IN THE MATTER OF the Automobile Insurance Review Hearing before the Board of Commissioners of Public Utilities announced by the Minster of Service NL on July 4, 2017

WRITTEN SUBMISSION OF THE CAMPAIGN TO PROTECT ACCIDENT VICTIMS

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(1) Introduction

On July 4, 2017 the Honourable Sherry Gambin-Walsh, Minister of Service NL, announced that there would be a comprehensive review of the automobile insurance system in the province. On August 9, 2017 Minister Gambin-Walsh, pursuant to s. 3.1(1) of the *Insurance Companies Act*, directed the Public Utilities Board (the "PUB" or "Board") "to conduct a review and provide a report of automobile insurance in the province as stipulated in the attached Terms of Reference". The report by the PUB was to be delivered to government by June 30, 2018.

The last review of the automobile insurance system in the Province occurred in 2005. The PUB Report to government following that review was delivered on March 31, 2005. Among the amendments to the *Automobile Insurance Act* which reduced damage award recoveries by injured claimants (i.e., recovery of net past lost income versus gross, 25% reduction in total damages for failure to wear a seatbelt, offset of employee sick leave from lost income damages) was the imposition of a $2,500 deductible by government. This deductible has remained in place since that date.

In the 2005 review the Insurance Bureau of Canada ("IBC") sought to have a cap imposed on innocent victims of automobile accidents. The arguments propounded by the IBC in 2005 are essentially the same as the arguments put forward by the IBC in 2018. In 2005, Don Forgeron, the Vice President of IBC, stated before the Board (Transcript of February 21, 2005 at p. 23):

> *MR. FORGERON:*
> *A …unless you deal with the significant cost driver, to suggest that stability is going to be realized in the auto insurance marketplace is, you know, is a false hope. It's simply not going to happen. And these slides clearly show, and there's a couple more later on, they clearly show that bodily injury claims are our most significant cost driver.*

Despite the ominous warnings of Don Forgeron in 2005, third party liability premiums (the component of total auto premium charged and collected for third party liability claims coverage) in Newfoundland and Labrador have increased less than even the modest increases in Consumer Price Index since that time (Report of Craig Allen, July 18, 2018, p. 7, Chart 4).

In 2005 the PUB accepted the Consumer Advocate's description of the issue before the Board as the "classic 'rights versus rates' debate" (p. i of the Executive Summary). In 2018 the issue cannot be characterized the same way. The insurance industry concedes that the imposition of a minor injury cap on damages for pain and suffering will not reduce insurance rates (interview of Natalie Higgins, Vice President of Intact Insurance, with CBC Radio on April 13, 2018). The industry's position this time around is that a minor injury cap is needed to stabilize insurance rates. IBC has, however, adduced no evidence to demonstrate the degree or manner in which stability will be achieved in the future (other than a blanket statement that less claims will equal less costs for insurance companies). In any event, premiums for third party liability have been remarkably stable in this Province, without a cap.

Newfoundland and Labrador is the last jurisdiction in Canada which maintains a system where innocent accident victims are compensated for their pain and suffering on the basis of principles set by the Supreme Court of Canada, subject to a $2,500.00 deductible. It is something that we should be proud of. The IBC's argument, however, is that since the other provinces have imposed a minor injury cap (at IBC's behest), so should this province. The Campaign suggests that such manner of deciding important public policy issues is deeply flawed.

It is the Campaign's positon that changes can be made which result in improvements in the insurance system while still maintaining the rights of innocent accident victims such as Della Ryan and Sheila Elliott (from whom this Board heard) to access justice and receive fair and appropriate compensation for pain and suffering based on principles set by the Courts, instead of based on an arbitrary cap proposed by the IBC. It is important that, in the discussion of numbers and profits, the human element not be forgotten. This Board has had the opportunity to hear the impact of motor vehicle accidents on Ms. Ryan and Ms. Elliott. Things that are part of a person's everyday life are no longer possible, whether it be lifting one's child, walking the dog or washing the dishes. These injuries, described as "minor" by the insurance industry (a label even IBC's own consultant, Viivi Riis, disagrees with) are not minor to the person affected or their families. In many cases, as this Board has heard, they are life-altering.

On the importance of the right to access justice to receive appropriate compensation reference is made to the following comments of retired Supreme Court Justice Robert Wells, who gave evidence before the Board on September 27, 2018 (Hearing Transcript, September 27, 2018, pp. 127-128:

> *JUSTICE WELLS:*
> *A. So when somebody talks about taking something away from the Court and putting an arbitrary cap on it, no matter what the cap is, it – it doesn't seem right to me because the Court is the organ that can give the full treatment and its decision guide what happens in settlements. So that's my feeling.*

(2) <u>The Role of the PUB</u>

On August 9, 2017 the Minister of Service NL announced the Terms of Reference for the Automobile Insurance Review, which included:

> *The Public Utilities Board shall undertake a review and report on the issues outlined below with respect to Automobile Insurance in the Province and in addition shall detail other issues or concerns raised by stakeholders participating in the review. Certain parts of the review are independent of each other and may be provided to the Department of Service NL upon completion separately.*
>
> *Phase I*
> *Phase I of the review will consist of a closed claim study into private passenger automobile insurance and a separate closed claim study into causes of high taxi claims costs.*
>
> - *To conduct a closed claims study to determine the costs associated with Third Party Liability/Section A bodily injury claims arising from the use of private passenger vehicles, including the use (or no use) of interim payments and whether Accident Benefits were available.*
>
> - *To review the impact on rates of a monetary cap on claims for non-economic loss for minor/mild injuries and the implications of such a cap for claimants.*
>
> - *To review the impact on rates of continuing with the current deductible of $2,500 or increasing the deductible.*
>
> - *To conduct an audit of taxi closed claims to determine the causes of poor claims experience, including details regarding the underlying causes of loss and high claim costs incurred, and provide any recommendations to reduce claim costs and reduce rates.*

The review being conducted by the Board is of a type commonly referred to as a policy or investigative review. In these circumstances the Board will not be making recommendations to government, as confirmed by the Chair of the Board on the first day of hearings on June 5, 2018. On this point, Chairperson Darlene Whelan stated at pp. 6-7:

> *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. It will then be up to government as to how they wish to use the information contained in our*

> *final report and whatever changes it contemplates for the automobile insurance product in this province.*
>
> *This may or may not include the introduction of a monetary cap for compensation for pain and suffering, retention of the current deductible scheme or some other framework. I expect our report will be but one consideration in any final public policy decisions to be made by government.*

The position outlined by the Chair is consistent with the position of the Board taken in 2005 wherein the Board stated that they would not be making any specific recommendations "since the formulation of public policy is the mandate of Government" (p. 1, 2005 Report).

However, in reporting to government the Board will review the information gathered and the evidence heard at the hearings. The principles of procedural fairness which apply at a hearing such as the present allow for the making of submissions by interested parties and a full and fair proper consideration of the same. Having regard to the importance of the policy decision which will be made by government (whether to take away or severely limit the right of innocent accident victims to access the justice system to receive fair compensation for pain and suffering and the loss of amenities of life) and the presumption that the government will rely upon the Board's report, it is crucial that the evidence which was presented to the Board be fully considered and fairly reported upon.

This point was highlighted by Dr. Kelly Blidook, a professor of political science at Memorial University, who gave evidence on research methods and the need for independent review in the gathering of data. On the issue of the Board's report, Dr. Blidook stated on September 14, 2018 at pp. 176-177:

> *A. No, but more so, there's going to be – the necessity of writing such a report is going to depend, to a certain degree, on their belief that the data they have is accurate and that the results from it can be used for meaningful decision. I do not – my language here, in case it's being misunderstood, is not that I ultimately expect that that report will have a line in it that says "we believe in the independence of this" or "we do not believe in the independence of this". But it will necessarily require, at least implicitly, a judgment as to whether or not the data is effectively translating the information that is needed for that judgment or whether it is not. And to me that still places an onus on the Board to make a subjective judgment about the usefulness of the data.*

This point becomes especially important where the Campaign is critical of the work done by an actuarial consultant hired by the Board, Oliver Wyman. It is the Campaign's position, as will be outlined in detail in this submission, that Oliver Wyman did not fulfil its role as an "independent" actuary and this failure to take proper steps resulted in the potential for bias in preparation of the Closed Claim Study which has been provided to the Board.

However, it is important that the Board not conflate the Campaign's criticism of Oliver Wyman with criticism of the Board itself. It is in this context that the Campaign will engage in a fulsome review of the submissions presented and evidence heard by the Board.

(3) Key Points

The following are some of the key points arising from the review, all of which will be reviewed in greater detail in this submission:

(1) The imposition of a minor injury cap will not result in the reduction of insurance rates. In essence, the IBC is arguing that the right of an injured accident victim to access justice and receive fair compensation for pain and suffering should be taken away on the basis that a minor injury cap is needed to ensure stability of rates.

(2) Contrary to the position of IBC and the insurance industry, the increase in insurance premiums in NL has not been as the result of an increase in personal injury claim payouts. Although total automobile insurance premiums have increased in the province close to the rate of inflation over time, this has occurred as a result of the increase in property claims and as a result of Newfoundlanders and Labradorians purchasing optional physical damages coverage in greater frequency. Third party liability premiums have not even increased at the rate of inflation and the number of motor vehicle accident injury claims is down by nearly 50% since 2001.

(3) The way the Closed Claims Study was prepared and the failure of Oliver Wyman to take required steps to ensure the accuracy and integrity of the data used has resulted in the creation of potential bias which undermines the conclusions reached by Oliver Wyman.

(4) The claim by the automobile insurance industry that it is losing money is false and misleading. In the first quarter of 2017 the Property and Casualty insurance industry in Canada reported almost $1.0B in profit from investment income alone. In 2016, automobile insurance companies in NL reported $100M in underwriting profit (approximately 23% profit from $430M in revenue). Dr. Fred Lazar and Dr. Eli Prisman have concluded that automobile insurance consumers in Newfoundland and Labrador have overpaid auto insurance premiums by as much as $92M between 2012-16 and that the automobile insurance industry in the Province as a whole is profitable.

(5) The benchmark Return on Equity of 10% for insurance companies underwriting in the Province ordered by the Board in 2005 should be reviewed. This is one way in which government can potentially find savings to reduce insurance rates.

(6) The IBC has not presented evidence to justify the imposition of a "minor injury" cap. The Campaign however, has presented significant evidence to support the fact that a cap will not benefit the citizens of the province in a meaningful way (and will, in fact, actually take away the right of innocent victims to fair compensation for their pain and suffering with nothing in return).

(7) The two medical doctors who have provided submissions to the Board (Dr. Karl Misik at the hearing and Dr. Stephen Major in an unsolicited written letter) have both expressed opposition to a "minor injury" cap. Dr. Misik, in particular, has confirmed the anticipated costs and resource burden to be placed on the health and medical system in the Province should a "minor injury" cap be implemented.

(8) A minor injury cap will have a disproportionate effect on students, seniors, children and the unemployed as they will have their claim for pain and suffering capped at $5,000 but, because of their status, there will be no claim for past or future loss of income. Their losses will be assumed by themselves instead of by those who caused the losses.

(9) 66-76% of all claims in the IBC Closed Claim Study would come within the definition of "minor injury". Not only would the imposition of a "minor injury" cap take away the right of innocent accident victims to access justice through the Courts, it would also significantly increase the profits of the insurance industry.

(10) WorkplaceNL has confirmed that it is opposed to any "minor injury" cap reform and has stated that such reforms will negatively affect the Injury Fund used by WorkplaceNL to compensate injured workers. A shortfall in the Injury Fund would require WorkplaceNL to increase the workers compensation premiums charged to employers and workers in the Province. Larger economic impacts require consideration

as it relates to the additional burden being shifted to employers and those in the labour force.

(11) RNC reports indicate that traffic accidents are down by 25% between 2013-2017, and Insp. Didham of the RNC has confirmed further decline in the frequency of motor vehicle accidents in the first two quarters of 2018 (Hearing Transcript, September 27, 2018, p. 23).

Year	Total Accidents in RNC Jurisdictions
2013	6284
2014	5991
2015	5574
2016	5213
2017	4752

Source: Royal Newfoundland Constabulary (RNC), Information Services

(12) The vast majority of NL residents, as well as numerous community organizations and associations, oppose a "minor injury" cap. Additionally, many provincial organizations have written to the Board to express opposition to the implementation of a "minor injury" cap, including CUPE, WorkplaceNL, NL Massage Therapists' Association, Newfoundland and Labrador Chiropractic Association, Trades NL, and the Seniors Against the Insurance Cap Coalition. The only organizations supporting a "minor injury" cap are insurance companies or related entities and the Associated Canadian Car Rental Operators.

(13) The problems faced by the taxi industry are totally unrelated to the question of a "minor injury" cap. The majority of taxi owners are not in favour of a "minor injury" cap and a

cap would do nothing to solve the issues being faced by taxi drivers relative to their insurance rate experience in Facility Association.

(4) Chronology

As previously stated, this present review was announced on July 4, 2017. The Terms of Reference were announced on August 9, 2017. The hearings were set to commence on May 23, 2018 and a report was to be delivered to government on June 30, 2018.

The Campaign felt that the time frames imposed for the review were unrealistic and between December 15, 2017 and late April 2018, Brad Wicks, Q.C., and Colin Feltham, on behalf of the Campaign, exchanged numerous letters with the Board seeking to clarify the procedure being utilized. The Campaign expressed concerns that there was simply insufficient time to properly present its case.

Cheryl Blundon, Board Secretary, in replying to a letter from Mr. Feltham, stated on April 6, 2018:

> *Considering the work to be done by June 30, 2018 the timelines are tight for everyone involved, including the Board. The closed claim study in particular is a significant undertaking requiring the collection of data from industry which normally requires nine months to complete. In this case the collection of the data which forms the basis of the reports of the Board's actuarial consultant was conducted by the Insurance Bureau of Canada ("IBC") over the period October 2017 to early March 2018. This allows 6 weeks for the completion of the actuarial reports by the Board's actuarial consultant. It is also notable that completion of the public sessions in May allows only one month for the Board to consider all of the issues in this review and complete its report.*

On April 10, 2018 Mr. Wicks, Q.C. wrote the Board and requested a postponement of the hearings on the basis that the time frames were unreasonable and would not allow sufficient time to prepare for questioning of the Board's consultants and would present difficulty in arranging for the Campaign's out-of-province experts to attend at the hearings.

On April 25, 2018, Sara Kean, Assistant Board Secretary, outlined Government's position that the date of June 30, 2018 would continue to apply for the filing of the Board's report. Mr. Wicks' request for a postponement of the hearing was rejected and the letter outlined that the hearing would commence on June 4, 2018, a postponement of approximately 10 days.

The Campaign was not satisfied with this response and on May 10, 2018 the Campaign filed a leave to appeal application in the Court of Appeal against the Board's refusal to grant a postponement. The Campaign also sought a stay of the hearing before the PUB until the appeal could be heard. In consultation with the Court of Appeal, an appeal hearing was scheduled for May 25, 2018

However, the appeal did not proceed. Prior to the hearing of the appeal, counsel for the parties agreed that the hearing of evidence would occur between June 4-June 13, 2018, with hearings to continue from September 6-14, 2018.

In a letter to Darlene Whelan, Chair of the PUB, dated April 16, 2018, the Minister confirmed that the government intended to draft legislation for presentation in the House of Assembly in the

Fall of 2018. However, in the Spring session of the House of Assembly Minster Gambin-Walsh, in response to a question on the PUB review, stated on May 24, 2018 (Hansard):

> *I believe in this Hon. House not too long ago, I said that we would hope to have an answer in the fall; however, we want to ensure that all stakeholders have opportunity to have input into this review. Mr. Speaker, as long as it takes for a review to be completed, we will do it.*

IBC placed considerable pressure on government ministers and officials in their incessant lobbying efforts to bring in a minor injury cap. Counsel for the Campaign elicited the following information from Amanda Dean during the IBC Panel Presentation on June 12, 2018:

(1) the IBC met three ministers or former ministers of Service NL (Perry Trimper, Eddie Joyce and Sherry Gambin-Walsh), the government department responsible for regulation of the auto insurance industry (pp. 58-60);

(2) IBC met with the Minister of Finance on one or two occasions but Ms. Dean did not remember whether they discussed the cap (p. 66);

(3) Ms. Dean met with the Minister of Transportation and discussed the cap (p. 66);

(4) IBC/Ms. Dean met with the Premier and officials from his office at a formal event and discussed the cap (p. 67);

(5) IBC met with the former Superintendent of Insurance (now a member of the Public Utilities Board) “maybe three times” and discussed the cap (pp. 68-70);

(6) IBC met with bureaucrats of Service NL in the previous 2 years “maybe” 10 times or less (pp. 68-70).

(5) The Hearing

Numerous submissions and reports have been filed with the Board. The Campaign will review the evidence presented to the Board in detail, where necessary. While the Board can consider all submissions, the Campaign submits that particular attention should be given to the oral evidence which was the subject of questioning by the parties.

The following is a chronology of the *viva voce* evidence heard by the Board:

(1) June 5, 2018 – CUPE, Paula Elliott (Oliver Wyman);

(2) June 5-8, 2018 – Paula Elliott, Oliver Wyman;

(3) June 11, 2018 – James Cameron, Report on Taxi Claims Review

(4) June 12, 2018 – IBC panel (Amanda Dean, Ryan Stern)

(5) June 13, 2018 - Jason Sharpe and Kent Rowe, IBAN

- Ken Moyse, Rogers Moyse

- Paul Prowse, Smart Driver Training

- Jeremiah Perry, Citizen

- Robert Rogers, 50 plus Federation of Senior Clubs of NL

- Dave Fleming, Owner, Northwest Taxi

- Doug McCarthy, private owner/taxi operator, Newfound Cabs

(6) September 6, 2018 – Paula Elliott, Oliver Wyman

(7) September 7, 2018 – Dr. Karl Misik

(8) September 10, 2018 – Victims' Panel, Della Ryan and Sheila Elliott

- Valerie Hynes, Richard Rogers, Q.C., and Kate McGarry, Lawyers' Panel

(9) September 11, 2018 – Craig Allen, Actuary

(10) September 12, 2018 – Viivi Riis, Physiotherapist

- Allan Wynperle and John Karapita, Ontario Trial Lawyers Association (OTLA)

(11) September 13, 2018 – Dr. Fred Lazar, Professor of Economics at York University, Lazar/Prisman Report

(12) September 13, 2018 – Garrett Donaher, City of St. John's Engineer

- Dr. Kelly Blidook, Professor of Political Science at MUN

- Peter Gulliver, Taxi Owner (City Wide, Bugden's, Northwest Taxi)

(13) September 27, 2018 – Retired Supreme Court Justice, Honourable Robert Wells

- Insp. Paul Didham, RNC Traffic Division

The date set for the filing of final written submissions with the Board is October 12, 2018. It is not known by the Campaign when the Board's report will be delivered to government.

