October 12, 2018

NL Board of Commissioners of Public Utilities
P.O. Box 21040, 120 Torbay Road
Prince Charles Building, Suite E-210
St. John's, NL A1A 5B2

RE: Written Submission to the NL Public Utility Board
2017 Automobile Insurance Review

To the NL Board of Commissioners:

Regarding the review of Automobile Insurance being undertaken by the NL Board of Commissioners of Public Utilities, the Atlantic Provinces Trial Lawyers Association makes the following submissions:

MANDATE – Review and Report

1. The Government of Newfoundland and Labrador initiated a review of automobile insurance in the Province by directing the Public Utilities Board to **review** and **report** on a number of automobile insurance issues, including but not limited to:
   - The impact of using monetary limits (caps); or
   - Deductibles for pain and suffering.

See: Transmittal Letter dated August 9, 2017 plus attached Terms of Reference August of 2017.

No Recommendations Required

2. Early on in the hearing process the Chair of the Commission, Ms. Darlene Whalen, noted that the PUB would not be making recommendations and that its mandate was to review and report.

***See**: June 5/18 Transcript of Ms. Whalen's comments:*
Page 6: Lines 14-25:

"I want to emphasize that the Board is not a public policy instrument of government, and as such the Board will not be making any decisions on any of the issues under review or making any recommendations to government on the issue of the cap or deductible. The Board's work is primarily research, analysis, and information gathering. The Board will listen and reflect the information gathered through the presentations, questions, answers written comments and submissions in its final report to government."

Page 38: Lines 15-25:

"I can't speak to the minister's letter specifically. In my opening statement I did say that we will not be making any recommendations on the issue of the caps, monetary cap or deductibles that are Terms of Reference specifically require us to review and report on those issues. There are a couple of specific areas within the Terms of Reference that speak to recommendations. So, where we've been asked to make recommendations, we will."

Page 39: Lines 1-5:

"Otherwise, we are reviewing and reporting. And as to the minister's expectation of recommendations, I have no … we are guided by the Terms of Reference issued to us."

'Caps' and 'Deductibles'

3. Although it is clear from the transmittal letter (Aug. 9/17) and its accompanying Terms of Reference (August 2017), the Reports filed, the Presentations made and the questions asked and answered, that it was the Board's responsibility to hear, consider and report upon a number of specific issues including:

- The reasons behind increasing claims costs for private passenger vehicles;
- The reasons behind increasing claims costs for taxi operators;
- And options to reduce these costs.

The Board had been specifically asked to examine the impact on rates and the implications for claimants of introducing a monetary cap on claims for non-economic loss for minor/mild injuries or continue with the current deductible of $2,500.00 or increasing the deductible.

***See**: June 5/18 Transcript of Ms. Whalen's comments:*
Page 4: Lines 23-25:

"The Terms of Reference issued to the Board require the Board to review and report on a number of specific issues, including the …"

Continued on Page 5: Lines 1-11:
"reasons behind increasing claims cost for private passenger vehicles and taxi operators, and options to reduce these costs. The Board has been specifically asked to examine the impact on rates and implications for claimants of introducing a monetary cap on claims for non-economic loss for minor mild injuries or continue with the current deductible of $2,500.00 or increasing the deductible."

Taxi Industry – real crisis? / Insurance Industry – what crisis?

4. These submissions on behalf of the Atlantic Provinces Trial Lawyers Association (APTLA) will focus primarily on the impact a 'cap' would have on claimants, (innocent victims in automobile accidents) who suffer whatever may be deemed to be a **'minor injury'**.

In any analysis into the imposition of a 'cap' on Third Party 'minor' injury claims one must necessarily appreciate the factual background that gives rise to the issue.

Put simply, it can be said that the reason that the Government and consequently the Board is addressing this issue is because the representatives of the Taxi Industry have complained vociferously about their difficulty in getting affordable insurance coverage and the Insurance Industry (through its official representative/lobby group the IBC) have complained repeatedly that the industry is experiencing significant losses.

