

FCNB Informal Consultation On Accident & Sickness Insurance-Related Changes To New Brunswick's Insurance Act

From: Weir, David (FCNB) <david.weir@fcnb.ca>
Sent: July-31-20 7:50 AM
To: Brendan Wycks <brendan.wycks@cafii.com>
Cc: Keith Martin <Keith.Martin@cafii.com>
Subject: Re: Questions on Life and A&S parts

Hi Brendan,

The end of September would be great.

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From: Brendan Wycks <brendan.wycks@cafii.com>
Sent: Thursday, July 30, 2020 4:41:37 PM
To: Weir, David (FCNB) <david.weir@fcnb.ca>
Cc: Keith Martin <Keith.Martin@cafii.com>
Subject: FW: Questions on Life and A&S parts

Hi, David.

Thanks for reaching out to CAFII for input/responses on your Questions on the Life and Accident & Sickness parts of various provincial/territorial Insurance Acts, as they relate to your work in leading a rewrite of New Brunswick's Insurance Act.

CAFII would be pleased to provide answers to the questions you've posed in the attached document.

However, we would like to get a sense of your deadline/timelines for receiving responses from industry stakeholders.

Given that your request has arrived in July and many CAFII member representatives and staff (Keith and myself) will be on vacation at various points in July and August, we would ideally like to have until the end of September to get our response submission in to you.

Would a September 30 submission deadline work for you?

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From: Weir, David (FCNB) <david.weir@fcnb.ca>

Sent: July-21-20 3:03 PM

To: Brendan Wycks <brendan.wycks@cafii.com>; Keith Martin <Keith.Martin@cafii.com>

Subject: Questions on Life and A&S parts

Hello Brendan and Keith,

I hope that you are well.

I have been doing a selected jurisdictional review of the life and accident and sickness provisions. I am reaching out to some key stakeholders to obtain feedback on some issues that I have identified.

If there are any other issues that you want to raise as well, please don't hesitate to mention them.

Thank you in advance for your assistance. If anything is not clear, please let me know.

Best regards,

David Weir

New Brunswick *Insurance Act* Modernization Project

Life and Accident and Sickness Insurance Review

As you are aware, the Financial and Consumer Services Commission is engaged in a complete review of the *Insurance Act*, with the goal of modernizing the Act which is over 50 years old. Our primary goal is to enhance consumer protection. However, we also intend to harmonize as much as possible with other jurisdictions and to update any archaic language in the Act to make it easier to read.

For updating the life part (Part X) and the accident and sickness part (Part XI), we are using the Manitoba *Insurance Act* as our primary source. However, we are also consulting the Alberta and Ontario Acts and the new Saskatchewan Act to ensure that our new Act is truly modern and captures the best consumer protections.

During our review, we have identified some issues that we are hoping to get your input on to assist us in making recommendations for amendments to government.

Sections 132 (life) and 186 (A&S) - Definition of Declaration

The current definition of "declaration" reads:

"declaration" means an instrument signed by the insured

(a) with respect to which an endorsement is made on the policy, or

(b) that identifies the contract, or

(c) that describes the insurance or insurance fund or a part thereof,

in which he designates, or alters or revokes the designation of, his personal representative or a beneficiary as one to whom or for whose benefit insurance money is to be payable;

We are contemplating adopting the Alberta provision

“declaration”, except in sections 677 to 681, means an instrument signed by the insured

(i) with respect to which an endorsement is made on the policy,

(ii) that identifies the contract, or

(iii) that describes the insurance or insurance fund or a part of the insurance or insurance fund,

in which the insured

(iv) designates, or alters or revokes the designation of, the insured, the insured’s personal representative or a beneficiary as one to whom or for whose benefit insurance money is to be payable, or

(v) makes, alters or revokes an appointment under section 663(1) or a nomination referred to in section 669;

Based on the wording of our current Act, we believe that the exceptions should be ss. 168 to 172 for the life part. Are there other provisions that should be included? There will be similar changes in the accident and sickness part.

Application of certain provisions:

Section 148.1 of Manitoba’s Act reads

[148.1](#) Despite section 115, section 119 and subsections 123(1) and (2) apply to contracts of life insurance.

