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Ms. Eleanore Fang
Secretary and Chair
Executive Operations Committee
Canadian Association of Financial Institutions in Insurance
21 St. Clair Avenue East Suite 802
Toronto, Ontario
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Via email: eleanore.fang@td.com

[Determine to whom the letter should be addressed. Just CAFII or someone in particular or directly to FICOM]

Dear Ms. Fang:

Re: Creditor's Group Insurance in British Columbia

Background

Bulletin-INS-15-002 CREDITOR'S GROUP INSURANCE (the "**Bulletin**") issued by the Financial Institutions Commission of British Columbia ("**FICOM**") states, among other things, that in respect of creditors' group insurance a creditor must play an active and substantial role in the procurement of a contract of creditors' group insurance.

Issue

You have asked whether an automobile dealer is a creditor for the purposes of procuring a contract of creditor's group insurance, as described in the Bulletin.

Conclusion

In our opinion, automobile dealers are properly characterized as “creditors” when they enter into agreements with purchasers for the purchase and sale of vehicles (“PSA”) except in the rare instances when the purchaser pays in cash for the vehicle at the time of signing the PSA. As such, an automobile dealer is properly a “creditor” for the purposes of the definition of creditors’ group insurance in the *Insurance Act* (BC) and for the purpose of procuring a contract of creditors’ group insurance. However, it is important to note, that in our view no requirement exists in the law of BC such that vehicle dealers must be creditors in order to sell credit protection insurance under the licensing exemption and in the manner that is presently the market practice in BC.

Reasoning

When a potential purchaser of a vehicle attends an automobile dealer, once a vehicle is selected, a PSA is entered into as between the dealer and the purchaser. The purchaser agrees to buy the vehicle, financing is arranged and the vehicle is picked up at a future point in time. Financing or leasing may be arranged with the assistance of the dealer such that the purchaser is able to perform his or obligations under the PSA. Sometimes the vehicle is on the lot and available for delivery in short order but in many instances, the vehicle is ordered and delivered at a future time. Few, if any, purchases are made instantly and in cash and if that is the case, there is no eligibility for credit protection insurance, if it is available, there being no debt to insure.

The term “creditor” is informed by the definitions of “credit” and “debt”. In the context of a car purchase, pursuant to a PSA, the buyer has an obligation in law, upon signing the PSA, to pay money to the dealer, upon delivery of the vehicle, in order to complete the purchase of the vehicle. It is well established that a vendor of goods and services is a “creditor” at the time the buyer is obligated to purchase the goods or services. A dealer and a buyer who have entered into a PSA are respectively a “creditor” and “debtor”. If the purchaser does not pay after signing the PSA, the dealer can pursue the purchaser for recovery of the purchase price.

According to *Words and Phrases Legally Defined* the word "credit" is not specifically a technical legal term. "Credit" is defined in *The Dictionary of Canadian Law* as including "credit" for which a borrower is required to pay and that is given under an agreement between a seller and a buyer of goods or services by which all or part of the purchase price is payable after the agreement is entered into".

Similarly, *Words and Phrases Legally Defined* states that "credit is obtained when, with the assent of the creditor and at the behest of the debtor, a debt remains for a time unpaid or, it may be suggested, when goods or services are supplied 'in confidence of future payment' being made for them...Credit can be obtained when payment otherwise due for goods and services is expressly deferred by consent..."

It is settled in Canadian law that a debt is owed if, and when, conditional liability to pay money exists, even if that money is payable at a future time.

In *Garner v. Strickland & Western Forest Industries Ltd.*, [1955] 4 D.L.R. 329 (B.C.C.A.) it was held that:

*The debt is a present debt, the payment is to be a future payment. There are many cases in which such debts have been held garnishable...*¹

While the definition of debt typically brings to mind an obligation to pay money, in a broader sense, it can also be in relation to generally owing an obligation. This broader definition was referenced in *Gardner v. Newton* (1916), 10 W.W.R. 51 (Man. K.B.), in which the court provided the common law definition of “creditor”:

A creditor is one who has a right to require the fulfilment of an obligation or contract; but its general and almost universal meaning is a person to whom a debt is payable.

An automobile dealer is a “creditor” at the time the buyer becomes obligated to purchase the car – the crucial time being the time at which the PSA is entered into. The fact that the PSA is later performed because the purchaser obtains borrowed funds to pay the dealer, or performs the PSA, when a leasing company buys the car on behalf of the purchaser, does not change the fact, that under the PSA, the dealer is a creditor and the purchaser, a debtor.