(6) Evidence presented by the Campaign

The Campaign is the primary group speaking for innocent accident victims at the Automobile Insurance Review. The Campaign has been present throughout the Board hearings and has presented the following evidence to the Board:

(1) a panel of lawyers who, on September 10, 2018, discussed issues such as the real scope of the "minor injury" definition as it applies to injured victims, with reference to recent Canadian case law, the real drivers of auto insurance rates in NL, and public opinion against a "minor injury" cap;

(2) a panel of accident victims, Della Ryan and Sheila Elliott, who presented to the Board on September 10, 2018;

(3) the reports and evidence of an actuary, Craig Allen;

(4) a report from Dr. Fred Lazar and Dr. Eli Prisman concerning the profitability of auto insurers in NL and the overpayment of auto insurance premiums by NL consumers, together with the testimony of Dr. Lazar who appeared before the Board on September 13, 2018;

(5) a report and evidence from Dr. Kelly Blidook, a Professor in Political Science at Memorial University of Newfoundland;

(6) retired Supreme Court Justice, Honourable Robert Wells, who began practicing law in NL in 1958 and was a Supreme Court Justice from 1986 until 2008.

The Campaign, in many respects, would rather that this review was an actual trial. In a trial, the IBC, as the proponent of the "minor injury" cap, would be required to prove its case on a balance of probabilities. The Campaign submits that it is striking that, other than an IBC panel and the presentation of evidence from a physiotherapist, the IBC has not presented any evidence from a physician, actuary, economist or finance expert, despite being fully aware that the Campaign would be calling such evidence. The IBC has chosen to rely upon the evidence of Oliver Wyman (which is in turn based wholly on a deeply flawed Closed Claim Study the IBC itself conducted). The only conclusion which can be drawn, the Campaign submits, is that the IBC assumed the imposition of a cap was a "done deal" and did not feel it necessary to provide evidence to support its position. This was at its peril as no one reviewing the record of this review could say that IBC has presented or relied on evidence which could support its argument in favour of a cap on even the most minimal standard of proof. To impose a cap in spite of this failure by the IBC is a true "Insult to Injury".

(7) Oliver Wyman Report #1 – Closed Claim Study Summary

The Closed Claim Study undertaken for this hearing was designed by the IBC in collaboration with Oliver Wyman. It was conducted by IBC. Oliver Wyman relied upon it in its reports and evidence. The principal actuary involved at Oliver Wyman was Paula Elliott, who gave extensive evidence before the Board. The Closed Claim Study included data on 1,977 claimants from 20 insurers whose claims were closed during the period January 1, 2016-November 30, 2017. Due to reporting problems with two insurers and the exclusion of their claimant data the claimant files included in the study were reduced from 1,977 to 1,741.

As outlined at p. 1 of their Report, dated April 19, 2018, Oliver Wyman was engaged by the Board to assist in reviewing the impact on rates of a monetary cap, continuing with the current deductible, or increasing the deductible. At p. 1 of its Report, Oliver Wyman outlined the following:

- in order to support the analysis outlined in the Terms of Reference Oliver Wyman "collaborated" with IBC to design the CCS (Closed Claim Study);
- IBC compiled and validated the data submitted by the insurers;
- the collection and validation of data took place from October 2017 to February 2018;
- the six insurer groups with the highest market share of private passenger vehicle, representing 86.7% of the total market share, participated in the study (TD Insurance, Aviva Insurance, Intact Insurance, Co-operator's Insurance, Royal Sun Alliance and Travelers Insurance). In total, 20 individual companies submitted data, but data from two of the companies was excluded;

- the initial target of 2,000 claimant files closed during the 12 month period was expanded by several months;
- in March 2018 IBC provided Oliver Wyman with a copy of the master file;
- 236 claimants from two insurance companies were excluded, leaving 1,741 claimants (74.4% of the provincial market share in total);
- there were 1,425 claims examined;
- total settlement costs of the 1,741 claimants was $69.9M, for an average total settlement cost of $39,580 per claimant;
- the total allocated loss adjustment expense (ALAE) was $3.9M, or $2,227 per claimant.

At p. 17 of its Report, Oliver Wyman stated under "Consideration of Limitations":

> *For our review, we relied on data and information available from IBC without independent audit. Though we have reviewed the data for reasonableness and consistency, we have not audited or otherwise verified this data. It should also be noted that our review of data may not always reveal imperfections. We have assumed that the data provided is both accurate and complete. The results of our analysis are dependent on this assumption. If this data or information is inaccurate or incomplete, our findings and conclusions may need to be revised.*

The Closed Claim Study is a significant document for the purposes of Oliver Wyman's work because it is that document which forms the basis for Oliver Wyman's "Minor Injury Reform Cost Estimates" dated May 17, 2018 (Amended). It is crucial, therefore, that the data used for the Closed Claim Study must be accurate and trustworthy. Ms. Elliott also verified that IBC did not have access to the individual claim files. IBC specifically stated in its Note to Users at p. 3, paragraph 7 that it did not conduct an audit of the claim files and that "IBC had no access to any supporting documentation or paper files" (see testimony of IBC Panel on June 12, 2018, pp. 13-14).

(8) The 2005 Closed Claim Study

Mercer Oliver Wyman was the actuarial company that completed the Closed Claim Study for the 2005 Automobile Insurance Review and Paula Elliott was also involved in that process. Mercer Oliver Wyman today is known as Oliver Wyman.

At p. 17 of the 2005 Report the Board states:

> *3.2 Private Passenger Automobile Closed Claims Study*
>
> *Before beginning the closed claims studies the Board engaged consultants with the relevant expertise and experience to assist in conducting the studies. The first consultant engaged was the Board's consulting actuary (Mercer) who played the primary role in the analysis of the data and report preparation. The Board also engaged the services of an insurance consultant, Mr. Bern Fitzpatrick who, with his prior experience in the industry, was able to serve as the primary liaison with the insurance industry. The Board also engaged the services of medical consultant, Dr. Sue Rideout-Vivian who, with a specialty in occupational medicine, advised the Board on medical issues arising from the studies. Finally the Board engaged the services of an accounting firm, NKHK Chartered Accountants, to ensure consistency and compliance by insurance companies regarding data collection.*
>
> *While the closed claims studies were conducted by the Board with the assistance of its consultants, the data was collected by the individual insurance companies under the direction of the Board. The detailed information needed to complete this study was available from the files maintained by each insurance company.*

At p. 20 of the 2005 Report the Board stated that "there was a general consensus during the review that the current closed claims study process was an improvement over the previous study". At p. 21 of its Report the Board observed:

> *While there was general support for the methodology employed in conducting the closed claims study, there were suggestions for further improvement. For example some participants suggested the study team would have benefitted from the involvement of a lawyer, in addition to the medical consultant. Based on what the Board heard it is clear that the closed claims study methodology and results were sound and reliable, and reasonably reflect the costs for the study period associated*

> *with Third Party Liability bodily injury claims arising from the use of private passenger and commercial automobiles in the Province.*

The Campaign wishes to highlight several other important points about the 2005 Closed Claim Study which are outlined at pp. 18-19 of the 2005 Report:

- the time frame for the closed claims study was July 1, 2001-June 30, 2004;
- basic information on 6,100 claim files was collected during the survey period;
- from the 6,100 claim files Mercer Oliver Wyman selected a proportional random sample for each participating insurer;
- the questionnaire which was provided to each insurer identifying the detailed info required was developed by the Board with the input of its insurance consultant, medical consultant and actuary;
- the Board held information sessions and weekly conference calls with participating insurance companies to clarify issues or concerns;
- "This approach was designed to ensure standardized collection of data to form a sound information base for the studies";
- the electronic data provided to the Board by the insurers was reviewed for accuracy and compliance by the Board with the assistance of the insurance consultant, the actuary and NKHK Chartered Accountants;
- a total of 1,369 claims records of the 6,000 claim files were detailed in the closed claims study.

(9) The Evidence of Paula Elliott on the Closed Claim Study

Under questioning by Counsel for the Campaign, Ms. Elliott verified that Oliver Wyman was engaged on September 28, 2017. Ms. Elliott also verified that she was involved with the 2005 Closed Claim Study and had been involved in the preparation of Closed Claim Studies in other provinces.

Ms. Elliott's evidence was that IBC collected the data and Oliver Wyman did not participate in any manner in collecting the data, training the staff or explaining terminology. She stated that the involvement of IBC collecting the data while they were also the proponent for the cap did not cause her any concern about bias or potential bias (June 5, 2018, pp. 156-157).

Ms. Elliott confirmed that she discussed the design of the Bodily Injury Closed Claims Study with IBC. However, Ms. Elliott stated that she did not have any involvement in the validation of the data (June 5, 2018, pp. 160-162).

IBC, according to Ms. Elliott, decided to extend the timeframes by several months and did not consult with her on that decision (June 5, 2018 at p. 70). She was "surprised" that they hadn't consulted her, and "in perhaps hindsight maybe they would have told us, I don't know why he didn't, but, yeah, everybody's communication style is different" (June 5, 2018 at p. 172). With all due respect, it was Oliver Wyman that was engaged by the Board to prepare a Closed Claim Study, not IBC.

Ms. Elliott testified that she made the decision to exclude the 236 files because it would have biased the study not to do so (June 5, 2018, pp. 174-175). Ms. Elliott admitted that she had never been involved in a closed claims study where approximately 10% of the files collected had to be excluded for potential bias (June 5, 2018, pp. 177-178).

When IBC brought this information forward they intended for Ms. Elliott to use it but she didn't know whether they should have realized that there was a problem (June 5, 2018, pp. 183-184). In the Campaign's submission Ms. Elliott should certainly have sought an answer to this question.

When questioned on the heading in her Report entitled "Consideration of Limitations" Ms. Elliott confirmed that no independent audit was performed and Oliver Wyman did not check the data in any manner (June 5, 2018, pp. 188-189). Ms. Elliott's understanding was that IBC was validating the data (June 5, 2018, p. 189). When shown "IBC Notes to Users" Ms. Elliott confirmed that IBC had not engaged in an audit process (June 5, 2018, pp. 191-192). Ms. Elliott was apparently of the understanding that IBC had performed an audit (June 5, 2018, pp.195-196). She admitted that part of the reason Oliver Wyman did not audit the data was because she assumed that IBC had done the same (June 5, 2018, pp. 199-200). Ms. Elliott verified that collection of the data was an important part of the process (June 5, 2018, p. 201). These admissions are crucial when examined in the context of Dr. Blidook's evidence on potential bias and the need for independent review.

On the second day of her evidence, Ms. Elliott was specifically questioned as to why Oliver Wyman did not recommend to the Board that steps be taken similar to what was done in 2005

PUB Review. Ms. Elliott was referred to her engagement letter with the Board dated September 28, 2017 which specifically required her "To participate in discussions with IBC in the design of bodily injury CCS and prepare a report summarizing the data collected in the CCS".

Ms. Elliott confirmed on a number of occasions that the quality of the data was important (June 6, 2018, p. 19) but she stated that it was not her role as an actuary to collect the data (June 6, 2018, p. 30). It was her position that IBC were the experts in collecting and validating the data and, since they had completed similar studies in the past, IBC were very skilled at it (June 6, 2018, pp. 3-4, pp. 29-31). Ms. Elliott's position appears to be that she did not take steps to ensure an independent review of the evidence as she "trusted" the IBC, a main proponent for a change in the legislation. This hardly appears to be a robust way to prepare data which is going to be used, at least in part, for the making of a significant public policy decision by government.

Despite her knowledge that IBC was a lobby group for the insurance industry and a proponent of the cap, her attitude seemed to be that there was no need for her to take further steps as she trusted the IBC. As she stated, this was IBC's "area of expertise" (June 6, 2018, p. 33).

Later in questioning, Counsel for the Campaign reviewed with Ms. Elliott the 2005 Closed Claims Study and the involvement of a medical consultant, an insurance consultant and a chartered accountant firm. Ms. Elliott confirmed that she had not considered making any recommendations to the Board that a similar approach should be adopted in preparing the 2018 Closed Claim Study (June 6, 2018, p. 37-41). The fact that Ms. Elliott had not even considered

taking these steps demonstrates the lack of rigour in her approach. The following exchange took place between counsel and Ms. Elliott on June 6, 2018 at pp. 52-53:

> *KENNEDY, Q.C.:*
> *Q. So, basically, the independent consultants that were utilized in 2005 which included an insurance – a retired insurance adjuster, a firm of chartered accountants and a medical consultant <u>were all filled by IBC in this present Closed Claim Study</u>, is that what you're saying, to the best of your knowledge?*
>
> *MS. ELLIOTT:*
> *A. Effectively, yes.*
>
> *(emphasis added)*

Given IBC's lobbying efforts and role as the proponent for the cap, this was not adequate. Ms. Elliott also confirmed that she did not do any audit nor try to read or interpret the files from a medical perspective, as that was not her area of expertise (June 6, 2018, pp. 57-60). One major difference between the 2005 CCS and the 2018 CCS was that in 2005 IBC was not involved directly, but in the recent study "IBC was fully engaged" (June 6, 2018, pp. 62-63). She stated that "I do have confidence in the data that was provided to me based on the history of IBC's work and their area of expertise".

The following exchange occurred between Counsel for the Campaign and Ms. Elliott on June 6, 2018 at pp. 67-68:

> *Q. But you're the one who is making the assumptions on the data provided, so shouldn't you, as an actuary and having regards to your term of engagement, ensure at a minimum that someone is checking other than the proponent, IBC themselves?*
>
> *MS. ELLIOTT:*
> *A. No. IBC is a manager, an expert of collecting and managing data. They are a service provider for the Superintendent of Insurance offices, that is their role, so that's their area of expertise, that's what the company does, so that's not my, you know, our role in this, and that's what their role was, and is, and*

> *that's what they did. They stated that they checked, validated, trained the staff that was collecting it.*
>
> *Q. And you accept that just absolutely?*
>
> *MS. ELLIOTT:*
> *A. Yeah, and as I've said, they have done this in the past, they are the expert, they collect data since 1950s or earlier on industry data, they validate it, they reject data, they are the experts at this. I've used the data that's been provided by IBC in the past. I'm repeating myself, but it's the same answer. I accepted the data provided to us. I accepted that they completed checks and validation of the data.*

Ms. Elliott's approach gives rise to real concerns about the independence of her approach. The approach adopted has placed the Board in an awkward position. As the Board knows, not only did IBC prepare the Closed Claim Study, the IBC actually is on the record in both written and oral presentations at this hearing as a proponent of a $5,000.00 cap. This is untenable. Ms. Elliott again stated that she understood IBC was a lobby group for the industry but she had no concern about bias (June 6, 2018, pp. 69-76).

In concluding his questioning Counsel for the Campaign had Ms. Elliott confirm that a significant number of claimants were seniors (15% of the claimants were seniors), students and children who if a cap was brought in, would have no claim for lost income (June 6, 2018, pp. 85-91). Also, 55.8% of the claimants in the Closed Claim Study were female and 90% of the claimants were 100% not at fault (June 6, 2018, pp. 85-91). These types of statistics have to cause concern for the Board about the disproportionate impact of a minor injury cap on females, children, students and seniors.

This is an important point which was addressed by Chief Justice Alex Hickman, a retired Chief Justice of the Supreme Court of Newfoundland and Labrador, Trial Division, in a letter dated February 4, 2005, wherein he stated:

> *It also, appears to me that the imposition of the proposed caps or deductibles on non-pecuniary damages will impact adversely on certain classes of claimants, such as students, seniors, homemakers, children and unemployed. Claimants falling into such classes will, most likely, be entitled to smaller pecuniary awards and as a consequence, their entitlement to damages for their losses under the caps and deductibles proposed will be proportionally less. By reason of their bearing an undue share of the costs of the proposals, they will be the victims of unacceptable discrimination.*

The comments made by Chief Justice Hickman are as applicable today as they were in 2005.

(10) Dr. Kelly Blidook

Dr. Kelly Blidook is a professor of political science at Memorial University who gave evidence before the Board on September 14, 2018. Dr. Blidook obtained his Ph.D. in political science from McGill University in Montreal in 2008. He has been teaching at Memorial since that date. Dr. Blidook's teaching responsibilities include research methods and the collection of data. Dr. Blidook was retained by the Campaign to examine the way data was collected by the IBC and used by Oliver Wyman in the Closed Claim Study. Dr. Blidook is an expert in this area.

Dr. Blidook filed a report with the Board on July 16, 2018. In his evidence Dr. Blidook addressed both intentional and unintentional bias (September 14, 2018, pp. 97-98). While there may be a negative connotation to his use of the word "bias" he stated that he refers more to systematic error, which can include both intentional and unintentional bias (September 4, 2018,

pp. 105-106). Most of Dr. Blidook's discussion, however, revolved around potential bias, such as an interested party being involved in the data collection (September 14, 2018, pp. 110-112).

In his Report at p. 2 Dr. Blidook stated "it seems inappropriate to use data supplied solely by IBC without independent verification". He also discussed the need for inter-coder reliability and the making of subjective decisions (September 14, 2018, pp. 159-160). Inter-coder reliability would include more than one person being involved in the examination of the data. He referred to the 2005 report as an example of a situation where someone independent of the process comes in and investigates/oversees the process (September 14, 2018, pp. 162-163).