Section 115 exempts A&S and Life from application of general contract provisions. However, this provision makes s. 119 (imperfect compliance) and s. 123 (waiver and estoppel) apply to life contracts. Saskatchewan and Ontario reference the same two matters (ss. 8-14 and 8-19 for Sask and 126 and 131 for Ontario (may not be proclaimed)).

Alberta’s 635 on the other hand references the following provisions:

515 (imperfect compliance),

521 (waiver and estoppel),

527 (limitations of actions),

533 (effect of criminal act), (this does not seem necessary as the provision specifically mentions “contract of insurance” includes insurance as part of life insurance for disability)

537 (filing policy with the Superintendent) and

547 (electronic communication)

Currently NB does not have an equivalent provision. We are proposing to add one. We intend to reference:

- 101 (imperfect compliance)
- 109 (waiver and estoppel – which will be amended)
- 117 (filing policy with the Superintendent)

Alberta's s. 537 is different than NB's s. 117. In particular, s. 537 includes "any endorsement or rider or advertising material issued or used by the insurer". Further, NB's s. 117 allows policies or applications that are "unfair, fraudulent or not in the public interest" to be prohibited.

Section 533 in Alberta is similar to s. 2 of NB, but that provision already explains that it applies to life contracts for the limited purpose of disability.

Alberta's s. 547 deals with allowing electronic communications. We intend to introduce a similar provision, but it should be outside of general insurance part so that it applies to life (and A&S) policies.

Likewise, for the A&S part, Manitoba's s. 203.1 reads:

203.1 Despite section 115, the following provisions apply to contracts of accident and sickness insurance:

- (a) section 119; (imperfect compliance)
- (b) subsections 123(1) and (2); (waiver and estoppel)
- (c) section 132. (method of notice to insurer or insured).

Alberta's s. 696 the lists the following sections

- 515 (imperfect compliance),
- 521 (waiver and estoppel),
- 527 (limitations Act),
- 530 (method of notice to insurer or insured),
- 533 (effect of criminal act),**
- 537 (filing policy with the superintendent) and
- 547 (electronic communication)**

We intend to include a similar provision and propose to include:

- 101 (imperfect compliance)
- 109 (waiver and estoppel – which will be amended)
- 117 (filing policy with the Superintendent)
- ??? (method of notice to insurer or insured – new provision)

We think that we will capture all of the Alberta provisions, but would welcome any insights that you have.

July 1, 1962 and transition dates

Section 133 in NB Act references July 1, 1962. We will be updating these provisions to match new wording in other jurisdictions. I understand that July 1, 1962 was the date that there was a major reform of the “uniform Life Act”. I assume that those amendments were made in NB at the time. Based on your experience in other jurisdictions that have updated their life and A&S parts, are there any other transition dates that we need to be considering?

Rights of group insured or claimant to group policy

We will be recommending adopting provisions similar to ss. 151(5) and 151(6) of the *Manitoba Insurance Act*.

151(5) In the case of a contract of group insurance, the insurer

(a) must, upon request, provide a group life insured or claimant under the contract with a copy of

(i) the group life insured's application, and

(ii) any written statement or other record provided to the insurer as evidence of the insurability of the group life insured under the contract that is not part of the application; and

(b) must, upon request and reasonable notice,

(i) permit a group life insured or claimant under the contract to examine a copy of the group insurance policy, and

(ii) provide that person with a copy of the policy.

151(6) In the case of a contract of creditor's group insurance, the insurer

(a) must, upon request, provide a debtor insured or claimant under the contract with a copy of

(i) the debtor insured's application, and

(ii) any written statement or other record provided to the insurer as evidence of the insurability of the debtor insured under the contract that is not part of the application; and

(b) must, upon request and reasonable notice,

(i) permit a debtor insured or claimant under the contract to examine a copy of the creditor's group insurance policy, and

(ii) provide that person with a copy of the policy.

Subsection 151(9) of the Manitoba Act goes on to read:

151(9) A claimant's access to documents under subsections (4) to (6) extends only to information that is relevant to:

(a) a claim under the contract; or

(b) a denial of such a claim.

Manitoba is consistent with Alberta and Ontario. Saskatchewan's new Act has a similar provision, but includes a paragraph (c). Saskatchewan's ss. 8-103(8) reads:

8-103 (8) A claimant's access to documents pursuant to subsections (4) to (6) extends only to information that is relevant to:

- (a) a claim under the contract;
- (b) a denial of a claim under the contract; and
- (c) obtaining the terms or extent of coverage under the contract.

