INSULT TO INJURY.CA

CAMPAIGN TO PROTECT ACCIDENT VICTIMS

P. O. Box 5236
St. John's, NL A1C 5W1

June 28, 2018

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

Attention: Cheryl Blundon, Director of Corporate Services and Board Secretary

Dear Madam:

Re: Insurance Review -Application to Question Aviva Canada Inc.

In relation to the above noted, please find enclosed an original and five (5) copies of the Application to Question Aviva Canada Inc. filed on behalf of the Campaign to Protect Accident Victims.

We trust this is satisfactory.

Yours very truly,

COLIN D. FELTHAM

cc. Consumer Advocate c/o Andrew Wadden
APTLA c/o Ernest Gittens
Spinal Cord Injury NL c/o Thomas W. Fraize, Q.C.
Insurance Bureau of Canada c/o Kevin Stamp, Q.C.

IN THE MATTER OF an Insurance Review Hearing before the Board of Commissioners of Public Utilities

AND IN THE MATTER OF an Application by the Campaign to Protect Accident Victims to question Aviva Canada Inc.

BETWEEN:

THE CAMPAIGN TO PROTECT ACCIDENT VICTIMS — **APPLICANT**

AND:

THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES — **RESPONDENT**

AN APPLICATION TO QUESTION AVIVA CANADA INC.

IN THE MATTER OF an Insurance Review Hearing before the Board of Commissioners of Public Utilities

AND IN THE MATTER OF an Application by the Campaign to Protect Accident Victims to question Aviva Canada Inc.

BETWEEN:

THE CAMPAIGN TO PROTECT ACCIDENT VICTIMS **APPLICANT**

AND:

THE BOARD OF COMMISSIONERS OF PUBLIC UTILITIES **RESPONDENT**

AN APPLICATION TO QUESTION AVIVA CANADA INC.

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1. On June 4, 2018, the Board of Commissioners of Public Utilities, hereinafter referred to as "the Board", commenced a public hearing to review and report on a number of issues with respect to automobile insurance in the province, including the reasons behind increasing claims costs for private passenger vehicles and taxi operators, and options to reduce these costs.

2. The Board released a Hearing Information document for the 2017 Automobile Insurance review in which they outline procedure for the public hearing. Paragraph two of this document states:

2. ***Presentations***

Presenters will not be sworn or subject to cross-examination. The Board's consultants and the parties' presenters may be questioned by the Board and the other parties. The Board may ask questions of all presenters.

Hearing Information attached hereto at Tab 1

3. The Insurance Bureau of Canada, hereinafter referred to as IBC, is a party to the public hearing and has made two submissions to the Board on March 7, 2018 and May 31, 2018. In accordance with the procedure as outlined in the Hearing Information document, the Applicant had the opportunity to question IBC in relation to both their submissions and their presentation to the Board on June 12, 2018.

4. On June 12, 2018, Ms. Amanda Dean, the Vice-President Atlantic for the Insurance Bureau of Canada, presented at the public hearing and gave the following evidence:

IBC is the national trade association that represents 90 percent of Canada's property and casualty insurers, the companies that provide the insurance for homes, businesses, and cars throughout the country.

Hearing Transcript, 2017 Automobile Insurance Review, June 12, 2018, attached hereto at Tab 2

5. Ms. Dean confirmed that one of the roles of the IBC is lobbying government. Upon questioning by Mr. Jerome Kennedy, Q.C., Ms. Dean admitted that IBC had lobbied the governments in Nova Scotia, New Brunswick, P.E.I., and other provinces across Canada for an imposition of a cap on all minor injuries, and had lobbied the Newfoundland Government during the 2005 automobile insurance review. She also conceded that she has had several meetings with ministers and officials in Service NL, the government department responsible for the automobile insurance review, in which they discussed the imposition of a minor injury cap in Newfoundland and Labrador.

Hearing Transcript, 2017 Automobile Insurance Review, June 12, 2018, attached hereto at Tab 2

6. Ms. Dean, in reference to the Oliver Wyman report, confirmed that there are six major insurers in Newfoundland and Labrador which include TD, Aviva, Intact, RSA, Travellers, and Co-operators all of whom, with the exception of Co-operators, are members of the IBC, and are all proponents of the minor injury cap.

> Hearing Transcript, 2017 Automobile Insurance Review, June 12, 2018, attached hereto at Tab 2

7. On May 31, 2018, Aviva Canada Inc., hereinafter referred to as "Aviva", a company under the umbrella of IBC, filed a submission to the Board entitled, "Auto Insurance in Newfoundland and Labrador". According to their submission, Aviva is the second largest property and casualty insurance group in Canada, providing home, automobile, leisure/lifestyle, and business insurance to 2.8 million customers. Automobile insurance is the "cornerstone" of their business, insuring 60,000 private passenger vehicles, or 22% of Newfoundland and Labrador's total market in 2016.

> Auto Insurance in Newfoundland and Labrador: Submission to the Board of Commissioners of Public Utilities (PUB), May 31, 2018, attached hereto at Tab 3.

8. It is the Applicant's position that Aviva's submissions contain egregious misstatements of fact and unsupported factual allegations that should be subject to questioning. Although Aviva. is not specifically named as a party to the proceeding, they are indirectly a party through IBC. Aviva has not solely relied on IBC's submissions, but instead have set out its own aggressive views on the issues before the Board. Aviva's report provides objectives and recommendations to the Board, including reducing bodily injury claims costs through improving litigation efficiency and reviewing contingency fees paid to personal injury lawyers, which are outside the Board's terms of reference and are, instead, an attack on lawyers. Aviva submits:

> *In 2016, the industry saw 1,692 Bodily Injury claims, but allocated $141 million to those claims. Legal representation is seen in 82% of claims, so on a straight line basis, $115.6 million of the total settlement amounts will pass*

through law firms in trust for their clients. Based on a 30% contingency fee, an amount equivalent to $34.7 million may be deducted from settlements and paid to lawyers.

Auto Insurance in Newfoundland and Labrador: Submission to the Board of Commissioners of Public Utilities (PUB), May 31, 2018, attached hereto at Tab 3.

9. Aviva also alleges in its submission:

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.

Auto Insurance in Newfoundland and Labrador: Submission to the Board of Commissioners of Public Utilities (PUB), May 31, 2018, attached hereto at Tab 3.

10. This submission is a clear misstatement of fact as the Supreme Court of Canada has held that contingency fees go directly to the issue of access to justice by making legal representation available to people who could not otherwise afford it.

See *Coronation Insurance Co. v. Florence* [1994] S.C.J. No. 116 at para 14 attached hereto at Tab 4;

See *McIntyre Estate v Ontario (Attorney General)* [2002] O.J. No. 3417 (ONCA) attached hereto at Tab 5;

In Newfoundland and Labrador contingency fee agreements are governed by Rule 55.17 of the *Rules of Court*, attached hereto at Tab 6, and in *Anderson v Canada (Attorney General),* 2016 NLTD(G) 179, Stack J. endorsed the propriety of contingency fee agreements and their importance in ensuring access to justice [at para 96-97] attached hereto at Tab 7.

11. Aviva suggests, with some pride, that legal representation is lower in provinces other than Newfoundland and Labrador, and that this has led to quicker resolutions of claims and lower claims payouts. Their submission states:

Aviva's average settlement was $34,886. Settlements were noticeably higher when there was legal representation ($41,000 with legal representation versus $9,900 with no legal representation). Claims with legal representation

> *had a much higher incidence of claims for future income loss, future medical services and future replacement services.*
>
> *The most surprising data point to emerge from the Closed Claim Study was the high rate of legal representation. 80% of Aviva's claims had legal representation. Legal representation in the entire closed claims sample was slightly higher at 82% and is a clear sign the system is broken. This number is far higher than what we see in other provinces – 50% for Ontario Bodily Injury claims (a figure that's also far too high in our view), less than 30% in Nova Scotia, New Brunswick and Alberta. The other surprising fact was that none of these claims resulted in a trial.*
>
> *Legal representation impacts the length of time it takes to resolve a claim. In the Aviva sample, claims with no legal representation closed after an average of 352 days, while claims with legal representation took an average 922 days. Again, Newfoundland and Labrador seems to be an outlier as we see quicker resolution times in New Brunswick and Nova Scotia, even with the involvement of plaintiff counsel – 324 days in New Brunswick and 520 days in Nova Scotia.*
>
> Auto Insurance in Newfoundland and Labrador: Submission to the Board of Commissioners of Public Utilities (PUB), May 31, 2018, attached hereto at Tab 3.

12. It is the Applicant's position that these are unsupported factual allegations that are indicative of the attitude of insurance companies and must be subject to questioning. Allowing Aviva to make untested submissions outside of the submissions of the IBC allows it and the IBC to manipulate the procedure as set out by the Board. Because IBC and its presenters are subject to questioning, and Aviva is an entity represented by the IBC, then Aviva is a de facto IBC presenter and should be subject to questioning by other interveners. Questioning Aviva will provide the opportunity to test its submissions so that the Board is not misled in the information it receives and so it can come to a more informed conclusion with respect to the issues before it.

13. The following are some of the issues on which questioning of Aviva should be allowed:

(1) Its relationship with the IBC;

(2) The statistics and numbers relied upon by Aviva, especially as it relates to the percentage of unrepresented individuals who settle accident claims without the assistance of lawyers;

(3) Profits made by the insurance industry;

(4) Its position on the role of lawyers in personal injury litigation.

14. It is the Applicant's position that if questioning is not allowed, then fairness dictates that the Board should not receive the Aviva submission into evidence.

15. The Applicant therefore seeks the permission of the Board to question Aviva in relation to its submission dated May 31, 2018 and its related presentation.

DATED AT St. John's, Newfoundland and Labrador this 27th day of June, 2018.

COLIN FELTHAM
ROEBOTHAN MCKAY MARSHALL
34 Harvey Road
PO Box 5236
St. John's, NL A1C 5W1

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2017 Automobile Insurance Review

Hearing Information

The following provides general information with respect to the hearing in the 2017 Automobile Insurance Review scheduled to begin on Monday, June 4, 2018.

1. Hearing Schedule and Sitting Times

The hearing will proceed in accordance with the Hearing Schedule established by the Board. The regular sitting times are from 9:00 am to 1:30 pm daily with a half hour break scheduled for 11:00 am. Please note that the first day of the hearing starts at 9:30 a.m. Interested persons should check the Board's website for the up-to-date Hearing Schedule.

2. Presentations

Presenters will not be sworn or subject to cross-examination. The Board's consultants and the parties' presenters may be questioned by the Board and the other parties. The Board may ask questions of all presenters.

3. Information and Documents

Parties should file all information and documentation in adobe*pdf format.

Written questions should be individually numbered and should identify the requesting party (example, PUB 01, PUB 02). Responses should reference the identifying number and repeat the question with the answer directly below.

The parties must provide copies of questions, information and documents to the other parties, in accordance with the Distribution List established by the Board.

All information and documents filed in the review will be placed on the record and on the Board's website, which is updated regularly. Information and documentation that is referenced during the hearing may be displayed on the screens in the hearing room.

4. Transcripts

Transcripts of the hearing will be distributed electronically to the parties and will be posted on the Board's website. Transcripts are normally available by 7:00 p.m. daily.

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NEWFOUNDLAND AND LABRADOR
BOARD OF COMMISSIONERS OF PUBLIC UTILITIES
120 Torbay Road, P.O. Box 21040, St. John's, Newfoundland and Labrador, Canada, A1A 5B2

Hearing Transcript

2017 Automobile Insurance Review

June 12, 2018

PRESENT:

The Board:
Darlene Whalen, Chair and CEO
Dwanda Newman, Vice-Chair
James Oxford, Commissioner

Board Counsel/ Staff:
Jacqueline Glynn, Board Counsel
Ryan Oake, Board Staff

Parties (Alphabetical Order)
Atlantic Provinces Trial Lawyers Association
Ernest Gittens

Campaign to Protect Accident Victims
Colin Feltham
Jerome Kennedy, Q.C.

Consumer Advocate
Dennis Browne, Q.C.
Andrew Wadden

Insurance Bureau of Canada (IBC)
Terry Rowe, Q.C.
Trevor Foster

Spinal Cord Injury NL
Thomas Fraize, Q.C.
Lara Fraize-Burry
Michael Burry

Presenters
Amanda Dean, IBC
Ryan Stein, IBC

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(9:02 a.m.)
CHAIR:
Q. Good morning, everybody. It looks like we're all ready to go. Mr. Rowe, I guess, over to you.
ROWE, Q.C.:
Q. Thank you, Madam Chair. Mr. Stamp, my colleague, won't be here today. He had a matter in court which he could not move or change in any way. So we are going to proceed with the presentation by IBC, and ready to do that are Amanda Dean, the Vice-President Atlantic of IBC, and with her is Ryan Stein, the Director of Policy. I think I have that correct. So they will proceed with the presentation.
CHAIR:
Q. Whenever you're ready.
MS. DEAN:
Q. Thank you. Good morning, and thank you for the opportunity to take part in this consultation process to offer my industry's feedback. As Mr. Rowe said, my name is Amanda Dean, and I am the Vice-President Atlantic for Insurance Bureau of Canada, or

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IBC, and here with me today is Ryan Stein, Director of Policy with IBC.

IBC is the national trade association that represents 90 percent of Canada's property and casualty insurers, the companies that provide the insurance for homes, businesses, and cars throughout the country.

Today I'm here on behalf of our member companies who write auto insurance in this province. Off the top, let me emphasize that our members fully recognize the problems within the Newfoundland and Labrador auto insurance system; namely, premiums are too high. That has a negative impact on the disposable incomes of the people of this province, but premiums are so high because claims payouts are incredibly and unsustainably high.

These interconnected problems have created instability and an unhealthy market with too few companies choosing to compete for the business. This instability is hurting Newfoundland and Labrador auto insurance customers and they deserve better.

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We've been hearing certainly from the people of this province for the past few months and receiving emails and calls on our consumer information line, and we've been hearing the impact that these high premiums certainly have on the people of this province.

In Newfoundland and Labrador, just four insurers write 87 percent of the auto insurance business. Compare that to Canada as a whole, where the four insurers with the largest market share write 55 percent of the business, or the Maritimes where the four insurers with the largest market share write 52 percent of the business. In fact, five of the largest insurers in the Maritimes don't write auto insurance in this province at all.

The reason for this is simple. Since 2006, selling auto insurance in Newfoundland and Labrador has, on average, been a losing proposition. Collectively, insurers have posted an average annual underwriting loss of 15 million dollars for the past 11 years. This annual loss continues even though

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Newfoundland and Labrador consumers have paid ever higher premiums compared to their neighbours in the Maritimes. In 2006, Newfoundland and Labrador drivers paid just $14.00 a year more than drivers in the Maritimes. Today they pay $318.00 more on average than consumers in the Maritimes.

What's even more startling is that the increase in premium is not even remotely keeping pace with the increase in claims payouts. They pay higher premiums after a collision, even though consumers in the other Maritime provinces can access better medical, rehabilitation, and disability income benefits.

Another sign of instability in the Newfoundland and Labrador market is the relatively high number of drivers who can access coverage only through the Facility Association, which is the insurer of last resort for high risk drivers. In this province, the Facility Association covers 3.3 percent of drivers. In other provinces, it covers less than 2 percent. Then there are those drivers who we read about who

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drive without insurance at all.

Now before I go any further, let me address the elephant in the room. That's the falsehood circulating around the province that over the past few years insurance companies have posted hundreds of millions of dollars in profits. Insurers are not making money on auto insurance in Newfoundland and Labrador. They are losing money.

Don't just take my word for it. Instead, take the word of a report on industry profitability that was commissioned by this Board. According to the March report by consulting firm, Oliver Wyman, insurers lost money in this province because costs are escalating here. This study also concluded that even though higher costs have led to higher premiums and limited availability, insurers still need to charge another 17 percent on top of 2017 premiums just to be viable.

So what are the cost pressures driving this instability. There is a big one, and that is the ever rising costs of settling

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bodily injury claims. Between accident years 2011 and 2016, the average cost jumped from $55,000.00 to nearly $79,000.00. That's a leap of $24,000.00, making the average cost of settling a bodily injury claim the highest in Atlantic Canada.

Here's another way to look at cost pressures. During the same time that those bodily injury costs per vehicle in Newfoundland and Labrador rose steadily, the same costs plummeted in Nova Scotia and in New Brunswick. In those provinces, the governments implemented a cap on pain and suffering awards for those with minor injuries. Between 2000 and 2016, bodily injury costs per vehicle were up 9 percent here, but down 51 percent in New Brunswick, and down 42 percent in Nova Scotia.

So where does all the money go if it doesn't go toward helping people recover from injuries? Most of the money goes toward cash based non-pecuniary damages. These cash payouts account for $25,000.00 per claimant or 64 percent of total settlements according to Oliver Wyman's

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study of claims that recently closed. For minor injuries, they account for $22,000.00 or 70 percent of total settlements, and again this is not, nor does it include payments for medical bills or lost wages. This amount is all in addition to putting people back to where they were.

Improving the auto insurance system for Newfoundland and Labrador citizens will take a collective effort. Today's opportunity to provide feedback is an important step.

I'd like to go further, though, and discuss the specific reforms that IBC, on behalf of our members, first proposed through this process in February. Our proposed package of reforms is designed to meet three objectives. Those objectives are to stabilize premiums by reducing and stabilizing bodily injury claim costs, improve health outcomes for people injured in collisions by providing access to treatment based on current medical evidence and by having appropriate accident benefit levels, and three, making it easier for people to repair and replace their damaged

Page 8

vehicles.

Now let me share several reforms that our members believe will right the ship and give the people of Newfoundland and Labrador the auto insurance system they deserve. The first reform we recommend is replacing the existing $2,500.00 non-pecuniary damages deductible with a $5,000.00 non-pecuniary damages cap on those with minor injuries. Deductibles, regardless of their size, erode over time until they become a small cost of doing business. On the other hand, non-pecuniary damages caps have been proven to contain bodily injury claim costs and keep premiums stable. We recommend a $5,000.00 cap that is adjusted annually for inflation and applies to all injuries deemed to be minor by the prevailing medical literature.

We're aware that in the Atlantic region, a $7,500.00 cap linked to inflation is common. However, that amount runs the risk of allowing bodily injury claim costs to run ahead of inflation. To avoid this, the BC government, which is the only other full tort jurisdiction in Canada, recently

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announced a $5,500.00 cap that will come into effect in 2019.

Along with recommending the introduction of a $5,000.00 cap in Newfoundland and Labrador, we recommend an up to date definition of minor injury. While there are several similar definitions that are used across the country, there are subtle but important differences amongst them. Choosing the right definition could mean the difference between the reform succeeding or failing in this province. For example, the definition in Nova Scotia covers only basic strains or sprains, even though the medical literature includes temporomandibular joint, which is pain in the jaw, psychological, and certain pain conditions such as common injuries from which most people recover within days, weeks, or a few months. The right wording has real consequences.

In Alberta, court decisions in 2012 and 2015 exposed the limits of its minor injury definition. As a result, the average bodily injury claim cost has increased by 55

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percent or 9 percent per year since that time. To address these rising claims costs, last month Alberta revised its minor injury definition to be more in line with the more up to date definitions across Canada. The more current definitions in Alberta, Ontario, New Brunswick, Prince Edward Island, and BC, apply the cap to all of the injuries that the prevailing medical literature deems minor.

At IBC, we believe that a cap of $5,000.00 that applies to pain and suffering awards for those with minor injuries should produce the savings needed to improve market conditions. The cap will also allow the government to enhance accident benefits.

Our next recommendation is threefold; make accident benefits mandatory, enhance the medical rehabilitation and disability income benefits to the levels in the Maritimes, and establish pre-approved evidence based treatment protocols. Currently, accident benefits in Newfoundland and Labrador provide fewer treatment options than in the Maritimes and Alberta. The fact

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that accident benefits are optional and low is especially problematic for someone seriously injured in a collision.

(9:15 a.m.)

Alberta and Nova Scotia have diagnostic treatment protocols. The intent is to provide people who have common injuries with immediate access to evidence based treatment on a pre-approved basis, so that they can recover quickly. Adequate accident benefits and treatment protocols are important parts of a quality auto insurance product. Combined with a cap on pain and suffering awards for those with minor injuries, they focus auto insurance on improving health outcomes instead of on cash settlements.

The last recommendation that I would like to discuss today is having Newfoundland and Labrador make the transition from the property damage claims settlement model to a direct compensation property damage or DCPD model.

This province's consumers could benefit from a simpler claims process if they could deal with their own insurer when repairing

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or replacing their vehicle. Currently, only Newfoundland and Labrador and Alberta have a tort based vehicle damage claims settlement model. The Maritimes and Ontario have the DCPD model.

At IBC, we believe, along with our members, that drivers in Newfoundland and Labrador deserve a stable auto insurance system, and we believe that a stable system can be achieved with the changes that I've outlined.

Thank you again for undertaking this consultation process and for the opportunity to share my industry's feedback. That's my presentation.

CHAIR:

Q. We're back to our regular order.

MR. FELTHAM:

Q. Thank you, Madam Chair. I'm going to begin the questioning for the Campaign, although today we have split it up across subject matters, it's just a question of sharing workload. We won't duplicate between myself and Mr. Kennedy, but I'll begin. Ms. Dean, I'd like to start with the closed claims

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study instructions document, if I could. Those are the IBC instruction on Newfoundland and Labrador private passenger third party liability BI closed claims study, 2017. I'd like to go to the notes to users section, page 3 of 4 of that section, which is toward the end of the document.

MS. KEAN:

Q. Which section?

MR. FELTHAM:

Q. There's a section at the back called notes to users, and it's numbered differently than the rest of the document. Okay, page 3 of 4. It's right there, thank you, and down toward number 7 is where I'd like to go. Ms. Dean, you have that document?

MS. DEAN:

A. Yes, I can see it, thank you.

MR. FELTHAM:

Q. All right. So this states in number 7 that, "IBC did not carry out any auditing process before claimant cases were accepted into the master file". You can confirm that?

MS. DEAN:

A. That's certainly what it says.

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MR. FELTHAM:

Q. Okay, and you agree with that?

MS. DEAN:

A. Absolutely.

MR. FELTHAM:

Q. And it also says, and you'll agree, that "IBC had no access to any supporting documentation or paper files"?

MS. DEAN:

A. That is correct.

MR. FELTHAM:

Q. And then IBC goes on to caution users in their interpretation of the data?

MS. DEAN:

A. I did not prepare this document, I should, I guess, provide that caveat. I'm a part of a different arm of IBC than those who prepared this document.

MR. FELTHAM:

Q. Okay, this is an IBC document that's been submitted to the Board and you're here on behalf of IBC today?

MS. DEAN:

A. It is.

MR. FELTHAM:

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Q. So I take it that the lack of an auditing process is the reason that IBC is cautioning users with respect to the interpretation of the data?

MS. DEAN:

A. Ryan, would you like to –

MR. STEIN:

A. I'll take this one. I mean, we wanted the users to know what IBC did and what IBC did not do, so we wanted the users to know about the training sessions that IBC undertook so that the people completing the file could complete it correctly, wanted to know that IBC did review the first 25 files of each company to make sure that they were reporting correctly, and after reviewing it, after getting everything, IBC also went through it, the master file, to make sure that everything reported appeared to be reported correctly, but, no, we did not do an audit.

MR. FELTHAM:

Q. All of those things you just mentioned, Mr. Stein, they're not mentioned here in number 7. What's mentioned here in number 7 is

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that there's a caution against interpretation of the data in the master file, there was no audit?

MR. STEIN:

A. There was no audit, that's correct.

MR. FELTHAM:

Q. So IBC doesn't know and cannot confirm whether the companies involved in the data collection were consistent as to, for example, how they allocated non-pecuniary general damages sort of in the context of global settlements? That can't be done.

MR. STEIN:

A. IBC did not undertake an audit, but gave all the training and instructions that we believe are required so that the companies completing the data would complete it correctly.

MR. FELTHAM:

Q. But there was no audit undertaken to confirm what I just stated?

MR. STEIN:

A. That's right, there was no audit.

MR. FELTHAM:

Q. And that kind of allocation, that would call

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for judgment on the part of the user of the data, the person providing the data, assessing the data?
MR. STEIN:
A. It would depend on a given file. Companies would often – you know, when they're reviewing the claims files, they would have had, you know – they would have broken down the settlement and the companies could then know what to report under each head of damage.
MR. FELTHAM:
Q. Right, using their judgment to do that?
MR. STEIN:
A. Well, if it was written like that in the file, then there was no judgment, they just recorded what was there.
MR. FELTHAM:
Q. But I'm talking about global settlements. How they are determined and how they are allocated is going to be based on the judgment of the person extracting that data from the file?
MR. STEIN:
A. Not if the file – the file would have broken

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down how the money was allocated.
MR. FELTHAM:
Q. Okay, but what I'm saying is in other cases where that's not been done and there's a global settlement that occurs?
MR. STEIN:
A. If there was a file like that, that just said here's an absolute dollar amount without any supporting documentation, I presume that's right, but I don't believe that that was the nature of the files the companies were going through.
MR. FELTHAM:
Q. Okay, but there was no audit to make that determination?
MR. STEIN:
A. There was no audit.
MR. FELTHAM:
Q. Okay, I'd like to move now to the February report of IBC, February, 2018, and in particular page 3 of 17. So under consumer outcomes, the second bullet, the second sentence, notes that, "Currently the top four insurers in Newfoundland and Labrador comprise 87 percent of the market". So, Ms.

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Dean, how has that changed in the last decade?
MS. DEAN:
A. There are fewer insurers operating within the province, and fewer insurers comprising a larger portion of the market share.
MR. FELTHAM:
Q. Okay, and when I looked at the 2005 report that the Board issued after the review then, they noted that in 2003 there were 11 companies writing 84 percent of the market at that time?
MS. DEAN:
A. Correct.
MR. FELTHAM:
Q. So in that intervening period, you're aware that a large amount of that decrease is owing to insurance companies buying or acquiring or integrating other insurance companies?
MS. DEAN:
A. Some of that is true, and there are certainly insurers who also left the province in that time as well.
MR. FELTHAM:

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Q. But the decrease that we're talking about is in large part owing to existing companies or other companies coming in and acquiring and integrating the companies that are in the province into their operations?
MS. DEAN:
A. In some instances, yes.
MR. FELTHAM:
Q. The bottom of page 3, the second sentence, IBC says here, "Experience from other jurisdictions shows that market performance and consumer outcomes improve when the product being sold focuses on care instead of cash", but if we look at Ontario for a moment, I mean, they've got a very robust accident benefits system, a component, and they've got a threshold and deductibles system to eliminate so-called minor claims?
MS. DEAN:
A. Uh-hm.
MR. FELTHAM:
Q. But we know they've got the highest rates in Canada?
MS. DEAN:
A. Uh-hm.

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MR. FELTHAM:
Q. So you'll agree with me that that's significantly at odds with your statement that experience from other jurisdictions shows market performance and consumer outcomes improve?
MS. DEAN:
A. The jurisdictions that we're referencing there are certainly the ones that have been able to control costs. Certainly Ontario has a very different product. Insurers can only offer an insurance product that is heavily regulated by the government in terms of what they can offer, but also regulated in terms of what they can charge. Comparisons with Ontario are a bit difficult to make. Certainly when we look at Nova Scotia, New Brunswick, PEI, and Alberta, there have been improved outcomes and a stable market in those jurisdictions.
MR. FELTHAM:
Q. But we have an example of Ontario where, you'll agree with me, they do have robust accident benefits for medical care?
MS. DEAN:

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A. Uh-hm.
MR. FELTHAM:
Q. They've got a threshold and a deductible system to get rid of the minor claims.
MS. DEAN:
A. Uh-hm.
MR. FELTHAM:
Q. But yet we're not seeing improvement of consumer outcomes certainly?
MS. DEAN:
A. Well, insurance is certainly a system, and they also have incredibly escalating claims costs and incredibly high premiums.
MR. FELTHAM:
Q. Despite their robust accident benefits for medical care and their means of eliminating minor claims?
MS. DEAN:
A. That is just part of the product.
MR. FELTHAM:
Q. This particular sentence uses a word there. You say that, "The product being sold focuses on care instead of cash".
MS. DEAN:
A. Uh-hm.