On the importance of this point Dr. Blidook stated on September 14, 2016 at p. 165:

> *PROFESSOR BLIDOOK:*
> *A. Ideally, someone or some organization that is not a proponent would take a look at the original information and also take a look at the data that was coded, and provide some kind of evidence to show that there is a clear translation from one to the other. That would be the ideal process. Talking about an audit, whether it's an audit, or whether it's simply an assessment, it's not deemed an audit, but at least gives us an actual rundown on the number of cases and the number of errors that were made or the number of misclassifications that were made, some type of organization that is disinterested in the outcome that can actually give us that evidence would be ideal.*

Dr. Blidook was also concerned about the wide range of minor injuries which was stated as being between 66-76% in the Oliver Wyman Report versus the 55% used in the Intact submission to the PUB (September 14, 2018, pp. 167-171).

On the importance of incorporating effective processes into the collection of data and the utilization of the same Dr. Blidook stated at pp. 174-175:

Q. Okay. So then you go on to your last couple of paragraphs, sir, and you talk about the issues being raised and then you go on to state, "the Board is essentially being asked to determine the independence of the IBC, both the data collectors as well as an advocate, and Oliver Wyman in these exchanges". So, perhaps you could go on, take that statement and outline what you mean by your comments after that.

PROFESSOR BLIDOOK:
A. So, my concern is simply that you've – rather than having data where we could simply look at – and so this works in a number of different situations and I understand that any kind of claim I'm making here might come across as though I'm accusing somebody of bias of pursuing their own interests. The truth is that effective processes take out those types of problems, right. It's not that – and this is true in politics. This is true in business and the purposes of audits. It's not that somebody is being accused of wrongdoing simply because a process to ensure that right doing was done is implemented. It's that ultimately if you don't follow those processes, then you end up stuck in the situation where you have to render judgments that are ultimately subjective and it increases the likelihood that mistakes will be made. And I just felt that this was something that should be highlighted; that this is an actual problem of the process as it is – as it has played out. That we shouldn't require sort of letters and explanations of, you know, independence or lack of independence or how a lack of independence can still translate into neutrally collected data. We can actually have evidence that those things were done and we're not being provided them.

In commenting on the process utilized in 2005 and the current Closed Claim Study, Dr. Blidook stated at pp. 182-183:

So, my sense was that the 2005 data collection was done in a more rigorous manner with the intention of kind of looking into the data and looking into the meaning of it more effectively than it was in the current situation.

Q. My last question for you, sir. When Ms. Elliott, the actuary for Mr. Oliver Wyman, was asked about the process utilized, she said "well, IBC now has" – and again, I'm paraphrasing and someone will correct me if I'm wrong, the IBC now has experience in doing this kind of work, having gone through it in a number of different provinces and essentially, I don't know if this was her word, but that she could trust or she trusted the IBC to collect the data properly. Do you have any comment on that from an objective view in terms of assessing the collection of data and maintaining the quality of data?

> *PROFESSOR BLIDOOK:*
> *A. Sure, so again, I mean I understand that my phrasing here may come across as though I'm saying, you know, imposing sort of distrust in a person or an organization, but more so, to me that's not a convincing statement because the two things that we do know is that we're dealing with an advocate or proponent for the industry and so there is an interest in the data that's collected. The fact that something has happened multiple times does not make it an effective process. It doesn't mean that it's been done properly. Again, we would go to, in any situation where we could, actual evidence to see if this were true, rather than the way that it's explained or simply saying because things were done in the past, clearly that they're being done well, which is essentially what that argument is.* *(emphasis added)*

The expert evidence of Dr. Blidook, when examined in the context of the evidence given by Ms. Elliott, should cause the Board to have serious concerns about the data-gathering process and whether the heavy reliance on the IBC without checks and balances has "tainted" the process. The failure of Oliver Wyman to take basic steps to ensure the independence and integrity of the data should cause this Board to conclude that government cannot legitimately use such data in making such an important policy decision. This conclusion is not a reflection on the Board but arises from the clear methodological shortcomings in the work performed by Oliver Wyman .

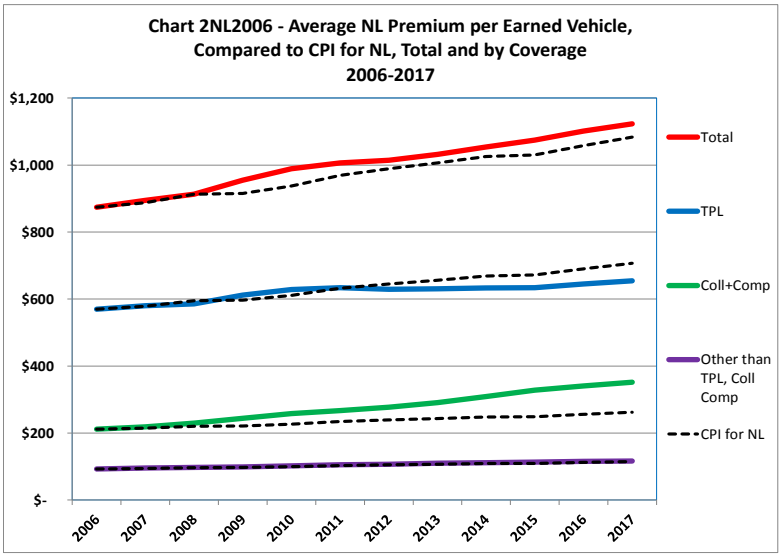
(11) Insurance Premium Drivers in NL and "Minor Injury" Reform Costs

Uncontested evidence supplied by the Campaign in this review confirmed the following with respect to automobile insurance premiums in this Province (based on the actuarial report of Craig Allen dated July 18, 2018 using GISA source data):

- -bodily injury claims have been declining in frequency since 2001.
- -between 2006 and 2017 the average premium for private passenger third party liability coverage paid by motorists has increased at an average annual rate of 1.3% (a rate less than the increase in the Consumer Price Index - CPI).

-the average annual cost of third party liability coverage in 2017 was less than it was in 2003 ($654 versus $673).

-while the average <u>total</u> private passenger automobile insurance premium has increased since 2006 by an average annual rate of 2.3% (just slightly higher than CPI), in that time Newfoundlanders and Labradorians have been buying more optional coverages for collision and comprehensive, driving the increase in overall premium charges, as outlined in the following chart:



As noted by Craig Allen in his July 18, 2018 report at page 13:

> *As noted above, the increased number of individuals purchasing optional physical damage coverage (collision, comprehensive, all perils, and specified perils), appears to be driving the increase in average total premiums above the growth in CPI.*
>
> …
>
> ***Bodily injury claims settlement costs appear to have a minor role, if any, in increases in average premiums in Newfoundland and Labrador since 2006.*** *(emphasis added)*

This begs the question of why the central focus by the IBC and the insurance companies involved in this insurance review has been on seeking a reduction in bodily injury claims cost through the imposition of a "minor injury" cap. Ms. Dean stated during the IBC Panel Presentation that the increases in premiums are not keeping pace with claims payouts and that there is instability because of the rising costs of bodily injury claims (June 12, 2018, pp. 4-6).

It does help explain, however, why Oliver Wyman found only modest projected premiums savings arising from a "minor injury" cap and why the IBC and its member insurers has changed its position and stated publicly that a "minor injury" cap will not result in premium reductions for consumers, but is now required for "rate stability". IBC's previous position was that a "minor injury" cap would result in a reduction of rates.

In its panel presentation on September 10, 2018, the Campaign provided a quote from a radio interview of Natalie Higgins, a Vice President with Intact Insurance, in response to a question on the CBC's St. John's Morning Show on April 13, 2018 as to whether a "minor injury" cap would bring down insurance rates. Ms. Higgins stated clearly (Campaign panel presentation, September 10, 2018, slide 19):

> ***"I think… no."***
> (emphasis added)

In that same interview, Ms. Higgins also commented on the increased costs of physical damage repairs to the insurance system. She stated (Campaign panel presentation, September 10, 2018, slide 18):

> *You know, something as simple even as, you know, the physical damage when somebody is in a car accident; the cost of repairing a vehicle today is so much greater than what we saw even five, six years ago. With the technology that's being introduced into vehicles, you know, a bumper we could have replaced years ago for $7-800...today, that same bumper is costing us $4-5000 because of all of these sensors, and, you know, the backup cameras, and all of the additional technology that's now being built into those vehicles.*

This comment is consistent with the findings of actuary Craig Allen. Mr. Allen found that property damage claims costs have increased over time in Newfoundland and Labrador, and that the share of third party liability cost per vehicle accounted for by property damage claims has increased over the period 2006-2017 from 18.7% to 22.2%. Mr. Allen further noted that property damage claims costs have increased at a higher rate than bodily injury claims costs (See Craig Allen's report of July 18, 2018, Executive Summary, points 5, 6, 8 and 9, page 1).

When the findings in the Oliver Wyman *Minor Injury Reform Costs Estimates* (Amended) report are examined, we see results also consistent with Ms. Higgins' appraisal of the impact of a "minor injury" cap on insurance premiums being paid by Newfoundlanders and Labradorians. Even accepting that the data relied upon by Oliver Wyman from the Closed Claim Study is reliable and useful (which the Campaign does not), without upward adjustment for any change in minor injury frequency or "Average Settlement & ALAE Costs", Oliver Wyman found that a $5,000 cap on "minor injuries" would result in annual premium reductions of just $112-$139 annually.

For auto insurance consumers this would, theoretically, translate into savings of only $9.33-$11.60 per month if the savings were actually realized and passed on to consumers. Meanwhile, these meager monthly savings would come at an extreme cost to accident victims (upwards of

76% of all claimants would be "capped" based on the Closed Claim Study results) who would have their right to access justice and to receive fair compensation for often very serious losses, effectively eradicated or severely curtailed.

As noted by the Campaign at the hearing, Intact Insurance in its written submission to the Board on March 20, 2018 (see p. 4) conducted its own internal closed claim study where it arrived at a conclusion different than that reached by Oliver Wyman relative to the proportion of claims that would be capped by a "minor injury" regulation. Intact found that only 55% of claims would be capped. If Intact's study is more accurate or reliable than the IBC Closed Claim Study relied upon by Oliver Wyman, then even the meagre $9.33-$11.60 per month premium savings figures are overstated. Even lower, or no, premiums savings would be derived from a cap, further calling into question the validity and efficacy of a "minor injury" cap as a cost saving measure for consumers.

The Oliver Wyman results presented in their *Minor Injury Reform Cost Estimates* report cannot be reasonably relied upon by the Board, owing to the demonstrated inadequacy of the Closed Claim Study process. The Campaign also urges the Board not to place any reliance on the notion that there may be additional savings from frequency declines following a cap's imposition. Such additional proposed savings were derived by Oliver Wyman only on the assumptions that with a "minor injury" cap there will be further savings derived from a decrease in "minor injury" frequency owing simply to the introduction and existence of a "minor injury" cap, and that there will be a decline in "Average Settlement & ALAE Costs".

Oliver Wyman itself recognizes the risks associated with its forecast related to its reliance on many assumptions. At p. 4 of the *Minor Injury Reform Cost Estimates* report Oliver Wyman states:

> *It is important to note that due to the nature of any forecast, the estimates we present in this report are based on* ***numerous assumptions****, both explicit and implicit. Our findings are sensitive to these assumptions, and are* ***particularly sensitive to certain assumptions*** *– such as the impact that reforms may have on Bodily Injury coverage claim frequency rates and the percentage of all claimants that will be defined as a minor injury claimant in Newfoundland and Labrador.* (emphasis added)

The assumption of Oliver Wyman that a decline in the number of bodily injury claims may occur with the introduction of "minor injury" cap reforms is based on the conclusion that the "minor injury" cap reforms in Nova Scotia and New Brunswick brought about declines in the number of bodily injury claims being made in those provinces, and the further assumption that if that did, in fact, occur in those provinces, that the same experience will occur in Newfoundland and Labrador. The Campaign submits that there is simply insufficient evidence to conclude that reforms in NB and NS caused a decline in the frequency of bodily injury claims.

When the chart on p. 21 of Oliver Wyman's *Minor Injury Reform Cost Estimates* report is examined, it is clear that declines in frequency were in fact already well under way prior to the introduction of any "minor injury" cap reforms in New Brunswick and Nova Scotia. To suggest that there is evidence of the subsequent reforms further increasing these declines is speculative at best and therefore should not be relied on by this Board in reporting to Government on the value or efficacy of a "minor injury" cap in producing insurance premium savings. In that regard, actuary Craig Allen has provided a clear contrary opinion to that of Oliver Wyman (July 18, 2018 Report, p. 15):

> *The Minor Injury Regulation appears not to have appreciably reduced the frequency of BI claims in other Atlantic provinces, above and beyond the trends that were already in place.*

Further, Paula Elliott admitted on questioning by counsel for the Consumer Advocate at the hearing that she could not say that bodily injury claim frequency would decline with a cap if one were introduced in Newfoundland and Labrador (June 7, 2018 at p. 223):

> *MS. ELLIOTT:*
>
> *A. It's certainly something I cannot do. I don't think I – my intent here was to, I believed it would be appropriate to present the idea that consumer behavior may change with the introduction of a cap, and that it's a consideration. I'm not able to definitely say by any stretch what that change in frequency rate might be due to the introduction of the cap, but I think it's appropriate to suggest that this is a plausible idea that the frequency rate may change with the cap, but I do not know how, you know, maybe there would be more claims in Newfoundland, I don't know. (*emphasis added)

Similarly, there is an assumption made by Oliver Wyman that a "minor injury" cap would bring about a reduction in the average bodily injury adjusting losses and expenses (ALAE). Oliver Wyman assigned a random value of 25% to this reduction factor without any form of analysis or study as to its appropriateness, but did so based on their "judgment" (see *Minor Injury Reform Cost Estimate* Report at p. 17). The Campaign again submits that this conclusion is speculative at best and ought not to be relied upon by the Board or Government when assessing the impact of "minor injury" cap reforms on premiums. Again, Craig Allen has differed with Oliver Wyman on this point and provided data analysis to support his conclusion. At page 20 of his July 18, 2018 Report Mr. Allen states:

> *For both [New Brunswick and Nova Scotia], the downward trend in ALAE per vehicle began before the introduction of caps in 2003. This suggests that there is no significant impact of caps on ALAE per vehicle.*

Thus, the caps have not brought about savings in ALAE and hence cost reductions and premiums savings, beyond those from trends already in place.

(12) <u>Questionable Value of "Minor Injury" Cap or Similar Reforms: Alberta, New Brunswick, Ontario</u>

Recent developments in two other provincial jurisdictions where "minor injury" caps already exist call into question the value or efficacy of a "minor injury" cap as a rate reduction or stabilization tool. In New Brunswick, the Wawanesa Mutual Life Insurance Company, New Brunswick's largest auto insurer, has applied to the New Brunswick Insurance Board (NBIB) to increase its private passenger automobile insurance rates by 11.69% (see attached Notice of Hearing from the NBIB). Facility Association has applied to increase its private passenger automobile insurance rates by 18.2% (see attached Notice of Hearing from the NBIB). On February 15, 2018 the New Brunswick Insurance Board approved rate increase requests from Allstate Insurance of 9.94% and from Pembridge Insurance for 8.05% (see attached NBIB rate application decisions).

Despite having a "minor injury" cap system, New Brunswick automobile insurers are filing for significant rate increases. The Campaign submits that this is not indicative of, or consistent with, a system with rate stability as the IBC and insurers argue will be achieved with a "minor injury" cap.

Similarly, as the Campaign pointed out in its panel presentation to the Board on September 10, 2018 (see slide 20), Alberta motorists have seen the largest increase in private passenger automobile insurance rates in Canada last year with rates rising by 8.29%. Average total annual

automobile insurance premiums are higher in Alberta at $1179 as compared to Newfoundland and Labrador $1123, despite Alberta having a $4,000 cap on "minor injuries" for the past number of years.

Ontario, too, has a system which caps claims and limits non-pecuniary compensation payouts. However, Ontario motorists are paying the highest auto insurance premiums in Canada. On September 12, 2018 representatives from the Ontario Trial Lawyers Association made a presentation to the Board. Allen Wynperle, a lawyer practising injury and insurance law in Ontario, commented on the state of affairs in Ontario (September 12, 2018, pp. 231-235):

> *MR. WYNPERLE:*
>
> *A. Okay, what I wanted to talk about was a little bit about the Ontario experience because I think it's important that when you start going down the road of amending auto insurance legislation you consider that experience and what has happened to us. We have had, since 1990, a no-fault or a hybrid legislation where there's accident benefits and there is a limited right to lawsuit and every government has had their hand in changing that balance, but over the last 10 years mostly, there have been significant complaints by the insurance industry of lack of profitability, there have been significant complaints from insureds that they're paying too much for premiums, and so the government has gone on a probably once every year or two cycle of cutting benefits for insureds, and this is, like I said, generally brought up by the insurance industry who feel that they cannot support the present product at the premiums that are presently existing in Ontario. And I will say that the premiums in Ontario seems [sic] to be, from everything we understand, to be the most expensive in the country. Despite 17 cuts to benefit rights for accident victims in the last eight years, we don't appear to be much better off. Injured people are getting less damages and they're getting less treatment because there's just not as much funding on the accident benefit side, and policy holders are not receiving the benefit of reduced premiums. Sadly, you know, when some of these benefit cuts were implemented, there was temporary reduction in premiums but as of last year, several large insurers have received premium increases in the province of Ontario by our regulator. ... We have a situation in Ontario where we have 9 million policy holders, insurance companies are taking in 13 billion dollars in auto insurance revenue for policies, and we do not seem to be able to get the system under control because*

> *those 9 million policy holders continue to pay increasing premiums all the time, despite all of these cuts.*

This cautionary tale from the Ontario experience should caution Government on the effects of tinkering with the automobile insurance system in the Province for concern of ending up in a situation like Ontario where premiums have continued to rise despite cuts to damages and benefits, or where "minor injury" caps ultimately do little to prevent insurance rate increases by insurers, but serve to severely limit the rights of innocent accident victims.

(13) Profitability of Automobile Insurance Companies in Newfoundland and Labrador

(i) Oliver Wyman – Profit and Rate Adequacy Review

One of the Terms of Reference provided to the Board by Government required the Board to examine the profitability of automobile insurance companies operating in Newfoundland and Labrador. The Board commissioned actuary Paula Elliott of Oliver Wyman to conduct this review and prepare a report. In particular, Oliver Wyman's review involved a historic review of profit levels, a comparison of the actual premiums charged for private passenger auto to the actual premium charged for the period 2012-16, and the assessment of rate adequacy for the 2017 accident year.