We are proposing to include Saskatchewan's paragraph (c) to enhance consumer rights and to assist a person in understanding his or her coverage even when there is not a claim. This could be helpful if a person is considering other insurance. We propose to do the same under the Accident and Sickness part (Saskatchewan's s. 8-159(8)). We welcome your thoughts.

Information set out in Policy and Certificate

We will be recommending adopting a provision similar to s. 154(2) of the Manitoba *Insurance Act*.

154(2) In the case of a contract of group insurance or creditor's group insurance, the insurer must issue, for delivery by the insured to each group life insured or debtor insured, a certificate or other document in which are set out the following:

- (a) the name of the insurer and a sufficient identification of the contract;
- (b) the amount, or the method of determining the amount, of insurance on
 - (i) the group life insured and any person whose life is insured under the contract as a person dependent on or related to the group life insured, or
 - (ii) the debtor insured;
- (c) the circumstances in which the insurance terminates and the rights, if any, on termination of the insurance of
 - (i) the group life insured and any person whose life is insured under the contract as a person dependent on or related to the group life insured, or
 - (ii) the debtor insured;
- (d) in the case of a contract of group insurance that contains a provision removing or restricting the right of the group life insured to designate persons to whom or for whose benefit insurance money is to be payable,
 - (i) the method of determining the persons to whom or for whose benefit the insurance money is or may be payable, and
 - (ii) the following statement in conspicuous bold type:

This policy contains a provision removing or restricting the right of the group life insured to designate persons to whom or for whose benefit insurance money is to be payable.

- (e) in the case of a contract of group insurance that replaces another contract of group insurance on some or all of the group life insureds under the replaced contract, whether a designation of a group life insured, a group life insured's personal representative or a beneficiary as a person to whom or for whose benefit insurance money is to be payable under the replaced contract applies to the replacing contract;
- (f) the rights of the group life insured, the debtor insured or a claimant under the contract to obtain copies of documents under subsection 151(5) or (6);
- (g) the following statement:

Every action or proceeding against an insurer for the recovery of insurance money payable under the contract is absolutely barred unless commenced within the time set out in The Insurance Act.

Saskatchewan includes an additional provision at paragraph 8-106(1)(e) that reads “a description of any restrictions or exclusions of coverage under the contract”. We are considering including Saskatchewan’s provision to enhance consumer rights and to assist a person in understanding his coverage. We welcome your thoughts.

We note that Saskatchewan also includes “a description of any restrictions or exclusions of coverage under the contract” in s. 8-105 related to what needs to be set out in the policy. Neither Manitoba nor any other jurisdiction have this. It seems odd to include it in a list of what must be set out in a policy as one would think that any restrictions or exclusions would have to be set out in the policy or they would not be restrictions or exclusions. We don’t feel that it is necessary, but perhaps we are missing something. I note that Saskatchewan does not include it for a regular policy at s.8.8.

We note that Saskatchewan’s s. 8-164(1) dealing with certificates for group and creditor’s group for accident and sickness insurance have the provision, but Saskatchewan’s s. 8-161 dealing with the policy does not. We intend to include it for our equivalent of Manitoba’s s. 209(2) (certificate). However, we don’t think that it belongs in our proposed equivalent of Manitoba’s s. 207(4) (what needs to be set out in the policy)? We want to confirm that you agree.

Termination of Policy

Manitoba has the following provision:

155(4) A person whose life is insured may, if an insurable interest no longer exists, apply to the court for an order requiring the insurer to immediately terminate the policy and pay over to the policy owner any value that exists in the policy.

We are proposing to adopt this and Manitoba's s. 217.1 under accident and sickness insurance. Although we intend to adopt a provision similar to Manitoba's s. 155.1 (and s. 217.2) which allows people to apply to court for an order respecting a policy, we feel that there is a gap, as a prerequisite to relief under s. 155.1 and 217.2 is that the application reasonably believe that their life or health might be endangered. We are curious as to why no other jurisdiction has felt the need to adopt it. Do you have any insights on this?