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MR. FELTHAM:
Q. You use the word "cash", and I notice that AVIVA does too in their submission to the Board.
MS. DEAN:
A. Uh-hm.
MR. FELTHAM:
Q. But really when you use that, what you're referring to there is the compensation that is received by innocent victims of auto negligence for their pain and suffering?
MS. DEAN:
A. The non-pecuniary amounts we're referring to.
MR. FELTHAM:
Q. Right, right, for those of what would be compensatory damages, they're settled, but that's the idea, that's what you're compensating?
MS. DEAN:
A. Yes.
MR. FELTHAM:
Q. Okay, but you call it "cash". Why do you call it cash?
MS. DEAN:

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A. Because it is an amount over and above that which is provided for care, for the medical bills, for the physiotherapy bills, and for any lost wages that might be experienced while individuals are undergoing medical treatment following their injuries.
MR. FELTHAM:
Q. That's why you call it cash?
MS. DEAN:
A. It's certainly one way of describing it.
(9:30 a.m.)
MR. FELTHAM:
Q. All right, let's have a look at – I'm sorry, I'm jumping around from place to place, but there are a bunch of documents. Let's go back to your slide show, please. If we look at page 2 or slide 2, I guess, this particular slide here – now you're showing, to be clear, these are total premiums?
MS. DEAN:
A. Average written premiums, so on average what the average Newfoundlander and Labradorian would pay compared to New Brunswick or Nova Scotia.
MR. FELTHAM:

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Q. Total auto premiums?
MS. DEAN:
A. Correct.
MR. FELTHAM:
Q. You're not limiting this to, for example, third party liability premiums, or just showing collision coverage premiums?
MS. DEAN:
A. Total premium for private passenger vehicles.
MR. FELTHAM:
Q. Okay, yes, and you don't break down here, like, what this is made up of. This is including Section B, everything, that somebody would purchase as private passenger auto product, this is the premium on average that they're paying?
MS. DEAN:
A. Correct.
MR. FELTHAM:
Q. Okay, and then if we go over to slide 5, here again average premium by province, so again we've got total auto private passenger premium being paid?
MS. DEAN:

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A. Uh-hm.
MR. FELTHAM:
Q. Yes?
MS. DEAN:
A. Yes.
MR. FELTHAM:
Q. And you don't break out the various coverages and show the trends here, do you?
MS. DEAN:
A. No, not when expressing the average.
MR. FELTHAM:
Q. Okay, why don't you do that? Why don't you break out and show what the trend is, for example, for collision and comprehensive over time in Newfoundland, or third party liability over time in Newfoundland? Why are you choosing to show only the average premium?
MS. DEAN:
A. We could certainly show a lot of numbers, but we might be here all day. Ryan, did you want to add to that?
MR. STEIN:
A. Just wanted to show what somebody who buys total coverage pays for auto insurance.

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MR. FELTHAM:
Q. You would be aware, though, that the average premium for the optional physical damages coverage, the collision and comprehensive – do you know that they've increased about 4.7 percent annually since 2006, do you know that?
MS. DEAN:
A. Is that from a GISA report?
MR. FELTHAM:
Q. I'm asking you if you know it?
MS. DEAN:
A. Well, I don't have the numbers in front of me. I certainly see a lot of numbers with the four Atlantic provinces.
MR. FELTHAM:
Q. That's not one that rings true to you at the moment?
MS. DEAN:
A. It's not one that I'm recalling at the moment.
MR. FELTHAM:
Q. Okay. Do you know what was happening with third-party liability premiums in Newfoundland and Labrador during the same

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period?
MR. STEIN:
A. No, but we know what was happening to the costs.
MS. DEAN:
A. Um-hm, um-hm.
MR. FELTHAM:
Q. So, you know what's happening to the costs. You know what's happening to the total premium, but you don't know what was happening to the individual premiums for the—or sorry, the individual coverages and the premium that relates to those?
MR. STEIN:
A. We tended to look at premium at the total level, but we do know what's been happening with the costs at the individual levels.
MR. FELTHAM:
Q. Okay. Are you aware that in Newfoundland and Labrador that we buy optional physical damages coverages more than our Atlantic Canadian neighbours? Did you know that?
MR. STEIN:
A. We did not do a comparison of that for this hearing.

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MR. FELTHAM:
Q. Okay. And I'd like to go to your slide that deals with the recommendations for reform. This is towards the end. It's not numbered, so—but it follows Slide 9. So, your first objective here you say is to "Stabilize premiums by reducing and stabilizing bodily injury claim costs." So, but I'd like to also look at the February 2018 report, page 4. And at the top of page 4 it notes, "IBC's reform proposals are designed to achieve the following four objectives. Reduce and stabilize premiums by reducing and stabilizing bodily injury claims costs."
MS. DEAN:
A. Um-hm.
MR. FELTHAM:
Q. But now, in your presentation today, you say just stabilize premiums? You'll agree with me, that's what you said?
MS. DEAN:
A. That's what's in the presentation, correct.
MR. FELTHAM:
Q. Okay. So, no longer saying reduce and stabilize premiums, but now saying just

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stabilize premiums?
MS. DEAN:
A. Well, the longer-term goal is to certainly reduce premiums, but as we have seen, the losses within the province over the past number of years are such that it's a tremendous amount, that massive reforms are needed in order to stabilize the insurance market to get to that point where claims costs can be controlled, and as premiums are driven by claims costs, that will then have an impact on the—a positive impact on the pocketbook of Newfoundlanders and Labradorians.
MR. FELTHAM:
Q. But you'll agree with me that in February 2018 you were saying reduce and stabilize premiums and today you're saying stabilize premiums only?
MS. DEAN:
A. Well, I think that's the first step, is to stabilize. We are—it's in our submission in February. We're not recanting that submission by any stretch of the imagination. We stand behind the

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submission, and that is certainly the goal.
MR. FELTHAM:
Q. That somewhere, sometime premiums might come down?
MS. DEAN:
A. Once claims costs are controlled, absolutely.
MR. FELTHAM:
Q. So, would you agree with me on this, if something is going up in cost at least than the rate of inflation, would you agree with me that that's stability in cost?
MS. DEAN:
A. Less than the rate of inflation?
MR. FELTHAM:
Q. Yes. If something is going up in cost less than the rate of inflation, that's pretty stable, isn't it?
MS. DEAN:
A. It would be.
MR. FELTHAM:
Q. So, I'd like to look at page 5 now of this same report, the February report. And there's a table towards the bottom called Annual Bodily Injury Claims Cost per

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Vehicle.
MS. DEAN:
A. Um-hm?
MR. FELTHAM:
Q. So, you've got the various provinces, Atlantic provinces, plus Alberta. So, if we look at the Newfoundland and Labrador column there, we're seeing—it says there that there's been a nine percent increase in claims costs over a 16-year period?
MS. DEAN:
A. Um-hm.
MR. FELTHAM:
Q. Okay? So, my math tells me that that's about a half a percentage point a year?
MS. DEAN:
A. Um-hm.
MR. FELTHAM:
Q. Does that make sense to you?
MR. STEIN:
A. I mean –
MR. FELTHAM:
Q. Nine percent over that 16-year period. I mean it's a little—you know, it's not exactly, but –

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MR. STEIN:
A. Yeah.
MR. FELTHAM:
Q. You get the point?
MR. STEIN:
A. We won't say it's exact, but we get what you're saying.
MR. FELTHAM:
Q. Yes.
MR. STEIN:
A. Yes.
MR. FELTHAM:
Q. Okay. So, I mean, based on what you agree with me on earlier, I mean that's stable claims costs.
MS. DEAN:
A. Well, when you're starting off at higher amount and it continues to increase, when you look at the neighbouring provinces –
MR. FELTHAM:
Q. No, just forget the neighbouring provinces for a moment. I'm asking about Newfoundland and Labrador and the increase over a period of time that's something much less than the rate of inflation.

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MS. DEAN:
A. Well, and that's what we're here talking about is Newfoundland and Labrador, and trying to stabilize the insurance market which—for auto insurance which is showing tremendous pressure and tremendous pressure lends itself eventually to increased costs for consumers which we're hearing from consumers is a difficult situation to be put in.
MR. FELTHAM:
Q. But let's go back to my question for a second. My earlier question you agree with me that something going up at less than the rate of inflation in terms of costs would be stable. And then, we see that the claims costs in Newfoundland and Labrador have gone up much less than the rate of inflation for the last 16 years. Ergo we've got stability, don't we?
MS. DEAN:
A. Stability at an incredibly high and unsustainable level.
MR. FELTHAM:
Q. If we look at that 409-dollar figure in 2016 for Newfoundland and Labrador, what is included in that? What claim costs go into that figure? Can list them out for me?

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MR. STEIN:
A. So, what would be in that figure would be the—it's GISA, it's data from GISA, General Insurance Statistical Agency. It would include indemnity payments. It would include the case reserves, and then it would include the actuarial reserve or the IBNR reserve that GISA and Ernst and Young would add onto it.
MR. FELTHAM:
Q. Sorry, so we've got the case reserve?
MR. STEIN:
A. Indemnity payment.
MR. FELTHAM:
Q. Indemnity payment.
MR. STEIN:
A. The case reserve.
MR. FELTHAM:
Q. Right.
MR. STEIN:
A. Oh, you would also include within that adjustment expenses, and then the actuarial reserve.
MR. FELTHAM:
Q. Okay. And who puts the actuarial reserve on?
MR. STEIN:
A. That would be done by GISA or Ernst and Young.
MR. FELTHAM:
Q. Not Oliver Wyman?
MR. STEIN:
A. No, this—no, not in this figure. Oliver—I mean, we're citing GISA. Oliver Wyman might have, I mean, might have done that in their report, but we're citing just GISA here.
MR. FELTHAM:
Q. Okay.
MR. STEIN:
A. Sorry, and this was written before the Oliver Wyman Report as well, so.
MR. FELTHAM:
Q. Sure, okay. I want to take you now to some testimony from the 2005 Automobile Insurance Review. So, this is testimony, I'm calling it testimony, a presentation of Mr. Forgeron, and I want to take you to

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something that he said back then. So, this is a February 21st, 2005 transcript. And I'd like to look at page 23. So, while we're waiting to go there, I guess, so in 2005, IBC was a cap proponent before this Board then, correct?

MS. DEAN:

A. I believe so. I was not with IBC at that time.

MR. FELTHAM:

Q. Okay, but you're aware that they were here in 2005 and they were a cap proponent?

MS. DEAN:

A. I am aware that they were here, absolutely.

MR. FELTHAM:

Q. And they were a cap proponent? They were not here advocating for a cap in 2005?

MS. DEAN:

A. I have not read Mr. Forgeron's presentation from 2005.

MR. FELTHAM:

Q. Setting aside that for a moment, what Mr. Forgeron—we'll get to that. But you know that in 2005 the IBC came to Newfoundland and Labrador before this Board and advocated

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for a cap on bodily injury claims?

MS. DEAN:

A. Okay.

MR. FELTHAM:

Q. Well, you don't know that?

MS. DEAN:

A. It's been something that we've been working on for an incredibly long time. So –

MR. FELTHAM:

Q. And you know that Mr. Forgeron gave a presentation on behalf of IBC at that time?

MS. DEAN:

A. I can see that here.

MR. FELTHAM:

Q. Okay. Do you know what he stated would happen if we did not bring a cap into Newfoundland and Labrador back in 2005?

MS. DEAN:

A. It is page 23, starting line 4?

MR. FELTHAM:

Q. Yes. You don't—it's not something you know now? This is—you're seeing the transcript, but you don't know what he said back then is what my point?

MS. DEAN:

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A. I don't know.

MR. FELTHAM:

Q. Okay. So, if we look at the transcript, starting at 3 of Mr. Forgeron--and here, you know, just some context, here he's talking about—he's there with Ms. Vall (phonetic) and also with IBC. And just to back it up to page 22, they're talking about total claims costs and drivers. And he—she says, "Now, as Don mentioned," this is on page 22, "Now, as Don mentioned before, this issue has come up for discussion a couple of times in the recent past. Little has changed to make this cost environment more amenable to long-term stability. Little has changed to really address these underlying cost factors. Temporarily premium adjustments happen, so there was a much better match, but very soon the cost pressure started to pick up again. I don't know if you want to add more onto that, Don." And we go to page 23.

MS. DEAN:

A. Okay.

MR. FELTHAM:

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Q. And then, Mr. Forgeron at line 3 starts and says, answer: "No, only to just reinforce that point, that 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." But we just talked about stability a few minutes ago and we looked at claims costs, and forgetting what level they were at, because that's not what he's talking about here. He's talking about stability over time.

MS. DEAN:

A. Um-hm.

MR. FELTHAM:

Q. We know that there has been stability in the auto premium charged for third-party liability coverage that relates to payment of BI claims, don't we?

MS. DEAN:

A. At a high level.

MR. FELTHAM:

Q. Okay, but he's not talking about that. He's talking about the level that existed back

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then, right, which you would say is--already say is a high level. And he says you will not have stability, but as you've stated to me, we have had a stability in that. Haven't we?

MS. DEAN:

A. At an unsustainably high level.

MR. FELTHAM:

Q. And we know that it's been increasing at a rate below inflation since Mr. Forgeron's time back in 2006?

MS. DEAN:

A. On average.

(9:45 a.m.)

MR. FELTHAM:

Q. Before my colleague takes over his share, there's only one other item I want to go to and that's the slideshow again, sorry. I keep calling it a slideshow and my friend is making fun of my terminology. So, I apologize if I'm not using the right language for that. But Slide 4, I just want to clarify on this document.

MS. DEAN:

A. Um-hm.

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MR. FELTHAM:

Q. So, as I understand it, as an automobile insurer, you'd have sort of two sources of revenue?

MS. DEAN:

A. Um-hm.

MR. FELTHAM:

Q. You'd have your premiums that you collect from the motoring public, and then, you'd have your investment income that you would earn on the float I'll call it. So, that is—there's a lag between when claims payments have to be made and when—and the total amount of premiums collected, and so, what you've got in between insurance companies have the ability to invest that, those collected premiums and earn investment income. Do I have that right?

MS. DEAN:

A. You do, and they're regulated federally in terms of those investments.

MR. FELTHAM:

Q. Okay. So, again, just to be—my point on it is we've got two pieces, if you will, to the revenue, right?

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MS. DEAN:

A. Um-hm.

MR. FELTHAM:

Q. We've got the premiums and then we've got the investment income?

MS. DEAN:

A. Yes.

MR. FELTHAM:

Q. So, when you show Average Annual Underwriting Loss, that's only one piece? That's the premium piece, isn't it?

MS. DEAN:

A. That's correct.

MR. FELTHAM:

Q. Okay. So, we don't see anything here in terms of--forgetting about whether I take issue with the accuracy of the numbers, and we'll just assume for the moment that they are correct. We're only seeing what relates to premiums collected?

MS. DEAN:

A. Correct.

MR. FELTHAM:

Q. All right. So, really that doesn't give us a full picture of what profitability is?

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MS. DEAN:

A. We did see in one of the Oliver Wyman reports the GISA ROE numbers. So, that would include both streams of revenue.

MR. FELTHAM:

Q. Right. And that's in the Oliver Wyman, but just in terms of your document here?

MS. DEAN:

A. This is just underwriting.

MR. FELTHAM:

Q. This is just one piece, right?

MS. DEAN:

A. Correct.

MR. FELTHAM:

Q. So, when I was reading the 2005 report--and maybe we can bring that up for a moment.

MS. GLYNN:

Q. The Board's report from 2005?

MR. FELTHAM:

Q. Oh sorry, yes. Thank you. And when we get it, I'd like to go page 109, please. It's just something that struck me. It was interesting when I was--and I read this report, and then when I saw your graph, it made me think of this. So, if we go to page

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109, toward the bottom there. Okay, the last paragraph. So, in this section of the report they're talking about these two income sources that insurers have, premium and investment income. And at that time, it says, "The consumer advocate noted that 2003 was the first time in 25 years that the property and casualty industry had an underwriting profit according to the facts of the General Insurance Industry in Canada in 2004." So, my point here is that, while you've shown us what's going on you say with underwriting income, clearly from that statement, from the report referred to in the 2005 study, the profitability piece and the investment income is obviously a really big part of this picture and really important in terms of whether an insurance company is making any money if for 25 years, from 2003 back, the insurers didn't make any money on premiums. You'll agree with that?

MR. STEIN:

A. Well, I mean, I'd have to see the numbers to validate that statement, but you know, just—but yes, investment income is an important

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source of income for insurance companies, just like underwriting results are.

MR. FELTHAM:

Q. And we can't really get a sense of what's going on with profit without that, can we?

MR. STEIN:

A. Overall in –

MR. FELTHAM:

Q. Without knowing both parts I mean, the premiums collected and the investment income.

MR. STEIN:

A. It's important, yes, if you want to look at total profitability, it's important to look at both which you can get out of the Oliver Wyman Report.

MS. DEAN:

A. One of the important messages with Slide 4 is that there has been more money paid out than has been taken in within this province. And that was one of the things that we wanted to achieve with that graph with the underwriting income.

MR. FELTHAM:

Q. Right. And with respect, Ms. Dean, that was

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the case for 25 years before 2003, according to what the Board noted back in 2005?

MS. DEAN:

A. And it would be interesting to look at investment income rates at that point in time versus what they are now.

MR. FELTHAM:

Q. But the point being, regardless of what the investment income rates—25 years there were underwriting losses, and the insurance industry didn't fold up its tent, it didn't go bankrupt. Again, my point being just we're only seeing one side of the story in terms of profitability with respect to Slide 4?

MS. DEAN:

A. We're also comparing two very different points of time as well.

MR. FELTHAM:

Q. Okay, I'm going to turn it over to my friend. Thank you very much.

MS. DEAN:

A. Thank you.

MR. STEIN:

A. Yes.

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KENNEDY, Q.C.:

Q. Thank you. Good morning, Commissioners. Ms. Dean, I have two quick questions on that point that you were just exploring with Mr. Feltham. Is it not correct that in 2017 in Canada the insurance industry reported 986 million dollars in investment profit alone?

MS. DEAN:

A. For the entire country?

MR. STEIN:

A. Can you please clarify your question? For the entire country, for a province, for a line of business?

KENNEDY, Q.C.:

Q. Is it not correct that in the first quarter of 2017 the insurance industry in Canada reported 986 million dollars in investment profit alone?

ROWE, Q.C.:

Q. Madam Chair, can we have that clarified? Does that include life insurers and disability insurers or is it just auto insurers? I don't know where that comes from.

KENNEDY, Q.C.:

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Q. I've asked the question. Can they answer? Is the answer yes or no?
ROWE, Q.C.:
Q. They don't know what the context is.
KENNEDY, Q.C.:
Q. I think the question is pretty clear, Commissioner—Madam Chair. In the first quarter of 2017, in Canada, did the insurance industry as a whole, report 986 million dollars in investment profit alone?
MR. STEIN:
A. I would have to check. Don't have that off the top of my head.
KENNEDY, Q.C.:
Q. So, that would equate with a 4-billion-dollar, close to a 4-billion-dollar profit, 3.5 to 4-billion-dollar profit for the insurance industry as a whole in Canada?
MR. STEIN:
A. We can't verify that. We don't know where your numbers are coming from.
KENNEDY, Q.C.:
Q. So, you don't know the answer? How much, sir, did the insurance industry make in 2016 in Canada as a whole, all lines of

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insurance?
MR. STEIN:
A. Off the top of my head, I don't know.
KENNEDY, Q.C.:
Q. You don't. You're the—what's your role, sir?
MR. STEIN:
A. I'm the director of Policy.
KENNEDY, Q.C.:
Q. For IBC?
MR. STEIN:
A. That's correct, yeah.
KENNEDY, Q.C.:
Q. And you don't know the answer to that question?
MR. STEIN:
A. I do not know the answer to that question.
KENNEDY, Q.C.:
Q. Okay. Ms. Dean, in 2016 in Newfoundland and Labrador, the Superintendent of Insurance, again my math might be very simplistic here, shows what I would suggest to you as 100 million dollars in profit for the automobile insurance industry in this province. Is that correct?

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MS. DEAN:
A. How are you arriving at that number?
KENNEDY, Q.C.:
Q. My question, Ms. Dean, in 2016 in Newfoundland and Labrador, the Superintendent of Insurance demonstrates—report demonstrates that the automobile insurance in Newfoundland and Labrador made 100 million dollars in profit or 23 percent profit. Is that correct?
MS. DEAN:
A. That is not correct.
KENNEDY, Q.C.:
Q. The number I put to you, Ms. Dean, I would suggest, especially the 986 million dollars in investment profit, would only be the banks that would make more money in Canada, is that correct?
MS. DEAN:
A. I do not follow the profitability of the banks, and I do not have a source for that number.
KENNEDY, Q.C.:
Q. Okay. Now you referred earlier to IBC or the Insurance Bureau of Canada, your—who you

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are, and I tried to get to from Ms. Elliott, but she really couldn't clarify. So, let's just try this. How many members would there be in the Insurance Bureau of Canada?
MS. DEAN:
A. We represent 90 percent of Canada's property and casualty insurers. So, that would be over 200 insurers across the country.
KENNEDY, Q.C.:
Q. Okay. So, this would be all lines of insurance, is that correct?
MS. DEAN:
A. Home, car and business.
KENNEDY, Q.C.:
Q. Okay.
MS. DEAN:
A. Life and health is completely another part of the industry.
KENNEDY, Q.C.:
Q. Are all Newfoundland and Labrador insurance companies members of IBC? All companies who operate in Newfoundland and Labrador, are they members of IBC?
MS. DEAN:
A. Not all.

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KENNEDY, Q.C.:
Q. You've indicated I think that four companies write 80 percent of the automobile insurance business. Are they members of IBC?
MS. DEAN:
A. They are.
KENNEDY, Q.C.:
Q. And then, I think the—well, I can go to this, say if we need to, Ms. Dean, but you've been here throughout the hearing. Ms. Elliott referred to six major insurers I think, TD, AVIVA, Intact, RSA, who else? There was two more. There were six major insurers which she referred to. Do you remember that?
MS. DEAN:
A. Travelers, Co-operators.
KENNEDY, Q.C.:
Q. Yes, Travelers, Co-op, yes.
MS. DEAN:
A. Yes.
KENNEDY, Q.C.:
Q. So, they're all members of IBC, correct?
MS. DEAN:
A. One of them is not.

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KENNEDY, Q.C.:
Q. And who is that?
MS. DEAN:
A. Co-operators.
KENNEDY, Q.C.:
Q. Okay. Now, one of the roles of IBC is lobbying, isn't it?
MS. DEAN:
A. Correct.
KENNEDY, Q.C.:
Q. Yes. Lobbying governments particularly?
MS. DEAN:
A. Um-hm.
KENNEDY, Q.C.:
Q. And you heard some discussion here yesterday, Ms. Dean, of ATIP or Access to Information and the Protection of Privacy Act?
MS. DEAN:
A. Um-hm.
KENNEDY, Q.C.:
Q. You're aware that that exists in every province?
MS. DEAN:
A. I am.

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KENNEDY, Q.C.:
Q. That if we write a public body and ask for certain information, then there's information provided. Certain can be redacted or privileged, but you're aware that that process exists?
MS. DEAN:
A. I am.
KENNEDY, Q.C.:
Q. You are aware, although it's—there seems to be some reluctance on your part to admit it, that IBC lobbied for the cap in Newfoundland and Labrador in 2005? You're aware of that? Okay, maybe you're not.
MS. DEAN:
A. It certainly would make sense.
KENNEDY, Q.C.:
Q. Yes. They also lobbied governments across Canada, Nova Scotia, New Brunswick, PEI, for example. You're aware of that?
MS. DEAN:
A. Yes.
KENNEDY, Q.C.:
Q. Correct?
MS. DEAN:

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A. Correct.
KENNEDY, Q.C.:
Q. In fact, what we see at times that the lobbying or that the imposition of the cap or an application such as we're dealing with here today is preceded by a crisis, isn't it?
MS. DEAN:
A. We strive to continue conversations with governments, provincial governments, about the heavily-regulated auto insurance product. And we hope that the auto insurance product does not arrive at a crisis because that does not benefit consumers. So, we work to provide the best information that we have as an industry to the provincial governments that regulate our industry.
KENNEDY, Q.C.:
Q. Are you aware of the crisis which occurred in New Brunswick in 2004 which led to Bernard—or partly led to Bernard Lord's defeat in New Brunswick, and then, the cap came in after that. Are you aware of that?
MS. DEAN:

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A. I am certainly aware of the crisis that arose throughout this entire region at that time.
KENNEDY, Q.C.:
Q. Yes, and you--I'm sure you're not going to agree with me. I'm going to put this to you, has the IBC in any way contributed to or helped create the crisis in relation to the taxi drivers which has now led us to where we are here today?
MS. DEAN:
A. We have not created a crisis with taxi drivers. That is outside of the role, my role, in representing our members and private passenger vehicles in this hearing.
KENNEDY, Q.C.:
Q. Are IBC registered lobbyists in the Province of Newfoundland and Labrador?
MS. DEAN:
A. We are.
KENNEDY, Q.C.:
Q. And are you a registered lobbyist?
MS. DEAN:
A. I am.
KENNEDY, Q.C.:

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Q. Who else in the IBC will be a registered lobbyist?
MS. DEAN:
A. Don Forgeron, our president and CEO. Also, a gentleman who is just recently no longer with us, Tom O'Handley, would have been registered as a lobbyist.
KENNEDY, Q.C.:
Q. In the last two year, how many meetings have either you or IBC personnel that you're aware of met with ministers of the Newfoundland and Labrador Government?
MS. DEAN:
A. There have been several meetings. We have had several new ministers in which we go in to introduce ourselves, and the industry and the information that we would be able to provide.
KENNEDY, Q.C.:
Q. Yes. And my question though is how many meetings have there been? Do you know that?
MS. DEAN:
A. I don't have the exact number of meetings.
KENNEDY, Q.C.:
Q. And Service Newfoundland and Labrador would be the department responsible for the automobile industry regulation, correct?

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MS. DEAN:
A. Correct.
KENNEDY, Q.C.:
Q. So, I think there have been by my account at least three ministers?
MS. DEAN:
A. That's sounds about right.
KENNEDY, Q.C.:
Q. Minister Trimper. I think Minister Joyce was there for a while.
MS. DEAN:
A. He was.
KENNEDY, Q.C.:
Q. And now, Minister Gambin-Walsh.
MS. DEAN:
A. Gambin-Walsh, correct.
KENNEDY, Q.C.:
Q. Have you met with all three of them?
MS. DEAN:
A. I've met with all three of those ministers.
KENNEDY, Q.C.:
Q. Have you met with other ministers in the government?

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MS. DEAN:
A. We have met with other ministers in the government with other files.
KENNEDY, Q.C.:
Q. When you say other files, I'm talking about the automobile insurance industry is what I'm talking about now.
MS. DEAN:
A. Okay.
KENNEDY, Q.C.:
Q. So, have you met with other ministers in the government in relation to the automobile industry and particularly the imposition of a cap?
MS. DEAN:
A. That would not have been the primary agenda item on the meeting with other ministers as our industry does interact with other departments on a number of levels. For example, oil spill remediation.
KENNEDY, Q.C.:
Q. Okay, did—first how many meetings did you have with other ministers? Have you met with the minister of Finance? I think there have been a couple of ministers of Finance.

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Have you met with them?
MS. DEAN:
A. Not the most recent minister of Finance.
KENNEDY, Q.C.:
Q. Did you meet with the previous minister of Finance?
MS. DEAN:
A. Yes, I did.
KENNEDY, Q.C.:
Q. How often?
(10:00 a.m.)
MS. DEAN:
A. I met with her once or twice in relation—the primary agenda on that meeting was the implementation of the RST when this government brought back the RST.
KENNEDY, Q.C.:
Q. Yes, you know the cap—but the cap came up or did it? Well, you tell me.
MS. DEAN:
A. I'm trying to –
KENNEDY, Q.C.:
Q. You tell me now.
MS. DEAN:
A. I'm trying to remember. It was some time

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ago because the RST implementation and how companies would be able to do a systems change is in the timeline that government required was—certainly took up a lot of time during that meeting. It may very well have come up.
KENNEDY, Q.C.:
Q. So, you don't remember if—you don't remember whether or not you met with the minister of Finance maybe for another reason and discussed the cap, is that what you're telling me?
MS. DEAN:
A. I'm telling you that I do remember meeting with the minister of Finance. I do remember that it was focused on the RST. I do not remember other portions of that discussion because we were in a very tight timeline and government was trying to get answers from the industry, industry was trying to get answers from government at that point.
KENNEDY, Q.C.:
Q. Just out of curiosity, the claim that--when you look at your average claims cost, does that include the taxes?

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MS. DEAN:
A. Average claim. Taxes associated with claims costs?
KENNEDY, Q.C.:
Q. Yes, the $409 that you refer to there, is that including the HST that's paid on that?
MS. DEAN:
A. The RST?
KENNEDY, Q.C.:
Q. RST.
MS. DEAN:
A. Sorry.
KENNEDY, Q.C.:
Q. Well, we pay –
MS. DEAN:
A. Yes, it's the retail sales tax which is over and above.
KENNEDY, Q.C.:
Q. HST/GST, yes.
MS. DEAN:
A. That was just HST/GST charged on claims pieces.
KENNEDY, Q.C.:
Q. The claims costs of 409 average, does that include also the cost of taxes?

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MS. DEAN:
A. It does not include the RST which was just implemented in, I believe it was July of 2016, if I recall.
KENNEDY, Q.C.:
Q. Does it include any taxes?
MS. DEAN:
A. It includes input taxes, so -
KENNEDY, Q.C.:
Q. And what percent? Are they minor taxes, if there's any such thing?
MR. STEIN:
A. You're referring to claims, the claims cost figures?
KENNEDY, Q.C.:
Q. Yes.
MR. STEIN:
A. And are there taxes applied on them?
KENNEDY, Q.C.:
Q. Yes, well you –
MR. STEIN:
A. I mean, yeah, regular GST/HST, some of these are exempt from those, but the—but yes, if taxes were incurred, they're included in those numbers.

