

Agenda Item 4(a)(3)
April 4/23 Board Meeting

From: Keith Martin
Sent: January 23, 2023 1:48 PM
To: CAFII EOC Members
Cc: CAFII Board Members; Brendan Wycks; Jake Becker
Subject: CAFII Analysis of FCNB Rule 001--Including a Comparison of Original and Final Regulation

Hello, CAFII EOC and Other Committee Members (Copy to Board Members):

FCNB (New Brunswick) has introduced a new restricted insurance agent licensing regime, called Rule INS-001.

CAFII had serious issues with the original version of the Rule, and outlined them in a letter on 7 February, 2022; but virtually none of the issues we raised were addressed in the updated Rule, which has now received Ministerial approval and is coming into force by 1 February, 2023. (There will be further guidance from FCNB on what if any transition or implementation period will be available.)

Please find attached the relevant documents for this New Brunswick Rule, **including an analysis of the original document as compared to the final version.**

There are many unclear expectations in the final version of the Rule, and there are concerns around the timeline for implementation. CAFII has captured these in a document that will soon be circulated for review to members, after which we will request a meeting between FCNB and CAFII and its members to walk through these issues.

There is one clause (Clause 46) that CAFII is particularly disappointed by:

46. A restricted insurance representative, or an employee of a restricted insurance representative, shall advise potential clients that he or she is not a licensed insurance agent and that the potential client may wish to seek advice from a licensed insurance agent.

Despite our strong reasons in our submission against this provision—it plays favourites by tilting the bar in favour of the advice channel, and we are concerned that offering this advice is not permitted by the Bank Act provisions for offering authorized insurance products—New Brunswick went ahead anyways with the provision.

In the 17 January, 2022 EOC meeting, there was strong support for asking our legal counsel (Stuart Carruthers, Stikeman Elliott) for an opinion on our legal options on this provision. This has now been supported by our Board, and we will be reaching out to Stikeman Elliott for their legal opinion on this clause.

Meantime, please do not hesitate to reach out to Brendan or me if you have any questions or concerns.

Regards,

--Keith

Keith Martin

Co-Executive Director / Co-Directeur général

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*Making Insurance Simple and Accessible for Canadians
Rendre l'assurance simple et accessible pour les Canadiens*

From: Keith Martin

Sent: February 7, 2023 12:44 PM

To: CAFII Board Members

Cc: CAFII EOC Members; Brendan Wycks; Jake Becker; Stuart Carruthers

Subject: CAFII Review of FCNB Rule INS 001--Legal Analysis from Stikeman Elliott, and Proposed Next Steps

Hello, CAFII Board Members (copy to EOC, and Market Conduct and Licensing Committee Members; Stuart Carruthers of Stikeman Elliott is also copied on this note):

The New Brunswick Financial and Consumer Services Commission (FCNB) has recently published the final version of Rule INS-001, which is mostly about the creation of a new restricted insurance agent licensing regime in the province.

The Rule includes a clause, Section 46, which CAFII strongly disagreed with in its written submission to the FCNB on a draft of the Rule:

46. A restricted insurance representative, or an employee of a restricted insurance representative, shall advise potential clients that he or she is not a licensed insurance agent and that the potential client may wish to seek advice from a licensed insurance agent.

Despite our strong reasons in our submission against this provision—it plays favourites by tilting the bar in favour of the advice channel, and we are concerned that offering this advice is not permitted by the Bank Act provisions for offering authorized insurance products—New Brunswick went ahead anyways with the provision.

The CAFII Board recently unanimously supported CAFII seeking a legal opinion on New Brunswick's (FCNB) Rule INS-001, Section 46.

We now have received an overview analysis from our legal counsel, Stuart Carruthers of Stikeman Elliott.

Unfortunately, it concludes that there is no clear legal basis for successfully challenging Section 46 of the recently implemented FCNB Rule INS-001.

It is likely that when FCNB rejected CAFII's objections to this clause in an earlier consultation on a draft of the Rule, FCNB similarly had legal opinions shared with it that it would stand legal scrutiny.

I have consulted with CAFII Board Chair Peter Thompson on next steps, and it was agreed that I would write the Board advising them of this development and share the legal opinion (attached, and also at the bottom of this email); and recommend putting this on the Agenda for the 4 April, 2023 Board meeting.

To further elaborate on next steps, CAFII could do nothing further, or if we did do something, it could not be legal in nature but rather continued advocacy/lobbying, either ourselves or if possible with CLHIA. But since a legal challenge is not apparently in the works, and since our next lobbying opportunity is likely when FCNB next reviews the Rule, discussion of this matter can likely wait until the 4 April, 2023 Board meeting.

Unless as a Board member you would like to discuss this sooner, we will at this time take no further action and have this on the Agenda for the 4 April, 2023 Board meeting for discussion.

Thank you,

--Keith

Keith Martin

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From: Stuart Carruthers <SCarruthers@stikeman.com>

Sent: February 6, 2023 8:51 AM

To: Keith Martin <Keith.Martin@cafii.com>

Cc: Brendan Wycks <brendan.wycks@cafii.com>; Stuart Carruthers <SCarruthers@stikeman.com>; Peter Hamilton <PHamilton@stikeman.com>; Michael Kilby <MKilby@stikeman.com>; Chris Lofft <CLofft@stikeman.com>; Sinziana Hennig <SHennig@stikeman.com>

Subject: RE: CAFII Analysis of FCNB Rule 001--Including a Comparison of Original and Final Regulation

Keith –

I. Introduction/Summary

I've now canvassed that New Brunswick Financial and Consumer Services Commission Rule INS-001 section 46 (the "**Section**") with my colleagues in our practice areas which I considered might present the best possible bases on which to further legally challenge the Section, if desired. Those areas were public policy/administrative law litigation (including under the Charter of Rights), competition law, and bank regulatory law.