In our view, a dealer is a creditor and can properly procure a contract of creditors’ group insurance².

However, we note that this aspect of the Bulletin is without foundation in law. This is the case for the following reasons:

- The *Insurance Act*³ (BC) (“IA”) does not deal with the distribution of insurance but rather it stipulates what is required for various contracts of insurance. The *Financial Institutions Act*⁴ (BC) (the “FIA”) deals with the regulation and licensing of various financial institutions, including insurance companies transacting business in British Columbia and it deals with the regulation of other persons, including insurance agents and adjusters. The IA does not contain any provision which specifies who can sell insurance and how they may sell it. Rather, those distribution issues are set out in the FIA.
- The FIA establishes the basic principle that no person may act in British Columbia as an insurance agent or insurance salesperson unless the person is licensed as an insurance agent or insurance salesperson, as the case may be⁵. Further, an insurer, officer, agent or

¹ See also *Lampman & Laidlaw Ltd. v. Levine* (1960), 22 D.L.R. (2d) 605 (B.C.C.A.).

² The *Insurance Act* requires that the person procuring the creditors’ group insurance be a creditor, which the dealer is at the time the contract is originated. Nothing prevents an insurance contract from directing payment of benefits to successor creditors, whether an entity which loans money to the purchaser to purchase the car, or whether the successor creditor is a vehicle leasing company. In each case the debt owed to the dealer is replaced with a debt owed to the lending or leasing company. The dealer, the lending or the leasing company are all creditors at some point in time.

³ RSBC 2012, c 1

⁴ RSBC 1996, c 141

⁵ Section 171(1) of the FIA

employee of an insurer, insurance agent or insurance salesperson must not pay or allow to be paid, or offer or promise, a commission or compensation to a person who is not an insurance agent licensee, or insurance salesperson licensee for so acting in British Columbia⁶. These prohibitions do not apply to a person or class of persons exempted by the regulations.

- The *Insurance Licensing Exemptions Regulation*⁷ specifically states that the general prohibition against unlicensed activity does not apply to a person whose only activity as an insurance agent or insurance salesperson is in connection with **credit insurance** sold incidentally to the granting or arranging of credit by that person or that person's employer⁸.
- “Credit insurance” as it is used in the *Insurance Licensing Exemptions Regulation* is specifically defined as credit protection insurance as defined in section 1 (1) of the *Classes of Insurance Regulation*⁹ which is as follows:

“credit protection insurance” means insurance under which an insurer undertakes to pay off credit balances or debts of an individual, in whole or in part, in the event of an impairment or potential impairment in the individual's income or ability to earn an income; credit protection insurance” in section 1 (1) of the Classes of Insurance Regulation

- You will note that the definition of “credit protection insurance” is the operative definition as it relates to who can sell insurance that pays of credit balances. You also will note that there is no reference in this definition or in the *Insurance Licensing Exemption Regulation* to “creditors’ group insurance” which is a large part of the focus of the Bulletin.
- Nothing in the law of BC requires that credit protection insurance be sold or structured as creditors’ group insurance. Such a requirement does not exist.
- The law of BC requires that a person selling credit protection insurance, which may or may not be structured as a group insurance contract, be either licensed or be selling credit insurance incidentally to the granting or arranging of credit by that person or that person's employer. This is what automotive dealers and their employees presently do, whether as an actual creditor or as a person who arranges credit.
- There is no requirement in the law of BC that if a dealer is to sell credit protection insurance under the exemption in the regulations, the dealer must be a creditor or procure

⁶ Section 178(1) of the FIA

⁷ BC Reg 328/90

⁸ There is also a corresponding exemption in the *Insurance Commission Exemption Regulation*, BC Reg 149/97

⁹ BC Reg 204/2011

a contract of creditors' group insurance as suggested by the Bulletin.

- BC law makers seem to have specifically anticipated the situation of those who arrange for credit but aren't in fact creditors. The exemptions seem to specifically anticipate a situation where the exempt seller may offer to arrange for credit from multiple sources while the seller is not a creditor. We are unsure as to why this clear legislative intent appears to have been ignored and why the Bulletin purports to impose requirements that do not exist and in fact conflict with the law, as it is in BC.

Yours truly,

A handwritten signature in black ink, appearing to read 'Jill McCutcheon', is written over a light gray, textured rectangular background.

Jill McCutcheon