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KENNEDY, Q.C.:
Q. Because the previous government had removed the 15 percent on the HST or on the tax, on insurance premiums.
MS. DEAN:
A. On insurance, correct.
KENNEDY, Q.C.:
Q. Okay. So, when you had put forward your average claims costs now of--$409, does that include taxes?
MR. STEIN:
A. Are you referring to the –
MS. DEAN:
A. The RST.
MR. STEIN:
Q. The RST, I believe, is applied on premiums. I do not believe it's included in the claims costs, only—the only taxes included on the claims cost numbers would be the taxes incurred for those claim services.
KENNEDY, Q.C.:
Q. Now let's come back to your meetings with the ministers of government. How many other ministers of government have you met with, Ms. Dean, you or anyone at IBC to the best

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of your knowledge?
MS. DEAN:
A. Certainly. We've met with the Minister of Transportation to discuss road safety.
KENNEDY, Q.C.:
Q. Did the cap come up?
MS. DEAN:
A. I believe it did. Minister of Environment with regard to oil spill remediation and climate change.
KENNEDY, Q.C.:
Q. Did the cap come up?
MS. DEAN:
A. That meeting, climate change and certainly what's been happening with the weather was a very large conversation. It may have, I do not recall.
KENNEDY, Q.C.:
Q. Okay. Have you met with the government caucus as a whole, for example?
MS. DEAN:
A. Government caucus? No, we have not in this province.
KENNEDY, Q.C.:
Q. Have you met with the premier or anyone in

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the premier's office?
MS. DEAN:
A. At an informal event I had a conversation with members of the premier's office, but we were unable to secure meetings with anyone in the premier's office. I know our president and CEO when there's a new premier anywhere in this country, he likes to introduce himself and certainly the industry, and we were never granted a meeting.
KENNEDY, Q.C.:
Q. In the informal meeting or discussion with the premier or members of the premier's office, did the cap come up?
MS. DEAN:
A. The cap did come up, that's what my members pay me to do.
KENNEDY, Q.C.:
Q. If I were to suggest—sorry?
MS. DEAN:
A. My members pay me to lobby government members.
KENNEDY, Q.C.:
Q. Are there any emails—okay, before I get to

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that, excuse me, how often have you met with bureaucrat's in the Department of Service Newfoundland and Labrador in the last 12 to 24 months?
MS. DEAN:
A. It would be a number of times, certainly when they have questions of our industry and we need to discuss what's going on within the market. Whenever we have updated data, we request meetings with those officials, so it would be a number of times.
KENNEDY, Q.C.:
Q. I'm interested in the cap. How many times have you met with bureaucrats, officials, either at the director level, ADM or deputy level in the Department of Service Newfoundland and Labrador in the last 12 to 24 months where you discussed the cap?
MS. DEAN:
A. A number of times, I don't have the exact number off the top of my head.
KENNEDY, Q.C.:
Q. Two dozen?
MS. DEAN:
A. Within the last 24 months?

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KENNEDY, Q.C.:
Q. Yeah.
MS. DEAN:
A. That would be excessive.
KENNEDY, Q.C.:
Q. Okay, well 15?
MS. DEAN:
A. Maybe 10; likely less.
KENNEDY, Q.C.:
Q. One of the new commissioners at the PUB was the former, I think, superintendent of insurance, did you meet with him?
MS. DEAN:
A. I did.
KENNEDY, Q.C.:
Q. How often did you meet with him?
MS. DEAN:
A. Oh goodness, I met with him maybe three times.
KENNEDY, Q.C.:
Q. Okay, so there were regular meetings with bureaucratic officials in the Department of Service of Newfoundland and Labrador where the cap was discussed?
MS. DEAN:

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A. Yes.
KENNEDY, Q.C.:
Q. Okay, that's what you do, you lobby.
MS. DEAN:
A. We bring a number of industry issues and certainly respond to what's happening within the market.
KENNEDY, Q.C.:
Q. Yes. Now how is IBC funded? Do other insurance companies pay certain amounts of money to be part of the IBC, where does your money come from?
MS. DEAN:
A. Insurance companies, our members, pay a membership fee.
KENNEDY, Q.C.:
Q. And part of that will come from the claims or the premiums that are paid by the insurers, is that a fair statement?
MS. DEAN:
A. They pay us and I –
KENNEDY, Q.C.:
Q. So the innocent accident victim is paying for you to take away or to lobby government to take away their own rights, that's what's

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happening, isn't it?
MS. DEAN:
A. To gather information about what's happening with the market and present information and best practices in other jurisdictions. It's a more effective model than having 200 different insurance companies constantly requesting meetings with those who regulate them.
KENNEDY, Q.C:
Q. I want to now deal with the May 2018 report, if we could bring that up, please. And first just confirm for me, Ms. Dean, that there are no—I don't see anyway, any particular mention in the February 2018 report in relation to fees paid to lawyers, is that a fair statement? Am I accurate on that?
MS. DEAN:
A. In the May 2018 report?
KENNEDY, Q.C.:
Q. Or excuse me, the first one, February 2018.
MS. DEAN:
A. That would be a fair statement.
KENNEDY, Q.C.:

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Q. Yeah. Yet in the May 2018 report, we basically get an attack on lawyers, don't we?
MS. DEAN:
A. Sorry, what page are you looking at?
KENNEDY, Q.C.:
Q. My first question, it's an overall question that in the May 2018 report there's basically an attack on lawyers, isn't there?
MS. DEAN:
A. We gather information when we prepare these reports from members and we certainly have discussions because we are submitting reports that represent their experience in any jurisdiction.
KENNEDY, Q.C.:
Q. Yeah, so it's not an attack on lawyers is what you're saying?
MS. DEAN:
A. It's a simulation or resembled information from our members in order to prepare this report.
KENNEDY, Q.C.:
Q. You can say you don't like us, it doesn't matter, Ms. Dean, you know, that's not going

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to affect me personally. Let's go to page 4.

MS. DEAN:

A. I have no personal –

KENNEDY, Q.C.:

Q. Well I'm going to show you that IBC does. Let's go to page 4, please, of the May 2018 report. The second paragraph, these massive non-pecuniary damage payments, so someone who gets $20,000 for an injury that affects their quality of life to the point of being able to play with their children, go to work, clean the house, do the things that other normal people do, that's a massive payment, is it, Ms. Dean, is that what you're saying?

MS. DEAN:

A. We are discussing minor injuries in these submissions, minor injuries only where individuals will recover.

KENNEDY, Q.C.:

Q. Whiplash 2, whiplash 1 and 2 is described as a minor injury, isn't it?

MS. DEAN:

A. It is.

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KENNEDY, Q.C.:

Q. So that person who has a neck injury, 12 to 24 months recuperating, affecting their ability to do the normal things that they do, that $20,000 to $30,000 that he or she gets, that's a massive payment, is it?

MS. DEAN:

A. Minor injuries are those which individuals will recover, and we are referring to the non-pecuniary damages amounts here versus what is paid in other provinces in relation to what is driving premiums in this province.

KENNEDY, Q.C.:

Q. We'll come to that later. So these massive non-pecuniary damage payments correspond directly to auto insurance legislation that emphasizes cash payments over health outcomes, so again, back to—I'm not going to repeat that, Mr. Feltham dealt with that issue of cash over care, correct?

MS. DEAN:

A. Correct.

KENNEDY, Q.C.:

Q. "The ability to take an injury that's expected to heal in a few days, weeks or months and to turn it into tens of thousands of dollars in cash is why 82 percent of injury claims involve personal injury lawyers." What do you mean by that statement?

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MS. DEAN:

A. Well, as we saw in the Closed Claims Study that was prepared by Oliver Wyman, 82 percent of injury claims, minor injury claims involved legal counsel. That is a high amount when we compare that to neighbouring provinces.

KENNEDY, Q.C.:

Q. Do you agree with me? Ms. Dean, that one of the most basic premises of our legal system in Canada is that people have the right to be represented by lawyers and the right to access justice?

MS. DEAN:

A. Absolutely, but also insurance is an indemnity to once you are, one of the basic principles is that of indemnity in placing you back to where you were prior to the incident, and what we are stressing,

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certainly in this report, is the care and getting individuals in this province better, quicker and back to their regular lives.

KENNEDY, Q.C.:

Q. So lawyers prevent that from happening, do they?

MS. DEAN:

A. That's not what we're saying, it's just that the process could be a lot quicker to get individuals better quicker. Again, we are all working within the constraints of the current legislation and regulation.

KENNEDY, Q.C.:

Q. Let me read this to you again, "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 percent of injury claims involve personal injury lawyers." Are you alleging here that personal injury lawyers engage in fraudulent practices?

MS. DEAN:

A. Not referring to any such thing, I am referring to the fact that there are certainly larger amounts paid for non-

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pecuniary damages in this province over and above that which ensures that the victims of motor vehicle collisions are healing, received the treatment that they require and incur any out-of-pocket expenses for lost wages and so on, that the current system—and insurance is very much a system, insurers offer a product and they manage claims at the end of the day for those unfortunate few of us who have to make a claim, while the many pay for it. And what we're hearing from consumers is that the pressures of paying for this current system is challenging to the pocket books of many Newfoundlanders and Labradorians.

KENNEDY, Q.C.:

Q. It's a very good answer, but I'm going to come back to my question now. Are you alleging –

ROWE, Q.C.:

Q. Madam Chair, she's answered the question. I mean –

KENNEDY, Q.C.:

Q. She has not answered—I asked a question, there was no answer. Listen to my question

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and listen to her answer.

ROWE, Q.C.:

Q. She said at the beginning –

KENNEDY, Q.C.:

Q. Can I ask my question?

CHAIR:

Q. Mr. Kennedy, are you –

ROWE, Q.C.:

Q. - that she was not alleging fraudulent parties.

CHAIR:

Q. I was just going to say, are you just looking for a "yes" or "no"?

KENNEDY, Q.C.:

Q. I'm going to come back to my question, is are you alleging then that lawyers are engaged in dishonest or unethical practices?

MS. DEAN:

A. No.

KENNEDY, Q.C.:

Q. Now, who is Aviva, are they a member of—they're a big insurance company, aren't they?

MS. DEAN:

A. Yes, they are.

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KENNEDY, Q.C.:

Q. Are they a member of the IBC?

MS. DEAN:

A. Yes, they are.

KENNEDY, Q.C.:

Q. You've read their report?

MS. DEAN:

A. Yes.

KENNEDY, Q.C.:

Q. You know what's in their report?

MS. DEAN:

A. I do.

KENNEDY, Q.C.:

Q. That's an attack on lawyers, isn't it?

MS. DEAN:

A. I certainly can't speak on behalf of Aviva.

KENNEDY, Q.C.:

Q. Well, as a member of the IBC, don't you speak on behalf of Aviva and other insurance companies?

MS. DEAN:

A. From time to time some of our members choose to advance additional commentary to that which the group of insurers that we assemble to come up with positions put forward.

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KENNEDY, Q.C.:

Q. Okay, let's go to your next paragraph. "This personal injury lawyer rate representation is unusually high." Is there something wrong with people being represented by lawyers in the view of IBC?

MS. DEAN:

A. No, it's just in our observation it's unusually high when compared to neighbouring provinces.

KENNEDY, Q.C.:

Q. Let's go to the next paragraph, "That so many Newfoundland and Labrador claims have personal injury lawyers is a symptom of the problem that has caused consumers to have to pay hundreds of dollars more for insurance."

MS. DEAN:

A. Yes.

KENNEDY, Q.C.:

Q. Are you blaming lawyers for the increase in premiums?

MS. DEAN:

A. I am not. I am blaming the system and I am blaming the current legislator of a regulatory regime that has led to the

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situation. It's also important to keep in mind that the last reforms in this province were 2004, that is 14 years ago. Any system where you have an industry that offers the product and you have government that regulates it, from both the product and the pricing side of things, there needs to be a review from time to time. We are well overdue in this province for that review.

KENNEDY, Q.C.:

Q. Okay. Again, a very good answer, but let me come back to my question. My question was that so many—I'm reading you the statement, "That so many Newfoundland and Labrador claims have personal injury lawyers is a symptom of the problem." So my question is, that indicates to me that you are blaming lawyers for the increase in premiums for the average person in this province, is that what you are saying there?

(10:15 a.m.)

MS. DEAN:

A. No, I'm blaming the current system, the current regulatory and legislative regime.

KENNEDY, Q.C.:

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Q. Okay, now it wouldn't be that so many lawyers are involved because there's such a mistrust of the greedy insurance industry, is it?

MS. DEAN:

A. It's the same industry that serves customers in other provinces as well, and those provinces have individuals who are involved in motor vehicle collisions who get better and go on with their lives.

KENNEDY, Q.C.:

Q. So let's continue a little bit further. If I could ask to have the Aviva submission at page 11, brought up, please? May, 2018. Aviva puts out some stats here, I just want to see if you agree with these stats. So if you look, you'll see there's a nice colour pie. "Aviva settlement average was 34,886. Settlements were noticeably higher when there was legal representation. 41,000 with legal representation versus 9900 with no legal representation." Now whether or not those numbers are accurate as a whole, do you agree with the general principle that when lawyers are involved in personal injury

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claims the claims payouts are significantly higher?

MS. DEAN:

A. This is a snapshot of Aviva's experience as a company itself, so I certainly can't comment on that. I'm not an employee of Aviva, they do not share on an ongoing basis this type of information with me. What we are talking about in our report is the current legislative and regulatory system that insurers, as well as drivers, participate in within this province.

KENNEDY, Q.C.:

Q. Okay, so in your experience, IBC's experience, would you agree that claims are settled for three to four times more money when lawyers are involved, as opposed to individuals negotiating with the insurance companies themselves, insurance adjusters themselves, is that a general principle?

MS. DEAN:

A. I have aggregate claims information that show that certainly claims in this province are unsustainably high.

KENNEDY, Q.C.:

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Q. Okay, let's go to the heading down there, the shocker, the number of lawyers, so you and Aviva, IBC and Aviva appear to share the same approach towards the number of lawyers involved in personal injury claims, that's what we just went through earlier, correct?

MS. DEAN:

A. It's certainly a higher amount that what is evident in the neighbouring provinces when it comes to minor injuries.

KENNEDY, Q.C.:

Q. And that's a bad thing from IBC's perspective, is it?

MS. DEAN:

A. It's one piece of why we need to take a look at the system.

KENNEDY, Q.C.:

Q. Okay, because what, lawyers are making too much money, is that what you're saying?

MS. DEAN:

A. I haven't said that.

KENNEDY, Q.C.:

Q. Okay, the last point on the Aviva, and I want to see again if these statistics correspond with your own, that last

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paragraph, "Legal representation impacts the length of time it takes to resolve a claim. In the Aviva sample, claims with no legal representation closed after an average of 352 days; while claims with legal representation took an average of 922 days." Again, is that a basic principle that you encounter that unrepresented victim claims settle much quicker than claims involving lawyers?

MS. DEAN:

A. That would be the experience of one of our member companies that I do not have the background or the ability to comment on those specific numbers.

KENNEDY, Q.C.:

Q. Okay, can you find those numbers for us, from an IBC perspective?

MS. DEAN:

A. No, I would not have access to those numbers.

KENNEDY, Q.C.:

Q. Can you find from an IBC perspective the difference between when claims settled, the amount the claim settled in unrepresented

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victims versus represented victims?

MR. STEIN:

A. If it's anywhere, it would be in Oliver Wyman's Closed Claims Study Report.

KENNEDY, Q.C.:

Q. Okay, now let's go to—is it IBC's position that there was too high a percentage of lawyers or too high a percentage of accident victims represented by lawyers?

MS. DEAN:

A. 82 percent as presented by the Closed Claims Study, as undertaken by Oliver Wyman, that seems to be a high amount.

KENNEDY, Q.C.:

Q. So the preferable, the IBC would prefer a system where an accident victim negotiates directly with an insurance adjuster and gets $2,500.00 as opposed to a case where a lawyer is involved and they get $30,000, is that the system that you're proposing?

MS. DEAN:

A. One of the things in terms of the insurance system, insurers can cost anything. They can cost out any form of a system. The difficulty comes with what that price tag is

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at the end of the day. We are hearing loud and clear from consumers that they are paying too much for insurance within this province and we can't ignore the fact that the premiums of the many pay for the few. However, when we're talking about those injured in motor vehicle collisions, those folks need to get better and that's why our recommendations also go on to advance some additional recommendations.

KENNEDY, Q.C.:

Q. So again, two questions that come out of that because with all due respect, I don't think you've answered my question. So is it the position of IBC that you would prefer to have unrepresented accident victims negotiate with insurance adjusters directly, as opposed to having lawyers involved?

MS. DEAN:

A. We would prefer to see a sustainable auto insurance market in Newfoundland and Labrador.

KENNEDY, Q.C.:

Q. With all due respect, my question is "yes" or "no". If you can't answer it, fair

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enough. Do you, are you suggesting that there should be a system where unrepresented accident victims negotiate with insurance adjusters directly, as opposed to being represented by lawyers?

MS. DEAN:

A. There should be a system where those who are injured heal and receive a reasonable amount of compensation.

KENNEDY, Q.C.:

Q. So you're not going to answer my question, are you? You're refusing to answer the question?

ROWE, Q.C.:

Q. Madam Chair, IBC has put forth their position that there should be a reform of the existing system. I mean, this is not a fair question to put to Ms. Dean who is here on behalf of IBC. She's only quoting the statistics that came out of the Closed Claims Study.

CHAIR:

Q. Sounds to me like you've gotten as far as you're going to go.

KENNEDY, Q.C.:

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Q. Thank you, Madam Chair. Now, when we have litigation, do IBC members, the insurances companies, they have lawyers, correct?
MS. DEAN:
A. Uh-hm, correct.
KENNEDY, Q.C.:
Q. They can hire lawyers to fight claims?
MS. DEAN:
A. Correct.
KENNEDY, Q.C.:
Q. Our system is set up so that we can go to court and courts will determine what they appropriate amounts are for non-pecuniary general damages, loss of past income, cost of future care, housekeeping, maintenance capacity, courts can do all that?
MS. DEAN:
A. Uh-hm.
KENNEDY, Q.C.:
Q. Are you aware of in the last couple of years of any of the insurance companies in this province have taken any claims to courts that would be characterized as what you call minor injury?
MS. DEAN:

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A. I am not aware, but that doesn't mean that they haven't.
KENNEDY, Q.C.:
Q. Now I want to come to page 5 of your February report, because now I'm going to suggest you get into a criticism of the court system. Page 5, this would be—excuse me, it's the February report, I apologize for that, Commissioners. Page 5, of your report. You see the paragraph there beginning, "The size of the average Newfoundland and Labrador bodily injury claim is inconsistent with prevailing medical literature on motor vehicle collision index rates (phonetic). A 2015 study by leading Canadian scientists and health practitioners state that most injured people recover within days or a few months." So you are aware of the fact that if insurance companies don't like what's going on, we go to court and a judge decides, correct?
MS. DEAN:
A. Correct. I'm also aware of the costs associated with that as well.

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KENNEDY, Q.C.:
Q. So the negotiations that take place between adjusters and lawyers would be based on the caselaw that has been determined by our courts.
MS. DEAN:
A. Correct.
(10:30 a.m.)
KENNEDY, Q.C.:
Q. So are you saying there that the courts are getting it wrong too, that they're not applying the prevailing medical literature?
MS. DEAN:
A. We are stating that there is a report, a study that was conducted in 2015 that can certainly add to the body of knowledge with regard to the prevailing medical literature.
KENNEDY, Q.C.:
Q. So that report that by your footnote is dated, what you say is the prevailing medical literature, is dated December 2014. In the last four years, has the IBC or any of their—excuse me, any of the member companies taken a case to court to ensure that this prevailing medical literature is

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before the judges of our province?
MS. DEAN:
A. Not that I'm aware of, but again, that doesn't mean it hasn't –
KENNEDY, Q.C.:
Q. Why wouldn't you do that? If your prevailing medical literature indicates that what judges, how we've been deciding cases for the last, ever how many years, and going back, I suppose we could go back to some of the cases in the '90s where the start of the change, why wouldn't the insurance company take this matter to court? Can you offer an explanation for that?
MS. DEAN:
A. Well certainly I'm not an employee of any one particular insurance company. I can only surmise that the expense associated with doing so may play into it, especially when you look at the size of claims within this province as it is.
KENNEDY, Q.C.:
Q. Okay.
MS. DEAN:
A. It addition to any wait times that it may

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take in order to get to trial, especially when you're dealing with individuals with minor injuries. The desire on the part of any insurer would be to get that individual in treatment as soon as possible and go from there.

KENNEDY, Q.C.:

Q. Okay, well let's just break that down. So essentially you're saying, well there's a cost involved, but the cost of paying a lawyer, as good as Mr. Rowe and Mr. Stamp are, they're not going to cost you as much as you've been paying out in claims for minor injuries from what you're saying, is that correct, the test one case.

MS. DEAN:

A. We wanted to participate fully within this hearing and that's what we're here to do.

KENNEDY, Q.C.:

Q. You wanted to participate fully in the hearing and I'm asking you, you've had this prevailing medical literature since 2014 and you're suggesting that perhaps nothing has gone to court because it's too expensive for lawyers?

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MS. DEAN:

A. It could be one of the options.

ROWE, Q.C.:

Q. Madam Chair, just stop, Ms. Dean. This is not a fair line of questioning for Ms. Dean. She doesn't deal with claims. What Mr. Kennedy is talking about is down at the very basic level, an insurance company, there's an examiner, an adjuster dealing with the claim. That person may or may not have defence counsel engaged. There are a whole raft of considerations that go into whether or not a matter goes to court, and Ms. Dean is way above being involved in that level of decision-making. I mean, she's at a high altitude with IBC; she's not down in the trenches with claims' examiners making a decision whether this should go to court or whether we should try to settle it. I mean, that's an unfair question for her.

KENNEDY, Q.C.:

Q. The IBC have made a presentation to this Board. We see that Aviva had done, put forward a similar presentation. There is, what I would suggest to you, Madam Chair,

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Commissioners, an—well it's an attack on lawyers and the role that lawyers play in the system. There's also, I would suggest to you, an implicit attack on the courts because prevailing medical literature should determine what awards are, as opposed to our tried and trusted court system. My questions have only been you had prevailing medical literature since 2014, why haven't you gone to court and tested your prevailing medical literature against the current awards or damages that are out there. She says it takes a long time and I agree with that, but December 2014 is four years. They have capable lawyers representing them. I don't know how that question is unfair when they're coming before this Board and suggesting as one of their recommendations that a minor injury definition should be in line with prevailing medical literature when they've had the chance to test it. All I am trying to find out is why haven't you tested it if your prevailing medical literature is so strong? If you feel that the question, the issue has been examined, fine, I'll move

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on. But the IBC have put this in their submission and while the blame the lawyer's routine may be something that they try to work with, it's something that we should be allowed to explore and so if you feel I've explored enough, I'll move on.

CHAIR:

Q. I think the question has been explored, but you will have the opportunity, Mr. Kennedy, to make a submission at the –

KENNEDY, Q.C.:

Q. Oh, there will be other lawyers coming before this Board to talk about this.

CHAIR:

Q. Absolutely.

KENNEDY, Q.C.:

Q. And maybe a judge or two. Okay, so now I want to now move into the May 2018 report. If we go to page 5. So if I understand you correctly, if you look at this—I understand IBC, Ms. Dean, I don't mean to personalize it with you, if I understand IBC's position that even though Ms. Elliott has outlined different frequencies and different cap amounts that could apply, it's IBC's

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position that there should be a $5,000 cap because higher caps provide more financial incentive for the personal injury lawyers to take on minor injury claims, so we're back to the lawyers again, aren't we? Do you see the comment there?

MS. DEAN:

A. I do see that.

KENNEDY, Q.C.:

Q. Yes.

MS. DEAN:

A. The lower cap amount would provide more stability as evidenced by the frequency change that had been presented in Oliver Wyman's report.

KENNEDY, Q.C.:

Q. Okay, but what you're saying there is that the higher caps provide more financial incentives for personal injury lawyers who take on minor injury claims. So in other words, the converse of that is that we don't want lawyers involved, is that what—is that the IBC's position, let me put it to you that way and I'll that alone, is that your position?

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MS. DEAN:

A. Again, we are comparing the legal representation as evidenced by the Closed Claims Study versus that of neighbouring provinces, that is high.

KENNEDY, Q.C.:

Q. And then you go on to state, this is page 8, excuse me, should be page 8, and use "The litigation process to increase cash payments, even though those common claims could easily settle without legal involvement." That's again, we've gone through that, I'm not going to question you, same point as we talked about earlier, correct?

MS. DEAN:

A. Uh-hm.

KENNEDY, Q.C.:

Q. Now, would you not agree with me, Ms. Dean, that when you take an experienced insurance adjuster and someone who has been in an accident, an innocent accident victim, that there was a power imbalance in the negotiation between the innocent accident victim and an experienced insurance

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adjuster?

MS. DEAN:

A. That accident victim is also a client of an insurance company and insurance companies would not exist without their customers.

KENNEDY, Q.C.:

Q. But they're also—part of the job is to save as much money as you can for your employer.

MS. DEAN:

A. I would suggest that the job would be to get people better as quickly as possible and as we're exploring in these submissions, there is a better way to get treatment for those with minor injuries.

KENNEDY, Q.C.:

Q. Okay, I'm going to finish with this line of questioning. I'll put this to you and then we're finished with this. And hopefully we'll get to question Aviva. The bottom line, I'd suggest to you, is that the insurance companies want to get able to determine what peoples' rights are and who will get what. Do you agree with that statement?

MS. DEAN:

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A. I do not.

KENNEDY, Q.C.:

Q. Okay. Let's now go to the—I'm almost finished, Commissioners. Let's go to page 4 of 17 which would be the February submission.

MS. KEAN:

A. What page again?

KENNEDY, Q.C.:

Q. It would be page 4 of 17. Now this sets out the bodily injury claims by province for 2016, the average claims cost. Do you see that?

MS. DEAN:

A. Yes.

KENNEDY, Q.C.:

Q. Okay. So, PEI which has a cap has an average claims cost of almost $73,000.00, $72,938.00

MS. DEAN:

A. Um-hm.

KENNEDY, Q.C.:

Q. Correct?

MS. DEAN:

A. Correct.

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KENNEDY, Q.C.:
Q. New Brunswick which has a cap is at 69,666, almost $70,000.00.
MS. DEAN:
A. Um-hm.
KENNEDY, Q.C.:
Q. Correct?
MS. DEAN:
A. Correct.
KENNEDY, Q.C.:
Q. And then New Brunswick is—I've done New Brunswick and PEI. Now, we just went through your—the comment at page 5 that the average size of bodily claims costs is inconsistent with prevailing medical literature on motor vehicle injuries. Correct? You remember we just referred to that a couple of minutes ago.
MS. DEAN:
A. Um-hm.
KENNEDY, Q.C.:
Q. So, are New Brunswick's almost $70,000.00 claim, is that inconsistent with the prevailing medication literature, even though there is a cap?

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MR. STEIN:
A. I think you can make the case that even New Brunswick's is a little high, probably a product of the cap being increased a few years ago.
KENNEDY, Q.C.:
Q. And PEI at approximately 73,000 or almost 73,000, that that is inconsistent with the prevailing medical literature even though they have cap. Is that the position?
MR. STEIN:
A. Saying it's probably a product of also them having a higher cap than they used to have.
KENNEDY, Q.C.:
Q. Now, I'm assuming that and please correct me if I'm wrong, but out of the—we started out with 1977 cases or whatever it was with the Closed Claims Study. We went down to 1741 because there was 236 Intact files eliminated. Does that sound right, those numbers should generally right?
MS. DEAN:
A. Yes.
KENNEDY, Q.C.:
Q. Okay. None of those cases—did any of those cases go to court?
MS. DEAN:
A. I'm not aware that they did.
KENNEDY, Q.C.:
Q. They wouldn't be involved in the Closed Claims Study if they'd gone to court, would they?
MR. STEIN:
A. If they were closed, they would be.
KENNEDY, Q.C.:
Q. Yes, okay. So, do you know if any of those cases had gone to court?
MS. DEAN:
A. I would not know that information.
KENNEDY, Q.C.:
Q. Now, Ms. Dean, you've heard Ms. Elliott's testimony and so with the $5,000.00 cap, the range of savings for the premium that we currently have could be from a hundred and dollars to below a hundred dollars, for the consumer of this province.
MS. DEAN:
A. I believe –
KENNEDY, Q.C.:
Q. Do you agree with that?

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MS. DEAN:
A. - her report said that that savings amount would be for the required average premium which she noted in her report would be about 17 percent higher than what it was in 2017.
KENNEDY, Q.C.:
Q. So, what she's put in her report, does that include the increase of 17 percent or is that another 17 percent onto that?
MS. DEAN:
A. That was in the footnote, so she did do the calculations.
KENNEDY, Q.C.:
Q. Okay, so maybe I missed that, but does the projected savings on the $5,000.00 cap, does that include the 17 percent increase? Or would the 17 percent increase be on top of that?
MS. DEAN:
A. It would be beyond that which was the average in 2017.
KENNEDY, Q.C.:
Q. Okay. So, we bring in the cap, we can save even less than $100.00 and then put 17 percent onto it right away. Is that what

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you're suggesting?
MS. DEAN:
A. That's not a decision that I'm in a position to make.
KENNEDY, Q.C.:
Q. I want to end with one example and see if this would come within your minor injury definition, or the minor injury definition, excuse me, not yours, the minor injury definition New Brunswick, Nova Scotia—so, this is my last question for you. So, whiplash 1 and 2 would be considered, under those definitions, minor injuries, correct?
MR. STEIN:
A. It would depend on if it resulted in a serious impairment which is also defined in those legislation regulations.
KENNEDY, Q.C.:
Q. Okay, but whiplash 1 and 2 by their very nature, they're the—I think the Oliver Wyman definition, they were in number 1. Oliver Wyman definition number 1—Ms. Dean, you were here for that, remember?
MS. DEAN:
A. Um-hm, yes.