Ms. Elliott prepared a report for the Board dated March 29, 2018 entitled *Profit and Rate Adequacy Review – Private Passenger Automobiles* (the "OW Profit Report"). One of the main issues examined in this report was whether the automobile insurance industry is sustainable in this province. In essence, Ms. Elliott examined the profitability of the industry. Ms. Elliott started with the premise that insurers should be entitled to a reasonable amount of profit, as

outlined in the Summary of her report. She also noted at p. 2 of that report that the PUB guideline target profit level is a Return of Equity of 10% dating back to the 2005 ROE benchmark hearing.

Ms. Elliott's position was that from 2012-2016 the premiums paid have proven to be inadequate to provide for claim costs, expenses and the Board's guideline profit provision (p. 3, OW Profit Report). In fact, Ms. Elliott noted that the industry's realized profit was negative in 2013, 2015 and 2016. Ms. Elliott concluded that automobile insurers in this province are losing money. As previously stated, it is the position of automobile insurers that they are losing money as a result of high bodily injury claim payouts (IBC Panel, June 12, 2018, pp. 4-6).

The situation is described as follows in Table 1 which can be found on p. 2 of the Oliver Wyman Profit Report:

Table 1: Estimated Profit Levels by Accident Year

Accident Year	POP Pre-Tax	ROE After-Tax
2007	8%	11%
2008	12%	16%
2009	8%	11%
2010	5%	7%
2011	7%	9%
2012	1%	2%
2013	-3%	-4%
2014	4%	6%
2015	-5%	-8%
2016	-6%	-8%

Unfortunately, Ms. Elliott, as with the other reports prepared by her, appears to accept that the information provided to her by the automobile insurers is full and accurate. At p. 28 of the Oliver

Wyman Profit Report, Ms. Elliot confirms that no independent audit of the information she relied upon was carried out.

It is important to understand that in arriving at their conclusions on profitability, Oliver Wyman deducted from the premiums charged and estimated investment income earned by insurers, the claims and expenses that were provided to them by the insurance industry. Simplistically, this analysis can be presented as follows:

Premiums + Investment Income – Claims and Expenses = Profit

While the premiums collected are more easily calculable, the investment income earned, and the figures utilized for claims and expenses are, in fact, subject to internal manipulation by insurers. The claim figures (which included case reserves and then further supplemental reserves) and expenses were not audited or examined critically in any fashion by Oliver Wyman. They were simply accepted as reported by insurers and inputted by Oliver Wyman into its analysis.

Even with the bald acceptance of insurance company claim and expense figures, Table 1 at p. 2 of the OW Profit Report confirms that, in its assessment, automobile insurers in the Province have been earning positive returns on equity (ROE) in 7 of the last 10 years examined.

(ii) <u>Operating Expenses</u>

Table 5 at p. 7 of the OW Profit Report contains a summary by Oliver Wyman of the Operating Expense Ratios based on operating expenses reported by insurers. Of particular note is the considerable variability in the expense ratios from year to year. The Campaign submits that such

expense variability should not be expected in an industry that is being run well relative to managing expenses, and should cause the Board to question the reasonableness of the expense ratios.

Further, Oliver Wyman also noted at p. 7 of the Oliver Wyman Profit Report that "…the IBC total expense ratios may be slightly overstated for private passenger automobiles." Despite the apparent overstatement of expenses by the IBC, no adjustment was made by Oliver Wyman to account for the same in their profit calculations, nor were any efforts made to audit or examine the reported expenses.

(iii) <u>Examination of Ms. Elliott by Atlantic Provinces Trial Lawyers Association (APTLA)</u>

As was made clear by the questioning of Paula Elliott by Barry Mason, Q.C. on behalf of APTLA at the review hearing, the figures utilized as the deduction for claims in the profit analysis equation include both case reserves (set by the adjuster handling the claim directly) and a supplemental reserve (added by the IBC before final reporting). Thus, the figure used as the "claim" deduction in the profit analysis may well be larger than the actual claim incurred by the insurer upon resolution of the particular claim.

Mr. Mason also made the following points during his questioning of Ms. Elliott:

(1) Oliver Wyman does not take into account the full insurance cycle (i.e., NL data showed that the Return of Equity for insurers in 2003-2006 was 23-24%) (June 8, 2018, pp. 23-59);

(2) automobile insurers routinely over-reserved potential claims, thereby having the ability to manipulate losses or profits in any given year. Mr. Mason referred Ms. Elliott to the comments of the Oliver Wyman actuary who denied this in 2002 but admitted it at a hearing in Nova Scotia in 2008 (June 8, 2018, pp. 125-147);

(3) the theme of Mr. Mason's examination was that Ms. Elliott should have looked deeper into the numbers, especially where Oliver Wyman got it wrong in Nova Scotia in 2008;

(4) the insurers claimed an average expense ratio in NL of 29.2% for the period 2007-2012, compared to the 22.9% which was accepted as an appropriate amount in Alberta in 2005. The point of Mr. Mason's questioning on the expense ratio differentials is that comparatively, Newfoundland and Labrador ought not to have expense ratios higher than those in Alberta for the same period of time based on higher cost of living and business expenses in Alberta versus Newfoundland and Labrador. A higher expense ratio impacts the apparent Return on Equity of the insurers by depressing the ROE figure (i.e., if the appropriate expense ratio applied were 23% versus 29%, the ROE would be higher) (June 8, 2018, pp. 74-109);

(5) when the claims cost per car (Ultimate Loss & ALAE Cost/Car, Column 3, Appendix A of OW Profit Report) is reduced from around $400 per automobile (which are the figures used by Oliver Wyman in their calculations relating to Accident Years 2015 and 2016) to $350 per automobile, the resulting Return of Equity of the insurers is seen to improve. Mr. Mason's point in this line of questioning was that Oliver Wyman ought to have used

a figure closer to $350 for the Ultimate Loss & ALAE Cost/Car given that these loss cost figures include the reserves set by the insurers, and loss cost figures for 2015 and 2016 Accident Years will not be as mature as those from older Accident Years. The tendency is for those loss costs to be reduced over time as the reserves "mature" and the actual claim costs are crystalized and paid out in real dollars with precise figures. Thus, older loss cost figures will prove more reliable and accurate (June 8, 2018, pp. 109-158). In explaining the nature of his concern relating to volatility in reserve setting practices, Mr. Mason stated at the hearing (Hearing Transcript, June 8, 2018, p. 146):

MASON, Q.C.:

Q. I guess what I find interesting or difficult to comprehend is we know that the reserving practices are highly volatile because we saw what happened in Nova Scotia where insurers were over reserved indicated that there was a very low return on equity; in fact, a negative return on equity, that turned out to be a 10.8 percent return on equity in 2002 because of the changes with reserves.
…

The Campaign submits that Mr. Mason's questioning of Ms. Elliott revealed that her profit analysis was flawed in that it relied on inputs of data from insurers, but did not critically examine those inputs. Had these inputs been critically assessed, they likely would have been modified and a more accurate profitability measure (ROE) of the automobile insurance companies been achieved. For example, Oliver Wyman ought to have considered reducing the operating expense ratios from those reported by the industry on the basis of volatility in the ratios year-over-year and on the basis that the operating expense ratios were too high for Newfoundland and Labrador relative to other provinces such as Alberta. Further, failing to take into account a larger number of years in the analysis to capture the full insurance or profitability cycle, using late Accident Year loss cost data, likely produced a distorted picture of insurance company profitability by

failing to incorporate more reasonable components of the claim and expense side of the ROE equation.

(iv) The Lazar/Prisman Report

Dr. Fred Lazar is a Professor of Economics at the Schulich School of Business and Faculty of Liberal Arts at York University. He obtained his Ph.D. from Harvard University and has been a professor at York University since 1972.

Dr. Eli Prisman is the Nigel Martin Chair in Finance at the Schulich School of Business at York University, a position which he has had since 1996. Dr. Prisman has been teaching at York University since 1989.

Both Dr. Lazar and Dr. Prisman have extensive knowledge of the automobile insurance industry. They were retained by the Campaign and provided a report to the Board in July 2018 entitled *Estimated Overpayments of Automobile Insurance Premiums in Newfoundland and Labrador, 2012-2016*. Dr. Lazar gave evidence before the Board on September 13, 2018. It is of note that Dr. Lazar and Dr. Prisman are the only experts in finance and economics who have provided any evidence on insurance company profitability for the Board to consider.

The following are some of the issues raised and points made in the Lazar/Prisman Report and the evidence of Dr. Lazar:

(1) when the TD subsidiaries (Primmum and Security National) and three other companies with average negative ROEs over the entire period 2011-2016 are excluded, the weighted

average ROEs for the remaining companies increase 12.2% over the period 2011-2016. The companies that have been profitable are very profitable (p. 4, Lazar/Prisman Report);

(2) NL ratepayers have overpaid between $54-$92M in insurance premiums over the period 2011-2016 (p. 5, Lazar/Prisman Report);

(3) there does not seem to be any capital problem for the auto insurance industry in NL (p. 5, Lazar/Prisman Report).

In his evidence before the Board, Dr. Lazar emphasized that economic theory is quite clear that unless a company earns money it will exit the jurisdiction. He pointed out that if companies were losing money in one particular aspect of the industry (i.e., TD subsidiaries) then standard economic reasoning suggested that:

(1) the company was using the line of business as a loss leader (generating profits in other lines of business);

(2) attempting to use other companies to increase their market share; or

(3) for tax purposes (September 13, 2018, pp. 23-29).

Dr. Lazar also suggested that Ms. Elliott, not being an economist, did not consider these basic economic principles (September 13, 2018, pp. 169-172).

Dr. Lazar also concluded:

(1) a 10% benchmark ROE is much too high and it would be more appropriate to use a 10 year rolling average (September 13, 2018, pp. 52-54);

(2) Oliver Wyman's assumptions for the ROE are unrealistically low (September 13, 2018, pp. 54-56);

(3) the operating expenses accepted by Oliver Wyman needed to be examined because there was no indication that insurers were attempting to increase efficiencies or use technology to reduce operating expenses (September 13, 2018, pp. 60-64);

(4) insurers threaten to exit the province in which they are seeking to increase rates and regulators accept this threat at face value. One question to be asked in NL is why insurers have not left the province if the situation is as dire as they say it is and why insurance companies are buying brokerages, if not to increase their profits. (September 13, 2018, pp. 211-213).

Dr. Lazar repeated on numerous occasions, under cross-examination by counsel for the IBC, that unequivocally, no matter how one quibbled with the numbers, NL ratepayers had made premium overpayments. These overpayments resulted from:

- the required ROE being too high
- the ROI being too low, and
- expenses being too high.

Dr. Lazar maintained that the reality, using logic and common sense, is that there were overpayments of premiums in every year in the range of 8-10%. In his testimony before the Board, Dr. Lazar provided the following response to questioning by IBC counsel explaining why one must arrive at an overpayment conclusion, regardless of whether the Oliver Wyman data is used (September 13, 2018, pp. 169-171):

> *DR. LAZAR*
>
> *A. Okay, I'll answer this as quickly as I can. I'm sure Ms. Elliott is a great actuary, I'm not going to question her, I'm sure she's extremely good. She's not an economist and she misses the point entirely. So let's take her expense numbers, use those, and I believe it's one to put in context, what's the relevance of all of this if we use a higher number? There is no relevance for the question of did consumers of auto insurance in this province pay too much? It's not relevant and here's the reason why. If you accept her expense numbers, let's take them, so they're going to enter into the rate setting process. What are the two key variables that we still disagree upon? The return on equity and the return on investment. The return on equity, Ms. Elliott, that was not her area of expertise, that's not what she was asked to do. So all I'm saying is even if we take her expense numbers for the time being, plug them in and let's go through the exercise, let's determine what the maximum premiums would have been allowed with a 10 percent return in equity, whatever number you want for the return on investment, here the premiums would have been allowed, redo that with a lower return on equity number, use her investment return if you want, use her expense numbers, that maximum allowable premium is going to be lower, which means consumers have overpaid. I don't care how – what numbers you use, how you try to cast this. Now, even if you use her numbers and again, she's not an economist, so I can't blame her for this, you've got to take into account what are best practice, what are expense ratios that should be the target for the Board.*
>
> *STAMP, Q.C.:*
>
> *Q. Madam Chair, if I can just interrupt here. It's not focussing on the question that I asked, it's focussing on –*
>
> *DR. LAZAR:*
>
> *A. Yes, but there's got to be context.*

STAMP, Q.C.:

Q. It's giving us a seminar that he gave earlier in his direct evidence or his direct presentation.

DR. LAZAR:

A. But again, it's the context, you're asking me these questions, what the difference is, so the question is what difference does it make for the fundamental question, and my answer is it doesn't, there are overpayments, regardless of what numbers you throw in because of the differences in return on equity that were used and what should have been used, that's the bottom line. Then, is her number the right one to have been used in the exercise, that's another question. And my answer to that is, no, it's not, regardless of general expense number it's the wrong number to use because, again, not being an economist, you don't realize that part of the regulatory process is to incentivize the companies that are being regulated to achieve the best practices.

(14) The Ontario Trial Lawyers Association (OTLA)

Allan Wynperle, President Elect of OTLA, and John Karapita, Director of Public Affairs with OTLA, gave evidence before the Board on September 12, 2018. Mr. Karapita explained that, after seeing a letter from IBC to MHAs in this province, he contacted Steve Marshall, Q.C., as he was concerned that IBC were making the same arguments in NL that they had been making in Ontario for years. Mr. Karapita stated that in 2013 OTLA heard the Vice President of the IBC say many of the same things they are presently saying in NL (September 12, 2018, pp. 238-240).

Mr. Wynperle stated that, despite having the most expensive premiums in Canada, the insurance companies were complaining in Ontario that they were losing money and there were continuous cuts to the benefits being allowed to accident victims. Mr. Wynperle explained that in Ontario no damages for pain and suffering are given unless the injuries are serious and permanent and even then there is a deductible of $38,000 (September 12, 2018, pp. 231-232). Mr. Wynperle further

stated that there is currently a minor injury guideline cap of $3,500, which has been reduced from the $100,000 available in 2010. Over the previous 8 years there had been 17 cuts to benefits rights for accident victims (September 12, 2018, p. 234).

In explaining OLTA's reason for attendance before the Board Mr. Karapita stated:

> *So it was in the context of that history that we faced in Ontario that we brought forward some concerns to our colleagues here in St. John's to talk about our own experience. It's what we saw as a pattern of the industry focusing on selected mounting claims costs, using the Ontario context, if you will, and the pattern of downplaying the insurance industry's profitability and dismissing the need, frankly, for accountability and transparency in some of that data.*

Mr. Karapita and Mr. Wynperle discussed the profitability of the auto insurance industry in Ontario and outlined that in 2016 there was a profit of $1.5B on auto insurance alone, or a 16% return on equity (September 12, 2018, p. 249). Mr. Karapita further stated that the auto insurers frequently claim to be losing money but they seldom admit to making money (September 12, 2018, p. 251).

Evidence from Mr. Wynperle and Mr. Karapita reinforces the age-old IBC theme that "the sky is falling". Mr. Forgeron preached this message in 2005 and the sky didn't fall. In fact, the insurance companies continued to make money and rates for third party liability coverage remained quite stable. IBC preached this same message in 2012 in Ontario and went on to make $1.5B in 2016. Now, at this present hearing IBC preaches the same message.

The answer to this theme is quite simple – if the insurance companies are not making money why are they still here? Why are insurance companies buying other insurance companies and why are insurance companies buying insurance brokerages? These insurance companies are still

here (and continuing to invest in insurance industry acquisitions) for one reason and one reason only – they are making money. It is in this context that the evidence from OTLA is very important.

(15) Minor Injury

(i) Lawyers' Panel – Definition of "Minor Injury"

In the IBC submissions dated February 2018 it summarizes the various minor injury definitions currently used in other Canadian jurisdictions as follows:

AB (2004)	NS (2010)	NB (2013)	PE (2014)
A sprain, strain or WAD (whiplash associated disorder) caused by a motor vehicle accident, that does not result in a serious impairment	A sprain, strain or whiplash associated disorder injury that does not result in a serious impairment. The injury must have been caused by the motor vehicle accident.	A contusion, abrasion, laceration, sprain, strain or whiplash injury, including any clinically associated sequelae, that does not result in a serious impairment or in permanent serious disfigurement	A sprain, strain or whiplash injury, including any clinically associated sequelae, that does not result in a serious impairment

Three of these definitions are revised definitions and were changed over time after a "minor injury" cap was first implemented in the Atlantic Provinces. Various Atlantic Provinces have implemented numerous changes, including to the definition of "minor injury" and the quantum of the cap itself, as well as indexation for inflation. Meanwhile, the profits realized by the insurers in the Atlantic Provinces after the original minor injury cap was legislated were triple the benchmark rates and they were immediate. However, in New Brunswick, for example, despite the tremendous profits earned there was no corresponding reduction in rates.

Initially, Courts were tasked with interpreting the "minor injury" cap definition for each jurisdiction and case law emerged quickly on the types of injuries that were captured by the

definition. The Campaign has presented some of this case law from the various Courts in the Atlantic Provinces which can be found at the Campaign to Protect Accident Victims' slide presentation dated September 7, 2018 from slides 8-11 inclusive.

It is important for the Board to acknowledge that the injuries captured by the so-called "minor injury" definitions in each jurisdiction do not fit with the term "minor" as members of the public normally think of that term. Often these cases took two or even ten years to be heard in Court, and despite the victims' continuous suffering throughout this period of time, the injuries were ultimately determined to be "minor injuries" because of the Courts' interpretation of the definition and specifically the interpretation of the "serious impairment" component of the definition.

The Campaign submits that the term "minor injury" is a misnomer cleverly invented by the insurance industry to lull decision makers and the public into believing that the injuries of innocent victims limited by a cap are truly "minor " in the normal sense. In reality, each of these definitions are designed to capture injuries, impairments and disorders that are neither minor nor temporary, contrary to what is suggested in various presentations and submissions from IBC, Intact, Aviva and RSA. These injuries are often permanent, result in major changes in the way a person may work, enjoy their recreational activities, care for loved ones or simply enjoy life, but yet the impact is not enough to be considered a serious impairment of an important bodily function, so it is still considered to be minor and is capped.