Well, framing the issue in this way inevitably leads to the obvious question: **Is the Insurance Industry actually experiencing the losses it is claiming?**

Not surprisingly, the contention or the argument between those who maintain that the Insurance Industry is experiencing significant losses and those who claim that it is not, are each focusing on different aspects of the issue.

From the presentations made, the questions asked, and the answers given during these hearings along with the documentation submitted to the board; it is clear that the Insurance Industry as a whole has on an annual basis made profits on its overall business in Newfoundland and Labrador in the approximate amount of **$100 million per year**.

Type of Auto Insurance	***Insurance Premiums ($000's)***			***Insurance Disbursements ($000's)***		
	2016	**2015**	**2014**	**2016**	**2015**	**2014**
Liability	263,279	254,806	244,663	210,818	235,024	231,858
Personal Accident	31,708	30,529	30,319	22,174	26,628	25,437
Other	138,864	132,549	123,655	101,782	97,894	83,811
TOTAL	**433,851**	**417,884**	**398,637**	**334,774**	**359,546**	**341,106**

Source: 2015 and 2016 Annual Reports of the Superintendent of Insurance, Tables V, Newfoundland and Labrador.

Nonetheless, it is the Insurance Industry's contention that as a whole, they have lost money in the provision of Third Party Liability Insurance.

To illustrate this point, by analogy it is tantamount to saying that the Grocery industry as a whole have made a $100 million in profits, but they are complaining that in one of its product lines (the sale of eggs) they have been losing money each year.

$100 million annually – is simply not enough?!

5. The Board is no doubt mindful that motor vehicular insurance is **compulsory** for all motor vehicles on our roads and consequently since motor vehicle owners are **being legislatively required to purchase this coverage** and Insurance Companies are the only vendors authorized to sell these products some form of regulatory mechanism/oversight is required to manage the Industry.

Within this regulatory framework there are processes in place to determine what level of pricing each Insurance Company can operate at, so that they can make what is considered to be a ***'reasonable'*** profit on their overall investment.

The current Insurance environment in Newfoundland and Labrador was described rather succinctly by Ms. Sherry Hillier, President of CUPE when she presented to the PUB:

> ***See****: June 5/18 at page 43, lines 4-7:*
>
> *"First of all, it is important to remember drivers are required by legislation to purchase Automobile Insurance."*
>
> *And at lines 13-15:*
>
> *"Legislation requiring Automobile Insurance means private Insurance Companies have a captive market."*
>
> Ms. Hillier went on to note:
>
> ***See****: June 5/18 at page 44, lines 9-25 and page 45 lines 1-6:*
>
> *"In 2016 drivers in Newfoundland and Labrador paid approximately 434 million in premiums and received approximately 334 million in claims. This information filed with the Superintendent of Insurance. The premiums exceeded disbursement payments for direct claims for almost 100 million dollars. Private companies used these 100 million dollars presumably to cover operating costs such as staff, offices, promotions, broker fees and other profits – other expenses including profits. Four companies have a stranglehold on the Insurance in Newfoundland and Labrador. Ninety-five percent of Auto Insurance services are provided by approximately 16 Insurers. When common ownership among*

these are factored in only four companies provide approximately 84 percent of the Automobile Insurance business."

What is minor?

6. Although no specific definition of 'minor injury' was provided to the Board, reference was made to the 3 definitions currently in use in the Atlantic Provinces:

Nova Scotia (2010)
Minor injury, with respect to an accident, means
(i) A sprain;
(ii) A strain; or
(iii) A whiplash-associated disorder injury caused by that accident that does not result in a serious impairment.

New Brunswick (2013)
Minor personal injury means any of the following injuries, including any clinically associated sequelae, that do not result in serious impairment or in permanent serious disfigurement:
(a) A contusion;
(b) An abrasion;
(c) A laceration;
(d) A sprain;
(e) A strain; and
(f) A whiplash associated disorder.