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KENNEDY, Q.C.:
Q. So, they would be minor injuries within the legislation, wouldn't they?
MR. STEIN:
A. They would be eligible to be minor injuries, depending on if the injury resulted in a serious impairment on the individual.
KENNEDY, Q.C.:
Q. Now, have either one of you examined closed claims files?
MS. DEAN:
A. No.
MR. STEIN:
A. No.
KENNEDY, Q.C.:
Q. Okay. So, you get a closed claims file, it could be going on for two years, 12 months, two years, not days or weeks because the person is represented by a lawyer. They get medical clearance. The doctor says your injury is either as good—the injury has resolved as good as it's going to or you're better. That's when the claims process, negotiations process would commence. So that person who has a whiplash 1 or 2 could

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have had 50 physiotherapy treatments, 50 massage treatments, not able to lift anything, wash the house, clean the house, lift the laundry, pick up the child, play with a child, sleep properly, driving uncomfortably, can't go to the gym, play regular sports, could miss some work, is that the person now that you, the IBC says should be subject to the five—the accident innocent, innocent accident victim, this person should be subject to a $5,000.00 cap?
MR. STEIN:
A. That's not what we're saying. The definition that is being used in the other provinces and the ones that we've recommended here is that it's a combination of the person's injury, is it some of the injuries you're speaking about? Yes. But did that injury have a functional impact, meaning did it substantially affect the injury person's daily life? You put the two of those together that would determine if that individual is a minor injury in relation to the cap.
KENNEDY, Q.C.:

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Q. And Ms. Elliott has stated in her Closed Claims Study or the Minor Injury Reform, MIR, Minor Injury Reform Cost Estimates, that 66 to 76 percent of the closed claims files would come within that minor injury. Are you aware of that, Ms. Dean?
MS. DEAN:
A. I am aware of that number.
KENNEDY, Q.C.:
Q. I don't have any further questions, thank you very much.
CHAIR:
Q. Thank you, Mr. Kennedy, Mr. Feltham. Mr. Gittens, are you –
MR. GITTENS:
Q. Thank you, Madam Chair. Ms. Dean, I just wanted to confirm an item that Mr. Kennedy bought to your attention and there was some very slight discussion about it and that was the question of whether or not in the 1,741, I think it was, 1,741 closed claims that was part of the Oliver Wyman study, I believe there was a comment to the effect that none of those had gone to court. Do you have any knowledge to contradict that?

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MS. DEAN:
A. I do not.
MR. GITTENS:
Q. Okay. I believe in the report, if I'm correct, that there was comment earlier that none of those closed claims showed any court involvement. I'm not saying lawyer involvement, but court involvement. Anyhow, bearing that in mind, the two areas I just want to check on; in one context if none of these were a court directed result, then I presume, it makes sense, that all of these was a result of negotiations between either the party or the injured party lawyer on behalf of the injured party and one of the members of the IBC.
MS. DEAN:
A. It would be with the insurer. IBC would not be involved.
MR. GITTENS:
Q. No, no, the members of the IBC which would be the insurer.
MS. DEAN:
A. Insurers.
MR. GITTENS:

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Q. That was just another way of saying the insurance company, that's alright, okay. So, if you're talking about a negotiated outcome, that is an outcome that both parties participate in.
MS. DEAN:
A. Um-hm.
MR. GITTENS:
Q. So, if there is a suggestion as there is clearly a suggestion throughout the entirety of these proceedings that the awards that are being paid out are too high. Am I misinterpreting that?
MS. DEAN:
A. You are not, in reference to minor injuries.
(10:45 a.m.)
MR. GITTENS:
Q. In reference to minor injuries. So, let me see if I'm back off again. You, on behalf of the IBC, on behalf of its members are saying the settlements that have been reached for minor injuries in this province are too high in terms of the sustainability of the system. Am I getting that correct?
MS. DEAN:

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A. You are, as it is increasing or making claims costs incredibly high, unsustainably high and premiums are not keeping up. So, it comes down to there's either large premium increases or the product is reviewed and repaired, for lack of a better word.
MR. GITTENS:
Q. There is a more direct solution, of course. If both of these parties are coming together and settling on amounts that are too high, one of those parties can draw the line.
MS. DEAN:
A. Well, in those –
MR. GITTENS:
Q. Nobody is twisting anybody's arm, in other words, this is a negotiated settlement.
MS. DEAN:
A. Within the current constraints of the legislative and regulatory framework in this province.
MR. GITTENS:
Q. Within the current constraints of the legislative framework and the judicial determination.
MS. DEAN:

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A. Um-hm.
MR. GITTENS:
Q. I believe that's what drives—I know it what's drives the lawyers in picking an amount that they feel is appropriate for the settlement of a minor injury. I guess the question would be what is it that drives the insurance companies in terms of settling on that particular amount?
MS. DEAN:
A. I do not work within a claims department. I would not be able to answer.
MR. GITTENS:
Q. So, therefore, the insurance companies have to take some responsibility for settling at amounts that, at the end of the day, your industry is saying is too high.
MS. DEAN:
A. Well, and certainly we're saying that loud and clear now. We've been saying it for some time, but the process had not allowed for a review of the product until this point in time.
MR. GITTENS:
Q. Yes, but let's stop for a second. In the

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existing process, and let's pick some of the numbers that has been thrown around. I don't even try to grab these numbers; there are just too many of them here. But I think there was a figure of about $38,000.00 being an average for the minor injury. Did one of your tables show that figure? We can pick another. I don't care what figure we pick, but the 38 comes to mind. Let me ask you then, what's the average for a payout on a minor injury claim? As I say, I don't really care what the number is, but you must have something in one of your reports there.

MR. STEIN:

A. We have it in our report. It would have come from the Oliver Wyman report and we're just trying to find it.

MR. GITTENS:

Q. Okay, just tell us what the number is. I don't care about the actual amount or –

MS. DEAN:

A. I don't want to cite an incorrect number.

MR. STEIN:

Q. Okay, so the average, I think you're referring to the average total settlement in

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the entire Closed Claims Study was around $39,000.00.

MR. GITTENS:

Q. Thirty nine thousand. For the exercise I want to go through, that's just as good as any other number. So, what you're saying, when you looked at, when Ms. Elliott looked at all 1,741 files and developed this number, she said the average settlement amount for a minor injury claim was $39,000.00. Is that a fair statement on my part?

MR. STEIN:

A. She said that number for—that would be total settlement, all of the claims that were in.

MR. GITTENS:

Q. Of all of the claims –

MR. STEIN:

A. In the study, yes.

MR. GITTENS:

Q. - 39?

MR. STEIN:

A. Yeah.

MR. GITTENS:

Q. Alright. So, let's just go with that

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number, 39,000. Let's walk through what happens if the insurance company said, I'm not giving you $39,000.00 for that injury. Anybody knows what happens then? The lawyer or the claimant has one of two choices, no three actually. They can walk away and say keep your damn 39,000, that's one choice, I suppose. They can accept it or they can litigate it. Does anyone have a fourth option? Are you aware of a fourth option?

MS. DEAN:

A. Other than reforming the system? No.

MR. GITTENS:

Q. No. On the day, on the ground that this person has to make a decision to accept the 39,000, they can either reject it, walk away, accept it or say to the lawyer, take them to court so I can get more because I think my injury is worth more. Would you agree that those are the options realistically speaking apart from the review that happens every, what is it, 14 years?

MS. DEAN:

A. Based on how you're framing it, certainly -

MR. GITTENS:

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Q. Based on how I'm framing it.

MS. DEAN:

A. - it seems reasonable.

MR. GITTENS:

Q. So, basically you're accepting that the insurance company does have the option of saying no, I'm not giving you $39,000.00 because we don't think—well, either we don't think it's fair or we don't think it's sustainable to the industry, whatever their reason, they can simply draw the line.

MS. DEAN:

A. Well, the options are different than what an insurance company would say. I would take issue with the insurance company saying no, I'm not going to pay. Certainly any insurance company who has a customer who has been injured in a motor vehicle collision would want that individual to get better and would want to put them back to the place that they were prior to the loss. So, that would absolutely include lost wages.

MR. GITTENS:

Q. Not arguing about what the insurance company would like to do. They would like to see

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everybody happy and everybody go to heaven. I'm talking about that on that decision about how much they're going to pay out on this particular claim, they have the option because we've just seen in 1,741 claims, I'm suggesting, there was no referral to court. So, they get to draw the line.

MS. DEAN:

A. Well, I'm not an adjuster, so I—there would be a process with an adjuster to review the claim and come up with a proposed amount.

MR. GITTENS:

Q. But we're all big boys and girls here, we know how the process works. The adjuster comes to some sort of settlement amount with the lawyer or the claimant. And if the adjuster says no, there is not settlement amount. I just don't see where you say that this 39,000 is too high and it's all the fault of the lawyers who are representing 82 percent of the claimants and negotiating this amount when for that amount to have been negotiated, the insurance company has to participate, co-operate and agree to the process.

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MS. DEAN:

A. I have stated that it would be the fault of the current insurance system within this province which includes the regulatory and legislative framework that everyone whether it's legal counsel, whether it's the victims, whether it's the insurers, all have to work within. There is a better way. And Newfoundland and Labrador is in a unique position where there have been changes that have been tried and tested in other provinces. So, let's take the best case examples, apply them here and control the cost, make this a sustainable insurance market so that drivers in this province are not paying an exorbitant amount for their auto insurance, but on the flip side of that let's ensure that victims are getting the care that they need.

MR. GITTENS:

Q. And I appreciate the talking points, but the reality is you haven't addressed the question I've put to you which is that in the current system which is a negotiated settlement system which requires both the

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claimant and the insurance company to agree on an amount that the insurance company has just as much power and authority to affect that settlement amount as does the client, as does the insured. And if the insurance company is saying we're paying out too much, they have control of saying, we're going to pay less and if you don't like it, you take us to court and see if we are correct or you are correct. Is that not a fair statement of the current system?

MS. DEAN:

A. I'm not a claims manager. I'm not an adjuster. I'm not involved in -

MR. GITTENS:

Q. But we are all reasonable people, we all can understand, same way I don't pretend to understand how the insurance industry does its figures to determine growth. I'll you some questions about that in a second. But we all know that the current legal system which has been around for about 800 years and has developed a process of balancing the interests of competing parties, can result in the system that we have here where if one

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of the parties feels aggrieved by it, they can force the other party to take them to court and make their argument before an impartial third party, a judge. So, my question to you is do you acknowledge that if these figures are too high, the insurance companies themselves have an option that they have chosen not to exercise. You may not know why; I may not know why, but they've chosen not to exercise that option. Is that a fair statement?

ROWE, Q.C.:

Q. Madam Chair, she's answered this. I mean, the matter is negotiated and it's done and the option is there for everybody to go to court.

MR. GITTENS:

Q. So therefore the suggestion that this $39,000.00 average is too high in the current circumstances is not a fault to be put at the feet of the claimant or the claimant's lawyer, it is a fault on both sides of the system because the insurance companies are participating in coming up with that $39,000.00 average figure.

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MS. DEAN:
A. Given the environment and the legislative and regulatory framework that they are working in within this province, yes.
MR. GITTENS:
Q. Okay. Anyhow, we just wanted to nail that down. It wasn't a one sided—the lawyers don't get to drive that truck. The insurance company is driving it as well. Let's get to the essence of what is before this Board and the questions I'm going about here are very general, but it suggests to the Board what it needs to know in order to make an assessment of what the insurance company is claiming on one side and what victims or the lawyers representing victims are claiming on the other side. Was Mr. Stern, is it?
MR. STEIN:
A. Stein.
MR. GITTENS:
Q. Stein, Mr. Stein, obviously in trying to make these assessments one has to pick units of time to deal with. And when you're dealing with it, your most convenient unit

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of time is a year or a number of years, I understand that. So, let us now deal on the fundamental question that's being posed between one side and the other and on one side I understand you to have been focussed or the industry, IBC to be focussed on the fact and I believe it's a fact that the cost of the paying out on third party claims exceeds the premiums that are being paid in to get that type of coverage. Is that a fair statement of the general calculation that's going on here, competition that's going on here?
MS. DEAN:
A. It's –
MR. GITTENS:
Q. On one hand, the insurance industry is saying the costs that we are paying out--and I'm narrowing it down to third party claims--the third party claims on one hand exceeds greatly the amount of money we are bringing in through premiums for that type of coverage.
MR. STEIN:
A. I would think that we're more focussed on

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the fact that premiums in Newfoundland and Labrador are a few hundred dollars higher than they are in the Maritime Provinces. And that the cost of third part bodily injury claims when we look at all the different coverages that make up insurance, that third party liability bodily injury claims are also several hundred dollars higher than in the Maritime Provinces. And so that explains—so those are the two outliers that were focussed on.
MR. GITTENS:
Q. But the calculation that this Commission has to make is to determine—they're being asked to determine if, and I think the word has been used, it's not sustainable, that these premiums that are being collected and I'm focussing on premiums for the moment versus what's being paid out for those bodily injury claims is quite askew, that the payouts are much greater than the total in premiums being collected.
MR. STEIN:
A. In general over the last few years, insurance companies have collected fewer

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dollars in revenue than they have paid out in claims cost and they're operating expenses.
MR. GITTENS:
Q. Isn't that the same, slightly different way of saying what I just said in terms of on one hand, one side of the equation you have the premiums, on the other side you have the payouts and adjusted—and costs, if you want to add that to it. And as a result of that, you're here saying this is not sustainable.
MR. STEIN:
A. That's what I was saying, I was adding in the cost to that.
MR. GITTENS:
Q. Right, fair enough, no issue there. I'm glad you can clarify it. But if we focus on only those two sides of the equation, we ignore what on the trail lawyers side they're saying, you're ignoring the real profits that the insurance company is making as a result of the combination of—and here is what I'm going to suggest the equation should be—on one hand, the incomes to the insurance company which is the premiums and

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secondly, the investment income. That's what should be on one side of the equations; premiums and investment income. And on the other side of the equation would be the payouts on the bodily injury plus the operating costs plus the reserves that have been put aside. There's two levels of reserves. I think you've already established that. Reserves that are put aside by the insurance company themselves and the reserves that are put aside by the IBC on behalf of the insurance companies, or has been designated by the Ernst and Young, for instance.

MR. STEIN:

A. Yeah, it's not IBC; it's Ernst & Young or GISA, yes.

MR. GITTENS:

Q. Okay, Ernst & Young or GISA? Alright. So, I'm saying if we're going to look at what's really going on here, it's not sufficient, and that's my only point, it's not sufficient to simply look the figures of the payouts on the personal injury costs and the operating costs and compare that with what's

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being paid in on premiums. That's my only point, that the more comprehensive analysis requires an equation that has, on one side the premiums because that's income to the insurance company, but then the insurance company takes those premiums and invests it. So, their total revenues are going to be a total combination of premiums and investment income.

MR. STEIN:

A. We agree that that would be –

MR. GITTENS:

Q. That's correct.

MR. STEIN:

A. - how you would assess profitability and I believe that's all covered in the Oliver Wyman profitability report.

(11:00 a.m.)

MR. GITTENS:

Q. And then on the other side of the equation, the elements that go into that are the payouts, the operating costs, the reserves on the first level plus the reserves at the second level. Is that a fair statement? Am I missing anything?

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MR. STEIN:

A. I don't think you're missing anything.

MR. GITTENS:

Q. Okay then. So then, before this Board at the end of the day, can make either a recommendation or an observation, it has to have one, two, three, four, five, six pieces of information for any given fiscal year. Is that a fair statement?

MS. DEAN:

A. Yes.

MR. STEIN:

A. That's a fair statement.

MR. GITTENS:

Q. Okay. So, therefore, until this Board is able to construct from the information given to it a chart that has for any given fiscal year, the premiums, the investment income, let me repeat that, the investment income and also know what the reserves are and how much of those reserves may be available years later because we can't tell for—this is 2018, we certainly can't tell for 2017 whether those reserves are adequate or not. Is that a fair statement?

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MR. STEIN:

A. It depends on which year you're referring to.

MR. GITTENS:

Q. Yes, I'm saying today. If this is 2018, even if we had the figures for 2017 and the reserves, we still wouldn't be at a point where we can make a determination as to how much of those reserves would be required as part of the payout. It'll take several years before the reserves can be truly assessed. Is that a fair statement?

MR. STEIN:

A. It'll take several years until you know the ultimate value of those claims, yes.

MR. GITTENS:

Q. Okay, well you say ultimate value of those claims, I say be assessed. We are both saying the same thing, are we not?

MR. STEIN:

A. I think we are.

MR. GITTENS:

Q. Okay, good stuff. So now if we go to the Board and say, Board, your report needs to have these six pieces of information before

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you can make an assessment or a recommendation to assess whether or not the premiums are, in fact, deficient for the payouts on personal injury. That would be a fair statement to the Board. That they need to have that full picture going back several years before they can make any, draw any conclusions.

MR. STEIN:

A. I believe that the Board would need that information and that they have that information in the actuarial reports that they have commissioned already.

MR. GITTENS:

Q. But the actuarial reports that have been commissioned goes back to 2010. It doesn't go back to 1990, it doesn't go back 20 years. Are you aware of that?

MR. STEIN:

A. I don't think you need that information to determine that premiums are too high here and that third party liability claims costs are too high.

MR. GITTENS:

Q. Maybe not, but if you want to determine the

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profitability of the insurance industry where we know that in certain years they make fantastic profits, 30 percent sometimes, as compared to the 10 percent that is mandated or agreed upon. Then for us to make an assessment as to whether or not this was a bad year or a year that indicates that it will be unsustainable, we need to know if they had years in which they made 30 percent profit and are now coming back before the Board for the year they made a 9 percent loss.

MR. STEIN:

A. I do not believe you need to go back all the way into the '90s or the early 2000s to make an assessment that right now the market is not healthy and is not good for consumers.

MR. GITTENS:

Q. But as –

CHAIR:

Q. Mr. Gittens, I'm trying to find a place where I won't break your train of thought, but you can tell me if this is good time or a bad time for us to take our break.

MR. GITTENS:

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Q. No, by all means, Madam Chair, I'm always accommodating to the Chair taking a break.

CHAIR:

Q. We'll see you in 30 minutes.

(BREAK – 11:06 A.M.)

(RESUME – 11:39 A.M.)

CHAIR:

Q. Back to you, Mr. Gittens.

MR. GITTENS:

Q. Thank you, Madam Chair. Mr. Stein, I think we had, just before the break, at least determined the items that should have been looked at in order to come to a determination of profitability or non-profitability of the insurance industry. And we had talked about six components to that and I think where we differ in the last of the question was you were saying that you don't think you need to go all the way back to determine what the Board needs to determine. That you felt that looking at one year, you can tell what the cost versus the premiums are for that particular—maybe I'm misquoting you, so do you want to correct that for me?

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MR. STEIN:

A. Yeah, I just said you don't have to go back all the way into the '90s and early 2000s. I didn't say one year, I think looking at multiple years, I think, is responsible.

MR. GITTENS:

Q. Fair enough. Madam Chair, I'm wondering if we can refer to the chart that Paula Elliott provided that had Newfoundland and all the other provinces.

MS. GLYNN:

Q. So, the one with Newfoundland was an IBC exhibit, you want Newfoundland included?

MR. GITTENS:

Q. Yes, I'd like to see the one with Newfoundland included.

CHAIR:

Q. That's the IBC exhibit.

MS. GLYNN:

Q. Yes.

MR. GITTENS:

Q. That was the IBC one, right?

CHAIR:

Q. Yes.

MR. GITTENS:

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Q. Okay, So Mr. Stern (sic.), as you were saying, you don't have to go back a whole bunch of years, right, but if you do go back a bunch of years and that's my expression, not yours, I like very precise terms like "bunch of years" as you can tell, you would want to include the period back in 2002, 2003, 2004 because in 2002, 2003, 2004 you can see there was a significant decline in the frequency of incidents, events I think it's called in your industry, that precipitated a major drop in the costs of the injury, the personal injury claims. Is that a fair statement?

MR. STEIN:

A. This is the frequency of bodily injury claims.

MR. GITTENS:

Q. Right. And if I recall the evidence given in here earlier and you may not have been present for that, it's that the industry, insurance industry or the IBC didn't anticipate that significant drop in the frequency at that time. Is that a—are you aware of that?

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MR. STEIN:

A. I've heard that before.

MR. GITTENS:

Q. You've heard that –

MR. STEIN:

A. I was not around IBC at that time.

MR. GITTENS:

Q. Right, but you're the policy guy for IBC and I take it you've looked at these figures. Do you have an explanation as to why they got it so wrong? The last time they were before the Board when they said that, you know, we have to close up shop, leave the province, you know, the sky is falling, but in fact, what happened was there was there was a major decline in the frequency and consequently the cost and consequently the profitability of insurance companies rocketed for the following years between '03 and '07 to the highest level in recent years around 20 to 30 percent. Did you, in your policy discussions, come across this anomaly and have an explanation as to why it occurred? Why the IBC got it so wrong the last time?

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MR. STEIN:

A. First, my name, Mr. Gittens is Mr. Stein, so just so you –

MR. GITTENS:

Q. Forgive me, with a name like Gittens, I got to get it right, someone else's, Mr. Stein.

MR. STEIN:

A. I just don't want you to get it wrong on the record all the time. Okay. So, the purpose of this slide was in response to Oliver Wyman's report saying that the frequency, if you were to impose a cap in Newfoundland and Labrador, the frequency of bodily injury claims would decline. And the Oliver Wyman report referenced what happened in the early 2000s in Nova Scotia and New Brunswick. And what we wanted to show with this, by throwing in Newfoundland and Labrador is that other factors besides the minor injury cap could have or likely did cause the frequency decline. And some of them could be, you know, improvement in vehicle safety, you know, road safety efforts, stuff like that, but it's hard to know exactly for sure why the frequency declined. But we feel—we

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do not think it was the cap on it. We do not believe that it was the cap on its own that caused that decline in Nova Scotia and New Brunswick. If you look at one year, you might think so. If you look at multiple years and you see it continuing to decline indicates that other factors were at play.

(11:45 a.m.)

MR. GITTENS:

Q. Okay, but what we're saying here and I'm not disagreeing with you that there were other factors involved and I think you, very accurately, and I thank you for not suggesting it was just the caps that were imposed; this existed prior to the caps being imposed in Nova Scotia and New Brunswick, but it was a decline that the industry obviously because they were here asking for the cap to be put in place because they had all these dire concerns as to what would happen in '03, '04, '05 and in fact, despite all the wonderful calculations that were put before the Board at that time they were completely wrong. Is that a fair statement?

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MR. STEIN:
A. I don't think they were completely wrong. I think they were right that bodily injury claims costs were quite high at that time and that if you were to put on a cap, cost control such as a minor injury cap, that it would reduce those costs and eventually it led to some pretty significant, you know, premium savings for consumers.
MR. GITTENS:
Q. Led to—but wasn't those years, '03 to '07, years in which the insurance industry made record profits?
MR. STEIN:
A. I don't know if they were record profits. I don't know what they did in each individual year, but I would anticipate that they made profits.
MR. GITTENS:
Q. They didn't die off and fly away as they alleged that they would.
MR. STEIN:
A. No, they did not.
MR. GITTENS:
Q. Okay. Those are all the questions I have

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for this witness. Thank you, Madam Chair.
CHAIR:
Q. Thank you, Mr. Gittens. Mr. Fraize?
MR. FRAIZE:
Q. Yes, I have a couple. So, I'll aim a question at both of you, I suppose. Do you agree that a victim of an accident may not be an insured?
MS. DEAN:
A. Yes.
MR. FRAIZE:
Q. Okay. So, there will be some victims that are injured which are not paying premiums.
MS. DEAN:
A. Correct.
MR. FRAIZE:
Q. So, in our discussions today we should be looking at a triangle, insurance company, insured, victim, correct?
MS. DEAN:
A. Correct. It would fair to also say that if there were an uninsured victim, there is coverage -
MR. FRAIZE:
Q. No, I'm thinking about someone that doesn't

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have a driver's license, because of medical reasons, they don't drive.
MS. DEAN:
A. Correct.
MR. FRAIZE:
Q. They are a pedestrian walking down the street.
MS. DEAN:
A. Yes.
MR. FRAIZE:
Q. They are persons in a wheelchair crossing a crosswalk and gets hit by a car.
MS. DEAN:
A. Yes.
MR. FRAIZE:
Q. They don't have insurance premiums.
MS. DEAN:
A. Correct.
MR. FRAIZE:
Q. Now, so the cap that insurance companies seem to want to have is going to affect the victim, correct?
MS. DEAN:
A. In terms of –
MR. FRAIZE:

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Q. Is that a yes?
MS. DEAN:
A. In terms of the payout in addition to –
MR. FRAIZE:
Q. No, no, I'm not talking about –
MS. DEAN:
A. - the medical bills.
MR. FRAIZE:
Q. The cap is going to affect the victim in terms of what the victim will receive as compensation resulting from the accident, is that correct?
MS. DEAN:
A. Correct, in that it is over and above any medical treatment in addition to loss wages.
MR. FRAIZE:
Q. Yes, but going back to what I'm saying. The cap would affect the victim which is one of three parties that are involved in our discussions. Is that a yes?
MS. DEAN:
A. Correct, it –
MR. FRAIZE:
Q. Okay.
MS. DEAN:

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A. - would impact the end.
MR. FRAIZE:
Q. Now, do you agree that we have to find our victim as we find, like, when an accident occurs, we don't know that victim may have other medical issues whereby an accident would have a greater effect on that person than another person. Correct?
MS. DEAN:
A. Correct.
MR. FRAIZE:
Q. Okay. So, when we talk about the cap and I'm going to talk about this concept of minor in a few minutes. You could have a situation where, let's take an example of a person that's in a wheelchair and they have what would classify as one of your minor injuries, but the injury itself on that person has much greater effect than on a person without being in a wheelchair. Do you agree with that?
MS. DEAN:
A. That is part of why we are recommending the diagnostic treatment protocols. It is a system in place in other provinces where a

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particular injury, there's a pre-approved schedule of treatments. So, the individuals get into treatment immediately. However, not everyone is created equal and responds to an injury in the same way. You and I would heal differently if we were hit by the same car. So, there's –
MR. FRAIZE:
Q. What I was thinking about –
MS. DEAN:
A. Sorry.
MR. FRAIZE:
Q. What I was thinking about, I know where you're going with this, but my comment is when someone has got limitation to begin with and using your words, "minor injury", that so-called minor injury, that injury affecting a muscle have a far greater effect because their mobility may be using fingers or their arms or they can't move their head. My point is injuries affect people in different ways. So, when we start talking about putting a cap and defining a set of injuries that will not, would come under the cap and have a certain amount, you're going

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to end up affecting those that are dramatically affected by what you would call a minor injury. Is that assumption, is that proposition you're able to –
MR. STEIN:
A. No, we look at it a little differently. So, -
MR. FRAIZE:
Q. I think you would.
MR. STEIN:
A. And well, let me explain. I think we talked about this; we did talk about this earlier. The minor injury definition that's used in other jurisdictions and that we've recommended be used here doesn't just take any—doesn't just say okay, you have a sprain/strain or whiplash, you are automatically minor. There's a functional assessment associated with that. Does that sprain/strain or whiplash that resulted from the collision cause the individual to have a serious impairment? Meaning, does it affect their daily lives, able to go to school, work, do daily activities? Recognizing that the same injury can affect people

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differently. So, based on that definition, if the injury results in the person having a serious impairment, they can't do their daily activities, they would not be subject to the cap.
MR. FRAIZE:
Q. Do you agree that having a cap in motor vehicle accidents is going to create a two-tier system? And now, where I'm going with this, if an individual happens to come in this building and slips and has a slip and fall and they suffer a so-called injury that will fall under your cap, they would have an action against the owner of the building without a restriction on damages, correct?
MR. STEIN:
A. I believe so.
MR. FRAIZE:
Q. Because what we're doing is for automobile accidents we're going to have the injuries restricted in terms of what quantum is given. Now, do you agree that there is more cars now than 10 years ago?
MR. STEIN:
A. I haven't checked the numbers, but if you

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say that's right, let's assume.
MR. FRAIZE:
Q. There seems to be more cars, let's assume there more.
MR. STEIN:
A. Yes, there does seem to be more cars.
MR. FRAIZE:
Q. And we got less accidents; more cars, less accidents. Picking up on discussions here this morning, the settlements are all negotiated between the negotiating parties. So, what you're trying to do once, going back to the victim, you're trying to put a lid on what their damages are worth. Is that what you're trying to do?
MR. STEIN:
A. We're trying to find balance –
MR. FRAIZE:
Q. You got three parties in this whole game, the victim, the insured –
MR. STEIN:
A. We're trying to find balance in the system recognizing that all those more cars, that means lots more people buying insurance in this province at premiums that are a few

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hundred dollars higher than everywhere else.
MR. FRAIZE:
Q. You say a few hundred dollars, are you talking about a hundred dollars?
MR. STEIN:
A. No, two to three.
MR. FRAIZE:
Q. Oh, okay, a little less than a dollar a day, is that what you're talking about?
MR. STEIN:
A. If that's what it comes out to?
MR. FRAIZE:
Q. Your words.
MR. STEIN:
A. Yes, $300.00 higher.
MR. FRAIZE:
Q. Okay. Now, when we have a disagreement with an insurance company, whether it's on disability insurance or how much damages are worth, we go to court to have it determined, especially on disability insurance. We seem to have a lot of that going on, trying to figure out if a person is disabled or not. But when we go to court, we have to prove our case and I think it was on page 5 of the

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report. You say, "legal decisions and the associated compensation amounts often do not align with prevailing medical literature.
MS. DEAN:
A. February report.
MR. FRAIZE:
Q. February report. My only point being, when we disagree and we can't agree on settlement, you go to court. In my experience in court, we got to prove our case. We bring out medical evidence and a judge listens to us and looks the prior case authority and determines the amount. By putting a cap in, what you've done is you've taken away or are you saying that the prior decisions of the courts were too high?
MS. DEAN:
A. What we're saying is the system needs to change. We're seeing upward pressures on claims, premiums are not covering claims. These systems and proposals that we are discussing in our reports have worked in other provinces, and we believe that they could work in this province in terms controlling costs for the many to pay for

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the claims of the few. In addition, we're also proposing options to get people better quicker.
MR. FRAIZE:
Q. Don't you think if we can't agree or come to a negotiated settlement--when we have disputes in our society, regardless of what they are, we go to a court and have our say, either we win or we lose. But what we're saying here, going back to my triangle, insurance company, insured, victim, the victim, excuse the pun, gets the short end of the stick; you've capped them. Shouldn't the victim has his right in court, if we can't prove, or he or she can't prove their damages?
MS. DEAN:
A. In these systems in neighboring provinces, people are getting better and people are getting compensated. The only difference is that claims costs are controlled and kept at a sustainable level.
MR. FRAIZE:
Q. Are they getting better or are they giving up?