This is to concisely report to you on that and then we could discuss further, including possible next steps.

In summary, we don't see any reasonable prospect of successfully legally challenging the Section from any of the litigation, competition or bank regulatory perspectives. As a result, it would appear that further and more intensive lobbying of the New Brunswick regulator would presumably present the best chance of successfully repealing or amending the Section. That might be most usefully undertaken on a co-ordinated basis with other aligned organizations, such as insurance industry groups like the CLHIA or non-insurance groups also subject to the Section, such as automobile dealer associations. While commencing or threatening litigation can sometimes be strategically useful in connection with any such lobbying, any such steps would need to be very carefully considered at the time, as they could also be counter-productive and/or present reputation risks to CAFII and its members.

II. Discussion

Taking each of those areas in turn, concisely:

1. Public Policy Litigation

Our litigation partner Sinziana Hennig advises as follows. Sinziana was part of the team which represented the CLHIA in the life insurance "side investment accounts" litigation in Saskatchewan. The following is based on initial, high-level research; we could consider this more exhaustively upon request.

- Generally, rules or regulations can be challenged (i) if a required rule-making process was not followed (very rare), (ii) as being unauthorized by the enabling statute (rarely successful), or (iii) on constitutional grounds.
- Based on an initial review of the *Insurance Act* (New Brunswick (the "**Insurance Act**")) and the *Financial and Consumer Services Commission Act* (New Brunswick) (the "**FCNB Act**") and the Rule-making Procedure Regulation under the FCNB Act:

- We don't see any material process requirements other than publication.
- There does not seem to be an obvious basis for arguing that the Section is unauthorized by the Insurance Act. In brief:
 - It seems to fall squarely within the scope of the Rule-making powers under s. 371.1(ff) of the Insurance Act (prescribing disclosure requirements for restricted insurance agents ("RIAs")), further supported by sections 371.1(v) and (cc) (rules respecting the responsibilities of RIAs, prescribing standards of practice and duties of RIAs).
 - While one of the grounds on which regulations or rules are sometimes challenged as *ultra vires* (beyond the powers/authority of the governmental entity) is that they discriminate against classes of persons without statutory authorization, here the Insurance Act contains a provision that expressly and broadly authorizes discrimination: s. 371.2(6) provides that: "rules may vary for or be made in respect of different persons, matters or things or different classes or categories of persons, matters or things."
 - The Insurance Act provides that in the event of a conflict or inconsistency between a rule and a regulation, the regulation prevails – but no relevant regulations have been adopted under the Insurance Act.
- We also considered whether the requirements of the Section could amount to "forced speech" in breach of Charter s. 2(b)(which protects freedom of expression). Section 2(b) breaches are relatively easy to establish, but even that may not be made out here, because the Section doesn't require the RIAs to use specific wording or preclude them from attributing the disclosure to a requirement by the regulator. If the RIAs could comply with the Section by saying some version of the following, it may not even be possible to establish a 2(b) breach: "I am required by the Financial and Consumer Services Commission to advise you that I am not a licensed insurance agent and that you may wish to seek advice from a licensed insurance agent. If they recommend to you alternative options, you should consider what is appropriate for you, considering your needs and your budget."
- Even if a breach of s. 2(b) could be established, the challenge for Charter claimants in expression cases is at the stage of whether the state can justify the breach. We would expect that it could, in the case of prescribing disclosure requirements for representatives interacting with the public in the context of a highly regulated regime.

2. Competition

We don't think there is any reasonable prospect of challenging the Section under the *Competition Act* (Canada). Our partner Michael Kilby, who's assisted CAFII on other matters, advises that:

- The *Competition Act* allows for private actions, but the scope for these is essentially limited to scenarios where: (i) a group of competitors is engaged in a price-fixing or similar conspiracy; or (ii) a dominant competitor is engaged in abusive conduct. Cases in these areas are rare and tend only to proceed on egregious facts. Challenging the rule-making discretion of a provincial legislature or regulatory agency falls well outside the scope of activity that would typically form the basis for a private action.
- A complaint can also be made to the Competition Bureau, with a view to causing the Bureau to challenge conduct under the *Competition Act*. However, in this case, it would be necessary as a first step to convince the Bureau that the Section is clearly anti-competitive, i.e., will result in higher prices to be paid by consumers. Even then, we do not think the Bureau would take enforcement action but rather may possibly make a submission to the NB regulator, advocating for a more pro-competitive rule. In the scenario where a regulatory provisions has an ambiguous outcome on the market (i.e., some benefits for consumers and some negatives for consumers, some winners and some losers), it does not seem likely that the Bureau would take a side. Even if it did take a side, this would not dictate the ultimate decision of the NB regulator. The time and effort needed to educate the Bureau on these issues, have them understand the market dynamics, form a view, etc. would be very substantial with the return likely to be minimal, if anything.

3. Bank Regulatory

We generally agree with Dallas Ewen's observations in his email. The Section does not require a referral to a specific agent, and the RIA, if asked for a referral, could either decline, or refer to a list (which we do not think would constitute promoting a specific agent).

Further, any constitutional challenge, focused on federal jurisdiction over the business of banking, would be a very uphill process, given the current provincial licensing requirements to which banks are subject, following the Supreme Court decision in the Canadian Western Bank case, holding that incidentally sold insurance was not a core banking activity and was therefore subject to provincial regulation.

Pleased to discuss further as constructive at your convenience.

Stuart S. Carruthers

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