Prince Edward Island (2014)
Minor personal injury means any of the following injuries, including any clinically associated sequelae, that do not result in serious impairment:
(i) Sprain;
(ii) Strain; or
(iii) Whiplash associated disorder injury.

In the absence of a specific definition we can only draw the Boards attention to the presentation by Dr. Karl Misik.

Dr. Misik's background, experience and expertise is adequately laid out in the transcript dated September 7, 2018 at pages 1-5:

One important take away from Dr. Misik's presentation was his explanation of the inappropriateness/inadequacy of the use of the term 'minor injury' when applied to the classification of an injury as opposed to the impact on the individual.

***See**: September 7/18 at pages 13 and 14, lines 7-25 and 1-5:*

"Well, again the term minor in my opinion should not be there at all. There should be a different classification, as already has been talked about, Type 1, Type 2 injury perhaps, and so on, but to consider minor being the definition really begs the question then what does major mean, and major, are we talking about individuals that have substantial brain injuries, broken bones and so on, but there is a gradation of that, and minor, in my opinion, does not exist because as I said, again people may feel somewhat better after two or three months and so on of physio or whatever treatment one prescribes, but it's the aftermath and the symptoms that relate to mental health that come as a result of the trauma. Trauma, in and of itself, creates significant mental health issues in a great proportion of these individuals down the road, and that is not captured anywhere in these definitions, but yet it is a problem that we deal with on an ongoing basis, and it is a rather difficult one to deal with."

<u>Insurer Profitability:</u>

7. The Board has heard extensive evidence on the profitability of auto insurers in Newfoundland. The evidence establishes that auto insurers in Newfoundland have earned healthy profits over the past two decades. The evidence does not support an insurance crisis mandating any type of restriction of legal rights on Newfoundland accident victims.

Stated simply, an insurer's profits are calculated as follows:

Profit = (Premium Charged + Interest Earned on Premium) – (Bodily Injury Claim Payouts + Operating Expenses + Claim Reserve)

Operating expenses and claim reserves are subject to manipulation by insurers. Manipulation of reserves and/or operating expenses leads to inaccurate loss ratio/returns on equity and profitability figures for insurers.

In addition, the profitability of insurers is affected by insurance cycles. The Board has heard evidence throughout the Hearing defining hard and soft market cycles. Insurer profitability changes significantly during hard and soft cycles. In order to assess the profitability of the auto industry in Newfoundland, an entire cycle (both hard and soft cycles) must be reviewed.

<u>Hard and Soft Market Cycles:</u>

8. Ms. Elliott was cross-examined with respect to the profitability of auto insurers in Newfoundland. Her financial review spanned 10 years, from 2007 to 2016. Ms. Elliott did not review the profitability of auto insurers in Newfoundland for the period of 2002 to 2006. The Atlantic Provinces Trial Lawyers Association submitted evidence establishing the profitability of auto insurers for Newfoundland from 2002 to 2006

<u>See</u>: Exhibit – "Nova Scotia Automobile Insurance Discussion Document" – page 16

The profitability of auto insurers in Newfoundland from 2002 to 2006 was staggering. The loss ratios for auto insurers in Newfoundland during that time frame were between 58% and 72%.

With a 75% loss ratio leading to roughly a 10% return on equity, it is clear that Newfoundland auto insurers were earning profits in the range of 20 to 30% from 2002 to 2006. For some unknown reason, Ms. Elliott failed to provide this data to the Board. This data establishes the highest period of profitability for auto insurers during the hard and soft market cycle in Newfoundland yet was omitted in Ms. Elliott's review.