The test involves an analysis of the impact of the injury on a bodily function. If it does have a permanent impact on a bodily function, the next question is whether that particular bodily function impacted is important? It has been determined that a serious impairment is one which causes substantial interference with the ability of the injured person to perform his or her usual daily activities or to continue his or her regular employment. Any interference is not sufficient; it must be a substantial interference to be considered serious.

The threshold to get over the minor injury definition as it has been interpreted by the Courts in Atlantic Canada is steep and does not resemble any of the submissions or presentations the IBC or any of the various insurers have provided. They discuss minor injuries, scrapes, strains, abrasions, etc., when they know full well that the Courts have interpreted very serious injuries to be minor and capped them at grossly insufficient compensation to the benefit of the insurer for the defendant who caused the injury.

It is the Campaign's position that this is contrary to the evolution of the case law for recovery of general damages in tort law in Canada. Non-pecuniary general damages are compensation for pain and suffering, loss of enjoyment of life, and the loss of amenities and expectation of life. Non-pecuniary general damages are also awarded to provide solace for what has been lost by an injury victim.

The various "minor injury" definitions canvassed above have categorized these damages as less important and not deserving of the compensation that lost wages or out of pocket expenses attract. The result is a disproportionately negative impact on victims whose losses are primarily

comprised of non-pecuniary general damages. Such victims routinely include the senior citizen who is retired and not working, the student who is attending school, the homemaker who cares for his or her children or elderly parents, or the poor or unemployed. If a cap on minor injuries is implemented these groups, who are far more vulnerable financially to begin with, will stand to lose the vast majority of their right to seek compensation for their losses. such consequences make a cap on non-pecuniary general damages for "minor injury" unconscionable, in the submission of the Campaign.

(ii) <u>Medical Evidence – Dr. Misik and Dr. Major</u>

It is of note that the Campaign called the only medical doctor to present to the Board on the topic of injuries sustained in motor vehicle collisions. Dr. Karl Misik, is a family physician who has practiced in Newfoundland and Labrador for 48 years, presented to the Board on September 7, 2018.

Dr. Misik outlined the typical types of soft tissue injuries that he sees in his practice regularly and consistently. He said the majority are types of acceleration/deceleration injuries involving the neck, back and shoulders. Dr. Misik took exception with the label of "minor injury" and was clear that, in his practice, the impact of these injuries on victims is not minor, not short lived and very much all-encompassing for a patient and their family. He gave examples of mothers being unable to care for their children or fulfill their responsibilities in the home, fathers trying to live and work in pain or mothers trying to work and still care for their children while suffering from the effects of so-called "minor injuries". Dr. Misik also highlighted for the Board, as we would

logically all expect, how when one member of a family suffers a "minor injury", the impact reverberates through the entire family.

Dr. Misik outlined the psychological impact of motor vehicle accidents on his patients' mental health and how at least 50% of his patients develop some sort of anxiety or depression associated with the collision and/or the injury, pain and limitations. He rejected the position that these injuries are short-lived, temporary or that they resolve when the Section A compensation claim is resolved. He referred to patients whose so-called "minor injuries" have remained with them for 13-15 years.

Dr. Misik further warned that a cap on non-pecuniary general damages and premature cessation of insurance benefits may have an unintended consequence on our public health care system as claimants seek assistance for so called "minor injuries" that are having a major impact on their lives. In the event that treatment is not provided, claimants, in his view, will seek second opinions or further testing to prove the necessity for further treatment or the seriousness of the impairment.

On September 16, 2018 Dr. Stephen Major, another St. John's family physician, submitted a letter to the panel in opposition to a cap on compensation for so-called minor injuries. He wrote:

> *Contrary to the propaganda of the insurance companies, I would like to express that at least 80% of patients I see in my practice with soft tissue injuries, that have chronic pain, continued to have the symptoms long after they have received financial compensation from a litigation…Regardless of the decision that the public utilities board makes, and regardless of whether compensation is limited, I predict that I will continue to treat many patients with chronic pain from soft tissue injuries related to motor vehicle accidents. These patients are not malingering, these are not patients who wish to be*

> *disabled, these are not patients simply seeking some financial compensation, these are real people that once injured end up with chronic pain, despite an active and comprehensive treatment program. The insurance industry has promoted a fallacy that these patients are not injured and do not require compensation. The reality is quite different. I strongly impress upon you to carefully consider any decision that you make that limits the compensation legitimate patients can receive for injuries they sustain in motor vehicle accidents that are not through any fault of their own.*

(iii) Section B – Accident Benefits

In the Terms of Reference the Board was asked:

To review Section B/Accident Benefits coverage and impact on rates with respect to:

- *Coverage limits on medical and rehabilitation benefits and indemnity for loss of income;*
- *Benefit payment practices (ie. advance payments versus reimbursement);*
- *Order of payment of benefits in relation to other benefit plans;*
- *Timeliness and efficiency of the injury assessment process;*
- *The relationship of Section B benefits to the settlement of Section A benefits; and*
- *Whether the coverage should be mandatory.*

Oliver Wyman prepared a report dated April 25, 2018 entitled *Other Coverages Review – Private Passenger Automobiles* (the "Other Coverages Report). This Other Coverages Report, respectfully, provides little assistance to the Board and does not provide a substantive review of the topics as mandated in the Terms of Reference. The Other Coverages Report was particularly deficient on the topic of Section B/Accident Benefits. The Campaign submits that insufficient evidence has been presented on this topic for the Board to reach conclusions or provide comment for consideration by government.

On page 11 of the Other Coverages Report Oliver Wyman confirmed that the Section B Closed Claim Study survey asked for claims costs, but 87% of the files included reported "unknown" for Accident Benefits coverages. Only 235 claimants had reported Medical and Rehabilitation Costs

and the average Costs were $3,058. For the 234 claimants that reported Disability Income Costs, the average was $462. However, it is the Campaign's position that the sample size was too low to be validated and Oliver Wyman was unable to comment on the relationship of Section B benefits on the settlement of Section A benefits. A further deficiency in the Other Coverages Report, arises from the fact that it covered only a portion of the aspects of Section B /Accident Benefits that the Terms of Reference contemplated would be reviewed.

Additional consideration will be given by the Board to possible reforms to no-fault medical and disability income benefits (Section B benefits) provided under the standard policy of automobile insurance. Section B Accident Benefits in Newfoundland and Labrador are not mandatory but GISA has reported that 94.6% of vehicles had this coverage in 2016. The benefits provided under Section B of the automobile policy can be further subcategorized into Medical, Rehabilitation and Funeral Expenses or Death benefits and Loss of Income Payments. Medical and Rehabilitation coverage indemnifies expenses incurred within four years from the date of the accident for necessary treatments essential for the treatment, occupational retraining or rehabilitation of the insured person to the limit of $25,000.00.

Loss of income, or weekly indemnity, payments are payable to the injured insured person who suffers a substantial inability to perform the essential duties of his or her occupation or employment, provided that such a person was employed on the date of the accident, and provided that within 104 weeks of the date of the accident he or she was unable to work for not less than 7 days. The weekly payment is the less of $140.00 per week or 80% of the insured gross weekly income.

It has been suggested that Section B benefits should become a mandatory component of a private passenger automobile insurance policy. Given that recent statistics provide 94.6% of policies include Section B Accident Benefits, it seems reasonable to require subscription to these coverages on a mandatory basis.

However, the insurers have asked to implement pre-approved evidence based treatment protocols without any medical evidence to support such a decision. Intact, for example, has outlined in their submission on p. 7 that medical referrals will not be required to avail of evidence based treatment protocols. Is this a safe and best practice for injured patients? Further, while Intact has suggested raising the medical and rehabilitation coverage from $25,000.00 to $50,000.00 they have submitted no evidence or claims experience from the Section B Closed Claims Study on the adequacy of the existing $25,000.00 coverage. The only average expenses we have to review are from the 235 claims included in the Section B Closed Claim Study, where the average Accident Benefit claims costs for medical and rehabilitation expenses were $3,058. The Campaign is unable to speak to the sufficiency of the $25,000.00 current coverage limit without further data and analysis of the subject.

Further, our experience is that insurers are reviewing claims eligibility under Section B well within the 4 year time period. Insurers typically retain mainland medical doctors regularly used by the insurers to conduct a so-called independent medical evaluation (IME) to determine whether further rehabilitation is likely for the claimant. The insurers then will only agree to fund treatments recommended by the insurance medical evaluator, even in cases where the claimants'

own treating physicians might be recommending otherwise. In these situations, the claims costs are kept by insurers well below the $25,000.00 coverage available.

While an increase in the Section B coverage limit for medical and rehabilitation expenses to $50,000.00 may be reasonable, the evidence to support such a change has not been presented to the Board. The Board is further cautioned that it should not interpret a proposed increase in the Section B medical and rehabilitation expense coverage limit as somehow providing a trade-off benefit for injured victims for having their compensation claims capped. The fact is, the vast majority of claimants, in our experience, would not receive any benefit from an additional $25,000.00 in Section B Accident Benefits coverage for medical expenses and rehabilitation costs.

Richard Rogers, Q.C., a member of the legal panel with extensive experience in working with automobile accident injury victims, outlined that often Section B claimants turn to the Section A (liability) insurer for compensation because they have received a poor claims experience from the victim's own insurance company.

Sheila Elliott, a member of the Victims' Panel, also outlined her struggle with obtaining coverage or reimbursement for physiotherapy, massage therapy and exercise therapy. The reason why Ms. Elliott turned to legal representation was because of the difficulty she was encountering with her own insurer trying to open a Section B claim and receive coverage for treatments.

The Campaign does not support evidence based treatment protocols that do not involve consultation with the victim, the victim's family doctor and/or the victim's preferred treatment providers. The Campaign does support an amendment that provides Accident Benefits coverage to be the primary coverage instead of private health plan collateral benefits. The Campaign further supports a requirement for Section B insurers to accept direct billing for insured benefits from all treatment providers, not only those on the insurers "preferred supplier" list, as a preferred supplier list creates a conflict of interest which does not benefit the victim/insured in this first party contract.

(iv) Viivi Riis, physiotherapist

IBC provided a presentation from Viivi Riis, a physiotherapist from Ontario, who has worked as a consultant with IBC for many years as they lobbied governments to implement a cap on "minor injury" damages throughout Canada. Ms. Riis prepared a report dated July 23, 2018 which was submitted to the PUB and she appeared before the Board on Wednesday September 12, 2018.

Ms. Riis was of the opinion that, while she disagreed with the term "minor injury" and preferred instead to call them Type 1 injuries, or to make reference to a non-pecuniary damages cap, she felt that if implemented well, and described as such, the proposal of IBC should, in fact, be implemented.

However, the Campaign submits that the Board ought to look more closely at the research Ms. Riis relied upon and, specifically, the "comprehensive 2015 study", better known as "Enabling Recovery from Common Traffic Injuries: A Focus on the Injured Person", by Cote P., et. al., and

the definition for Type 1 injuries she uses on pp. 3-4 of her report. Ms. Riis employs a very broad definition of Type 1 injury that includes physical, psychological and pain effects and sequelae, including mental and psychological symptoms. However, when the study is reviewed more carefully it appears that the purpose of the Cote paper was to determine how to optimize the recovery of the injured individuals and not to come to a manner of defining injuries for the purposes of a cap on compensation. Ms. Riis is taking this research and repurposing it inappropriately.

On August 29, 2018, Dr. Darrell Wade, on behalf of the Newfoundland and Labrador Chiropractors Association submitted a letter to the Board that also reviewed the Cote report. Dr. Wade pointed out that, while researchers state 50% of motor vehicle accident victims who present with Type 1 injuries will recover within six months, 50% of these victims do not and that is a large number of people who will require treatment, assistance, guidance in navigating their rehabilitation.

Further, Ms. Riis in her report on p. 6 recommends against defining a serious impairment based on a chronological timeline. This seems somewhat disingenuous considering that the Cote report she relied upon subscribes to timelines heavily. The treatment protocols suggested for injuries in the first 12 weeks were very different for injuries with symptoms that persisted beyond 12 weeks. The involvement of further testing and additional professionals also changed as time went on. It seems incongruent that Ms. Riis would ask the Board to consider a very broad definition of a “minor injury” in keeping with this comprehensive study, but then refuse to define a serious impairment or utilize the timelines provided in that same research. Given that Ms. Riis was the

only non-voting member of the expert panel on the Cote study and given her well-established relationship with IBC, a proponent for the "minor injury" cap, the Campaign submits that the Board should give little weight to her evidence and opinions as they are not reliable.

(16) Access to Justice

The Campaign has previously touched upon the access to justice issue having regard to the disproportionate effect of the "minor injury" cap on seniors, students and the unemployed. However, there is another aspect of the access to justice issue which must be commented upon. IBC made the following comments at p. 4 of its May 2018 submission:

> *These massive non-pecuniary damage payments correspond directly to auto insurance legislation that emphasizes cash payments over health outcomes. The ability to take an injury that is expected to heal in a few days, weeks or months, and turn it into tens of thousands of dollars in cash is why 82% of injury claims involve personal injury lawyers.*

Aviva's submission to the Board is even more pointed in its attack on lawyers at p. 11 where it makes the following points:

(1) settlements were noticeably higher when there was legal representation ($41,000 with legal representation, versus $9,900 with no legal representation);

(2) the "most surprising data" to emerge from the Closed Claim Study was the high rate of legal representation. This high rate of legal representation "is a clear sign the system is broken";

(3) legal representation impacts the length of time it takes to resolve a claim.

At p. 18 of its report Aviva states:

> *As mentioned in Section 4, lawyer representation in Newfoundland and Labrador is 82% - which is a major issue in Canada. This suggests major issue and creates excessive costs in the system that all customers pay for.*
>
> *Transparency into the practices of plaintiff lawyers is required as part of any effort to achieve best outcomes for premium payers and particularly, those injured who are paying lawyers' large fees in pursuit of awards that distract from the priority of patient care. Government should expect an adverse stakeholder reaction from trial lawyers who will suggest that this is an access to justice issue and insist the contingency fee system is in the best interest of clients in order to ensure they get a fair settlement from insurance companies.*

The greed of the insurance industry is once again illustrated by their complaint that claimants receive more money for their injuries when they are represented by a lawyer. The power imbalance which exists between the injured person and the insurance adjuster emphasizes why lawyers are needed.

IBC was questioned on these statements during the IBC Panel Presentation and Amanda Dean agreed, albeit somewhat reluctantly, that IBC was not alleging lawyers were engaged in fraudulent practices. However, the Campaign did not have the opportunity to examine Aviva on its statements as they refused to present themselves for examination and the Board refused to issue an Order requiring their attendance.

The importance of the contingency fee arrangement in ensuring citizens' access to justice was confirmed by O'Connor A.C.J.O. in *McIntyre v. Ontario (Attorney General*) [2002] O.J. No. 3417 (Ont. C.A.) at paragraph 55:

> *There can be no doubt that from a public policy standpoint, the attitude towards permitting the use of contingency fee agreements has undergone enormous*

> *change over the last century. The reason for the change in attitude is directly tied to concerns about access to justice. Over time, the costs of litigation have risen significantly and the unfortunate result is that many individuals with meritorious claims are simply not able to pay for legal representation unless they are successful in the litigation. In this regard, Cory J. made the following comments about the [page275] importance of contingency fees to the legal system in Coronation Insurance Co. v. Florence, [1994] S.C.J. No. 116 at para. 14:*
>
> > *The concept of contingency fees is well established in the United States although it is a recent arrival in Canada. Its aim is to make court proceedings available to people who could not otherwise afford to have their legal rights determined. This is indeed a commendable goal that should be encouraged. . . . Truly litigation can only be undertaken by the very rich or the legally aided. Legal rights are illusory and no more than a source of frustration if they cannot be recognized and enforced. This suggests that a flexible approach should be taken to problems arising from contingency fee arrangements, if only to facilitate access to the courts for more Canadians. Anything less would be to preserve the courts facilities in civil matters for the wealthy and powerful.*

The Campaign submits that the Board should expressly reject the position taken by the insurance industry on the involvement of lawyers in representing claimants in personal injury claims.

(17) <u>The Taxi Review</u>

Although the high insurance rates charged to taxi drivers in this province precipitated this current review, it is the Campaign's position that the issue faced by taxi drivers has nothing to do with, and will not be remedied by, the imposition of a cap for so-called "minor injuries".

The Board interviewed a number of taxi owners and operators on April 10 and 12, May 2, and September 18, 2018. Their complaints primarily concerned the high insurance rates they were being charged and the difficulty those rates were causing in the taxi industry, as well as concerns

over the placement of such a high percentage of taxis in Facility Association for underwriting purposes.

As part of the review, the Board commissioned a report from James Cameron, an insurance industry consultant from Ontario. Mr. Cameron conducted a review of taxi claims in Newfoundland and Labrador. In large part, Mr. Cameron simply reviewed claims reporting and adjusting experience in the Province. He found that "Claims settlements were provident, fair and expeditiously handled" (Cameron Report, p. 4).

In terms of claims costs, while in his report he stated that taxi rate increases had been owing to continuously escalating loss costs (Cameron Report, p. 4), Mr. Cameron conceded on questioning by Campaign counsel that, in fact, his statement was erroneous (June 11, 2018, pp. 65-68).

Mr. Cameron also recommended in his report that as a solution to high taxi insurance premiums the Province consider implementing minor injury caps or thresholds on injury claims. The Campaign points out, however, as confirmed by Mr. Cameron on questioning by Campaign counsel at the hearing, that Mr. Cameron's suggestion to implement caps or thresholds was made without any financial, actuarial or other direct assessment by him as to whether such measures would make a meaningful impact on taxi insurance costs and rates. Further, the Campaign submits that it is patently inappropriate to suggest radical measures that would drastically impact an entire population of approximately 500,000 residents in order to address an issue affecting some 800 taxi owner/operators.