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MS. DEAN:
A. They're getting better.
MR. FRAIZE:
Q. Now, I'm not trying to give you a hard time. I represent a group here that are affected by accidents, and a variety of them. I have a problem when you create a two-tier system being auto accident and non-auto accident. And you take away a person's right to go to court to prove their case. If you can't prove it, the case rules against you. And when I look at accidents, I see an accident like a pie and what you're doing is you're going to define a portion of the pie which you're going to say this is how much it's worth. We keep in our discussions here talking about minor injuries. They're not minor injuries. They're a group of injuries which the insurance companies want to identify as into a pot which they can put a cap on. Am I correct?
MS. DEAN:
A. According to medical literature and the practice in other provinces.
FRAIZE, Q.C.:

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Q. Now I've had the opportunity to see how doctors react in court and they defend their positions, they say this is an injury and so forth, so I presume the medical doctors read the same literature that you're referring to, right. So going back – a couple of further comments. Just going back, let's not call it minor injuries, let's just call it a group of injuries that the insurance companies wants to put in a little box and say this is the amount it's worth.
MR. STEIN:
A. We also want to give them pre-approved evidence based treatment through the diagnostic treatment protocols.
FRAIZE, Q.C.:
Q. But you just want – I'm just saying let's not mislead ourselves. Don't call it – because there's quite a bunch of injuries in that box. It's not just minor, but there is a bunch of injuries in that box. Let's call the injuries that you want to apply to the – in other words, you want to have those group of injuries excluded from the tort system. Let's not call it minor injuries. I think

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those are all my comments. Thank you.
MR. STEIN:
A. Just to respond, we don't want to exclude anyone from the tort system. We're just talking about non-pecuniary damages. We're also talking about providing access to evidence based treatment on a pre-approved basis for people with those injuries.
FRAIZE, Q.C.:
Q. No further questions.
CHAIR:
Q. Thank you, Mr. Fraize. Consumer Advocate.
(12:00 p.m.)
BROWNE, Q.C.:
Q. Thank you, Chair. If we can go to your presentation, the average written premium, page 1, and for consumers, consumers are monitoring their premiums and consumers are concerned with the increase in premiums, and we see that the average premium, and we don't know exactly what the components are o average here, but be that as it may, it seems to be higher than other provinces. Now when – and if we can go to the – if we can just move from that for a second, the

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average premium by province, if we go to page 3 of the – yeah, the average premium by province, page 3, the top diagram there – sorry, page 5 of your presentation. It's number 5 of your presentation, sorry. We see there the average premium just going right back to 2001 according to this, it was always a bit higher in this province than in the other provinces, according to that, if it's average premium by province, but I bring you back to 2004 for a minute because in 2004 the government of the day introduced a $2,500.00 deductible and brought in other measures, and subsequently there were some changes. People were promised cheaper rates, good insurance coverage, balanced rate reductions. Now if we look just at 2004 and 2005 based on this, we see that the cost of premiums for consumers did go down for a couple of years, but then in 2006, we see the average premium by province – I mean, Newfoundland has taken off there, and right up to now, 2016. My question is this, at what point did you make representation to government regarding these increases in

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premiums that were being paid by consumers to ask for some action, or did you?

MS. DEAN:

A. We have been sharing data from the insurance industry for a number of years with government in this province, as we do in every province. So every year, GISA releases its reports publicly, we collect that information and prepare slide deck such as this, and will share some of that information with government with the hope that if there are pressures building within any given system, we can have conversations and perhaps a review before we get to the point where premiums are prohibitive for consumers, and particularly those on fixed incomes due to the rising of claims pressure within a market.

BROWNE, Q.C.:

Q. Now you've given evidence or you stated that you lobby, you're a lobbyist?

MS. DEAN:

A. Yes, I am.

BROWNE, Q.C.:

Q. Did you at any point lobby any of the

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administrations from 2004 forward to bring in changes to effect what you're trying to do here?

MS. DEAN:

A. We have suggested that a review would be a good thing to do, to take a look at what's happening within the market. We have been doing that for years since the mid 2000's most certainly.

BROWNE, Q.C.:

Q. So you've lobbied government to seek changes. From what year within your experience did you commence the lobbying?

MS. DEAN:

A. Within my experience, I would recall late '08/09.

BROWNE, Q.C.:

Q. And what were you lobbying for at that point?

MS. DEAN:

A. For a review of the auto insurance product. We don't profess to have all the answers. As an industry trade association, we collect information, we collect data, and we share that information. We want to be able to

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provide the best information we possibly can to any government, and from my office, any of the four Atlantic provinces.

BROWNE, Q.C.:

Q. So that was 2008. This is 2018. Was there any result to your efforts to bring in some systemic changes?

MS. DEAN:

A. There was not. There was always hope the market would turn around. It clearly hasn't, and as we can see with the trajectory of that line, it's not going to turn around any time soon, and we certainly know that when the other Atlantic provinces conducted more recent reviews of their products, we do mention what's going on in those provinces to those who regulate our industry in this province, but each province must make its own decisions.

BROWNE, Q.C.:

Q. And one of the governments attempted to deal with some of this expense by reducing or eliminating the retail sales tax on insurance. This diagram, does it, in fact, include these reductions or any reductions

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or is it ex any kind of RST or HST?

MR. STEIN:

A. I mean, everything that's included in a premium would be included in this. So if you pay taxes on your premium, it's there.

BROWNE, Q.C.:

Q. Now here you are suggesting a $5,000.00 cap?

MS. DEAN:

A. Yes.

BROWNE, Q.C.:

Q. And why $5,000.00 when New Brunswick has found that they needed to increase their cap to $7,500.00, and I do believe it's a similar cap in the other Atlantic provinces? Why would you suggest $5,000.00?

MS. DEAN:

A. It comes down to what was the numbers that were presented in the Oliver Wyman Reports. So Oliver Wyman presents that there was a premium deficiency in 2017, premiums need to increase by 17 percent, which is about $200.00. If we look at the required – the average accompanying required premium reductions that was presented by Oliver Wyman as well, and it's on page – we did an

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excerpt on page 5 of our May, 2018 report. The cost savings for 15 percent frequency change is $140.00 to $175.00. So best case scenario, if reforms are implemented, frequency drops 15 percent, there's still a $25.00 increase that would be needed to get to the required premium amount for 2017. So a long way of saying the best case scenario with frequency drop, that amount as estimated by Oliver Wyman is still not the increase that is needed to break even, or as Oliver Wyman had included in the report, to assume a 10 percent ROE, which is allowed within this province. So we need these numbers to be right as an industry, quite frankly, based on where the results are. We're also looking at the frequency discussion that has occurred within this hearing over the past number of days, in that in the early 2000's the frequency drop in New Brunswick, Nova Scotia, and Newfoundland and Labrador, cannot solely be attributed to reforms. There could be a number of different factors. We can't predict consumer behaviour, we can't predict

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that frequency will actually decline further, so we needed to in order to break even according to these numbers as presented by Oliver Wyman, so the $5,000.00 cap is the closest thing to get industry out of the red.

BROWNE, Q.C.:

Q. So the $5,000.00 cap will give you a 10 percent rate of return?

MS. DEAN:

A. Well, according to Oliver Wyman's calculations and a 15 percent decrease, and let's be perfectly honest, no one in this room or driving on the roads in this province are losing sleep over insurance companies losing money. The real problem comes from what happens when insurers are short money, and that means premiums must go up, and that puts additional pressure on the consumers of this province.

BROWNE, Q.C.:

Q. But when insurers are making a lot of money too, if they go beyond the range of rate of return that's expected, what happens then?

MS. DEAN:

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A. Well, that is certainly a conversation that would happen with the rate regulator, the PUB; as well as the insurer in question.

BROWNE, Q.C.:

Q. Because we saw another jurisdiction where the cap came in, the rate of return went up dramatically for insurance companies. Is that not true?

MS. DEAN:

A. I'm trying to remember the exhibits that were--there's been many.

MR. STEIN:

A. That is true, and also during that time, premiums were declining and, you know, going back to the previous graph that we had from the slide presentation, you saw premium declines, Nova Scotia, New Brunswick and Prince Edward Island, just showing that the market's healthy, you know, consumers benefit by lower and stable premiums.

BROWNE, Q.C.:

Q. But was there a--was it commensurate with the--was the decline commensurate with the increases in profits that the industry was receiving?

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MR. STEIN:

A. It's not--because they're projecting the actuaries for the companies are projecting forwards, it's, you know, there's quite a bit of degree of uncertainty in general, best of times. Then when you add in a reform where you're trying to predict what the effect is, there's even a little bit more uncertainty, so, you know, you can look back in time and say, "hey, you know, that profit seemed a little bit high". Okay, it was hard to know at that time what the experience was going to be, but the positive experience from all of this is that premiums just kept going down and down and down and down in those provinces and that's why people are paying about $300 less for insurance and people there have access to more accident benefits than they do here.

BROWNE, Q.C.:

Q. So, if the Public Utilities Board was to set a range in your rate of return, let's say 10, 12 percent, 13 percent, something like that, and you go up to 20 percent, what remedy is available to consumers to claw

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back what it wasn't--not intended in the premiums for you to realize?
MR. STEIN:
A. Well, it's not--you can't really go back in time, but, you know, that graph showed, they were--insurers responded the next year, lower premiums, consumers benefited, lower premiums the year after that.
BROWNE, Q.C.:
Q. Is there any formula that was derived in these jurisdictions to ensure that consumer premiums went down commensurately with the increases that the insurance industry was receiving?
MR. STEIN:
A. I mean, I don't think that there was any--I mean, I don't think--I mean, it would work as if the companies would have now more experience in this new environment and then be able to predict, okay, here is what next year is likely going to be, here's how we can respond, and they felt that they could respond by lowering premiums. All these rate changes have to be approved by the provincial regulators, rate boards and, you

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know, through that process felt that the premiums set at that time, which were lower than the year before, were adequate.
BROWNE, Q.C.:
Q. You're making a proposal here and it was in your February 2018 first filing, and it's found on page 12 of 17 and down below under, "Reform Proposal", it says, "IBC recommends that the Newfoundland and Labrador government transitioned to a market-based approach for rate regulation by replacing the prior approval framework with a use-and-file framework focussed on regulating overall rate levels. The intent is to create an environment for consumers to reap the benefits of increased competition and/or more accurate premiums relative to risk and for the regulator to position itself to be able to identify a remedy and a solvency or market conduct concerns efficiently by focusing its limited resources and overseeing the market." And in Appendix B are the components of IBC's proposed use-and-file framework. What exactly are you proposing here? Can you put it in common

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language?
MS. DEAN:
A. Sure, well, first to address, we recognize that this proposed piece of reform is outside the scope of this particular hearing and we recognize that Service NL will be taking a look at this proposal; however, for the sake of transparency, we prepared one submission that would come through--to the PUB through this process and that same submission is going to Service NL again, so all parties are aware of everything that IBC is putting out there. One of the things that this would address would be the cost of filing, which is, I'm to understand, again, I don't work with an insurance company, but I'm to understand that rate filings are a costly endeavor and when you have, let's say just hypothetical numbers, if you had a $200,000 rate deficiency in premium, so a premium deficiency to cover your claims, yet the process costs $500,000 in order to file for a rate increase, you're going to wait until you have perhaps a $600,000 rate deficiency to make that cost worthwhile.

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So, it's recommending taking a look at the rate regulation process within this province.
BROWNE, Q.C.:
Q. So, you want some kind of automated adjustment formula, the same way electric utilities used to have in this Province some years age where the adjustment would take place based on a formula, rather than a hearing?
MS. DEAN:
A. Well, and I'm not familiar with that process, but there would still be checks and balances and a huge role for the rate regulator in another system.
(12:15 p.m.)
BROWNE, Q.C.:
Q. And you look like you're trying to say something there?
MR. STEIN:
A. No, I'm just looking at you. I don't have anything to add.
BROWNE, Q.C.:
Q. Okay. I thought you might have had something to offer. So, these reformed

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proposals are all based on, and page 14 of 17 there, we see them. You have Appendix A and then you go on to proposed rate regulation framework and Appendix B. Now, why did you settle on a cap to recommend, as opposed to say, a $10,000 deductible?

MS. DEAN:

A. Based on the experience of a minor injury damages cap in other neighbouring provinces and taking a look at claims costs where, quite frankly claims costs are coming from in this province, and what could be implemented in order to control those costs and based on the experience in other provinces with the cap, that is how we arrived at this proposal.

BROWNE, Q.C.:

Q. But other provinces have a deductible, such as Ontario, they went to a large deductible in the 30,000 range, but has anyone tried a deductible in the 10,000 range to see if that would give any relief to the cost of premiums for consumers, which is what our objective is here?

MR. STEIN:

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A. I think it's--the Ontario deductible is not the--it's not like it's the Newfoundland deductible, it's just instead of 2,500, it's like 3,700. It's a completely different system. In Ontario you cannot sue for non-pecuniary damages unless your injury is serious and permanent, then if you meet that threshold, which is only the most serious injuries, then you have the ability to pursue a bodily injury claim and then the deductible is applied; whereas in Newfoundland it's just, as you know, 2,500 on all. So, the Ontario system, if you're talking about access to tort is quite a bit more restrictive than what we're talking about here with caps.

BROWNE, Q.C.:

Q. In reference to Facility Association and the taxi industry, is there any discussion within Facility Association of deriving various products to assist those who find themselves in Facility to get out? It seems once you're caught in there, there's no escape card.

MS. DEAN:

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A. I'm unfortunately not aware, I don't work for the Facility Association, but if we are talking about taxis, I do know from an insurer perspective the rate of claims is certainly higher than those insurers would consider at this point in time.

BROWNE, Q.C.:

Q. Okay. I think my colleague might have some questions.

MR. WADDEN:

Q. Thank you. Ms. Dean, now we've met; Mr. Stein, we haven't. My name is Andrew Wadden, I'm counsel for the Consumer Advocate. I've just got a few questions, some points of clarification.

MR. STEIN:

A. Sure.

MR. WADDEN:

Q. Can we just go to page three of your initial submission, I guess that's the February submission. Under "Consumer Outcomes", that first paragraph there, just something I wanted to get a better understanding of. If you go about three lines down, it indicates, "Maritime consumers also have access to more

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medical rehabilitation and disability income benefits". I'm sort of hooked on the word, "more", there, can you just elaborate on that a bit more for me? Exactly what does "more" mean? Flush it out for me.

MR. STEIN:

A. More means a few things. So, the accident benefits limits in, we'll just focus on the two main ones, medical rehabilitation in Newfoundland and Labrador is $25,000; in the Maritime provinces it's $50,000. Income replacement is, in Newfoundland and Labrador, $140 per week; in the Maritime provinces, it's $250 per week. And then the third thing which we've put an emphasis on is Nova Scotia has it and Alberta has it, no other jurisdiction in the Maritimes has it. I use the diagnostic and treatment protocols, which is four people with sprains, strains or whiplash, they get access to pre-approve--they get access to evidence based treatment on a pre-approved basis. So, you don't have to apply for it, you just go into treatment, the treatments designed to last for, you know, 21 treatment

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visits or 90 days for physiotherapy, chiropractor, if you need to visit a physician and then, you know, some massage and some acupuncture is also available.

MR. WADDEN:

Q. Okay. Just to get an understanding of how the two issues are tied together, is it the view of IBC that, for that to happen, for Newfoundlanders to be able to access these, we'll say added benefits, more robust accident benefits program, is that reliant upon the institution of a cap or could that be done in any event?

MR. STEIN:

A. It could be done in any event, of course, but, you know, adding in more treatment does have a cost and one of the ways of reducing those costs is to, you know, reduce the cash payments on the other end.

MR. WADDEN:

Q. Okay. To your point on cost, you know, you reference the idea of grossing up a $25,000 benefit to 50K, making a larger, weekly indemnity. I understand all that, it sounds great, but have you costed that out? I'm

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curious what that would do to premium for consumers?

MR. STEIN:

A. We have not costed it out, but if you look at like, the other jurisdictions that have those levels, their costs aren't that much different or higher than in Newfoundland.

MR. WADDEN:

Q. But you don't have exact numbers on it?

MR. STEIN:

A. We do not, not for this province, no.

MR. WADDEN:

Q. Yeah, and I'm only asking you, Mr. Stein, because one of the things as counsel for the Consumer Advocate and as a Consumer Advocate one of the things we have to do is sort of make a determination of what we're going to recommend in terms of all the things that the PUB is looking at, and one of those things is accident benefits.

MS. DEAN:

A. Right.

MR. WADDEN:

Q. So, I understand the changes you're proposing, in terms of the benefits under

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Section B, are there any proposed changes in terms to accessibility to them? Let me ask this by way of example, perhaps I'd be clearer. In my experience, and you both probably know this, I've acted for insurers in my past, I've acted for injured victims, I've been on both sides of this coin and on both sides, one thing I've seen is that some companies, perhaps some more than others tend to, in certain circumstances, put up some barriers that perhaps don't need to be there when it comes to their insureds, their customers accessing accident benefits. It's not just as simple as making a phone call and saying, "I had an accident", even though it's a no-fault product. Do you have any suggestions, any recommendations in to how to make it easier? Will there be specific ways for the customer to access the benefits?

MR. STEIN:

A. Yeah, and I think, you know, the diagnostic and treatment protocols is exactly that, it's pre-approved in Nova Scotia and Alberta. You go to your physician, you go

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to your physiotherapist, you know, they file the papers and you're put into the system and the auto insurer is also the first payer when you're in the protocol, so it's not like the--you know, you got to deal with your other insurance providers, whether it's a health benefit from work or whatnot. Auto insurance is the first payer, so it's meant to be like no hassles; get into treatment, get into treatment fast. It's evidence based, go through it, let's see how you are at the end of the, you know, the 21 treatment visits or the 90 days and then it goes into the regular no-fault system.

MR. WADDEN:

Q. Okay. Is the idea, Mr. Stein, that the customer would be able to access the accident benefits and avail of them fully, up to the maximum, say the 50,000 and without having to go--revert back to their, say, work insurer or would they only be able to access part of it?

MR. STEIN:

A. No, it's only for the--it would only be for what's within the protocols, which would be

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the--which is designed to be for the first three months of treatment for people that have sprain, strains or whiplash injuries.

MR. WADDEN:

Q. Okay. So, they'd be an initial go to, but not necessarily the only go to, the customer would still likely have to avail of their own insurance if they had it?

MR. STEIN:

A. Yeah, so it's pre-approved, first payer during the protocols, that timeframe, and then if more treatment is required after it, it would revert back into the regular accident benefit system, yeah.

MR. WADDEN:

Q. Okay. While we on the topic briefly of, you know, what it's going to cost in terms of premium, one of the other proposals within your submissions, I can't remember what page, but is the idea of DCPD. Have you looked at how that's going to impact on premiums for the consumer?

MS. DEAN:

A. We haven't looked at it in terms of premium, we do recognize that it does save costs over

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the long run, so the insureds are dealing with their insurer when faced with just a property damage claim. So, you and I are in a collision, no bodily injuries, just damage to vehicles. Your insurer pays to fix your car, my insurer pays to fix my car. I'm at fault for the collision, so I have that on my record, you do not; however, your insurer still pays to repair your car and the thought is there the insurance companies can provide that level of customer service to their own insurance, there's no subrogation with a third-party insurance company, it happens quicker and the--it levels out eventually, because your insurer will have a number of at fault drivers in these situations as they will have a number of not at fault drivers in these situations.

MR. WADDEN:

Q. Okay. Thank you, and I do appreciate the utility of it. Again though, I guess I'm just wondering, we really can't say at this point, can we, other than looking at other jurisdictions, what that does to an individual's premium, we don't know how much

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it's going to mean an increase?

MS. DEAN:

A. Correct.

MR. WADDEN:

Q. Okay. Is there a way to figure that out?

MS. DEAN:

A. I'm not an actuary, but -

MR. WADDEN:

Q. No, I understand.

MR. STEIN:

A. No, I don't--I mean, maybe a company can kind of figure it out because they'll have access to, you know, the individual vehicles of their, you know, they'll know the details of the vehicles of their customers. You know, overall, you know, it's just changing who pays, it really shouldn't have much of a cost impact, though it will on the individual, because depending on, you know, the nature of their car, you know, the insurer will know in advance they type of car that they're going to be repairing, but ultimately, it's just, you know, it's probably just a better customer experience versus, you know, you're in a collision

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having to, you know, figure out, you know, okay, now how do I work to get my car repaired, I wasn't at fault here, you deal with your own insurance company.

MR. WADDEN:

Q. Okay. There are a number of instances within your submissions and I don't think I need to point to a particular one where you use BC as sort of a comparative and we know that they're undergoing some changes out there now. It looks like their instituting a cap and I think, in the amount of, I think it's 5,500?

MR. STEIN:

A. That's correct.

MR. WADDEN:

Q. And I understand they have a public insurance system, I'm just wondering, I just want to get your views on this, is BC a good province to be using as a comparator, notwithstanding are the obvious population difference. Our understanding as lawyers, and I think any lawyer would tell you in the room that injury claims in BC, ones that go to court at least we know of, have

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traditionally been significantly higher from a reward perspec—award's perspective rather, in terms of non-pecuniary lost and they have been anywhere else in the country, certainly in Newfoundland. In fact, when you go to court here and you raise a BC case with the judge, they're almost dismissive of it at times. Is that a province we should be using in terms of cap comparator, should we be going--because you're recommending five grand, they're at about 5,500, what are your views on that?

MR. STEIN:

A. I think, you know, if you're looking at a cap comparator, you can also look at Alberta, which is, you know, started at 4,000, linked to inflation is now just upwards of 5,000. I think what's unique about looking at BC is that other than, you know, Newfoundland and Labrador, they're the only province with a predominantly tort-based auto insurance that didn't have a cap or any significant cost control and, you know, them--now moving in that direction, I mean, it's quite--it's just an interesting

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case study happening at an interesting time.

(12:30 p.m.)

MR. WADDEN:

Q. Okay. Can we go briefly to your second submission, I think around page three. Yeah, I think it's up there, just up--yeah, and I know Mr. Browne asked you a bit about this and so did some of the other counsel, I just want to make sure I'm understanding this. I'm looking at the second table, average company required premium reductions. So, let's make this as--and sometimes when I ask these questions, I just want you to understand, obviously transcripts are produced, this stuff is in the news. We act for consumers, we want to make this stuff so everybody can get it, okay?

MS. DEAN:

A. Absolutely.

MR. WADDEN:

Q. Let's assume for the moment that a $5,000 cap is introduced as you're suggesting. So, am I to read that table to suggest that premiums would go down, assuming also a 10 percent return on investment remains, we'll

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say 130, 140 bucks?

MR. STEIN:

A. So, that table is what's called the required premium -

MR. WADDEN:

Q. Yeah.

MR. STEIN:

A. So, you know, you have the required premium is what insurance companies are, you know, according to Oliver Wyman, should be charging to cover their claims costs, their operating expenses and to earn a reasonable rate of return. That required premium right now is around $200 higher than the current premiums and so, what this table is showing is that you put in the $5,000 cap, it really takes away a good chunk or almost all of that risk of those higher premiums.

MR. WADDEN:

Q. Okay. Allow me to put it another way. The cap comes in, let's assume it's a $5,000 cap, what do you think the average consumer in Newfoundland can expect their insurance bill, in terms of their car, to go down by?

MR. STEIN:

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A. I don't know what they expect.

MR. WADDEN:

Q. What do you think it will go down by? What can a consumer expect? If the consumer is being asked to accept a cap, let's just say we recommend, okay, we're fine with a cap, we're going to have a $5,000 cap in Newfoundland and Labrador, and we're recommending it, because we assume there's going to be some sort of quid pro quo here, the consumer is going to benefit in terms of their annual insurance bill for the vehicle. How much is it going to go down?

MS. DEAN:

A. In this scenario, it would stay the same until claims pressures are relieved and premiums can act accordingly.

MR. WADDEN:

Q. It would stay the same, initially?

MS. DEAN:

A. Initially, according to the scenario and the actuarial numbers as presented by Oliver Wyman.

MR. WADDEN:

Q. Okay. How long would it stay the same?

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Give me an estimate? I'm not trying to nail you down, I know you're not an actuary, I get that.

MS. DEAN:

A. Yeah.

MR. WADDEN:

Q. But we're just trying--we got to be able to tell the consumers, "here's what you can expect, folks, if you accept this cap. Here's what's going to happen to your bill and here's when it's going to happen".

MS. DEAN:

A. It would depend on--number one, it would depend on company experience, so, some companies may do a lot better in, let's say the first three years than others. Those companies would be able to adjust their rates quicker than some others. So, again, we get back to trying to predict consumer behaviour and how all of this is going to impact those claims costs and, of course, the frequency. Will we have no change, will we have increased frequency, or will we have a frequency drop?

MR. STEIN:

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A. And consumers will also benefit from the other side of the proposal, which is the access to the—the higher accident benefits, the access to more, to preapproved evidence based treatment, all designed to get them into treatment faster, get them better faster and get them to move on with their lives. It's looking at auto insurance differently.

MR. WADDEN:

Q. Right, I get that and I fully appreciate that it's more robust provisions that are provided for. Of course, a lot of people aren't going to have accidents, thankfully, so they won't care about the accident benefits provision; in fact, some of them probably aren't even going to buy them unless it's mandatory.

MR. STEIN:

A. Which we're recommending.

MR. WADDEN:

Q. So, I understand you're recommending that, so let's assume we're talking about the consumer who is never ever going to avail of these more robust Section B provisions,

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which I do see value in for the person that's hurt. All they care about is how much is my insurance premium? What am I paying to insure the car out in the driveway? And you've seen, obviously, as you've mentioned several times, we are the last jurisdiction, last full tort jurisdiction really, right, so you've seen the experiences elsewhere, you're very familiar with what's gone on in Nova Scotia, as we all are, given the numerous testimony we've heard, are you able to give me some estimate, some number, what can we tell consumers about in terms of their reduction in premiums? It's going to vary from company to company, you've said that; I get it. But we got to give them some idea of what they're getting if we're going to tell them at the same time they're giving up a right. Can I get any kind of estimate?

MS. DEAN:

A. Well the challenging thing from our perspective too is, as a trade association, we can only speak about the aggregate numbers, so again, company performance is

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going to be different, company underwriting manuals based on their filings, they're going to—that's when the driver experience comes into account in creating individual premiums. That is a detail that I certainly can't get into, as I'm not part of an underwriting department.