Court Action

We are proposing to adopt a provision similar to Manitoba's 155.1. However, we prefer the structure of Ontario's s. 179.1 (subject to what the drafters wish to do). Section 179.1 reads:

179.1 (1) A person may make an application to the court if,

- (a) the person's life is insured under a contract;
- (b) the person is not the insured under the contract; and
- (c) the person reasonably believes that the person's life or health might be endangered by the insurance on his or her life continuing under that contract.

Ontario's provision goes on to read:

(2) Upon an application being made under subsection (1), the court may make any order it considers just in the circumstances, including,

- (a) an order that the insurance on that person's life under the contract be terminated in accordance with the terms of the contract other than any terms respecting notice of termination; and
- (b) an order that the amount of insurance under the contract on that person's life be reduced.

The court's authority to make an order is broad (i.e., an order that the "court considers just"). Each jurisdiction has the same two potential orders (termination of policy, reduction of amount). Based on our previous work with the Maritime Harmonized project, we intend to include the following two potential orders:

- an order designating a different beneficiary; and
- an order designating a different owner or assigning the contract.

Despite the broad authority, we want to make it clear that these are two options and we believe that they may provide better solutions in some cases. For the second item we are envisioning a situation where a spouse may feel more comfortable if her or his former partner was no longer the owner of a policy, but still wants to maintain the policy and to protect insurability. We believe that her taking over ownership of the policy is the best solution. We welcome your thoughts and would like your opinion on the best wording for that clause (i.e., is "assigning" appropriate?).

Further, the jurisdictions include the following subsection:

- An order made pursuant to this section binds any person having an interest in the contract.

During the Harmonization Project, we had proposed the following wording:

- An order made by the court binds any person having an interest in the contract and, if applicable, discharges the insurer of all liabilities in respect of the policy terminated by the order.

We think that this provides greater clarity, but would like your input to ensure that there are no unintended consequences arising from the additional words.

We are proposing the same for the accident and sickness part.

Medical Assistance in Dying

Saskatchewan adopted the following:

8-118.1(1) In this section, “medical assistance in dying” means medical assistance in dying as defined in section 241.1 of the *Criminal Code*.

(2) Section 8-118 does not apply to an insured who receives medical assistance in dying.

(3) If a contract contains an undertaking, express or implied, that insurance money will be paid if a person whose life is insured receives medical assistance in dying, the undertaking is lawful and enforceable.

(4) For the purposes of this Act, if an insured receives medical assistance in dying, that insured is deemed to have died as a result of the illness, disease or disability for which he or she was determined to be entitled to receive that assistance, in accordance with clause 241.2(3)(a) of the *Criminal Code*.

We are proposing to adopt something similar. We appreciate that industry has taken the position to not deny in cases of medical assistance in dying, but we would like to see it codified. Do you have any feedback on Saskatchewan’s provision? Also, we propose to use “person whose life is insured” as opposed to “insured” which will make it clear that it also applies to group life insureds.

Prescribed rights of insured

We are proposing to introduce a provision similar to Manitoba’s ss. 174(2):

174(2) Despite subsection 168(1), if a beneficiary is designated irrevocably and has not consented as described in clause (l)(b), the insured may exercise any rights in respect of the contract that are prescribed by regulation.

Saskatchewan has a similar provision at ss. 8-128(2). However, we note that Saskatchewan also has the following provision at ss. 8-122(4):

8-122(1) An insured may, in a contract or by a declaration, other than a declaration that is part of a will, filed with the insurer at its head office in Canada during the lifetime of the person whose life is insured, designate a beneficiary irrevocably.

(2) If the insured makes a designation pursuant to subsection (1):

(a) the insured, while the beneficiary is living, may not alter or revoke the designation without the consent of the beneficiary; and

(b) the insurance money is not subject to the control of the insured or the claims of the insured's creditors and does not form part of the insured's estate.

(3) If an insured purports to designate a beneficiary irrevocably in a will or in a declaration that is not filed pursuant to subsection (1), the designation has the same effect as if the insured had not purported to make it irrevocable.

(4) If a beneficiary is designated irrevocably, the insured may exercise the prescribed rights to deal with the contract of insurance. 2015, c.I-9.11, s.

We feel that the substance of ss. 8-122(4) is covered in ss. 174(2), but want to confirm that we are not missing anything.