APTLA submits that the Board must take into account the significant profits earned by Newfoundland auto insurers throughout the cycle when determining whether the insurance rates are currently adequate. Failure to do so would allow auto insurers to reap the benefits of extremely high profits during one part of the cycle and then look to consumers or accident victims to bail out auto insurers when they are less profitable during a soft cycle. A careful review of auto insurance cycles in Newfoundland establishes clearly that auto insurers (on average) have earned more than reasonable profits since 2002.

Operating Expenses:

9. The Atlantic Provinces Trial Lawyers Association led evidence that the operating expenses in Newfoundland (as percentage of premium) are higher than Alberta. One would assume that Alberta has a higher cost of living than Newfoundland, which would suggest that Alberta's operating expenses should be higher. The evidence before the Board further establishes that Oliver Wyman recommended a 23% operating expense ratio for Alberta in 2005. Similarly, this Board held that a 25% operating expense ratio was appropriate in 2005. The operating expense ratio in Newfoundland (until recent changes made by the IBC on how they calculate operating expenses in 2012 – See Elliott report, page 7) has been well in excess of 23 and 25%. The evidence led by APTLA shows that operating expenses are, on average, 6.2% higher than operating expenses deemed reasonable by Oliver Wyman in Alberta. There is no basis upon which this Board should allow an operating expense ratio higher in Newfoundland than an operating expense ratio in Alberta. It is submitted that auto insurers need to operate efficiently before there is consideration of impacting the rights of accident victims in Newfoundland.

It is APTLA's position that the appropriate operating expense ratio ought to be the average of the past three years' operating expense ratios in Newfoundland less 6.2%.

Claims Reserve:

10. Insurance companies place a claim reserve on each of their bodily injury claims. As it often takes many years to settle claims, the reserve may be too high or too low. The claim reserve is shown as a loss payout (as part of the UL & ALAE figure in Ms. Elliott's exhibit attached to her report) in the given year that the reserve is implemented. In essence, the reserve is shown as a loss payout even though it has not been paid out until the claim is

settled. Reserves are the mechanism by which the insurance industry can hide their profits as they can simply increase their reserve to make their company look less profitable than they are in reality.

In addition, a supplemental reserve is applied by the IBC before the UL & ALAE data is supplied to GISA. This allows the IBC through their activities to hide insurer profits by simply increasing the supplemental reserve. The GISA data contains both the case reserve (by the insurance company) and the supplemental reserve (provided by the IBC). The inherent conflict of the IBC's actuary placing a supplemental reserve on the data is apparent. The IBC as the paid lobbyist of the insurance companies could easily manipulate the supplemental reserve and could easily hide the insurance company's profits in doing so. This is exactly what occurred in Nova Scotia in 2002 before the bodily injury cap was placed on accident victims.

In Nova Scotia, a rate hearing application took place in 2002. Ms. Elliott and Ted Zubulake opined at that Hearing that insurance premiums were inadequate and that insurers were losing money. Both experts failed to observe the insurers were significantly over-reserved and hiding profits. Years later, during the Nova Scotia Constitutional Challenge (Hartling), Mr. Zubulake was forced to admit that insurers were significantly over-reserved and that insurers in Nova Scotia were in fact reasonably profitable in 2002 (one full year before the cap was implemented in Nova Scotia). The "revised" calculations showed that the insurance industry in Nova Scotia earned a 10.8% ROE in 2002, again one year before implementation of the CAP. APTLA submitted this evidence to this Board for its consideration (Exhibit – "Nova Scotia Automobile Insurance Discussion Document" – page 12).

Moreover, the Exhibit establishes that the insurance industry in Nova Scotia achieved record setting profits of 32.9% ROE (2003), 31.4% ROE (2004) and 27.5% ROE (2005) for example. Premiums dropped very little in Nova Scotia following the imposition of the CAP on accident victims. Insurers' profits skyrocketed. Accident victims permanently lost their right to fair compensation. Oliver Wyman missed all of this during their analysis. Unless this Board carefully reviews the evidence before it, Newfoundland may make the same error.