MR. WADDEN:

Q. Okay. In your, I think it's your initial submission at page 13, let me just double check that to make sure I'm right. Yes, page 13. Now, Ms. Dean, you and I—you, rather and your counsel met with myself and the Consumer Advocate recently and I mentioned this in a meeting we had, but I'll mention it now publicly, and we've said from the very beginning one of the areas we are focussing on for the consumers is the idea of accident and prevention, right, so to use a somewhat rough analogy, if the premium issue is a cancer, then the cap, perhaps, can be characterized as the radiation to reduce the premium or get rid of it, or in some cases maybe it won't fix it. Our thought has always been if the premium is a

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cancer what we should really do would be stopping people from smoking.
MS. DEAN:
A. Uh-hm.
MR. WADDEN:
Q. Prevent the cancer from happening in the first place, right?
MS. DEAN:
A. Correct.
MR. WADDEN:
Q. Your report, while it mentions at page 13 the idea of improving highway safety and preventing collisions, and I understand as well from your earlier testimony at one point I think you met with the Minister of Transportation?
MS. DEAN:
A. Uh-hm.
MR. WADDEN:
Q. Which I think is a very positive move.
MS. DEAN:
A. Absolutely.
MR. WADDEN:
Q. The report doesn't talk much about this stuff, not a report other than this

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paragraph, can you give me some ideas, has IBC been doing anything else in this regard? You mandate is you lobby for insurers; I know what your mandate is.
MS. DEAN:
A. Uh-hm, yes.
MR. WADDEN:
Q. But certainly insurers would benefit from the idea, the possibility that we could reduce accidents in Newfoundland and reduced accidents lead to reduced claims. I don't think too much of a jump, right.
MS. DEAN:
A. Uh-hm.
MR. WADDEN:
Q. So have you guys been doing anything in that regard? Are you doing anything to try and get accidents down, to help insurers not have the claims in the first place?
MS. DEAN:
A. We do undertake from time to time campaigns on road safety, so whether it's—I know before the seat belt laws were brought in, that was something that we were quite active in being involved with, whether it's anti

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distractive driving campaigns or the use of snow tires and the safety measures that come with using snow tires, so those types of campaigns we have absolutely been involved with in the past, and those things do, hopefully, work to prevent collisions from happening. However, again, you're coming back to the consumer behaviour piece of it and it could take a longer period of time in order to see those results. This province, for example, was the first in Canada to bring in anti cell phone laws as well. So it's, you know, those types of things are helpful, but they are slower to produce results because it's changing the mindset and it's changing behaviour.
MR. WADDEN:
Q. Slower to produce results in terms of ultimately ending up in reduced premiums, is that what you mean?
MS. DEAN:
A. Well, claims drive premiums, so –
MR. WADDEN:
Q. Right, okay. As of last week here in Newfoundland, I think June 7th was the date,

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a number of reforms did come into effect by Service NL. I think one of them is some more severe penalties for distracted driving, more severe penalties around blood alcohol content, those types of things.
MS. DEAN:
A. Uh-hm.
MR. WADDEN:
Q. Did IBC have anything to do with—have any meetings with any members of government about any of that or is that solely separate and apart from you guys? I'm wondering if you had any influence on any of those things that came in.
MS. DEAN:
A. We did not influence those things. We certainly watched governments across the country for these types of efforts. We support governments who bring in these types of initiatives and quite frankly, they are a welcome addition to the driving landscape.
MR. WADDEN:
Q. Just so I have a full understanding and so we can convey to consumers how your submissions were created, aside from the

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data that you've received and provided, much of which, of course, is in the aggregate, was there any ground level work? Did you talk to any—did you actually speak to consumers? Were there any surveys? Did you speak to injured people, people who have injured in accidents, anything like that?

MS. DEAN:

A. We did not. We spoke with our member companies who work with injured parties when they place a claim.

MR. WADDEN:

Q. Okay. Now I know and I don't doubt the thrust of what you're saying because a number of times during your presentation today in answering your questions, you've referred to consumers, I think you were trying to do what's best for consumers.

MS. DEAN:

A. Uh-hm.

MR. WADDEN:

Q. So I take that at face value. Mr. Browne asked you some questions about Facility. Does IBC have any comments or any suggestions of what we can do in terms of

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Facility relative to the taxi drivers? We've heard the taxi drivers mentioned a lot of times over the past week or so. It's a big problem. As we've said before, we'd like to try and find solutions to get them out of Facility, if it's possible, have them working with insurers, create more of a competitive process for their business. Does IBC have any suggestions around that? Have you spoken to insurers about some work that can be done in that area?

MS. DEAN:

A. The only thing that I could comment on there, again because I'm not an employee of Facility Association, would be that the reform packages that we're proposing for private passenger vehicles, would also apply to the taxi situation, and would have results with that portion of FA's business accordingly.

MR. WADDEN:

Q. Mr. Stein, I just wanted to clarify a question that Mr. Fraize asked you, or perhaps digging a bit deeper because I didn't fully understand your answer. He was

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asking about people who were injured or already have an injury, essentially, so let's do it by way of example again. Perhaps a different example than Mr. Fraize provided. Someone who has pre-existing, we'll say disability on one hand is non-functional and I've seen, I've actually seen a file like this before, they're in an accident, the other hand is injured, so you know, someone is in an accident and they sprain a wrist, probably going to end up being qualified under the definition that's being proposed in terms of the minor injury. If someone is in an accident and has that same injury and they've got a serious pre-existing disability, just explain to me how the minor injury cap and the definition that you're proposing would impact on that person? Because, obviously the impact on their life is going to be a lot more, right? All of a sudden, they have two hands they can't use, so help me with that.

MR. STEIN:

A. So the definition that we've proposed is about, you know, would, besides the injury

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having to be a sprain, strain or whiplash, is the, because of the injury, is the person now, is the person not able or has the injury had a substantial effect on the injured person's daily life which is, you know, if you look at the Maritime definitions and the Alberta definition, that's—it's all defined, you can't go to school, work, daily activities, injuries supposed to be ongoing since the accident and so on. So if at the end of the injury, yeah, they have one of those injuries, sprain, strain or whiplash, but because of the injury, you know, it's a serious impairment as per that definition, they would not be subject to the cap. So there's two parts. You have to have the specific injury and then there's, is this injury having a substantial effect on your daily life? If the answer is "yes", then the person won't be subject to the cap. So it's recognizing that although these injuries could be minor or tend to be minor, in some cases they have a disproportionate effect on the person, as, you know, your example could

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be that, and then, you know, that injury is not minor.

MR. WADDEN:

Q. Okay, thanks very much.

CHAIR:

Q. Thank you. I guess in the interest of completeness in finishing the round of questioning, I go back to you, Mr. Rowe, is there anything you need to –

(12:45 p.m.)

ROWE, Q.C.:

Q. Just a couple of items, Madam Chair, if I could just take a couple of minutes. There was a question from Mr. Feltham way back a couple of hours ago now, about a comparison with the Ontario experience in terms of costs and, or premiums and the response, it might have been you, Ms. Dean, said Ontario was very different from Newfoundland.

MS. DEAN:

A. Uh-hm.

ROWE, Q.C.:

Q. Then subsequently Mr. Stein gave a more full description of the ability to sue, the threshold, could you just elaborate on that

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for us again?

MR. STEIN:

A. Well I think those came up based on two different questions. The threshold—so one of the questions that I responded to was comparing the Newfoundland deductible to the Ontario deductible and I think it was about have you tried to, you know, thought of a deductible $10,000 or some higher amount and I was just clarifying that Ontario, it's not just a deductible, it's you are not able to pursue non-pecuniary damages unless your injury is serious and permanent based on a, you know, a verbal threshold, that's the definition. And then, if you meet that threshold and you pursue non-pecuniary damages, then the deductible applies and it's 3700, so I was just trying to make the comparison that it's quite a bit—it's a lot different than in Newfoundland and it's not just the bigger deductible that makes it different, that verbal threshold is a main component of it.

ROWE, Q.C.:

Q. Okay, so in Ontario, you're not talking

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about a minor injury at all, you're talking about something that the injury has to be permanent and serious?

MR. STEIN:

A. To be able to pursue non-pecuniary damages, yes.

ROWE, Q.C.:

Q. Okay, and then you have a deductible of 3700?

MR. STEIN:

A. That's right.

ROWE, Q.C.:

Q. And the system –

MR. GITTENS:

Q. 37,000.

ROWE, Q.C.:

Q. 37,000?

MR. STEIN:

A. Sorry, 37,000, yes.

ROWE, Q.C.:

Q. So 37,000 would be deducted off the non-pecuniary damage award in Ontario.

MR. STEIN:

A. In Ontario, yes.

ROWE, Q.C.:

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Q. Assuming the person meets the threshold of being permanently and seriously injured.

MR. STEIN:

A. Correct.

ROWE, Q.C.:

Q. Okay, and the system that is being proposed here is much different from that?

MR. STEIN:

A. That's correct, so what we're talking about here would be a cap on non-pecuniary damages for people that meet the definition of minor injury which we're saying, a sprain, strain, whiplash, any clinically associated sequelae, whether physical or psychological in nature that does not result in a serious impairment, meaning affecting the person's daily life.

ROWE, Q.C.:

Q. Right, okay. And the person is still free to sue for the other types of damages without any regard to the cap?

MR. STEIN:

A. Correct.

ROWE, Q.C.:

Q. So any loss of income?

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MR. STEIN:
A. Correct.
ROWE, Q.C.:
Q. And any special damages if they lost some personal property in the course of the accident, they could recover from that?
MR. STEIN:
A. Correct.
ROWE, Q.C.:
Q. And any additional medical expenses that wouldn't be covered by their accident benefits?
MR. STEIN:
A. Correct.
ROWE, Q.C.:
Q. There was reference to the chart in your February submission, page 4. There was reference to the—sorry, page 5, the chart on page 5 comparing Newfoundland with New Brunswick, Nova Scotia, Prince Edward Island and Alberta and the suggestion was made that this indicates that in fact costs have been stable since 2000, I think this was Mr. Feltham, because the changes up by 9 percent. Do you see what I'm referring to

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there?
MR. STEIN:
A. Yes, correct.
ROWE, Q.C.:
Q. And I think the response was that that was from an already high level. Can you just elaborate on that?
MR. STEIN:
A. So what we're trying to show with this graph is looking into the early 2000s, before any of these provinces put in their reforms, which was the deductible in Newfoundland and the minor injury caps in the other provinces and trying to show what their experience was, so yeah, if you just look at Newfoundland, you know, moving from 376 to 409, 9 percent change, it looks good, it looks stable. But then when you compare it to the other provinces, which have seen these, you know, massive declines ranging from 13 percent to 51 percent and are now several hundred dollars lower, you know, it really shows that Newfoundland is an outlier.
ROWE, Q.C.:

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Q. So in looking at that table, New Brunswick and the next one to it, bodily injury claims costs have declined on an average of 51 percent over that same time period?
MR. STEIN:
A. Correct.
ROWE, Q.C.:
Q. And as compared to Newfoundland which increased by 9 percent?
MR. STEIN:
A. Correct.
ROWE, Q.C.:
Q. All right, I don't have any further questions.
CHAIR:
Q. Do you have any questions?
COMMISSIONER NEWMAN:
Q. No.
COMMISSIONER OXFORD:
Q. No questions.
CHAIR:
Q. Okay, and I have no questions. I guess we're done. Thank you very much. Thank you, Mr. Rowe.
MS. GLYNN:

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Q. So we're back to tomorrow morning at 9:00. We have six public presentations scheduled for tomorrow.
CHAIR:
Q. The schedule is available on the website?
MS. GLYNN:
Q. It is.
CHAIR:
Q. Okay, we'll see you in the morning.
Upon conclusion at 1:12 p.m.

CERTIFICATE

I, Judy Moss, hereby certify that the foregoing is a true and correct transcript in the matter of the 2017 Automobile Insurance Review, heard on the 12th day of June, 2018 before the Board of Commissioners of Public Utilities, 120 Torbay Road, St. John's, Newfoundland and Labrador and was transcribed by me to the best of my ability by means of a sound apparatus.

Dated at St. John's, Newfoundland and Labrador this 12th day of June, 2018.

Judy Moss

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Auto Insurance in Newfoundland and Labrador

Submission to the Board of Commissioners of Public Utilities (PUB)

Aviva Canada Inc.

May 2018

AVIVA

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1. Introduction

Aviva Canada Inc. (“Aviva”) thanks the Government of Newfoundland and Labrador for the opportunity to participate in its review of auto insurance. Aviva is very concerned about the state of the auto insurance market in Newfoundland and Labrador.

This review presents an opportunity to take a step back from a system that has not received the attention it requires for a number of years and is challenged on many fronts. We invite a creative and fresh-eyed examination beyond “the way it is”, to instead look at solutions that will best serve the consumer and allow the auto insurance market to take advantage of current innovations.

It would be a wasted opportunity to merely look at what other provinces have done – particularly since most jurisdictions are still dealing with many of the issues that are present in Newfoundland and Labrador, just less severely. On a global level, Canada is not a leader – even the provincial “leaders” still lag behind many successful international jurisdictions that have found product and market solutions that still deliver lower premiums, stability, competition, innovation and consumer choice.

We implore the Government of Newfoundland and Labrador to become a leader in Canada and look beyond tweaks to transformational change that will really make a difference. The recommendations we have presented in this report are created from an evidence-based and jurisdictional analysis. Aviva also commissioned MQO to conduct a consumer poll in order to better understand what’s important to our customers in Newfoundland and Labrador.

What's best for consumers in Newfoundland and Labrador is at the center of all of the recommendations in this paper, and you’ll find a highlighted note under each recommendation that outlines the specific benefits for our customers.

2. About Aviva Canada Inc.

Aviva Canada is the second largest property and casualty insurance group in the country providing home, automobile, leisure/lifestyle and business insurance to 2.8 million customers. Aviva Canada has more than 4,000 employees in 27 locations across Canada.

Automobile insurance is a cornerstone of our business. In 2016, Aviva insured 60,000 private passenger vehicles or 22% of the total Newfoundland and Labrador market. Aviva also insured 31,000 homes and 3,000 businesses. In the same year, we collected $70.4 million in premiums, handled 7,163 automobile-related claims and paid $5.9 million in taxes to the government. Aviva Canada is a successor to Cabot Insurance and purchased RBC General Insurance in 2016. Aviva distributes its products directly in a partnership with RBC Insurance and through independent brokers: Munn Insurance, Wedgwood Insurance Limited, South Coast Insurance Agency Ltd., Crosbie Job Insurance, Aon, Marsh Canada Limited and Steers Insurance.

Aviva Canada is a wholly-owned subsidiary of Aviva plc. Aviva is one of the world's largest insurers, with 33 million customers worldwide, £490 billion in assets under management and businesses in 15 countries across North America, Europe and Asia. As a global company, we have experience with many different auto insurance systems and products, and among the stakeholders commenting, we bring a unique, international perspective.

3. Aviva's objectives, recommendations and the benefits

Aviva aspires to achieve the following objectives through this review. Our recommendations follow for how to achieve each objective. We have also summarized the impact of recommendations on the auto insurance marketplace. The elements of the auto insurance marketplace are discussed in detail in the following section.

Objective/recommendation	Benefit
1. Refocus the system on care not cash and stabilize insurance premiums a) Reduce Bodily Injury claims costs i. control the cost of Minor Injury claims ii. improve litigation efficiency iii. review contingency fees b) Expand Accident Benefits coverage and improve health outcomes i. make Accident Benefits coverage mandatory and increase limits ii. introduce programs of care iii. adopt the Health Claims for Auto Insurance (HCAI) system	↑ value ↑ affordability ↑ availability
2. Take care of customers and their cars Adopt a Direct Compensation Physical Damage (DCPD) settlement model for physical damage claims.	↑ value ↑ affordability
3. Be tough on fraud a) Revise the regulator's mandate to include responsibility for fighting fraud. b) Mandate insurers to report fraud to the regulator. c) Eliminate root causes of fraud by prohibiting referral fees and prohibiting the practice of service providers asking consumers to sign blank work orders. d) Prohibit the practice of service providers charging different amounts based on whether costs will be covered by insurance.	↑ value ↑ affordability
4. Modernize regulation and facilitate competition and innovation a) Eliminate rate regulation for fleets, snowmobiles and motorcycles. b) Replace prior approval rate regulation with use-and-file regulation. c) Refocus regulatory resources and revise the superintendent's mandate to include responsibility for maintaining a healthy auto insurance marketplace with a corresponding duty to act. d) Create insurance products for ride-hailing and car-sharing. e) Undertake a review of the Insurance Act with the objective of modernizing it. This review should include a specific focus on accommodating electronic and digital communication.	↑ value ↑ affordability ↑ competition ↑ profitability ↑ adaptability
5. Address socially unacceptable issues a) Reduce the number of uninsured drivers. b) Campaign against distracted driving.	↑ value ↑ affordability ↑ profitability

4. Achieving a healthy auto insurance market

The actions resulting from this review need to improve the health of the auto insurance market in Newfoundland and Labrador (NL). At present, the market is neither healthy nor sustainable. The current trajectory left unchecked exposes Newfoundlanders to an unacceptable level of personal and financial risk, unnecessarily in our view. The following table sets out the criteria for a healthy auto insurance market and provides an overview of the current state of the market. Each component is important and taken together – not in isolation – produces the best-case scenario for consumers.

Ideal state	Current state
Affordability – Premiums are stable and affordable.	**Affordability** – NL has the highest premiums in the Atlantic Region. Aviva's premiums in NL have increased by 25.7% from 2008 to 2017, and a further increase of 10.5% has been approved for 2018. Loss trends and rate indications remain high for NL, signaling that premiums will continue to rise. The high premiums remain insufficient to cover claims and other insurance costs. According to Oliver Wyman, average premiums in 2016 were 16.2% lower than what they should have been.[1]
Value – Customers receive value for their premiums. A balance is struck between affordable premiums paid by all drivers and the total cost of claims incurred by a small subset of premium payers.	**Value** – Auto insurance is mandatory in order to drive a motor vehicle. A total of 323,023 cars were insured in NL in 2016. Just 11% of drivers had a vehicle damage claim, while only 0.5% had a Bodily Injury claim. Claims payments are expected to account for 85% of total premiums for accident the year 2016.[2] A large number of drivers don't have claims but are paying increased premiums due to claims.
Competition – Insurance can be purchased from a number of different insurers through different methods of distribution (agents, brokers or direct from the insurer).	**Competition** – NL has the most concentrated auto insurance market in Canada, with the top four insurers comprising 87% of the market. The province is at risk of being just one withdrawal away from having no market at all.
Availability – There is sufficient product for the demand.	**Availability** – 3.2% of consumers have to buy insurance from the Facility Association, compared to 2.0% in other provinces.[3]
Profitability – The industry is profitable enough to be able to continuously invest in the product and the province.	**Profitability** – From 2010 to 2016, the industry's profit levels were lower than the PUB's profit guideline.[4]
Adaptability – The industry is able to adapt, innovate and leverage technology to provide new products to customers at fair prices.	**Adaptability** – NL has a strict regulation regime that's slow to respond to new ideas. Many jurisdictions globally have moved to more flexible regulation that produces stable and competitive rates and allows for innovation in products and price.

[1] Oliver Wyman NL PPA Profit and Rate Adequacy Review, page 23 [2] Oliver Wyman NL PPA Profit and Rate Adequacy Review, page 10
[3] Data from Facility Association [4] Oliver Wyman NL PPA Profit and Rate Adequacy Review, page 6

5. The issues

i Oliver Wyman Profit and Rate Adequacy Review Report

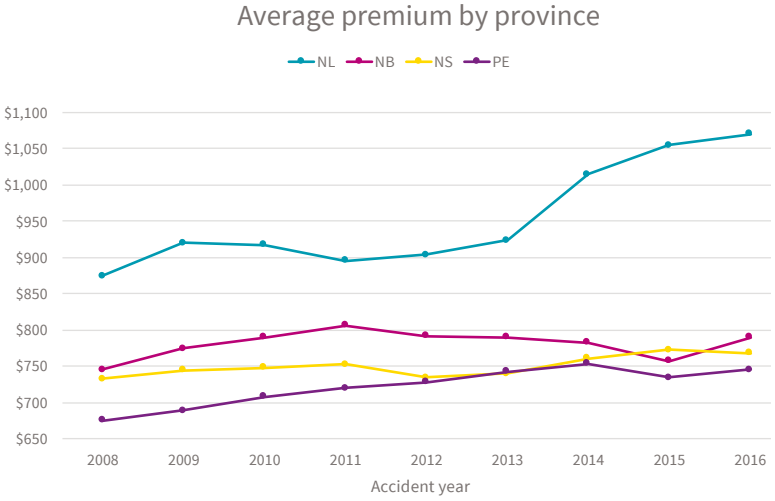
The Government retained Oliver Wyman to review the profit and rate adequacy of the private passenger auto insurance market.
The report concluded:

- The industry's realized profit levels are lower than the PUB's guideline from 2010 to 2016, with negative profit in 2013, 2015 and 2016. The industry was expected to suffer even larger losses in 2017 than 2016.
- From 2012 to 2016, the premiums charged by insurance companies were not adequate enough to cover claims costs, expenses and the Board's guideline profit provision.
- With the exception of two years, loss ratios have increased every year since 2008, from a low of 67.9% in 2008 to a high of 86.7% in 2015.
- Current premiums are inadequate. An average increase of $179 or 16.2% was required in 2016.

ii Aviva's data

Aviva's data is consistent with Oliver Wyman's findings and provides additional insights.

Premiums are increasing but still inadequate



Newfoundland and Labrador has the highest auto insurance premiums in the Atlantic region. From 2008 to 2016, premiums in Newfoundland and Labrador increased by 22.4%, while the other Atlantic Provinces saw increases of less than half that amount. High claims costs are driving the need for premium increases. Without action, claims costs and in turn premiums will continue to rise.

Claims costs increased more than premiums

During the 2008 to 2016 time period, our claims costs increased more than premiums.

Bodily Injury claims costs increased more than other coverages. Premiums and claims costs increased more than inflation, measured by the Consumer Price Index.

Premiums	Overall claims costs	Bodily Injury claims costs	Inflation (consumer price index)
↑ 22%	↑ 67%	↑ 74%	↑ 15%

A small number of claims result in big costs

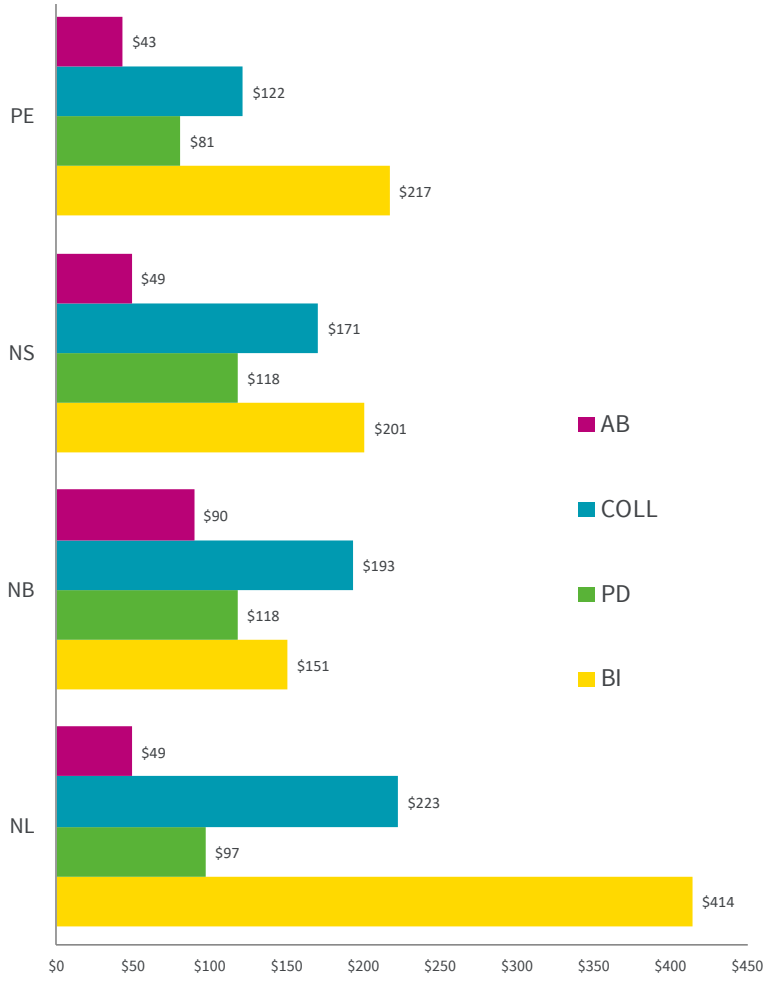
The table below illustrates the significant impact of claims. In 2017, 11% of our customers had a physical damage claim, only 0.65% had a Bodily Injury claim and 0.72% made a claim for Accident Benefits. However, the cost of claims accounts for 86% of premiums. A small number of drivers have claims, but those claims result in big costs borne by all.

In 2017, Aviva insured:

Total customers	Claims	Total premiums	Claims incurred
58,592	6,382 physical damage claims 379 Bodily Injury claims 427 Accident Benefit claims	$73 million	$22.6 million $33.2 million $6.4 million

Bodily Injury costs are the highest in Newfoundland

Claims costs per vehicle for traffic collision – related coverage 2016



Bodily Injury claims costs are significantly higher in Newfoundland and Labrador than in the other Atlantic Provinces. In 2016, Newfoundland and Labrador Bodily Injury claims costs per vehicle were 175% higher than New Brunswick, 106% higher than Nova Scotia and 91% higher than Prince Edward Island. The other three Atlantic provinces adopted Minor Injury caps in 2003. This has been effective in controlling Bodily Injury claims and stabilizing premiums.

Source: Aviva Group of Companies data (excluding Non-Standard business) from Internal Database.

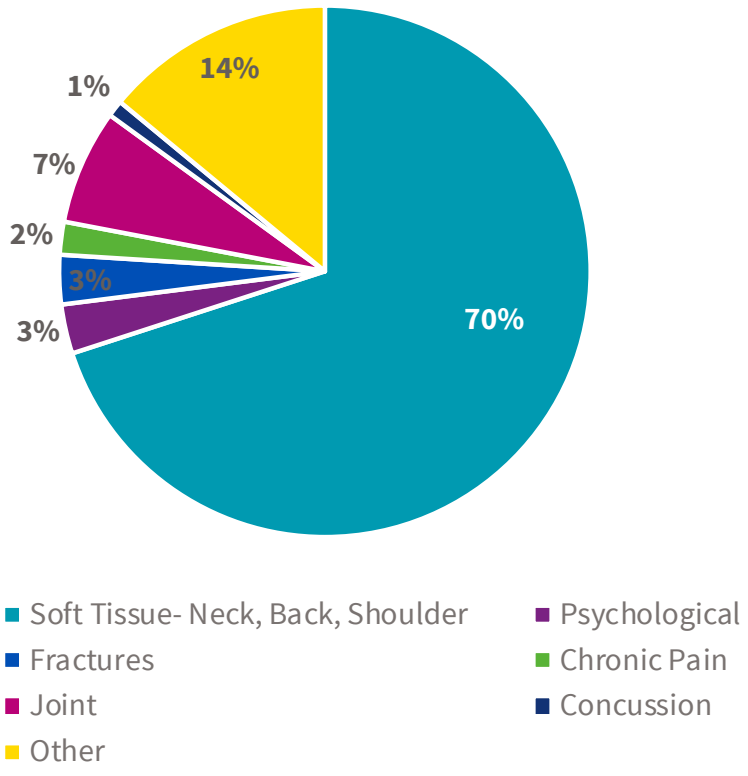
iii The Closed Claim Study

Aviva participated in the Closed Claim Study as requested and defined by the Public Utilities Board and reviewed 405 claims. We noted the following during this study:

Most accidents do not involve serious injuries

Of the 405 claims, one claim involved a fatality and there were no other serious injuries such as quadriplegia, paraplegia, amputations or serious brain injuries. 70% of the injuries were soft tissue injuries. A breakdown of the types of injuries is found in the diagram below:

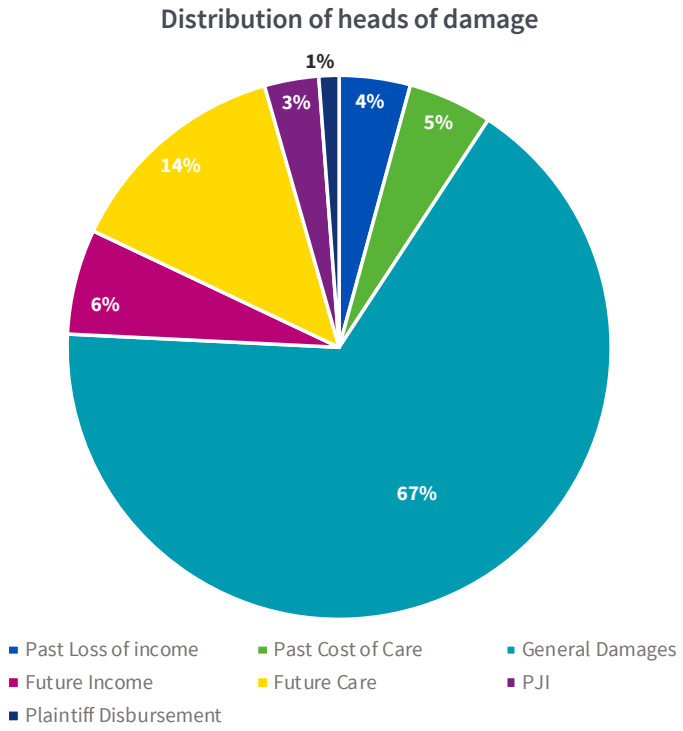
Distribution of injuries



This finding is consistent with Oliver Wyman's analysis of the entire closed claims sample. Using a three category classification, Oliver Wyman found that 66% of claims comprised the Class 1 group (minor neck, back, knee, shoulder, joint injuries). The Class 2 group of injuries included fractures, chronic pain, TMJ, psychological and concussions, and accounted for 31% of the sample. Serious injuries (fatalities, spinal cord, amputation, internal organs, weight bearing fracture, post-concussion syndrome) were only seen in 21 of 1,749 claimants, or 1.2% of the sample.

