AMF regarding the application of the RRADM to credit card-embedded insurance benefits. Section 12 provides as follows:

> 12. Subject to the provisions of Title VIII, no person may act as or purport to be a representative without holding the appropriate certificate issued by the Authority.
>
> However, a financial institution may, by giving out brochures or flyers or using direct mail or any other form of publicity, invite the public to purchase insurance products.

In our view, the second paragraph of section 12 of the ARDFPS merely allows financial institutions to distribute brochures or flyers by mail or otherwise or to make any other kind of publicity regarding the insurance products it distributes.

This provision does not deal with the conditions upon which insurance products may be distributed to the public, nor with the obligations of disclosure that card issuers must fulfill in order to enter into valid and binding contracts with their clients.

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