Ms. Elliott testified (for the purposes of the Newfoundland review) that she did not accept the IBC's supplemental reserve. She claims that she reviewed the claim reserves and payouts from insurance companies and that she placed a supplemental reserve on top of those figures before concluding the claims costs were increasing by 4.5% a year in Newfoundland. Normally, this would be a better approach than the IBC placing a supplemental reserve on those figures. However, given Ms. Elliott's/Oliver Wyman's conflict and lack of independence (due to their connection with the insurance industry through Marsh and McLennan) the fact that Oliver Wyman is placing a supplemental reserve on these figures versus the IBC should give this Board little comfort.

Oliver Wyman is significantly increasing the supplemental reserve (when there is no statistical evidence that court awards in Newfoundland are increasing by 7% per year). As stated, in Nova Scotia, the supplemental reserve was too high and once the cases in Nova Scotia settled,

it became apparent that Nova Scotia auto insurers had a 10.8% return on equity in 2002 – one full year prior to the implementation of the CAP. Reserves must be examined carefully so that Newfoundland does not make the same mistake.

The more current the UL & ALAE figures, the more susceptible those figures are to manipulation by way of a reserve. Most bodily injury claims do not settle in the year the accident occurred. Therefore a significant portion of the UL & ALAE figure in 2015 and 2016 will be a claim reserve. The UL & ALAE figure per car for 2014 in Newfoundland was $354.37. By 2015, that figure jumped to $413.33. The figure is slightly lower in 2016 at $396.75, but still roughly a 14% increase. It is APTLA's submission that the jump of over $50.00 in two years is largely due to an artificial increase in claim reserves. This artificial increase in reserves should not be accepted by the Board as an appropriate measure of claims expenses in Newfoundland.

Ms. Elliott was asked by APTLA to calculate the projected return on equity for auto insurers in Newfoundland using an appropriate UL & ALAE figure of $352.37 and an appropriate operating expense ratio of 18.2%. When Ms. Elliott used these figures, the return on equity for auto insurers in Newfoundland went from a -9% return on equity to a +8.7%.

It is APTLA's position that auto insurers in Newfoundland are currently earning in the range of 9% per year as a return on equity. Given the astonishing profits made by auto insurers from 2002 to 2010, a profit figure of close to 9% in 2017 is clearly more than adequate.

The evidence before this Board is that auto insurers in Newfoundland earned healthy profits from 2002 to 2017. There is simply no financial basis to recommend the imposition of restrictions on Newfoundland accident victims given the healthy profits of auto insurers in this province.

Victimization of the already victimized!

11. We note that from a number of the presenters there was an overall consensus that for certain already vulnerable populations the imposition of a 'cap' would have a disproportionately negative impact.

These would include:

- Students;
- The unemployed;
- Single mothers;
- Persons with existing injuries/disabilities;
- The elderly.

The Board was made aware of the comments of retired Chief Justice Alex Hickman (as he then was) when parts of his 2005 correspondence was presented by Ms. Valerie Hynes:

***See**: September 10/18 at page 187, lines 9-22:*

"It is necessary to bear in mind when dealing with non-pecuniary damages that such category covers compensation for pain and suffering, enjoyment of life, the loss of amenities and expectation of life as well as aggravated damages related to the manner in which the wrong was committed. In my view non-pecuniary damages should be regarded as an umbrella designed to ensure that an injured Plaintiff who has been the victim of the tort of another be compensated by way of damages for whatever reasonable loss he or she sustains."

And at page 189, lines 3-8:

"The general damages, the pain and suffering, the change in their life, the inability to do the things they want, and that compensation which is the solace for what they've lost is the vast majority of their claim."