Large amount of settlement dollars paid for general damages (pain and suffering)

Chart 2 illustrates the breakdown of Aviva's settlements by head of damage. Of the claims dollars paid, 67% went to general damages for pain and suffering, followed by future care costs (14%) and future income loss (6%). Again, this is consistent with Oliver Wyman's findings that 64% of the total settlement dollars were paid to general damages for pain and suffering.



Aviva's average settlement was $34,886. Settlements were noticeably higher when there was legal representation ($41,000 with legal representation versus $9,900 with no legal representation). Claims with legal representation had a much higher incidence of claims for future income loss, future medical services and future replacement services.

The shocker – the number of lawyers

The most surprising data point to emerge from the Closed Claim Study was the high rate of legal representation. 80% of Aviva's claims had legal representation. Legal representation in the entire closed claims sample was slightly higher at 82% and is a clear sign the system is broken. This number is far higher than what we see in other provinces – 50% for Ontario Bodily Injury claims (a figure that's also far too high in our view), less than 30% in Nova Scotia, New Brunswick and Alberta. The other surprising fact was that none of these claims resulted in a trial.

Legal representation impacts the length of time it takes to resolve a claim. In the Aviva sample, claims with no legal representation closed after an average of 352 days, while claims with legal representation took an average 922 days. Again, Newfoundland and Labrador seems to be an outlier as we see quicker resolution times in New Brunswick and Nova Scotia, even with the involvement of plaintiff counsel – 324 days in New Brunswick and 520 days in Nova Scotia.

6. What consumers think

Before presenting our recommendations to government, we carried out a poll to find out what consumers think. Aviva retained an Atlantic polling company, MQO, to conduct a survey of Newfoundland and Labrador residents. The survey included 400 current drivers (200 in St. John's and 200 throughout the rest of the region) and was conducted between April 25 and April 30, 2018. The full report can be found in Appendix A.**

Key findings

- Car insurance premiums are viewed by 83% as increasing and **becoming financially difficult by 63% of drivers**.
- As car insurance premiums increase, 63% drivers are **not seeing an increase in value.**
- Further, many perceive that **premiums are increasing at a faster rate** than insurance claim payouts.
- Nearly all drivers (90%) in Newfoundland and Labrador view car insurance companies in the province as profitable and many would **like to see more competition in the market.**
- **Uninsured drivers are seen as a significant issue** in the province and the vast majority (69%) feel it's having an impact on premiums.
- There is broad support (71%) for giving drivers the choice to **pick and choose** what benefits should be included in their policy as a means of reducing their premiums. This included options for the level of rehabilitative care and making the right to sue an optional benefit that could be purchased as part of their policy (67%).
- The majority (90%) are also **in favour of a cap on pain and suffering claims** if it results in lower car insurance premiums. Two thirds (67%) were also in favour of making the right to sue for pain/suffering an optional benefit that could be purchased as part of their policy.
- There is also (79%) support for a **cap on lawyer contingency fees** for Personal Injury cases, with most (30% and 33% respectively) feeling it should be capped in the 10-20% range.

7. Solutions

1. Refocus the system on care not cash and stabilize insurance premiums

Newfoundland and Labrador's system is overly focused on tort compensation for Bodily Injury claims. As illustrated on the previous page, only a small percentage of Newfoundland and Labrador drivers have Bodily Injury claims and yet those claims account for more than 50% of all claims dollars paid. The high Bodily Injury claims costs result in higher premiums for all drivers. This issue is not unique to Newfoundland and Labrador, but most other provinces tackled this problem over a decade ago. They took steps to control the costs generated by Minor Injuries and rebalanced the system by expanding Accident Benefits coverage. The focus shifted from cash to care. Over time, most provinces have seen some erosion in the level of savings generated by Minor Injury reforms – there is work underway to review and fix this erosion. Striking the right balance between premiums and claims coverage requires constant attention.

In order to refocus the system, Bodily Injury claims costs must be reduced and Accident Benefits coverage expanded to focus on care. Bodily Injury claims costs can be reduced by reducing both the amount of the settlement and the transaction costs associated with disputes.

a) Reducing Bodily Injury claims costs

It will not be possible to stabilize and then reduce premiums without reducing compensation for Bodily Injury claims. Currently, the average settlement for Bodily Injury claims in Newfoundland and Labrador is $34,886, with 67% of our bodily damage expenses going towards general damages. We offer four possible options. There are advantages and disadvantages to each, and each model will produce a different level of savings.

i Control the cost of Minor Injury claims

Option A – Nova Scotia definition

Nova Scotia, New Brunswick, PEI and Alberta all define "Minor Injury" in regulation and limit the amount of general damages payable. The definitions are similar, but not identical, and focus on sprains, strains and whiplash associated disorders. For the purposes of this exercise, we have selected the Nova Scotia definition because it's the narrowest.
Nova Scotia defines Minor Injury as:

> "A sprain, strain or whiplash associated disorder injury that does not result in a permanent serious impairment (defined term) and resolves within 12 months."

Advantage:	The definition is easy to understand.
Risks:	The 12-month resolution condition may be easily manipulated. The definition has eroded over time as psychological, chronic pain and concussion injuries become more widely diagnosed and fall outside the definition.

Projected savings:
We estimate that this definition would capture 70% of our existing Bodily Injury claims and generate premiums savings of $57 or approximately 4.4%.

Option B – Expanded Minor Injury list

Another option is to expand the list seen in Option A to include a broader range of Minor Injuries. A possible definition is:

> "Minor Personal Injury" means the following injuries, including any clinically-associated sequelae (which we have defined), that do not result in serious impairment or permanent serious disfigurement: contusion; abrasion; laceration; subluxation; sprain; strain; headache; temporomandibular strain or sprain; whiplash associated disorder; diagnosis of depression."

Advantage:	This definition is similar to the Minor Injury definition recently introduced by the British Columbia Government. The broader list of injuries recognizes that claimants often experience a cluster of symptoms in addition to a primary injury. The broader list will generate a higher level of savings.
Risks:	The size of the cap may impact the amount of litigation. Since Nova Scotia increased its cap, we've seen an increase in litigation. Court decisions may erode the list, so the list should be reviewed on a regular basis and be kept current.

Projected savings:
We project that this definition would capture 81% of our Bodily Injury claims.
A Minor Injury cap of $5,000 will generate premium savings of $111.95 or 8.62%.
A Minor Injury cap of $7,500 will generate premium savings of $95.96 or 7.39%.

Option C – Ontario threshold and deductible (impairment model)

Ontario has taken a different approach to defining Minor Injuries and created a threshold. General damages are not payable for claims that are below the threshold. The threshold is defined in terms of impairment level and there is no list of injuries. A claimant surpasses the threshold if their impairment results in a Permanent Serious Disfigurement or Permanent Serious Impairment (these terms are defined). In addition, general damage awards are also subject to a deductible, indexed annually for inflation. Ontario's deductible currently stands at $37,983.33.

Advantage:	The impairment definition has resulted in less erosion than the Minor Injury definitions. There is a sizeable body of case law that will provide some guidance to decision makers.
Risks:	Because the definition is broader, it has generated more litigation. This litigation is bolstered by contingency fees, adverse cost insurance and rampant lawyer advertising.

Projected savings:
For the purposes of costing, we assumed that any claim with general damages of $30,000 of less would fall under the threshold or deductible.
It's estimated that 87% of Bodily Injury claims would fall within this definition.
An Ontario threshold and deductible would generate premium savings of $179.13 or 13.79%. The premium savings for a threshold alone (no deductible) would be $169.53 or 13.05%.

Option D – consumer choice – optional Minor Injury coverage

The fourth option that we present for consideration is an optional tort model. Similar models can be found in Saskatchewan and New Jersey. This model allows the consumer to choose whether they can claim general damages for Minor Injuries in the event of an accident. The basic policy excludes coverage for pain and suffering, except if the pain and suffering is the result of a Serious Injury (which is defined). Customers have the option to buy back tort coverage for all injuries from their own insurer. Approximately 3% of drivers in New Jersey purchase this optional coverage. Customers who do not purchase the right to sue for general damages can still claim income loss and also have access to Accident Benefits coverage that will provide treatment and income replacement. This option has significantly reduced litigation and freed up courts. Brokers and agents are required to provide quotes for three different coverages. If they do so, they have statutory immunity from any E&O litigation. The Superintendent's office also has a detailed website that explains various coverages.

Advantage:	This option gives meaningful choice to consumers and lets them control the amount of their premium. Consumers who feel strongly about retaining the right to sue in any circumstance can buy back the option. This option also frees up courts at a time when there's pressure to try criminal cases faster. Our consumer poll found that the vast majority (71%) of drivers would like to pick and choose what benefits should be included in their policy as a means of reducing their premiums, and two thirds (67%) were also in favour of making the right to sue an optional benefit.
Risks:	We have not calculated the cost of the buyback option. It may be expensive if there's no significant uptake. This is a bold option and is likely to receive resistance, especially from the legal community that would be impacted.

Projected savings: We calculated the savings based on 100% of customers taking the basic coverage. This would produce premiums savings of $211.11 or 16.25%. If there's interest, we would be happy to draft wording for the optional tort coverage and provide a view of cost.

Recommendation

Aviva believes that customers should have the right to choose their coverage and what premium they pay and recommends the adoption of Option D.

[5] We propose the following definition: the basic policy excludes coverage for pain and suffering for all injuries, except loss of a body part; permanent loss of function in a body part; significant disfigurement or significant scarring; a fracture; a diagnosed traumatic brain injury by a qualified medical practitioner that results in a permanent impairment of a cognitive or a physical function; a diagnosis of major depressive disorder that persists longer than six months despite regular treatment; or death.

ii Improve litigation efficiency and reduce transaction costs

The longer claims stay open, the more money they cost. Claims with legal representation take almost three times longer to resolve. Litigation in Newfoundland and Labrador needs to be sped up. The injured plaintiff and the defendant being sued are both entitled to quicker resolution. The following changes will help move matters along quicker:

Binding medical assessment

Options A, B,and C will require a determination of whether the injuries or impairments are minor. This should be a relatively straightforward issue, but in most provinces, it has spawned litigation. In order to reduce the costs and time associated with litigation, we recommend that the Government establish a panel of medical assessors. A medical assessor would be chosen from the Panel and would decide if the injury or impairment is minor. The medical assessor's decision should be binding on the parties and the court. This would reduce the costs associated with competing medical opinions and speed up the litigation process, which is in the best interests of all parties. As an additional benefit, the Government can easily collect data from the medical assessors in order to understand how any reform is working.

Mandatory production

Certain documents must be produced in every Personal Injury lawsuit. However, a lot of wasted time and effort is spent on producing these documents. A plaintiff who commences litigation should be compelled to produce the following documentation:

- hospital records if applicable
- clinical notes and records dating back five years
- section B file
- ambulance records

Reducing the time for service of a statement of claim

Newfoundland and Labrador's rules currently allow a plaintiff to take 12 months to serve a statement of claim and the plaintiff can apply to extend the time for service for two more years. We recommend that the rule be changed so that a statement of claim must be served within six months of issuance. This is consistent with other provinces.

Allow pre-trial examination of experts

Since none of our cases proceed to trial, there's little for either party to challenge the opinion of experts. Allowing pre-trial examination of experts will help both parties understand the expert's testimony better, and this may lead to earlier resolution.

Avoid double compensation

Income replacement is available through Accident Benefits coverage and also through Bodily Injury coverage. In order to avoid double compensation, the regulations should provide full deductibility of Accident Benefit payments from tort awards. In addition, income replacement benefits and wage continuance under short-term and long-term disability plans should also be deducted from loss of income awards in Bodily Injury claims.

Mandatory reduction for contributory negligence

There should be mandatory reductions for contributory negligence of a Bodily Injury award for impaired driving, distracted driving (texting), failure to wear a seatbelt and failure to wear a helmet. These reductions are currently the subject of negotiation. Stipulating the amount of reduction provides clarity and certainty for all parties.

Recommendation

We encourage the government to adopt the five measures noted, in order to improve litigation efficiency to ultimately benefit injured auto accident victims.

Why is this helpful for consumers?

These are efficiency and streamlining suggestions to reduce the amount of time spent in litigation and focuses stakeholders on the highest priority work, which is providing necessary care when it's needed. It also removes waste and distraction from the system. Quicker resolution is good for plaintiffs and defendants.

iii Review contingency fees

It's not clear to us why there's such a high rate of legal representation in Newfoundland and Labrador. However, we're concerned about the potential amount of money flowing away from injured claimants. It's our understanding that most Personal Injury lawyers in Newfoundland and Labrador work on a contingency fee basis of 30%. This could potentially result in a very large amount of money being directed at lawyers instead of auto accident victims.

In 2016, the industry saw 1,692 Bodily Injury claims, but allocated $141 million to those claims. Legal representation is seen in 82% of claims, so on a straight line basis, $115.6 million of the total settlement amounts will pass through law firms in trust for their clients. Based on a 30% contingency fee, an amount equivalent to $34.7 million may be deducted from settlements and paid to lawyers.

MQO's poll (as highlighted in Section 6) found that 79% of NL respondents support a contingency fee cap if it would reduce their premiums. One third of the NL respondents support a contingency fee cap of 20% or less. As a comparison, in New Brunswick has a contingency fee cap of 25%.

Recommendation

This issue should be reviewed more closely to ensure that lawyers are paid a fair amount and injured victims receive an appropriate share of their settlement. A contingency fee cap of 20% is a good consumer protection measure.

Why is this helpful to consumers?

As mentioned in Section 4, lawyer representation in Newfoundland and Labrador is 82% – which is a major issue in Canada. This suggests a 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.

b) Expand Accident Benefit Coverage and improve health outcomes

i Make Accident Benefits Coverage mandatory and increase limits

Accident Benefits in Newfoundland and Labrador is an optional coverage, although 98% of Aviva's customers purchase this coverage. Newfoundland and Labrador have the lowest benefit limits in Canada – a comparison can be found in Appendix B.

Other provinces with private auto insurance expanded Accident Benefits coverage and introduced diagnostic treatment protocols or programs of care to ensure injured claimants have access to science-based treatment.

Recommendation

Aviva recommends that Accident Benefits coverage be mandatory and the levels of coverage be expanded to the same coverage levels as New Brunswick:

- Increase medical and rehabilitation benefits from $25,000 to $50,000 for four years.
- Increase funeral expenses from $1,000 to $2,500.
- Increase death benefits from $10,000 for head of household or spouse to $50,000 for head of household and $25,000 for spouse.
- Loss of income benefits should be increased from $140/week for 104 weeks maximum to $250/week for a lifetime if totally disabled and 104 weeks if partially disabled. The unpaid housekeeper benefit would increase from $70/week for 12 weeks to $100/week for a maximum of 52 weeks.

Why is this helpful to consumers?

Increased benefits ensures customers are better supported during the difficult time after an accident, enabling full and fast recovery for injuries.

ii Introduce programs of care

Programs of care should be introduced for the treatment of frequently seen injuries such as soft tissue injuries with associated sequelae, chronic pain, post-traumatic stress disorder, and concussions. Effective programs of care have been shown to improve health outcomes and reduce costs.

Recommendation

We encourage the government to look to other auto insurance markets and workers compensation for programs of care and adopt those. There's no need to reinvent the wheel.

Why is this helpful to consumers?

Focusing on care instead of cash helps people get better, faster, with evidence-based treatments and more rigour to the health aspect of the recovery.

iii. Adopt the Health Claims for Automobile Insurance System (HCAI)

We recommend that Newfoundland and Labrador adopt and implement Ontario's Health Claims for Auto Insurance ("HCAI"). HCAI is an electronic system developed by Ontario auto insurers, working closely with the Financial Services Commission of Ontario (FSCO), the Ontario Ministry of Finance, various medical rehabilitation provider associations and other stakeholders. This system is used for transmitting auto claims forms between insurers and healthcare facilities in Ontario. HCAI provides valuable data about injuries sustained in auto accidents and the treatment provided.

Recommendation

The provincial government should adopt HCAI. This data can be used by the government to address injury trends, develop new programs of care and understand the effectiveness of current programs of care.

Why is this helpful to consumers?

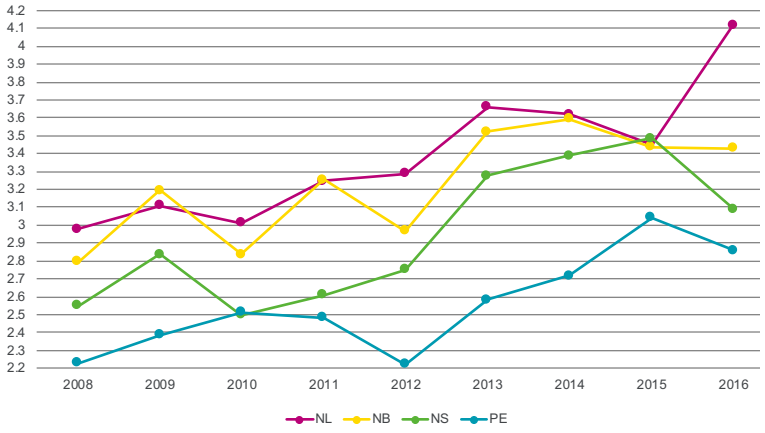
This helps consumers because tracking health information allows more scientific and methodological rigour so that ultimately, patients can receive improved medical treatment and get better faster through improved treatment protocols.

2. Take care of customers and their cars when there is an accident

Auto physical damage costs have been steadily increasing because the frequency of collisions is increasing and so is the cost of repairs.

Collision frequency has been trending upwards for all of the Atlantic provinces, with Newfoundland and Labrador having the highest collision frequency in most of the last nine years.

Collision claims frequency (per 100 vehicles) by province



Physical damage costs have increased by 47% from 2008 to 2016, while optional coverages have also increased – Collision by 45% and Comprehensive by 80%. New cars, with increasingly expensive technology, will continue to drive up costs. At some point, when there are more cars with enhanced safety features on the road, collision frequency should decrease. Until that time, the trend of increasing physical damage costs will continue.

One way to better control physical damage costs is to adopt the Direct Compensation Physical Damage settlement model. Newfoundland and Labrador and Alberta are the only provinces that still use a tort-based vehicle damage claims-settlement model. In this model, the owner of the damaged car must deal with the at-fault driver's insurer. The not-at-fault insurer can then subrogate against the at-fault insurer and recover their payout. Insurers have dedicated teams that handle these subrogation claims. This is an expense that adds no value to the customer.

Recommendation

Adopt Direct Compensation Physical Damage ("DCPD") as the property damage claims settlement model.

Why is this helpful to consumers?

An improved process would allow the owner of the damaged car to deal with their own insurer. This model is called "Direct Compensation Physical Damage" and customers rely on their own insurer to repair and/or replace the vehicle, regardless of fault. This allows Aviva, in other provinces, to provide better and faster customer service. Repairs are approved and undertaken more quickly. The subrogation process and associated costs are eliminated. In other provinces, repair time is reduced and customer Net Promoter Scores (customer satisfaction) are higher.

3. Be tough on fraud

Address the major elements of fraud that cost the system.

In Aviva's "Crash, Cash and Backlash" report on auto insurance fraud in Canada, we listed the many ways and stages in the claims process where fraud can occur (see Appendix C). Insurers are currently not required to measure and report fraud in Newfoundland and Labrador, so it's difficult to say how much fraud there is. Aviva believes that fraud is an issue in Newfoundland and Labrador, just like it is elsewhere in Canada, because fraud does not recognize provincial boundaries.

In 2017, we conducted a national Insurance Fraud Consumer Survey as part of our report. The results from Newfoundland and Labrador are noteworthy:

- 85% believe fraudulent insurance claims are the reason their premiums have increased
- 57% believe that 25% of all auto insurance claims are fraudulent
- 84% believe that efforts to reduce auto insurance fraud would help lower premiums
- One in four know someone who has claimed fraudulent personal injuries after an auto accident
- 75% feel auto repair shops are inflating vehicle repairs
- 71% feel tow truck drivers regularly receive "kickback" payments for towing damaged cars to specific auto repair shops
- 91% believe more needs to be done to reduce auto insurance fraud

Government, insurers and consumers all have a role to play in the fight against fraud. Government and specifically regulators have a responsibility to understand how much fraud is in the system and require insurers to fight fraud and track progress. In addition, the root causes of fraud should be addressed. The consequences of fraud should be reviewed to ensure that they are a deterrent.

Recommendation

a) Assign responsibility for fighting fraud:
- The regulator should have a clear mandate to regulate the insurance industry to deter and prevent fraud.

b) Mandate insurers to report fraud to the regulator:
- The industry should be required to report fraud to the regulator. The industry must safely share relevant fraud data between insurers and government entities in order to truly understand the scale and scope of fraud in the system, while working together to effectively offer and implement solutions.

c) Eliminate root causes of fraud:
- Prohibit referral fees.
- Prohibit the practice of service providers asking consumers to sign blank work orders.

d) Prohibit the practice of service providers charging different amounts based on whether costs will be covered by insurance or not.

Why is this helpful to consumers?

This is an issue of what is fair and not allowing illegal activity to raise the cost of insurance for all drivers. Insurance works when all parties behave responsibly and ethically.

However, this issue is challenging to track, quantify, investigate and pursue. It's also possible that as the rules change, the types of fraud will change or will continue to happen either way. It will be challenging to quantify the success.

4. Modernize regulation to facilitate competition and innovation

Transition to use-and-file rate regulation

Insurance regulation in Canada is heavily focused on rate regulation and Newfoundland and Labrador is no exception. Strict rules limit insurers' abilities to create different pricing strategies for consumers.

Newfoundland and Labrador regulates rates more than other jurisdictions. Other Canadian provinces limit rate regulation to private passenger vehicles. However, Newfoundland and Labrador also regulates rates for fleets, snowmobiles, motorcycles.

The rate regulation process is strict. Prior approval is needed from the Board of Commissions of Public Utilities (PUB) for a rate increase. Insurers are required to submit full rate filings, including actuarial indications, for any rate increase regardless of size. These filings are costly and time consuming to produce. Simplified filings are only allowed for rate reductions. The PUB hearing process is costly and time consuming, and can deter insurers from applying for rate increases.

Rate regulation rules do not allow insurers to adequately price for their own risks. Strict rate regulation promotes cross-subsidization of poor drivers at the expense of good drivers. It understates the actual costs of insurance products and contributes to rate inadequacy. The hearing process adds costs, which are ultimately borne by consumers without adding commensurate value.

Taken together, this type of regulation is a serious deterrent for new entrants into the marketplace.

It's time to question the value of strict rate regulation – it's clear it does not reduce premiums. Premiums can only be reduced by bringing down costs. The current rate regulation system has not kept rates current. Oliver Wyman concluded that 2016 rates were underpriced by an average of 16%. This means that some customers are potentially facing large premium increases. So why should this system continue?

Most of the rest of the world has moved away from strict 'prior approval' rate regulation. Europe eliminated rate regulation in the 1990's. Quebec has no rate regulation, and is the most competitive auto insurance jurisdiction in Canada. In the United States, 38 states have moved to a use-and-file, file-and-use or flex rating system.

It's time to transition to a use-and-file system. Under use-and-file, an insurer has to file information supporting its overall rate after implementation. There's no requirement to file underwriting criteria. An insurer can implement a rate 30 days before submitting the prescribed information to the regulator. The regulator has 30 days to conduct a review based on the following criteria:

- The rate cannot be unfairly discriminatory, where unfairly discriminatory refers to rates based on rating factors prescribed as prohibited in insurance legislation.
- The overall rate should be able to withstand projected losses and expenses.
- The overall rate should not substantially lessen competition.

Recommendation

a) Eliminate rate regulation for fleets, snowmobiles and motorcycles.
b) Replace prior approval rate regulation with use-and-file regulation.

Why is this helpful to consumers?

Allowing more flexibility for insurers will result in different pricing models and more price options. The costs associated with prior approval rate regulation are significant and are ultimately borne by consumers. Reducing these costs will reduce costs for consumers. There is no evidence that rate regulation helps to control costs. A change in the regulatory system may entice other insurers to enter the market.

Refocus regulatory resources

There are a finite number of regulatory resources. The heavy focus on rate regulation means that there are less regulatory resources to focus on the overall health of the auto insurance marketplace. As noted earlier, the Newfoundland and Labrador auto insurance marketplace is not healthy despite all of the regulation. There's little capacity to focus on issues that contribute to a healthy marketplace like product design, cost drivers including inflation, innovation, market conduct and fraud. Each of these is an important issue that impacts consumers. It's time to modernize regulation and move away from heavy sets of rules to a more principle and risk-based approach that considers the overall health of the marketplace.

Recommendation

c) The Superintendent's mandate should be revised to include responsibility for maintaining a healthy auto insurance marketplace with a corresponding duty to act. Healthy marketplace should be defined according to the criteria listed in the section titled 'Achieving a Healthy Auto Insurance Market.'

Why is this helpful to consumers?

This is positive for consumers because it has been shown in other jurisdictions to result in stable premiums, a healthier insurance market and more choice.

Prepare for the future of mobility and customer expectations

Mobility is changing quickly. Car-sharing, ride-hailing and autonomous vehicles are already here in Canada in various stages of progress. Insurance, which has historically been based on single owner/single use models, needs to evolve quickly in order to support these new forms of mobility. Regulation should enable, not discourage, technological development. Aviva and other insurers do not want to stand in the way of the development of new mobility models or autonomous vehicles. Instead, Aviva is proactively looking to support progress and innovation within the mobility ecosystem. Aviva wants to partner with regulators and government to facilitate the transition to a more sustainable and safe future of mobility, where insurers are able to underwrite potential risks with confidence.

Insurance companies are grappling with the challenges of serving customers with dynamic and changing expectations. For example, many customers want to interact digitally with their insurer, but current rules still require insurers to send paper and on occasion, registered mail. Given the rapid pace of change, insurers face the real threat of being left in the dust, alienating customers, and suffering in business because we're responding to agile realities with the rules of the 20th century, which were not designed for flexibility and change.

Recommendation

d) Create insurance products for ride-hailing and car-sharing.
e) Undertake a review of the Insurance Act with the objective of modernizing it. This review should include a specific focus on accommodating electronic and digital communication.

Why is this helpful to consumers?

Regulations need to adapt so that insurers can continue to meet their customers' expectations.

Aviva conducted a poll of 1,504 customers in Newfoundland and Labrador, Ontario and Alberta in 2017 to gauge public opinion on digital capabilities around insurance and regulation. We found that we are not meeting customers expectations, and they want that to change. Here are some the key findings:

- 70% rate the insurance industry behind other industries when it comes to delivering an effective online experience. Customers want the ability to transact digitally, regardless of their age, where they live, or the channel they have used to purchase their insurance.
- 77% feel regulation has an impact on their auto premiums and the ability of insurers to offer innovative products and services.
- 81% feel more flexible regulation would allow insurance companies to quickly provide customers with products and services that would benefit them.

5. Address socially unacceptable issues

a) Reduce the number of uninsured drivers

Newfoundland and Labrador has a significant challenge with uninsured drivers.

If cost is the reason that some drivers are uninsured, a low cost insurance offering can be considered. For example, New Jersey offers a “dollar-a-day” policy. The policy has reduced liability limits because there are no assets to protect. It has Accident Benefits coverage to provide treatment and tort coverage only for serious injuries.

Recommendation
The government should consider a low-cost insurance offering.

Why is this helpful to consumers?

Uninsured drivers are unfair to premium paying drivers and of course, it’s contrary to law. For the drivers who do not have insurance due to affordability, this option would help them contribute to the system, be protected and abide by the law.

However, this solution does not address the drivers without insurance for other reasons besides cost.

b) Campaign against distracted driving

Aviva conducted a review of claims from 2016 and 2018 to analyze the effects of distracted driving on claims. Distracted driving is challenging to prove, but our review found that despite efforts to reduce distracted driving with stiffer penalties, fines, and public awareness, claims related to distracted driving have actually increased 23% nationally and 8% in the Atlantic provinces.[6]

Aviva also conducted a poll of 1,504 Canadians in 2017 and an overwhelming number – 95% of respondents – said texting and driving by others makes them feel unsafe on the roads. A total of 88% of Canadians have witnessed other drivers texting while behind the wheel, while only 22% admitted texting while driving themselves.

Only 48% of Canadians think fines and demerits are a deterrent, while only 32% said they think peer pressure will work. Almost four out of five Canadians (78%) said they want to see a technology solution that would stop distracted driving by disabling texting and other functions while the driver is behind the wheel. Last fall, Apple's new iOS operating system debuted a 'do not disturb while driving' feature. This is progress as almost three-quarters of Canadians (73%) in our poll said they would use anti-texting technology.

Recommendation

The government and industry should work together to educate consumers and raise awareness about the dangers associated with distracted driving.

Why is this helpful to consumers?

Reducing distracted driving prevents accidents and makes the road safer for all of us.

[6] Distracted driving-related accidents are difficult to prove without drivers admitting complete fault. Aviva Canada's claims data that support the increase in distracted driving-related accidents are what Aviva Canada estimates based on cause of claim. This assessment includes cause of claims frequently linked to distracted driving such as: rear end impact, vehicles changing lanes, improper passing, lost control, collision with fixed object, failure to obey stop sign, failure to obey a traffic light, failure to obey a yield sign, hit and run, parked car struck, and a single vehicle accident.