In response to the report of James Cameron, the Campaign provided a report from actuary, Craig Allen, dated April 4, 2018. Mr. Allen's report was clear that implementing a "minor injury" cap, such as is under consideration in this review, would be of little or no benefit to taxi drivers and their problems with high insurance premiums. At p. 2 of his report, Mr. Allen contrasted the claim frequency of taxis in Facility Association with that of private passenger automobiles. It is clear from the table on p. 2 that taxis have a claim frequency problem that a "minor injury" cap will do nothing to resolve or mitigate. Mr. Allen recommends accident prevention measures to reduce the number of claims for taxis through improved driver education and safety training for taxi drivers, better screening of taxi drivers on hiring, and measures to improve vehicle condition and roadworthiness as some suggested options in this regard. Further, measures to bring the claims experience under control for taxis may well allow them to move from the Facility market to the commercial market, thereby enabling them to secure better premium rates. Mr. Allen notes at p. 5 of his report:

> *The benefits of an effective program to reduce claim frequency and severity would support the shared interests of the public, the government and the taxi industry. Further, such a program would add an additional economic incentive for taxi drivers to maintain good driving practices in order to remain certified to qualify for better rates in the competitive market.*

The Facility Association has also confirmed that a "minor injury" cap would be of no benefit to assisting taxi drivers with high insurance premium costs. On June 29, 2018, the Board wrote to Facility Association with a list of additional questions relating to taxis. On September 25, 2018 the response of Facility Association to those questions were distributed by the Board. In a reply to the Board's question concerning suggestions on how to reduce claims costs for taxis, Facility Association was clear that reducing accidents would be helpful, but that the IBC proposals in this

review for reducing claims costs, in other words a "minor injury" cap, would be of little assistance for the rate inadequacy that exists presently for taxis:

> *4. **Question:** Does Facility Association have any suggestions to reduce claim costs and rates for its Taxis class of business in Newfoundland and Labrador?*
>
> ***Response:** Claims costs arise for accidents which occur, the claims resulting from accidents and the system of reparations with respect to eligible claims. Therefore, reducing accidents could be a positive step. We do not usually comment on the mandatory coverage to be required in each jurisdiction we serve unless we see a feature in the coverage that is likely to pose risks to availability. We understand IBC has put forward constructive proposals in this regard. We do note that given the significant rate inadequacy for Newfoundland and Labrador Taxis, a reduction in claims costs would not necessarily eliminate that inadequacy.*

Further evidence as to the lack of benefit to the taxi industry of a "minor injury" cap can be seen in Facility Association's response to Question 3 from the Board at p. 1 of the Facility Association reply. In a table comparing average written premiums for taxis among the Atlantic Provinces and Newfoundland and Labrador, it is noted that the average written premium for taxis has been lower in Newfoundland and Labrador for each of the four years from 2012 to 2015 as compared to New Brunswick. In 2016, the average written premiums for taxis in Newfoundland and Labrador were just slightly higher in Newfoundland and Labrador than in New Brunswick. The Campaign submits that if a "minor injury" cap, such as has existed in New Brunswick since the early 2000's, would have any utility in reducing taxi cab insurance premiums, then we should not be seeing lower average premiums in Newfoundland and Labrador for 2012 to 2015 as compared to New Brunswick.

Perhaps the most important evidence presented on this issue came from taxi cab owner, Peter Gulliver, who testified before the Board on September 14, 2018. Mr. Gulliver testified that he and/or his daughter own City Wide Taxi, Northwest Taxi and Bugden's Taxi. Mr. Gulliver owns 182 taxi licences or almost one half in the City of St. John's, Jiffy Cabs owns 85 licences and Newfound Taxi has 49 licences (September 14, 2018, pp. 125-126).

Mr. Gulliver stated unequivocally that Doug McCarthy, the only taxi driver who has come forward to the Board and presented in support of a "minor injury" cap, does not speak for him or the taxi industry.

Mr. Gullliver's primary complaint, echoed by other taxi drivers and owners interviewed by the Board, is that almost all taxi drivers are automatically forced into Facility Association (685 taxis in 2016 and 95.7% of the taxi market share, according to the Facility Association reply to Board questions numbers 1 and 3.v.), and this results in insurance rates of $11,000-$13,000 per year. Mr. Gulliver's position, as stated before the Board, is that the lack of the availability of a commercial insurance market to taxis is equivalent to price-fixing in the insurance industry. He also alleged that Facility Association and the insurance industry were in conflict of interest. Mr. Gulliver stated that he had no problem with high-risk drivers being sent to Facility but he questioned why someone like himself, who had been driving for 41 years without an accident, also had no choice but to go to Facility.

Mr. Gulliver outlined the following information which should cause this Board concern and which also highlights the difficulty faced by the taxi industry in this province:

(1) the cost of insuring nine personal vehicles for himself, his wife and his daughter was $13,000. The cost of insuring him if he drove one taxi was $11,000 (he gave the example that to insure a 2018 Toyota Camry as a taxi would cost $10,714 plus 15% HST);

(2) Mr. Gulliver had 102 buses which transported 72 school kids per bus on a daily basis and the cost to insure each bus was $1,100;

(3) he stated that 40-50% of the drivers who drove his cabs had clean drivers' abstracts;

(4) he estimated that his taxis averaged 12 accidents per year;

(5) the insurance rates for taxis had only gone up in the last 5-7 years and it had been 8 years since there has been an increase in the taxi rate;

(6) hotels in the city had shuttle busses which took passengers from the St. John's Airport to their hotels and, despite engaging in the same service as a taxi, were not treated that way for insurance purposes.

Mr. Gulliver's main point can be summarized as follows: "How do I get out of Facility Insurance?" so that taxis can obtain commercial rates. Mr. Gulliver stated, consistent with Mr. Allen's opinion and the evidence of Facility Association, that a cap would make no difference to him because he would still be in Facility Association. Mr. Gulliver was of the further opinion was that if someone was injured they "should get what today's value is" and not be restricted by a "minor injury" cap (September 14, 2018, pp. 127-128).

It is clear from all of the evidence presented to this Board that something needs to be done to help the taxi industry obtain fair and reasonable insurance rates. But it is also clear that it is an

issue separate and apart from the issue of whether a $5,000 “minor injury” cap should be imposed on pain and suffering compensation. Craig Allen’s recommendations would make a good start at addressing the problem.

(18) Public Opinion

In its panel presentation to the Board on September 10, 2018, the Campaign included results of a public opinion survey from May 2018 conducted at the request of the Campaign. The survey results were clear in that the citizens of the Province are largely not in favour of insurance reform measures that place caps on injury compensation.

The following results from the survey were notable:

- 69% of Newfoundlanders and Labradorians believe a cap will mean more profits for insurance companies.
- 62% of residents believe that a cap will not lower insurance premiums, whereas only 16% believe a cap would lower insurance costs.
- 70% of residents agree that a cap on pain and suffering compensation would take away a victim’s right to fair compensation
- 77% of residents agree that insurance companies should not have the power to decide what is fair compensation for injuries (the effective result of a “minor injury” cap) and 81% do not support a system when the insurance adjuster for the party that caused the injuries has the power to tell a victim what his/her pain and suffering is worth.

- 70% of Newfoundlanders and Labradorians oppose a $5,000 cap on claims for pain and suffering compensation.

Further overwhelming opposition to a "minor injury" cap can also be gleaned from the written submissions that have been received by the Board from members of the public, organizations or associations. The vast majority of comments provided either indicate that individuals and organizations are against the imposition of a "minor injury" cap or at least do not indicate support for such a cap:

Opposed to/Not Indicating Support For a Cap

Platinum Limousine Inc.
Workplace NL
Jovanax Ent. Inc.
The Rotary Club of Waterford Valley
CUPE NL
Insurance Brokers Association
Insurance Institute of Canada
Facility Association
NL Massage Therapists' Association
NL Chiropractic Association
Campaign to Protect Accident Victims
Canadian Federation of Independent Business
Building Trades of Newfoundland and Labrador
NL Public Sector Pensioners Assoc.
St. John's Firefighters Retirees Assoc.
NAPE Retirees Local 7002
Retired Teachers Assoc. of NL
Retired Correctional Officers
National Assoc. of Federal Retirees (NL)
Cdn. Assoc. of Retired Persons (St. John's/Avalon)
Marine Atlantic Pensioners Assoc.
Silver Lights Retirees (NL Power & Nalcor)
CBC Pensioners
RNC Veterans Assoc.
Lillian's Law
Nfld. & Lab. 50+ Federation Inc.

Support a Cap

Insurance Bureau of Canada
Intact Insurance
Allstate Insurance Company
Aviva Insurance
Co-Operators Insurance
Royal & SunAlliance Insurance
Assoc. Cdn. Car Rental Operators
Doug McCarthy

SOPAC
Spinal Cord Injury NL
Dr. Karl Misik
Dr. Stephen Major
Retired Supreme Court Justice Robert Wells
Atlantic Provinces Trial Lawyers Association
Ontario Trial Lawyers Association
Peter Gulliver (City Wide, Bugden's, Northwest Taxi)
Della Ryan
Sheila Elliott

(19) Comments and Recommendations

There are significant reliability and validity problems inherent in the Closed Claim Study performed by IBC and Oliver Wyman. In short, the study is not fair and not independent enough to be reliable. Further and other deficiencies exist in relation to the Closed Claim Study relative to Section B Accident Benefits. The Campaign has also identified the serious deficiencies in the work of Oliver Wyman in meeting the Terms of Reference requirements as it pertains to examining the "other coverages", including property damage claims, collision and comprehensive coverage, and unidentified/uninsured motorist coverage.

On the other hand, the evidence led by the Campaign and described above, overwhelmingly supports the position that the imposition of a cap is not justified as a public policy response to the "problem " of rising automobile insurance rates caused by rising bodily injury claims . Not only are accidents declining, the component of automobile insurance rates third party liability coverage from which pain and suffering awards are paid, has increased at less than the modest rate of inflation in Canada for many years. IBC now admits that a cap will not reduce, as originally argued, but only "stabilize" overall insurance rates. The "problem", as defined by IBC, does not exist. The cap is a "solution" to a non-existent "problem". This begs the question of

what is the real reason for the IBC to recommend a cap wearing its hat as industry advocate (rather than its other hat as apparently "neutral" capacity as contractor for the Closed Claim Study). As noted earlier in this submission, the evidence led by the Campaign would suggest that it is to decrease payouts to victims and increase profits to the insurers it represents.

Despite these serious deficiencies, there are comments that the Campaign is prepared to make to the Board to consider relative to its report to government:

1. Emphasis must be placed on accident prevention. This can be achieved through the "three pillars" identified by Inspector Didham of the RNC in his presentation: awareness, education and enforcement. A "minor injury" cap will not prevent a single accident, nor save a single accident victim from pain and suffering. The insurance industry can assist in reducing accident frequency through increased funding of community awareness, education and enforcement initiatives.

2. A "minor injury" cap on pain and suffering compensation will do nothing to reduce insurance rates currently being paid by Newfoundlanders and Labradorians, but will serve to act as a draconian denial of the ability of an individual to access justice. The insurance industry has confirmed this fact publicly. At best, a cap may reduce insurance company claims costs and increase insurance company profits.

3. There is no crisis in bodily claims costs as the insurance industry would have this Board believe. Bodily injury claims frequency has steadily declined in this Province since 2003 and the third party liability premium charged by insurers has increased in

this Province since 2006 at a rate less than CPI. There is nothing to indicate the decline in frequency will not continue, as Insp. Didham of the RNC has suggested, with increased awareness, education, and enforcement, and increased availability of safety features on new vehicles becoming standard equipment.

4. Automobile insurance companies operating in Newfoundland and Labrador are, on the whole, profitable. The only economics and finance experts heard from by the Board have confirmed this and the insurers have done nothing to refute this assertion by offering their own expert evidence or opening their books so that their operating expenses, reserve setting practices, or other aspects of their financial operations, can be analyzed. The insurers seeking a cap on the compensation of automobile accident injury victims in this Province have asked Newfoundlanders and Labradorians to "just trust us".

5. Problems in the taxi industry arising from high total premium costs for automobile insurance will clearly not be remedied by a cap on "minor injury" claims. The majority of the taxi license holders do not want a cap on "minor injury" claims because they see the lack of utility in such a mechanism for reducing their premiums. The taxi issue is a very separate and different issue, which will require a set of innovative recommendations that should not include a cap on "minor injury" claims.

6. There appears to be some utility in making Section B Accident Benefits a mandatory coverage (the vast majority of policy holders already buy the coverage and there may be some administrative costs savings to insurers who will no longer have to determine or pursue subrogated claims for Section B benefits paid). There is a serious concern

with implementing the Section B treatment protocols proposed by the IBC, as it appears to remove or severely limit the role of the individuals' medical care providers in their treatment and may place artificial constraints and limits on treatment that may well not accord with treating the claimant as an individual. The Board has heard from family physicians, and the massage therapist and chiropractors associations in opposition to these protocols as proposed.

7. Section B insurers should become the first loss payors on medical claims, even in cases where individuals have private or group health coverage. This preserves that private or group health coverage in the event that the claimant may need it or other purposes, and makes the process more streamlined for the claimant and the insurer.

8. Section B insurers ought to be required to accept direct billing from all treatment and rehabilitation sources, not only "preferred clinics" of the insurers.

9. Maintenance of the present $2,500 deductible for automobile accident injury claims is appropriate. In our experience, the deductible is included in every settlement discussion with insurers and has allowed them to achieve savings in claims costs in a reasonable fashion without undue harm to innocent victims.

10. The introduction of a "minor injury" cap will place undue strain and shift costs to the health care system of the Province. Family physicians and hospital resources will see an increased demand as claimants work to fight against a cap on compensation, and are forced to navigate the insurance system without the benefit of legal counsel in many cases.

11. A "minor injury" cap will negatively impact the compensation fund managed by Workplace NL and jeopardize the availability of that fund to compensate injured workers. The result will be an increased workers compensation levy to employers, who will then shoulder that burden economically, thereby depressing the economy of the Province.

DATED at the City of St. John's, in the Province of Newfoundland and Labrador this day of October, 2018.

_____

COLIN D. FELTHAM

_____

JEROME P. KENNEDY, Q.C.
ROEBOTHAN, MCKAY, MARSHALL
Whose Address for Service is:
P.O. Box 5236
5th Floor, Paramount Building
34 Harvey Road
St. John's, NL., A1C 1W5

Counsel for the Campaign to Protect Accident Victims

NEW BRUNSWICK INSURANCE BOARD

IN THE MATTER of an application under subsection 267.2(1) of the *New Brunswick Insurance Act (the Act)* by Wawanesa Mutual Insurance Company to amend currently approved automobile insurance rates

NOTICE OF HEARING

WHEREAS the New Brunswick Insurance Board ('the Board') has received an application from Wawanesa Mutual Insurance Company ('Wawanesa') with a request to amend its currently approved private passenger automobile insurance rates as shown:

All Coverage Types Combined - Overall Average +11.69%

and;

WHEREAS subsection 267.51(1)(b) of *the Act* requires that an insurer appear before the Board where filed rate increases are more than 3% greater than the rates previously filed

and;

WHEREAS section 19.41 of *the Act* provides the Board with the authority to determine its own procedure and form of hearing

NOW THEREFORE IT IS ORDERED THAT:

1. The Board will conduct a hearing to consider the application by Wawanesa to amend its currently approved rates by an average increase of 11.69%. The purpose of the hearing is to determine if the proposed rates are just and reasonable and the Board will decide this matter on the basis of the evidence and arguments made by Wawanesa and any other parties to the hearing.

2. Parties that intend to intervene (i.e. actively participate) in the hearing should notify the Board in writing, by 5:00 pm (ADT) on **Friday July 20, 2018** by notifying the Board at the address below. Electronic notification by email is acceptable. Please refer to the Board's Hearing Procedure Guidelines (available on the Board website http://www.nbib-canb.org/en/hearings.php).

3. The Board will hold a pre-hearing conference call on **Wednesday July 25, 2018** beginning at 11:00 am (ADT). Parties to the hearing will be provided with conference call information, may attend the call and make representations about the procedure to be followed, including the format of the hearing and any other relevant matters. The Board may cancel this conference call in the event that there are no interventions to this rate application.

4. The Hearing Schedule for this hearing will be published on the Board website following the pre-hearing conference call.

5. Subject to the Board's decision with respect to confidentiality dated September 24, 2007, non- confidential portions of the rate application are available for examination at the office of the Board. Anyone wishing to examine the rate application should contact the office of the Board at the number(s) or address below.

DATED at the City of Saint John, New Brunswick, this 5th day of July, 2018

BY THE BOARD

C. Kevin Duff
Secretary to the
Board

New Brunswick Insurance Board
Suite 600, 55 Union Street
Saint John, NB E2L 5B7

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email: hearings@nbib-canb.org

NEW BRUNSWICK INSURANCE BOARD

IN THE MATTER of an application under subsection 267.2(1) of the *New Brunswick Insurance Act (the Act)* by **Facility Association** to amend currently approved automobile insurance rates

NOTICE OF HEARING

WHEREAS the New Brunswick Insurance Board ('the Board') has received an application from **Facility Association** ('FA') with a request to amend its currently approved private passenger automobile insurance rates as shown:

All Coverage Types Combined - Overall Average ***+18.20%***

and;

WHEREAS subsection 267.51(1)(b) of *the Act* requires that an insurer appear before the Board where filed rate increases are more than 3% greater than the rates previously filed

and;

WHEREAS section 19.41 of *the Act* provides the Board with the authority to determine its own procedure and form of hearing

NOW THEREFORE IT IS ORDERED THAT:

1. The Board will conduct a hearing to consider the application by FA to amend its currently approved rates by an average increase of 18.20%. The purpose of the hearing is to determine if the proposed rates are just and reasonable and the Board will decide this matter on the basis of the evidence and arguments made by FA and any other parties to the hearing.

2. Parties that intend to intervene (i.e. actively participate) in the hearing should notify the Board in writing, by 4:30 pm (ADT) on **Wednesday July 4, 2018** by notifying the Board at the address below. Electronic notification by email is acceptable. Please refer to the Board's Hearing Procedure Guidelines (available on the Board website http://www.nbib-canb.org/en/hearings.php).

3. The Board will hold a pre-hearing conference call on **Tuesday July 10, 2018** beginning at 11:00 am (ADT). Parties to the hearing will be provided with conference call information, may attend the call and make representations about the procedure to be followed, including the format of the hearing and any other relevant matters. The Board may cancel this conference call in the event that there are no interventions to this rate application.