Enforcement of payment

Section 208(3) in the Accident and Sickness part of the New Brunswick *Insurance Act* reads:

208(3) A beneficiary designated under section 207 may upon the death by accident of the person insured or group person insured enforce for his own benefit, and a trustee appointed pursuant to section 209 may enforce as trustee, the payment of insurance money payable to him, and the payment to the beneficiary or trustee discharges the insurer to the extent of the amount paid, but the insurer may set up any defence that it could have set up against the insured or his personal representative.

There are three elements

- A beneficiary or the trustee can enforce a payment of insurance money,
- The payment to the beneficiary or the trustee discharges the insurer, and
- The insurer can set up a defence that it could have set up against the insured.

Manitoba has broken this into three subsections:

225(6) A beneficiary designated under section 224 may enforce for his or her own benefit, and a trustee appointed under section 226 may enforce as trustee, the payment of insurance money payable to the beneficiary or for his or her benefit under the contract or by a declaration in accordance with the provisions of the contract or declaration.

225(7) In an action by the beneficiary or trustee, the insurer may set up any defence that it could have set up against the insured or the insured's personal representative.

225(8) Payment by the insurer to the beneficiary or trustee discharges the insurer to the extent of the amount paid.

Like N.B.'s ss. 208(3), the payment to either the beneficiary or the trustee discharges the insurer. However, the other jurisdictions who have updated their Acts do not have this clause. For example, Saskatchewan's s. 8-183 reads:

8-183 A beneficiary may enforce for the beneficiary's own benefit, and a trustee appointed pursuant to section 8-181 may enforce as trustee, the payment of insurance money made payable to the beneficiary or trustee in the contract or by a declaration in accordance with the provisions of the contract or declaration, but the insurer may set up any defence that it could have set up against the insured or the insured's personal representative.

Saskatchewan's Act (like the others) has the following:

8-181(1) An insured may in a contract or by a declaration appoint a trustee for a beneficiary and may alter or revoke the appointment by a declaration.

(2) A payment made by an insurer to a trustee for a beneficiary discharges the insurer to the extent of the amount of the payment.

Unlike Manitoba's subsection 225(3), Saskatchewan's subsection 8-181(2) only talks about the payment to the trustee discharging the insurer.

In the life part, all jurisdictions are like the Saskatchewan Accident and Sickness provisions. For example, Manitoba's Act includes these provisions:

170(1) An insured may, in a contract or by a declaration, appoint a trustee for a beneficiary and may change or revoke the appointment by a declaration.

170(2) A payment made by an insurer to a trustee for a beneficiary discharges the insurer to the extent of the amount paid.

[172\(1\)](#) A beneficiary may enforce for his or her own benefit, and a trustee appointed under section 170 may enforce as trustee, the payment of insurance money made payable to the beneficiary or trustee in the contract or by a declaration in accordance with the provisions of the contract or declaration.

172(2) In an action by the beneficiary or trustee, the insurer may set up any defence that it could have set up against the insured or the insured's personal representative.

We like the Manitoba provisions for the Accident and Sickness, but wonder why it is treated differently in other jurisdictions and in the Life Part. We welcome your comments on the discrepancies and the rationale.

Presumption of death declaration

Subsection 8-140(2) of the Saskatchewan Act reads:

8-140 (2) A declaration of presumption of death made by the court pursuant to subsection (1) must contain particulars of the following information to the extent that those particulars have been established to the satisfaction of the court:

- (a) the full name of the person presumed dead, including, if applicable, a birth or married name;
- (b) the place where the death is presumed to have occurred;
- (c) the date on which the death is presumed to have occurred;
- (d) whether the presumed death was accidental;
- (e) any other information that the court directs.

We are proposing to include a similar provision. We note that Alberta has a similar provision (ss. 680(2)) but includes “the sex of the person presumed dead”. We are not sure of the need to include this, so would welcome your opinion. We will also proposing similar provisions for the accident and sickness part.