Ms. Hynes continued at page 189 lines 11-25 and page 190, line 1:

"And what Justice Hickman was saying is that these people will be disproportionately discriminated against by this cap because it will have a far greater impact on their claim than it would necessarily on someone who has tremendous benefits for their work. They have a lot of sick leave or they have, you know, an employer who is very accommodating and things like that. So, there's certain segments of our population that are going to be even a little bit more impacted, a lot more impacted than others, and that's something to bear in mind, too, because they can't otherwise or been made up for somehow or somehow justified through special damages."

Day in Court

12. Implicit in the concept of an 'individuals right to sue' is the expectation of a claimant getting their 'day in Court'.

For all practical purposes it is generally accepted that a person's 'day in Court' is no longer achievable through the conduct of a trial.

Trials are extremely expensive; they are inconvenient, protracted and risky.

In the vast majority of cases, where the litigation process is actively and rigorously pursued, the furthest along the process that a claimant usually reaches is the settlement conference before a Judge.

Even so, this has the salutary effect of allowing the claimant to 'tell their story' to a respected and impartial arbitrator.

In this regard, the comments of Justice Robert Wells should be well noted:

***See**: September 27/18 at pages 106, lines 24-25 and 107, lines 1-19:*

"Now, with regard to the settlement conference, it was very, very much like a mediation because you went into it and it was a process. Most settlement conferences on personal injury matters took a day, sometimes might take two days, but usually it was a day. And you went in there allowing the parties to speak and encouraging the parties to speak, as well as their counsel, because people felt that they had to tell their own story and they did it sometimes very effectively. If you didn't give them the opportunity to speak themselves, they could well feel that all this was in the hands of lawyers and the Judge and they didn't have a proper hearing. But when they could explain to a Judge their side of things, that was very important, and usually these things took a morning and then began discussion after the break on the parameters of the case."

And at page 136, lines 2-25 and page 137, lines 1-19:

"Mr. Gittens:

So, finally, I take it the essence of what you're putting before the Board today is a fundamental principle objection or concern about the fact that the litigation process which allows people who have minor injuries or whatever their beliefs might be an opportunity to express themselves, get their day in court, before resolving these issues?

Justice Wells:

If it goes to a settlement conference, see Plaintiff's themselves very often, usually perhaps I would say, want to be heard by a Judge. There is a difference between being heard in a Settlement Conference and giving sworn evidence in a courtroom, but to a lot of Plaintiffs, I think to most of them as individuals, the fact that they have their say and that a Judge is there listening is important. If you think of it, you know, we all, when we're involved in something, especially as personal and immediate as injury, we all want to have our say before a neutral person. If we think about it, any of us had an injury, would you rather have your say before a Judge, either in a courtroom or a settlement conference room, or would you rather have somebody say to you 'well, there's no point in you saying anything because in your type of injury, there's a cap'. Well, I know where I'd rather be and I think I know where most people would rather be, getting the treatment – I don't mean to pun here, but getting the treatment from the system of a specific look at their injuries and what the result of their injuries is or will likely be and have a decision made or an agreement come to on that basis rather than a cap on any stage of the proceedings.

That's my view. Now, you may not be surprised I've 59 years this fall as lawyer and Judge and I guess that's the way I think."

Déjà vu – All over again

13. We have heard this song before, the Insurance Industry though its advocacy/lobby group have been repeating this refrain across North America State by State and across every region in Canada.

The hue and cry has been the same:

- The Industry is about to collapse;
- They will have to withdraw from the subject marketplace unless 'caps' are implemented.

In the Atlantic Provinces the last go-around occurred approximately 15 years ago in 2003. The end result for consumers was the implementation of 'caps' for 'minor/soft tissue injuries'.

There was no need then and there is no need now for "caps" on minor injuries in Newfoundland. There is simply no basis whatsoever to recommend the imposition of restrictions on Newfoundland accident victims given the enormous impact on victims and the objectively healthy profits of auto insurers in this province.

All of which is respectfully submitted on behalf of the Atlantic Provinces Trial Lawyers Association.

Sincerely,

David Brannen
APTLA President

Ernest Gittens
APTLA Vice President