4. The Hearing Schedule for this hearing will be published on the Board website following the pre-hearing conference call.

5. Subject to the Board's decision with respect to confidentiality, dated September 24, 2007, non- confidential portions of the rate application are available for examination at the office of the Board. Anyone wishing to examine the rate application should contact the office of the Board at the number(s) or address below.

DATED at the City of Saint John, New Brunswick, this 19th day of June, 2018

BY THE BOARD

C. Kevin Duff
Secretary to the
Board

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New Brunswick Insurance Board

DECISION

IN THE MATTER:
Of a rate revision application for **ALLSTATE INSURANCE COMPANY OF CANADA**
With respect to automobile insurance rates for
PRIVATE PASSENGER VEHICLES

Written Hearing
Heard at Saint John, New Brunswick

PANEL:	Ms. Marie-Claude Doucet	Chair
	Mr. Jim Jessop	Member
	Ms. Elizabeth Turgeon	Member

Date of Written Hearing: January 30, 2018

Decision Rendered February 15, 2018

Summary

[1] Pursuant to subsection 267.5(1) of the *Insurance Act,* R.S.N.B., 1973 c. I-12, (the "Act") the New Brunswick Insurance Board (the "Board") convened a Panel of the Board to conduct a written hearing (the "Hearing") on January 30, 2018 at the offices of the New Brunswick Insurance Board, in Saint John. The purpose of the Hearing was to consider the rate revision application (the "Filing") submitted by Allstate Insurance Company of Canada (the "Applicant" or "Allstate") with respect to automobile insurance rates for private passenger vehicles (PPV) in New Brunswick. Allstate is an insurance company duly licensed to write automobile insurance in New Brunswick.

[2] In compliance with subsection 19.71(3) of the *Insurance Act,* the Board provided to the Office of the Attorney General ("OAG") and to the Consumer Advocate for Insurance ("CAI"), all documents relevant to the Hearing. Pursuant to subsection 19.71(4) of the Act, the OAG and the CAI initially advised the Board of their intention to intervene. The OAG participated to the interrogatory process by submitting two rounds of questions to the Applicant.

[3] On January 16, 2018, the OAG notified the Board of its withdrawal as an intervenor to this matter. On January 18, 2018, the CIA also notified the Board of her discontinuance as an intervenor.

[4] For the purpose of the written hearing the Panel accepted the following exhibits as part of the Record as shown below:

EXHIBIT	DESCRIPTION	DATE
1	Allstate Private Passenger Vehicle Rate Filing	Aug 29, 2017
2	Questions from EY	Sept 29, 2017
3	Questions for NBIB	Oct 2, 2017
4	Allstate Response to NBIB	Oct 6, 2017

5	Allstate Response to EY	Oct 6, 2017
6	Request from EY	Oct 27, 2017
7	Allstate Response to EY	Oct 27, 2017
8	EY Actuarial Review Summary	Nov 3, 2017
9	Written Interrogatories Round 1 from OAG	Dec 14, 2017
10	Allstate Response to Interrogatories Round 1	Dec 22, 2017
11	Interrogatories Round 2 from OAG	January 4, 2018
12	Allstate Response to Interrogatories Round 2	Jan 12, 2018
13	Allstate Final Written Submission	Jan 23, 2018

[5] Following the hearing, on February 9, 2018, the Panel ordered the Applicant to adjust its overall indication for the impact of the combination of the following four (4) changes:

1) Apply adjustment factors of +1.77% for physical damage coverages (Property Damage (PD), Direct Compensation – Property Damage (DCPD), Collision (CO), Comprehensive (CM), Specified Perils (SP) and All Perils (AP)), +1.2% for Accident Benefits (AB) and +0.44% for Bodily Injury (BI) for experience prior to July 1, 2016 to account for the effect of the HST change;

2) Exclude the Facility Association Residual Market experience from its analysis;

3) Rely only on New Brunswick data for its trend analysis;

4) Modify its filing in order to remove the catastrophe load provision of 1.00% from the Comprehensive coverage.

[6] The required changes as per above result in an overall indication of 30.62%, a decrease of 0.10% from Allstate's prior indication of 30.72%.

[7] The Panel, after examining the evidence in its entirety, approves the rate change of **+9.94%** proposed by the Applicant.

[8] The approved rates will be effective on March 15, 2018 for new and May 15, 2018 for renewal business.

1. Introduction

[9] The Board is mandated by the Legislature with the general supervision of automobile insurance rates in the Province of New Brunswick. In order to fulfill that mandate, the Board exercises the powers prescribed by the Act. One key responsibility for the Board is to ensure that rates charged or proposed to be charged are just and reasonable. Under the *Act, supra* each insurer carrying on the business of automobile insurance in the province must file with the Board the rates it proposes to charge once every 12 months from the date of its last filing. An insurer must appear before the Board when :

a. The Insurer files for a rate change more than twice in a 12 month period, or

b. The Insurer files rates where the average rate increase if more than 3% greater than the rates charged by it within the 12 months prior to the date on which it proposes to begin to charge the rates, or

c. When the Board requires to do so.

Procedural History

[10] The Applicant filed a rate revision application for the PPV category on August 29 2017, proposing an overall average rate increase of 9.94%.

[11] The Board issued a Notice of Hearing on November 8, 2017 and convened a Panel of the Board to conduct a hearing on the matter. The Office of the Attorney General and

the Office of the Consumer Advocate for Insurance both provided notice of their respective intentions to intervene in the rate hearing.

[12] Prior to the Hearing, the OAG submitted two sets of interrogatories to the Applicant, to which answers were provided. The OAG however provided the Board with its notice to withdraw as an intervenor in this matter on January 16, 2018.

[13] On January 18, 2018, the CAI also informed the Board of its withdrawal as an intervenor.

[14] A pre-hearing written final submission was provided by the Applicant to the Board on January 23, 2018.

[15] Finally, the Panel held the written hearing on January 30, 2018.

2. Evidence and Positions of the Parties

Allstate Insurance Company of Canada

[16] The Applicant's Filing forms the main portion of its submission and the evidence before the Panel.

[17] Pursuant to its mandate, the Board, upon receipt of the filing, proceeded to investigate the Filing in order to determine whether the proposed rates are "just and reasonable".

[18] Allstate presented a Filing to the Board with an overall indication of +30.72% and proposed to select an average rate change of 9.94% based on its first alternative indication. Following are the changes proposed to the existing rates by coverage:

Bodily Injury (BI)	+ 13.97%
Property Damage (PD)	*Included in BI*

Property Damage – Direct Compensation (DCPD)	+ 8.85%
Accident Benefits (AB)	+ 8.96%
Uninsured Auto (UA)	+ 9.44%
Collision (CL)	+ 7.52%
Comprehensive (CM)	+ 7.78%
Specified Perils (SP)	+ 7.94%
All Perils (AP)	*Included in CM/CL*
Total	***+ 9.94%***

[19] The rates contained in the Filing are produced assuming a target return on equity (ROE) of 12%, a 10.10% target return on premium (ROP) and a 1.70:1 premium to surplus ratio. The proposed overall average rates would increase from the current average of approximately $789.87 to approximately $868.40.

[20] The Applicant submits that the Filing was prepared utilizing sound actuarial methods and practices and that the assumptions contained therein are reasonable and that the Filing has been prepared in accordance with the filing guidelines issued by the Board.

Office of the Attorney General

[21] The OAG was provided with the Filing and all related documents. The OAG was also given the opportunity to query the Applicant through a written interrogatory process which provided for two rounds of interrogatory questions and answers. At the conclusion of the interrogatory process, the OAG discontinued its intervention and did not participated further in the hearing process. The interrogatory questions and answers were part of the Record before the Panel.

Consumer Advocate for Insurance

[22] The CAI was also provided with all the relevant documentation and had initially advised the Board of its intention to participate to this matter as an intervenor. However, on January 18, 2018, the Board was informed of the CAI's discontinuance as an intervenor in this matter.

3. Analysis and Reasons

[23] The Panel has reviewed all of the written evidence before it, along with the submissions made by the Applicant.

[24] In the present matter, the Panel of the Board determines that Allstate Insurance Company of Canada must amend some of the assumptions, calculations and methodology used in its Filing. The Applicant was therefore ordered to provide the Board with the calculation resulting from those amendments on February 9, 2018.

[25] The Panel addresses each issues individually as follows:

1) Adjustments

[26] Within the Record before the Board, it was noted by both the Board's consulting actuary as well as by the OAG's retained actuary, Ms. Paula Elliott of Oliver Wyman, that the Applicant was not compliant with the Board's filing guidelines in some of its assumptions and methodologies.

- ***Harmonized Sales Tax (HST)***

[27] In its Filing, the Applicant did not make any adjustment to prior historical claims experience to reflect the change in HST rate from 13% to 15% effective July 1, 2016. In the written interrogatory phase (Exhibit 9, page 1), the OAG suggested adjustment factors of +1.77% for physical damage coverages (PD, DCPD, CO, CM, SP and AP), +1.2% for AB and +0.44% for BI for experience prior to July 1, 2016.

[28] In its Final Submissions (Exhibit 13, page 2), the Applicant agreed that the adjustments factors provided by the OAG were reasonable and agreed the adjustment was necessary to reflect the effective HST rates.

[29] The Panel agrees with the concession and requires Allstate to make the HST adjustments as proposed and agreed to by the Applicant.

- ***Inclusion of Facility Association Residual Market Experience***

[30] To the extent that Allstate's own experience was not credible, the Industry data - provided by the General Insurance Statistical Agency (GISA), including Facility Association (FA)'s losses - was used as the complement of credibility. The Board's guidelines explicitly state that the Facility Association Residual Market (FARM) results should be excluded from the company's own experience. Similarly, the FARM experience should be excluded when industry-wide experience is used.

[31] In its Final Submission (Exhibit 13, page 2), the Applicant explains to the Board that the inclusion of FA's data was done inadvertently and agreed to remove the losses incurred on the FA residual market when calculating its adjusted loss cost.

[32] The Panel acknowledges that it was not the intention of Allstate to include FA's losses and accepts the company's intended measure to adjust its loss cost removing FA's data.

2) Trend Selections

- ***Loss Cost Trends***

[33] The selection of loss trend rates requires the analysis of past data and the application of professional judgement in order to select trend rates for each coverage which in this case is achieved by separately selecting and then combining frequency and severity trend rates, representing past experience and future expected results.

[34] Further to a review of the Applicant's selected trends, the Panel identifies no issue with the general approach adopted by Allstate, and finds its overall trend selection to be reasonable.

[35] It was, however, noted that for trend selection of some coverages, Allstate has used the New Brunswick Industry data (for BI, PD, medical benefits and income replacement), as well as the Atlantic data for other smaller coverages (funeral benefits, death benefits, underinsured motorist and uninsured automobile).

[36] Section 4.b. of the NBIB's Filing Guidelines directs that the insurer's own data must be used to the extent that it is credible. It also directs that New Brunswick specific loss data for the filed category of insurance at the coverage level must be used.

[37] In its Final Submission (Exhibit 13, page 3), the Applicant proposed changing its industry trend selection to rely solely on New Brunswick experience in order to ensure compliance with Section 4.b. of the New Brunswick Insurance Board's Filing Guidelines.

[38] The Panel, in agreement with the Applicant, requests modification to rely only on New Brunswick data for the purpose of trend selection.

- ***Premium Trends***

[39] For the development of its premium trends, the Applicant chose to adopt IBC published rate group drift factors (incorporating VICC drift factors), as opposed to using its internal premium drift. This selection remains consistent with Allstate's previous filing submissions. In its Final Submission (Exhibit 13, page 4), Allstate recognized that the selection of this methodology presents a divergence with the loss trend selections.

[40] The Panel recognizes that the premium trend selection is an exercise of judgement and that the methodology adopted by Allstate is reasonable in the absence of other information. Notwithstanding, the Panel opines that companies should use their own data for premium trends unless it provides the Board with support indicating that its rate group trend is similar to that of the industry. Consequently, for the purpose of future rate Applications, the Board will expect the use of the company's own

experience to derive its rate group drift unless it provides the Board with the appropriate support demonstrating that their data is similar to used by VICC.

3) Health Service Levy Allocation as a Variable Expense

[41] The Applicant's considered the allocation of the Health Service Levy (HSL) to be a variable expense. The OAG questioned the treatment of the HSL as a variable expense as opposed to a fixed expense. In its Submission (Exhibit 13, page3), the Applicant justifies the treatment of the HSL as a variable expense arguing that this expense is collected based on a percentage of premium.

[42] The Panel agrees with the Applicant that where the levy is collected as a percentage of the premium, it should be treated as a variable expense.

4) Fixed Expense Allocation

[43] The Applicant's fixed expense provision currently varies by coverage. The fixed expense component is assumed to vary only by the number of exposures as opposed to by premium. Allstate argues that under such an assumption, the allocation to each exposure should be independent of the coverage purchased and that by allocating it only to mandatory coverages the same fixed expense is applied to each exposure. Furthermore, the Applicant submits that allocation to non-compulsory coverages would result in vehicles carrying more coverage being assigned greater fixed expense.

[44] The Panel is satisfied by the Applicant's rationale on its allocation change to general expense ratio and finds it to be reasonable.

5) Catastrophe Loss Load

[45] The Applicant selects a catastrophe load of 1.0% for the comprehensive coverage% and provides its justification for catastrophic loss provision based on Allstate's

historical accident experience for years 2007 to 2017. However, NBIB's Filing Guidelines, paragraph 4.b.4. provides that *"The Province of New Brunswick is rarely impacted by catastrophes affecting automobile insurance claims. The NBIB does not expect that there should be a loading for this"*.

[46] The Panel is not satisfied by the evidence provided by Allstate that the inclusion of a Catastrophe Load of 1.00% is justified. The Panel therefore requires the Applicant to remove this loading provision from its filing.

6) Complement of Credibility

[47] To the extent that a Company's own experience is not fully credible, the insurer must select a complement of credibility in order to be considered fully credible. Allstate, lacking data to reach the full credibility standard, selected the Industry experience as the complement of credibility. In its interrogatory questions (Exhibit 10, page 3), the OAG raised concern with respect to Allstate's selection of complement of credibility and questions the Applicant on its rationale for not selecting the experience of Pembridge, its sister company, as the complement of credibility.

[48] In its answers to the OAG's interrogatory questions (Exhibit 10, page 3), Allstate responded that the industry experience presents a larger source of data in relation to Allstate and Pembridge's experience and therefore provides more stability as the compliment.

[49] The Panel agrees with the Applicant that the industry experience provides a more stable complement of credibility and finds this selection reasonable.

7) Profit Provisions

[50] In the calculation of its overall rate level change need, Allstate includes a profit provision targeting a ROE of 12%, a P/S ratio of 1.7 to 1, as well as a pre-tax return on investment (ROI) of 0.64% for cash-flow and 0.97% for surplus.

- ***Selection of pre-tax Return on Investment***

[51] The process of developing rates that are just and reasonable requires rate applications to account for the revenue received from sources other than directly from policyholders. One source of these funds is investment income that is received on surplus funds held by insurers. Generally, these surplus funds stem from two sources: short-term cash flow and accumulated equity (surplus) and are invested using different approaches, i.e. short-term and long-term respectively. Generally, the higher the overall investment return, the lower the overall rate indications.

[52] The Applicant prepared its Filing by selecting a pre-tax return on investments (ROI) of 0.64% for cash flow and 1.08% for surplus, varying by coverage (Exhibit 10, page 5). This ROI is assumed by the Applicant on the basis of an estimated return on a risk-free portfolio of investments. Allstate explains that these rates are reflective of the use of risk-free rates given Allstate bears the risk of its investments and not the policyholders. Furthermore, the Applicant emphasized that being as likely to realize negative returns, those should not be borne by policyholders (Exhibit 13, page 7) and argues that using safer investments, such as T-bills and government bonds, are more reasonable for determining returns on policyholder supplied funds.

[53] The Panel accepts Allstate's selection on its rate of return as reasonable.

- ***Selection of Premium to Surplus Ratio***

[54] The Applicant's indication applies an overall 1.7 to 1 P/S ratio varying by coverage. Allstate supports this selection based on the 5-year average of Allstate Canada Group's P/S ratio from the company Property and Casualty-1 (P&C), which suggests the business operated at an average ratio of 1.73:1 over years 2012 to 2016. The Applicant also points that the company has never reached a ratio of 2:1 during this five year period (Exhibit 13, page 6).

[55] In light of the evidence provided by the Applicant, the Panel finds the P/S ratio of 1.7:1 to be reasonable.

4. Decision

[56] For the reasons set out above, the Board finds the Applicant's Filing not to be just and reasonable in its entirety and therefore orders the following changes to be made:

1) Apply an adjustment factors of +1.77% for physical damage coverages (PD, DCPD, CO, CM, SP and AP), +1.2% for AB and +0.44% for BI for experience prior to July 1, 2016 to account for the effect of the HST change;

2) Apply the adjustment to exclude the FA's experience from its loss costs;

3) Apply the adjustment to rely only on New Brunswick data for the purpose of trend selection; and

4) Modify its filing in order to remove the catastrophe load provision of 1.00% from the Comprehensive coverage.

[57] The impact of these changes will be to decrease the overall rate indications from an average increase of +30.72% to an average increase of +30.62%.

[58] The Applicant is ordered to incorporate changes to the rate application as set out in paragraph 56 above and is **approved to adopt the proposed average rate change of +9.94%.**

[59] The approved rates will be effective on March 15, 2018 for new and May 15, 2018 for renewal business.