Accident and Sickness

Section 187(1) of the NB Act references provisions that apply to a contract that was made, or in effect, prior to October 1970. We compared Manitoba and Saskatchewan and have identified several provisions that we will be adopting and will be included in the list. In particular, provisions similar to the following provisions will be included (Saskatchewan references):

- 8-156, - provisions applying to A&S
- 8-158 – application to group insurance
- 8-173 – Disclosure of material facts (same as our 202 and Manitoba’s 219)
- 8-179 – Irrevocable designation
- 8-180 – designation in will
- 8-186 – insured dealing with contract
- 8-188 – entitlement to dividends
- 8-189 - transfer of ownership
- 8-191 – enforcement of creditor’s group rights
- 8-193 – insurer obligation to pay upon sufficient evidence (not sure if we will adopt this)
- 8-194 - Declaration as to sufficiency of proof (Manitoba’s 230.4(2))
- 8-195 – declaration of presumption of death

Please let us know if there are any issues with these provisions applying to policies issued prior to 1970.

Further, we feel that our proposed provisions similar to s. 217.1 and s. 217.2 in Manitoba (court order re termination of policy or other relief) should also be included on the list, as it would make sense that that relief was also available for pre October 1970 policies.

Statutory Conditions

There is a difference in whether the Statutory Conditions are placed in a schedule or not. What is your opinion on this? What are your thoughts on putting them in a regulation? Our final decision may depend on drafters' preference.

Statutory Condition 4

NB's Act has the following statutory condition:

4 Where the benefits for loss of time payable hereunder either alone or together with any other benefits, compensation or right of payment for or in respect of loss of time due to disability exceed the money value of the time of the person insured, the insurer is liable only for that proportion of the benefits for loss of time stated in this policy that the money value of the time of the person insured reduced by all such other benefits, compensation, or rights of payment other than as are provided under this and similar contracts or as are provided under a contract of group insurance, or a life insurance contract providing disability benefits bears to the aggregate of the benefits for loss of time payable hereunder and under similar contracts and any contract of group insurance or life insurance contract providing disability benefits and the excess premium, if any, for the current term shall be returned to the insured.

I note that Alberta, BC and Manitoba removed the condition, but note that Ontario did not. We are proposing to repeal it, but wonder if you have any insights into why Ontario retained it. Ontario also appears to be out of sync on statutory conditions 5 and 6 as well.

Payment of premium by assignee or beneficiary

Manitoba has the following provision under its accident and sickness part:

217.3 Except in the case of group insurance or creditor's group insurance, an assignee of a contract, a beneficiary or a person acting on behalf of one of them or on behalf of the insured may pay any premium that the insured is entitled to pay.

Most jurisdictions only have it for life insurance. We welcome your thoughts on whether it should also be included under accident and sickness.

Non-payment of premium

NB's Act includes ss. 198(2), which reads:

198(2) Where a cheque or other bill of exchange or a promissory note or other written promise to pay is given for the whole or part of a premium and payment is not made according to its tenor the premium or part thereof shall be deemed never to have been paid.

Manitoba retained the provision for accident and sickness. The other jurisdictions removed the provision (but retained it for life insurance). We welcome your thoughts on whether it should be retained under accident and sickness insurance.

Persons insurable - Insurable Interest

Saskatchewan had proposed the following new provision at 8-171(2):

(2) If a primary person places insurance on the life or well-being or both of any person set out in clause (1)(a), the insurer shall send a notice in writing to those persons who are insured:

(a) at the time the insurance is placed, advising of the particulars of the insurance; and

(b) when any material changes are made to the insurance, advising of the particulars of the changes, including assignment or cancellation of the contract.

This provision was not proclaimed. No other jurisdiction appears to have it. I understand why Saskatchewan had proposed it. Did industry have issues with it?

Payment to relatives or persons equitably entitled

Section 217 of the New Brunswick Act reads:

217 Notwithstanding that insurance money is payable to a person, the insurer may if the contract so provides, but subject always to the rights of an assignee, pay an amount not exceeding two thousand dollars to

(a) a relative by blood or connection by marriage of a person insured or the group person insured, or

(b) any person appearing to the insurer to be equitably entitled thereto by reason of having incurred expense for the maintenance, medical attendance or burial of a person insured or the group person insured, or to have a claim against the estate of a person insured or the group person insured in relation thereto,

and any such payment discharges the insurer to the extent of the amount paid.

We note that this provision has been maintained in those jurisdictions that have updated their accident and sickness part and we intend to do the same. We understand how the provision works, but would welcome your input on why such a provision was enacted. We also propose to increase the amount to \$10,000 and welcome your thoughts on that.