Dated at Saint John, New Brunswick, on February 15, 2018

Marie-Claude Doucet, Panel Chair
Chair, New Brunswick Insurance Board

WE CONCUR:

Jim Jessop, Board Member

Elizabeth Turgeon, Board Member

New Brunswick Insurance Board

DECISION

IN THE MATTER:
Of a rate revision application for **PEMBRIDGE INSURANCE COMPANY**
With respect to automobile insurance rates for
PRIVATE PASSENGER VEHICLES

Written Hearing
Heard at Saint John, New Brunswick

PANEL:	Ms. Marie-Claude Doucet	Chair
	Mr. Jim Jessop	Member
	Ms. Elizabeth Turgeon	Member

Date of Written Hearing: January 31, 2018

Decision Rendered February 15, 2018

Summary

[1] Pursuant to subsection 267.5(1) of the *Insurance Act,* R.S.N.B., 1973 c. I-12, (the "Act") the New Brunswick Insurance Board (the "Board") convened a Panel of the Board to conduct a written hearing (the "Hearing") on January 31, 2018 at the offices of the New Brunswick Insurance Board, in Saint John. The purpose of the Hearing was to consider the rate revision application (the "Filing") submitted by Pembridge Insurance Company (the "Applicant" or "Pembridge") with respect to automobile insurance rates for private passenger vehicles (PPV) in New Brunswick. Pembridge is an insurance company duly licensed to write automobile insurance in New Brunswick.

[2] In compliance with subsection 19.71(3) of the *Insurance Act,* the Board provided to the Office of the Attorney General ("OAG") and to the Consumer Advocate for Insurance ("CAI"), all documents relevant to the Hearing. Pursuant to subsection 19.71(4) of the Act, the OAG and the CAI initially advised the Board of their intention to intervene. The OAG participated to the interrogatory process by submitting two rounds of questions to the Applicant.

[3] On January 16, 2018, the OAG notified the Board of its withdrawal as an intervenor to this matter. On January 18, 2018, the CIA also notified the Board of her discontinuance as an intervenor.

[4] For the purpose of the written hearing the Panel accepted the following exhibits as part of the Record as shown below:

EXHIBIT	DESCRIPTION	DATE
1	Pembridge Private Passenger Vehicle Rate Filing	Aug 29, 2017
2	Questions from NBIB	Sept 1, 2017
3	Questions from EY	Oct 5, 2017
4	Pembridge Response to NBIB	Oct 6, 2017

5	Pembridge Response to EY	Oct 13, 2017
6	EY Actuarial Review Summary	Nov 3, 2017
7	Written Interrogatories Round 1 from OAG	Dec 14, 2017
8	Pembridge Response to Interrogatories Round 1	Dec 22, 2017
9	Interrogatories Round 2 from OAG	January 4, 2018
10	Pembridge Response to Interrogatories Round 2	Jan 12, 2018
11	Pembridge Final Written Submission	Jan 23, 2018

[5] Following the hearing, on February 9, 2018, the Panel ordered the Applicant to adjust its overall indication for the impact of the combination of the following five (5) changes:

1) Apply adjustment factors of +1.77% for physical damage coverages (Property Damage (PD), Direct Compensation – Property Damage (DCPD), Collision (CL), Comprehensive (CM), Specified Perils (SP) and All Perils (AP)), +1.2% for Accident Benefits (AB), and +0.44% for Bodily Injury (BI) for experience prior to July 1, 2016 to account for the effect of the HST change;

2) Exclude the Facility Association Residual Market experience from its analysis;

3) Rely only on New Brunswick data for its trend analysis;

4) Amend its filing by modifying its fixed expense ratio to be 12.69%; and

5) Modify its filing in order to remove the catastrophe load provision of 1.00% from the Comprehensive coverage.

[6] The required changes as per above result in an overall indication of 37.90%, a decrease of 1.36% from Pembridge's prior indication of 39.26%.

[7] The Panel, after examining the evidence in its entirety, approves the rate change of **+8.05%** proposed by the Applicant.

[8] The approved rates will be effective on April 1, 2018 for new and June 1, 2018 for renewal business.

1. Introduction

[9] The Board is mandated by the Legislature with the general supervision of automobile insurance rates in the Province of New Brunswick. In order to fulfill that mandate, the Board exercises the powers prescribed by the Act. One key responsibility for the Board is to ensure that rates charged or proposed to be charged are just and reasonable. Under the Act, each insurer carrying on the business of automobile insurance in the province must file with the Board the rates it proposes to charge once every 12 months from the date of its last filing. An insurer must appear before the Board when :

a. The Insurer files for a rate change more than twice in a 12 month period, or

b. The Insurer files rates where the average rate increase if more than 3% greater than the rates charged by it within the 12 months prior to the date on which it proposes to begin to charge the rates, or

c. When the Board requires to do so.

Procedural History

[10] The Applicant filed a rate revision application for the PPV category on August 29 2017, proposing an overall average rate increase of 8.05%.

[11] The Board issued a Notice of Hearing on November 8, 2017 and convened a Panel of the Board to conduct a hearing on the matter. The Office of the Attorney General and

the Office of the Consumer Advocate for Insurance both provided notice of their respective intentions to intervene in the rate hearing.

[12] Prior to the Hearing, the OAG submitted two sets of interrogatories to the Applicant, to which answers were provided. The OAG however provided the Board with its notice to withdraw as an intervenor in this matter on January 16, 2018.

[13] On January 18, 2018, the CAI also informed the Board of its withdrawal as an intervenor.

[14] A pre-hearing written final submission was provided by the Applicant to the Board on January 23, 2018.

[15] Finally, the Panel held the written hearing on January 31, 2018.

2. Evidence and Positions of the Parties

Pembridge Insurance Company

[16] The Applicant's Filing forms the main portion of its submission and the evidence before the Panel.

[17] Pursuant to its mandate, the Board, upon receipt of the Filing, proceeded to investigate the Filing in order to determine whether the proposed rates are "just and reasonable".

[18] Pembridge presented a Filing to the Board with an overall indication of +39.26% and proposed to select an average rate change of 8.05% based on its first alternative indication. Following are the changes proposed to the existing rates by coverage:

Bodily Injury	+ 8.65%
Property Damage	+ 7.77%
Property Damage – Direct Compensation	+ 8.69%
Accident Benefits	+ 8.68%
Uninsured Auto (UA)	+ 0.00%
Collision (CL)	+ 7.62%
Comprehensive (CM)	+ 7.79%
Specified Perils	+ 7.84%
All Perils	*Included in CM/CL*
Total	***+ 8.05%***

[19] The rates contained in the Filing are produced assuming a target return on equity (ROE) of 12%, a 10.37% target return on premium (ROP) and a 1.70:1 premium to surplus (P/S) ratio. The proposed overall average rates would increase from the current of approximately $761.88 to approximately $823.22.

[20] The Applicant submits that the Filing was prepared utilizing sound actuarial methods and practices and that the assumptions contained therein are reasonable and that the Filing has been prepared in accordance with the filing guidelines issued by the Board.

Office of the Attorney General

[21] The OAG was provided with the Filing and all related documents. The OAG was also given the opportunity to query the Applicant through a written interrogatory process which provided for two rounds of interrogatory questions and answers. At the conclusion of the interrogatory process, the OAG discontinued its intervention and did not participate further in the hearing process. The interrogatory questions and answers were part of the Record before the Panel.

Consumer Advocate for Insurance

[22] The CAI was also provided with all the relevant documentation and had initially advised the Board of its intention to participate to this matter as an intervenor.

However, on January 18, 2018, the Board was informed of the CAI's discontinuance as an intervenor in this matter.

3. Analysis and Reasons

[23] The Panel has reviewed all of the written evidence before it, along with the submissions made by the Applicant.

[24] In the present matter, the Panel of the Board determines that Pembridge Insurance Company must amend some of the assumptions, calculations and methodology used in its Filing. The Applicant was therefore ordered to provide the Board with the calculation resulting from those amendments on February 9, 2018.

[25] The Panel addresses each issues individually as follows:

1) Adjustments

[26] Within the Record before the Board, it was noted by both the Board's consulting actuary as well as by the OAG's retained actuary, Ms. Paula Elliott of Oliver Wyman, that the Applicant was not compliant with the Board's filing guidelines in some of its assumptions and methodologies.

- ***Harmonized Sales Tax (HST)***

[27] In its Filing, the Applicant did not make any adjustment to prior historical claims experience to reflect the change in HST rate from 13% to 15% effective July 1, 2016. In the written interrogatory phase (Exhibit 7, page 1), the OAG suggested adjustment factors of +1.77% for physical damage coverages (PD, DCPD, CO, CM, SP and AP), +1.2% for AB and +0.44% for BI for experience prior to July 1, 2016.

[28] In its Final Submissions (Exhibit 11, page 2), the Applicant agreed that the adjustments factors provided by the OAG were reasonable and agreed the adjustment was necessary to reflect the effective HST rates.

[29] The Panel agrees with this concession and requires Pembridge to make the HST adjustments as proposed and agreed to by the Applicant.

- ***Inclusion of Facility Association Residual Market Experience***

[30] To the extent that Pembridge's own experience was not credible, the Industry data - provided by the General Insurance Statistical Agency (GISA), including Facility Association (FA)'s losses - was used as the complement of credibility. The Board's guidelines explicitly state that the Facility Association Residual Market (FARM) results should be excluded from the company's own experience. Similarly, the FARM experience should be excluded when industry-wide experience is used.

[31] In its Final Submission (Exhibit 11, page 2), the Applicant explained to the Board that the inclusion of FA's data was done inadvertently and agreed to remove the losses incurred on the FA residual market when calculating its adjusted loss cost.

[32] The Panel acknowledges that it was not the intention of Pembridge to include FA's losses and accepts the company's intended measure to adjust its loss cost removing FA's data.

2) Trend Selections

- ***Loss Cost Trends***

[33] The selection of loss trend rates requires the analysis of past data and the application of professional judgement in order to select trend rates for each coverage which in this case is achieved by separately selecting and then combining frequency and severity trend rates, representing past experience and future expected results.

[34] Further to a review of the Applicant's selected trends, the Panel identifies no issue with the general approach adopted by Pembridge, and finds its overall trend selection to be reasonable.

[35] It was, however, noted that for trend selection of some coverages, Pembridge has used the New Brunswick Industry data (for BI, PD, medical benefits and income replacement), as well as the Atlantic data for other smaller coverages (funeral benefits, death benefits, underinsured motorist and uninsured automobile).

[36] Section 4.b. of the NBIB's Filing Guidelines directs that the insurer's own data must be used to the extent that it is credible. It also directs that New Brunswick specific loss data for the filed category of insurance at the coverage level must be used.

[37] In its Final Submission (Exhibit 11, page 3), the Applicant proposed changing its industry trend selection to rely solely on New Brunswick experience in order to ensure compliance with Section 4.b. of the New Brunswick Insurance Board's Filing Guidelines.

[38] The Panel, in agreement with the Applicant, requires modification to rely only on New Brunswick data for the purpose of trend selection.

- ***Premium Trends***

[39] For the development of its premium trends, the Applicant chose to adopt IBC published rate group drift factors (incorporating VICC drift factors) as opposed to using its internal premium drift. This selection remains consistent with Pembridge's previous filing submissions. In its Final Submission (Exhibit 11, page 4), Pembridge explains that the company does not separately review its own vehicle rate group experience, but does have a premium trend exhibit based on onlevelled average premiums by coverage. Pembridge further submits that this not only reflects rate group drift but also other mix of business shifts.

[40] Pembridge finally submits that since loss trends are based on industry experience, there should be an alignment on the premium trends by using rate group drift factors (Exhibit 11, page 4).

[41] The Panel recognizes that the premium trend selection is an exercise of judgement and finds that the methodology adopted by Pembridge is reasonable in the absence of other information. Notwithstanding, the Panel opines that companies should use their own data for premium trends unless it provides the Board with support indicating that its rate group trend is similar to that of the industry. Consequently, for the purpose of future rate Applications, the Board will expect the use of the company's own experience to derive its rate group drift unless it provides the Board with the appropriate support demonstrating that their data is similar to used by VICC.

3) Health Service Levy Allocation as a Variable Expense

[42] The Applicant considered the allocation of the Health Service Levy (HSL) to be a variable expense. The OAG questioned the treatment of the HSL as a variable expense as opposed to a fixed expense. In its Submission (Exhibit 11, page3), the Applicant justifies the treatment of the HSL as a variable expense arguing that this expense is collected based on a percentage of premium.

[43] The Panel agrees with the Applicant that where the levy is collected as a percentage of the premium, it should be treated as a variable expense.

4) Expense

- ***Expense Exhibit***

[44] Prior to its Final Submission, the Applicant noticed an error with respect to the fixed expense ratio calculated for year 2016. The three-year average fixed expense ratio presented was 14.06%, while it should have been calculated to be 12.69%.

[45] The Panel orders the Applicant to make the necessary correction using 12.69% as the fixed expense ratio.

- ***Expense Ratio***

[46] The expense ratio used by the Applicant is based on both Pembridge and Pafco's data combined. The rational provided to the Board by Pembridge is that many expenses are shared by the two companies as both operate in the same channel of distribution and many of Pembridge's brokers also write Pafco business. In addition, other operations of the company, such as underwriting, also service both companies under the same leadership. The Applicant therefore submits that combining expenses of both Pembridge and Pafco is reasonable and provides more stable results for expenses.

[47] The Panel finds the methodology employed by the Applicant to calculate the expense ratio to be reasonable.

- ***Fixed Expense Allocation***

[48] The fixed expense component is assumed to vary only by the number of exposures as opposed to by premium. Pembridge argues that under such an assumption, the allocation to each exposure should be independent of the coverage purchased and that by allocating it only to mandatory coverages the same fixed expense is applied to each exposure. Furthermore, the Applicant submits that allocation to non-compulsory coverages would result in vehicles carrying more coverage being assigned greater fixed expense.

[49] The Panel is satisfied by the Applicant's rationale on its allocation of general expense ratio and finds it to be reasonable.

5) Catastrophe Loss Load

[50] The Applicant selects a catastrophe load of 1.0% for the comprehensive coverage and provides its justification for catastrophic loss provision based on Pembridge's historical accident experience for years 2007 to 2017. However, NBIB's Filing Guidelines, paragraph 4.b.4. provides that *"The Province of New Brunswick is rarely impacted by catastrophes affecting automobile insurance claim. The NBIB does not expect that there should be a loading for this"*.

[51] The Panel is not satisfied by the evidence provided by Pembridge that the inclusion of a Catastrophe Load of 1.00% is justified. The Panel therefore requires the Applicant to remove this loading provision from its filing.

6) Complement of Credibility

[52] To the extent that a Company's own experience is not fully credible, the insurer must select a complement of credibility in order to be considered fully credible. Pembridge, lacking data to reach the full credibility standard, selected the Industry experience as the complement of credibility. In its interrogatory questions (Exhibit 10, page 3), the OAG raised concern with respect to Pembridge's selection of complement of credibility and questions the Applicant on its rationale for not selecting the experience of Allstate, its sister company, as the complement of credibility.

[53] In its answers to the OAG's interrogatory questions (Exhibit 8, page 3), Pembridge responded that the industry experience presents a larger source of data in relation to Allstate and Pembridge's experience and therefore provides more stability as the compliment. Furthermore, in its Final Submission, Pembridge explains that the market represents a better reflection of the company's current state and therefore finds that applying the industry experience as the complement of credibility to be more appropriate.

[54] The Panel agrees with the Applicant that the industry experience provides a more stable and appropriate complement of credibility in the circumstances and finds this selection reasonable.

7)Profit Provisions

[55] In the calculation of its overall rate level change need, Pembridge includes a profit provision targeting a ROE of 12%, a P/S ratio of 1.7 to 1, as well as a pre-tax return on investment (ROI) of 0.66% for cash-flow and 0.99% for surplus.

- ***Selection of pre-tax Return on Investment***

[56] The process of developing rates that are just and reasonable requires rate applications to account for the revenue received from sources other than directly from policyholders. One source of these funds is investment income that is received on surplus funds held by insurers. Generally, these surplus funds stem from two sources: short-term cash flow and accumulated equity (surplus) and are invested using different approaches, i.e. short-term and long-term respectively. Generally, the higher the overall investment return, the lower the overall rate indications.

[57] The Applicant prepared its Filing by selecting a pre-tax return on investments (ROI) of 0.66% for cash flow and 0.99% for surplus, varying by coverage (Exhibit 8, page 5). This ROI is assumed by the Applicant on the basis of an estimated return on a risk-free portfolio of investments. Pembridge explains that these rates are reflective of the use of risk-free rates given Pembridge bears the risk of its investments and not the policyholders. Furthermore, the Applicant emphasized that being as likely to realize negative returns, those should not be borne by policyholders (Exhibit 11, page 7) and argues that using safer investments, such as T-bills and government bonds, are more reasonable for determining returns on policyholder supplied funds.

[58] The Panel accepts Pembridge's selection on its rate of return to be reasonable.

- ***Selection of Premium to Surplus Ratio***

[59] The Applicant's indication applies an overall 1.7 to 1 P/S ratio varying by coverage. Pembridge supports this selection based on the 5-year average of Pembridge Canada Group's P/S ratio from the company Property and Casualty-1 (P&C), which suggests the business operated at an average ratio of 1.73:1 over years 2012 to 2016. The Applicant also points that the company has never reached a ratio of 2:1 during this five year period (Exhibit 11, page 6).

[60] In light of the evidence provided by the Applicant, the Panel finds the P/S ratio of 1.7:1 to be reasonable.

4. Decision

[61] For the reasons set out above, the Board finds the Applicant's Filing not to be just and reasonable in its entirety and therefore orders the following changes to be made:

1) Apply an adjustment factors of +1.77% for physical damage coverages (PD, DCPD, CO, CM, SP and AP), +1.2% for AB and +0.44% for BI for experience prior to July 1, 2016 to account for the effect of the HST change;

2) Exclude the Facility Association Residual Market experience from its analysis;

3) Rely only on New Brunswick data for its trend analysis;

4) Amend its filing by modifying its fixed expense ratio to be 12.69%; and

5) Modify its filing in order to remove the catastrophe load provision of 1.00% from the Comprehensive coverage.

[62] The impact of these changes will be to decrease the overall rate indications from an average increase of +39.26% to an average increase of +37.90%.

[63] The Applicant is ordered to incorporate changes to the rate application as set out in paragraph 61 above and is **approved to adopt the proposed average rate change of +8.05%.**

[64] The approved rates will be effective on April 1, 2018 for new and June 1, 2018 for renewal business.

Dated at Saint John, New Brunswick, on February 15, 2018

Marie-Claude Doucet, Panel Chair
Chair, New Brunswick Insurance Board

WE CONCUR:

Jim Jessop, Board Member

Elizabeth Turgeon, Board Member