8. Conclusion

Aviva thanks the Government of Newfoundland and Labrador for undertaking this comprehensive review and consultation. We encourage the Government to take full advantage of this review and make significant changes to the auto insurance system as the current system is unsustainable. We would be pleased to discuss any aspect of our response and participate in any discussions regarding implementation.

For further information, please contact government_relations.canada@aviva.com

NL Consumer Study
Summary Report
May 2018

Presented by:

MQO RESEARCH RECHERCHE
a group m5 company

Background and Methodology

- MQO conducted a survey with Newfoundland and Labrador residents on behalf of AVIVA to gauge public attitudes and perceptions towards car insurance rates.

- A total of 400 current drivers were surveyed across Newfoundland and Labrador (St. John's CMA: 200 / Remainder of province: 200).

- The overall margin of error for this survey is +/- 4.9% 19 times out of 20.

- Data collection occurred between April 25th and April 30th, 2018.

- Results are presented at the overall level. Responses were very consistent by region, gender or age. Differences by these sub-groups are only reported if a significant difference was observed.

Demographics

- The table below provides an overview of the demographic profile of survey respondents.

Demographic Profile

Region	Overall (n=400)
St. John's CMA	200
Other NL	200
Gender	
Male	190
Female	209
Age	
18 to 24	58
35 to 54	139
55 and over	203

Key Findings

- Car insurance premiums are viewed as increasing and becoming financially difficult for many drivers.

- As car insurance premiums increase, drivers are not seeing an increase in value. Further, many perceive that premiums are increasing at a faster rate than insurance claim payouts.

- Nearly all drivers in Newfoundland and Labrador view car insurance companies in the province as profitable and many would like to see more competition in the market.

- Uninsured drivers are seen as a significant issue in the province as the vast majority feel it is having an impact on premiums.

Key Findings

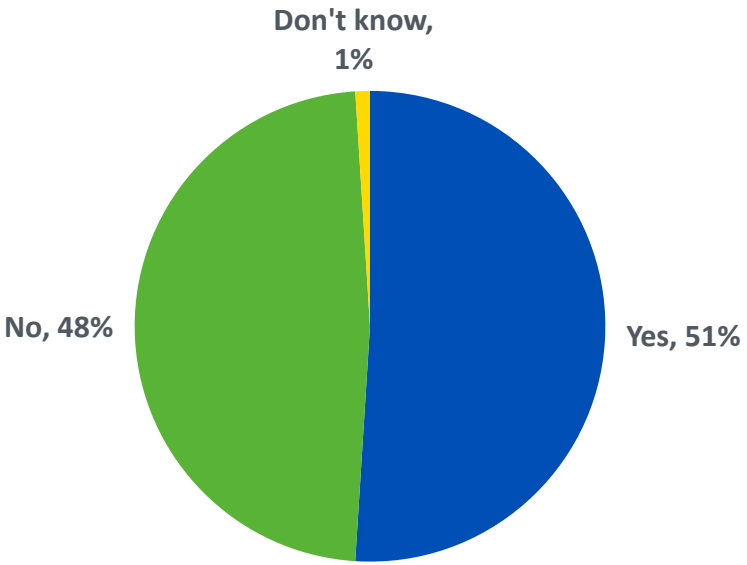
- There is broad support for giving drivers the choice to pick and choose what benefits included in their policy as a means of reducing their premiums. This included options for the level of rehabilitation care and making the right to sue an optional benefit that could be purchased as part of their policy.

- The majority are also in favour of a cap on pain and suffering claims **if** it results in lower car insurance premiums.

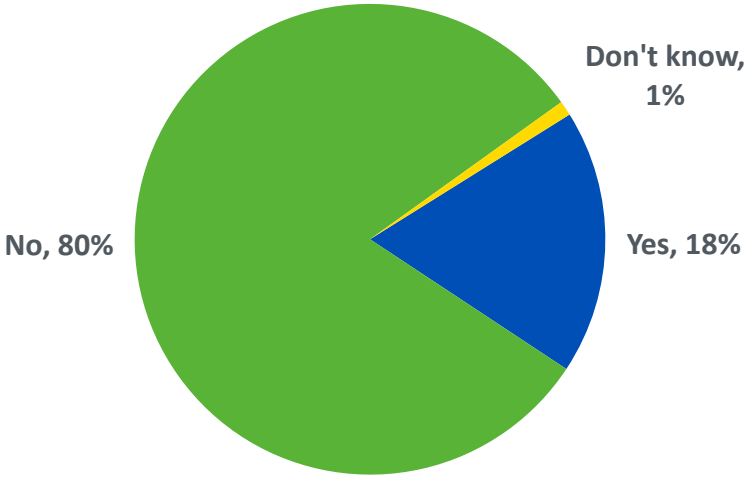
- There is also support for a cap on lawyer contingency fees for personal injury cases with most feeling it should be capped in the 10-20% range.

Filing Insurance Claims

One-half (51%) of respondents had filed an insurance claim (in general) in the past. Meanwhile, just one-in-five (18%) were aware that over 95% of those insured have never made an injury claim.



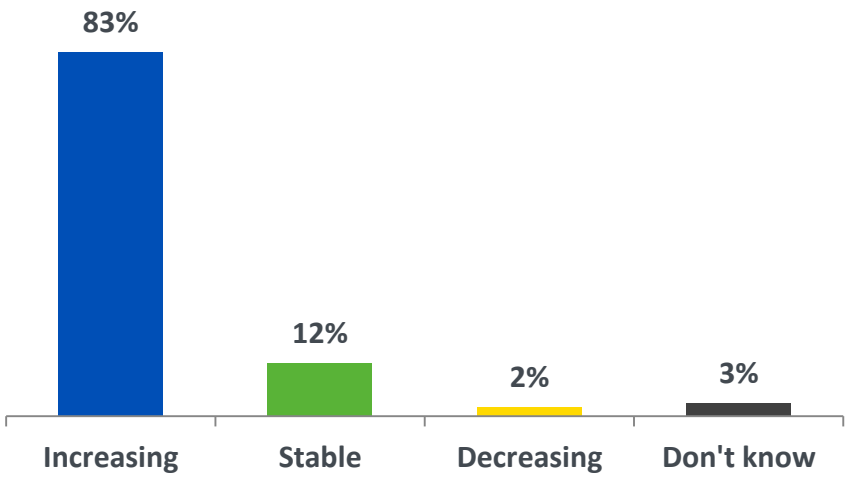
Q1. Have you ever filed a car insurance claim? (n=400)



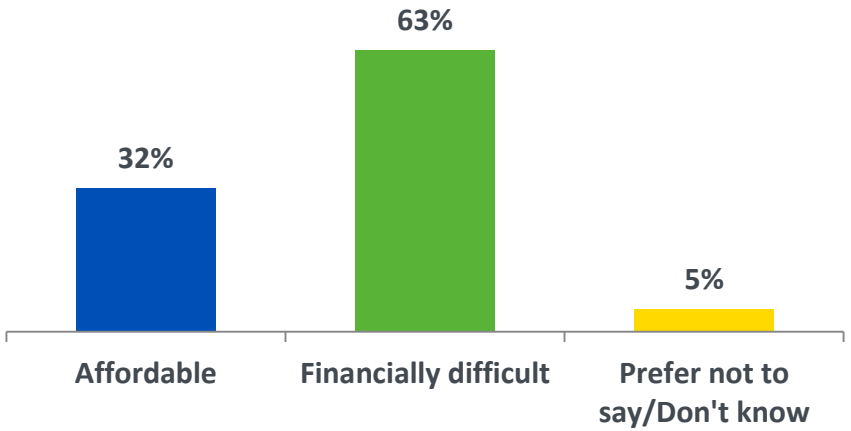
Q2. Were you aware that over 95% of those insured never made an injury claim? (n=400)

Car Insurance Rates

The majority of respondents (83%) believe that car insurance rates are increasing. Further, almost two-thirds (63%) feel that purchasing car insurance is becoming financially difficult.



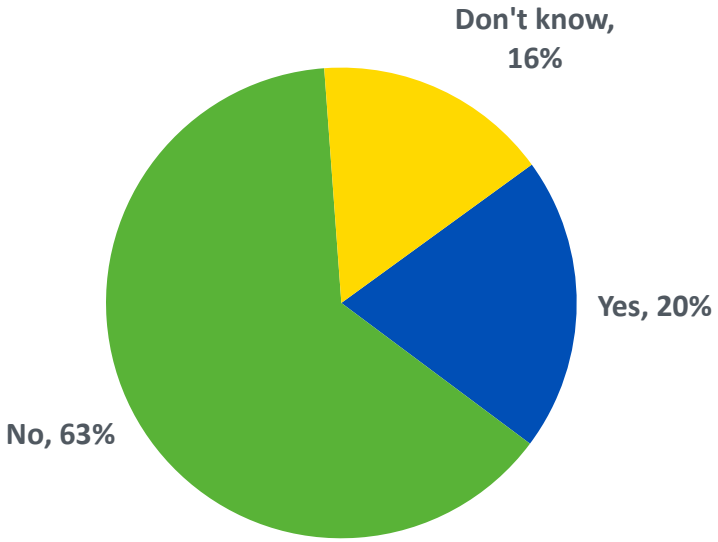
Q3. Would you describe car insurance rates as increasing, stable or decreasing? (n=400)



Q4. In your opinion, is the purchase of car insurance…? (n=400)

Value of Car Insurance

Among those who said car insurance rates are increasing or stable, almost two-thirds (63%) do not believe the value they receive has increased commensurately. Further, more than one-half (54%) feel that insurance rates are increasing at a faster rate than insurance claim payouts.



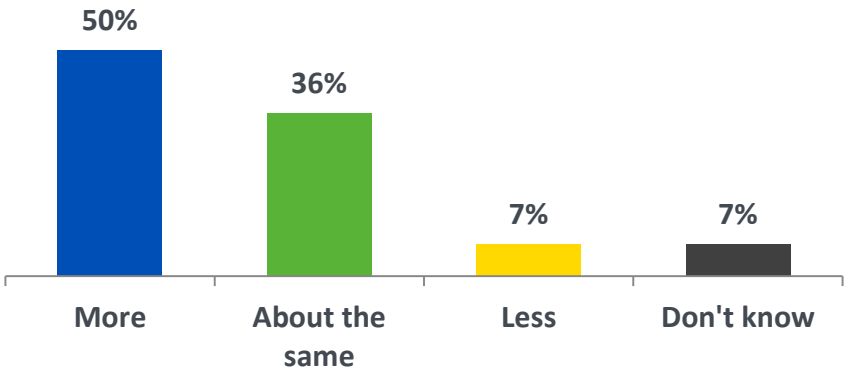
Statement	Total
Total (N)	394
Insurance rates are increasing at the same rate as insurance claim payouts	16%
Insurance rates are increasing at a faster rate than insurance claim payouts	**54%**
Insurance rates are increasing at a slower rate than insurance claim payouts	3%
Don't know	26%

Q5. In your opinion, as car insurance rates increase, has the value you receive from your insurance increased as well?
SUBSET: Those who said car insurance rates are increasing or stable.
(n=394)

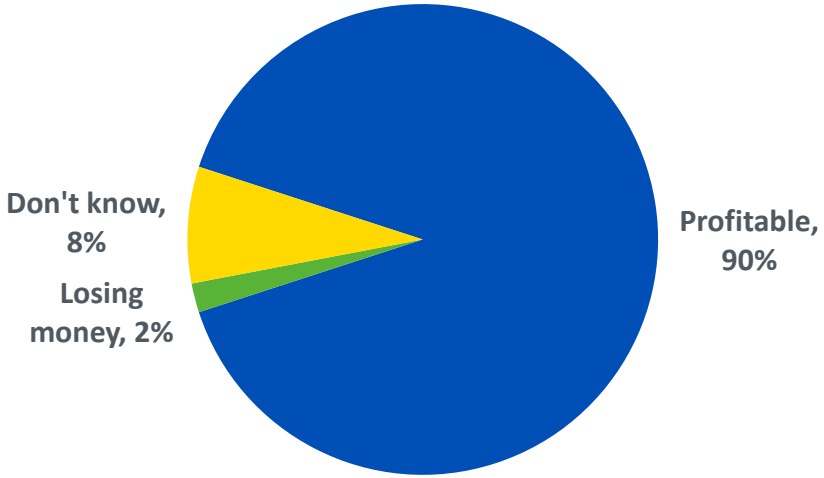
Q6. Which of the following best reflects your views on car insurance rates?
SUBSET: Those who said car insurance rates are increasing or stable.
(n=394)

N.L. Insurance Companies

One-half of respondents indicated there should be more insurance companies operating in the province. Meanwhile, the vast majority (90%) believe that insurance companies operating in the province are profitable.



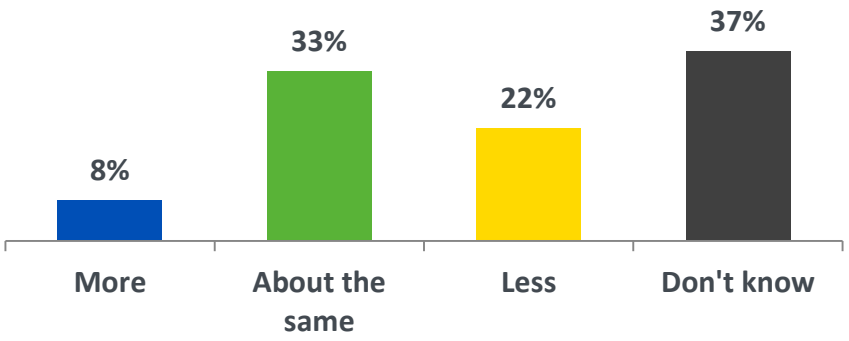
Q7. Do you believe there should be more, less or about the same number of insurance companies currently operating in NL?
(n=400)



Q8. In your opinion, are insurance companies doing business in NL…?
(n=400)

Current Benefits

Respondents had some difficulty identifying whether drivers in this province receive more, less or about the same overall benefits for personal injury claims compared to the rest of Atlantic Canada. While 37% were unsure, one-third (33%) felt benefits were on par with the other Atlantic Provinces and 22% felt they received less.

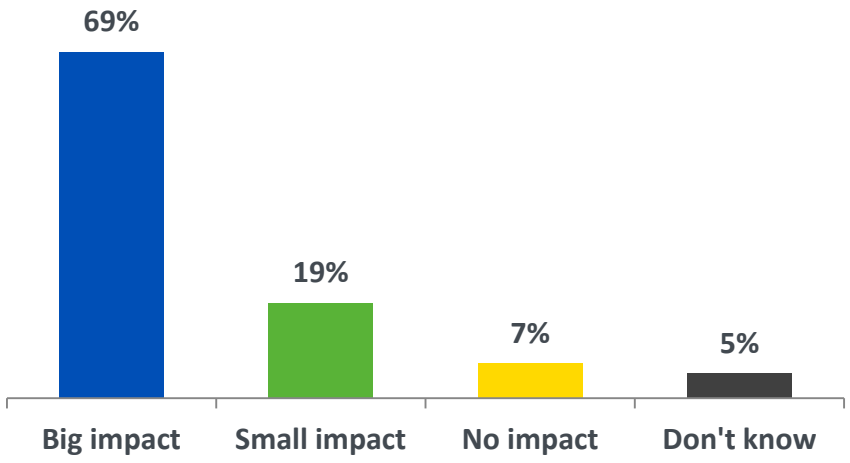


Q9. Do you think that NL drivers receive more, less or about the same overall benefits for personal injury claims compared to other Atlantic Provinces?
(n=400)

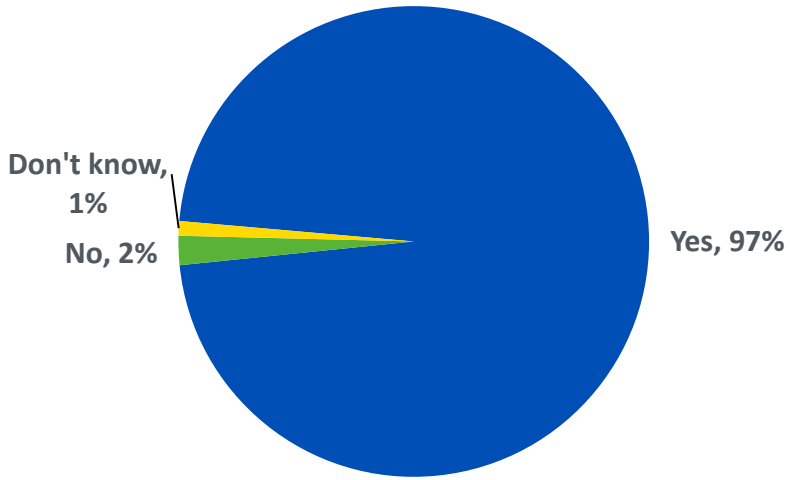
Males (12%) are more likely than Females (5%) to feel that drivers in the province receive more benefits compared to the rest of Atlantic Canada.

Uninsured Drivers

Uninsured drivers are seen as a significant issue in the province. More than two-thirds (69%) of respondents felt that uninsured drivers have a big impact on car insurance rates while a further 19% said it had a small impact. Meanwhile, there was widespread support for insurance premiums to be based on one's driving and claim history.



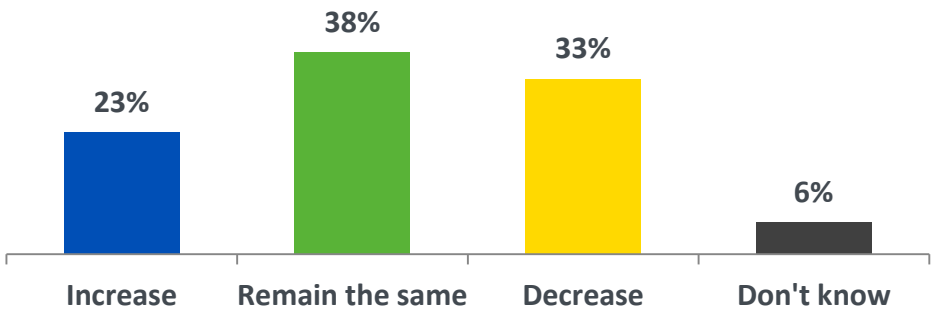
Q10. Do you believe that uninsured drivers have a big impact, small impact or no impact on car insurance rates in NL? (n=400)



Q11. In your opinion, should insurance premiums be based on your driving and claim history such that drivers with a clean driving record pay less for their premiums and drivers with a poor driving record pay more? (n=400)

Insurances Premiums & Rates

Respondents were split with regards to the potential impact of reduced claim payout costs on insurance rates. While one-third (33%) feel insurance rates would decrease, 38% believe the rates will remain the same and almost one-quarter (23%) believe rates would continue to increase.

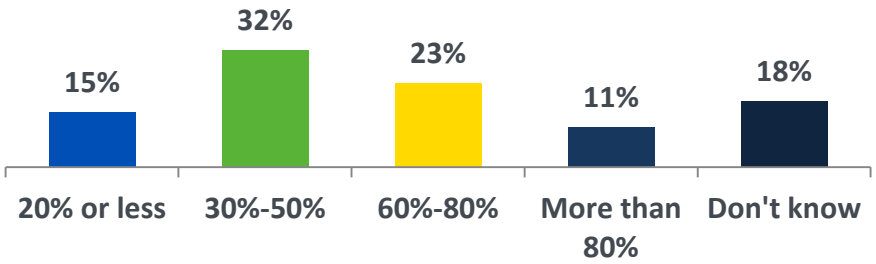


Q12. If the costs associated with claim payouts were reduced in NL, do you feel this would cause your insurance rates to…? (n=400)

Males were more likely to expect rates to continue to increase (27%) if claim payout costs were reduced compared to Females (19%).

Personal Injury Claims – Legal Advice

Respondents gave a wide range of responses when asked what percentage of injury claims involve a lawyer. With regards to factors affecting people's decision to retain lawyers for personal injury claims, nearly everyone felt that people find the claims process complicated (80%) and need support (87%), that they don't trust insurance companies (82%) and want to maximize their settlement (92%).



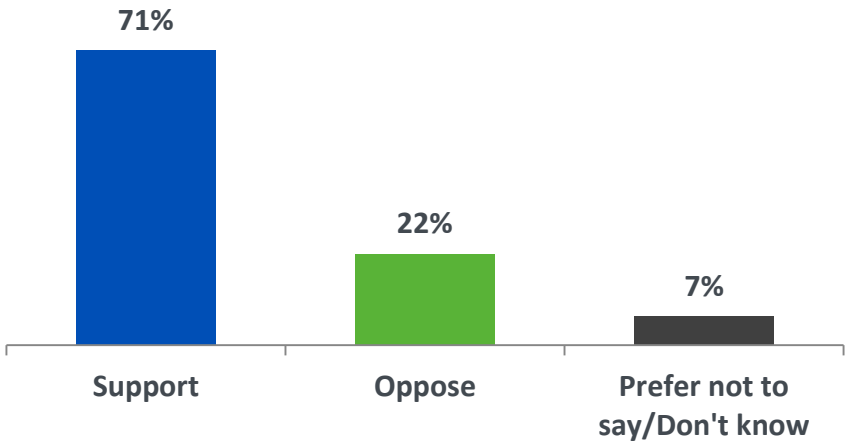
Q13. What percentage of personal injury claims do you believe lawyers are involved with? (n=400)

Statement	Total (% 'Yes')
The process is too complicated	80%
They need help or support to navigate the claim process	87%
They don't trust insurance companies	82%
They want to maximize their settlement	92%

Q14. Which of the following do you believe are factors in people's decision to retain lawyers for personal injury claims? (n=400)

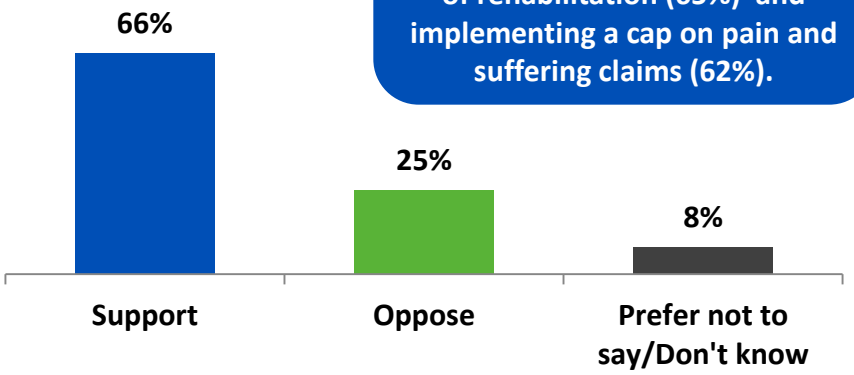
Rehabilitation Care and Pain and Suffering Claims

Seven-in-ten respondents (71%) support the option to choose the level of rehabilitation care included in their insurance policy. Meanwhile, two-thirds (66%) support the addition of a cap on pain and suffering claims as a means to reduce premiums.



Q15. In the event of a serious injury, claimants receive compensation for rehabilitation care. Would you support or oppose having the option to choose the amount or level of rehabilitation care included in your policy based on the premium you pay? (n=400)

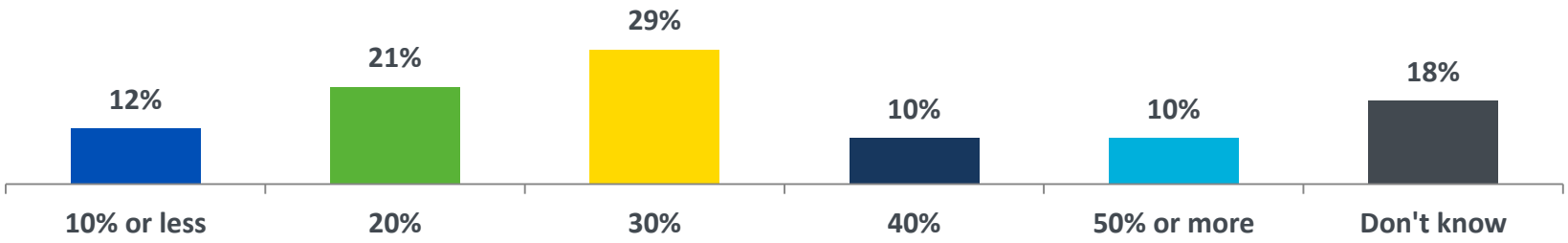
Those who have filed a claim previously are less supportive of the option to choose their level of rehabilitation (65%) and implementing a cap on pain and suffering claims (62%).



Q16. If the addition of a cap on pain and suffering claims resulted in lower car insurance premiums, would your support or oppose it? (n=400)

Contingency Fees

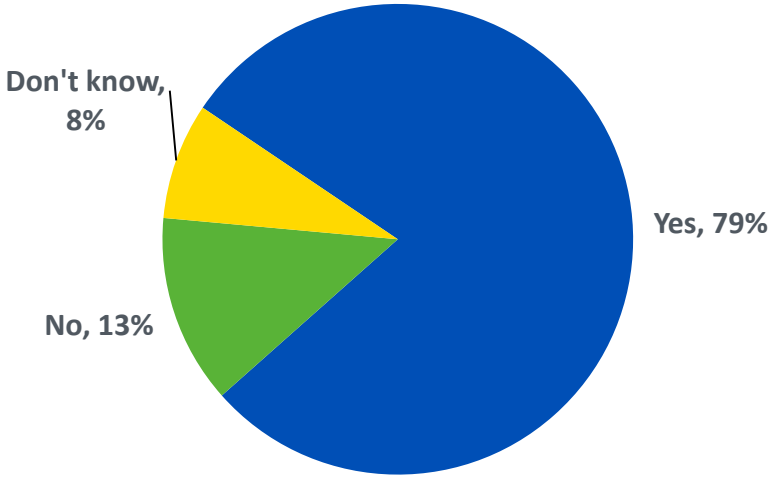
When asked what percentage of settlements lawyers typically take if they win a personal injury case, the top estimates were 30% (29% of respondents) and 20% (21% of respondents).



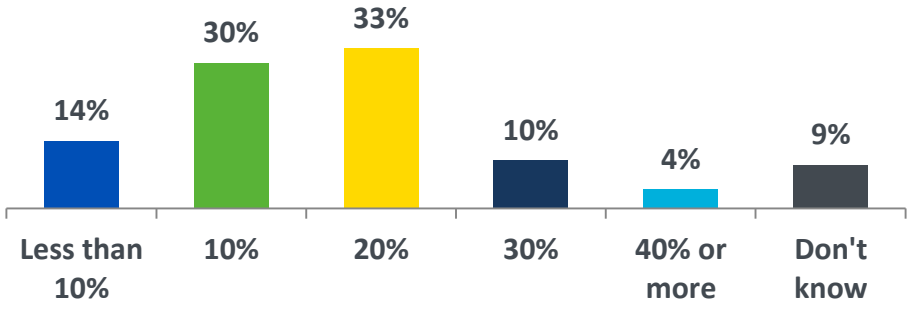
Q17. Lawyers usually work on the basis of contingency fees where they receive a flat percentage of your settlement if you win your case. What percentage do you think lawyers charge on average for car insurance claim cases? (n=400)

Contingency Fees

Respondents overwhelmingly believe that there should be a cap on contingency fees charged by lawyers for personal injury claim cases (79%). Among those who agreed contingency fees should be capped, the vast majority felt it should be 20% or less and nearly one-half saying it should be 10% or less.



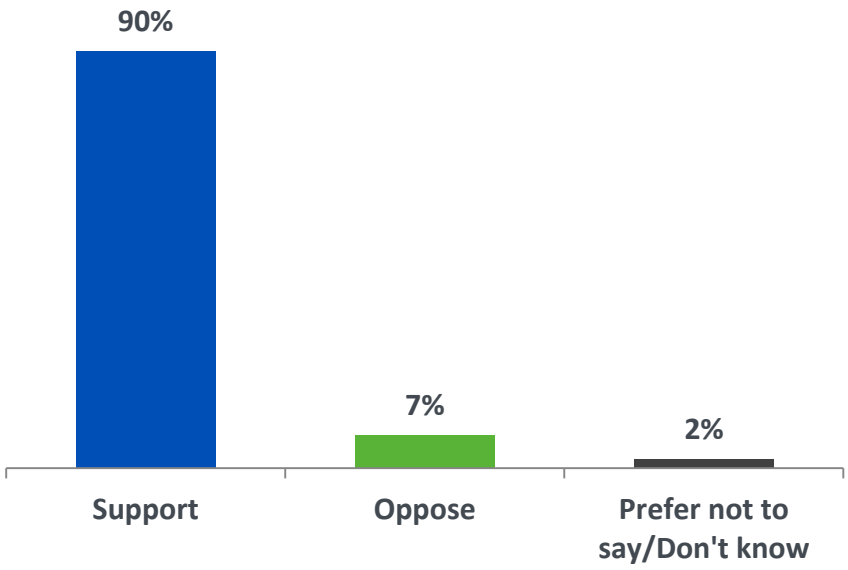
Q18. Currently there is no cap on contingency fees charged by lawyers for car insurance claim cases. Do you think contingency fees should be capped?
(n=400)



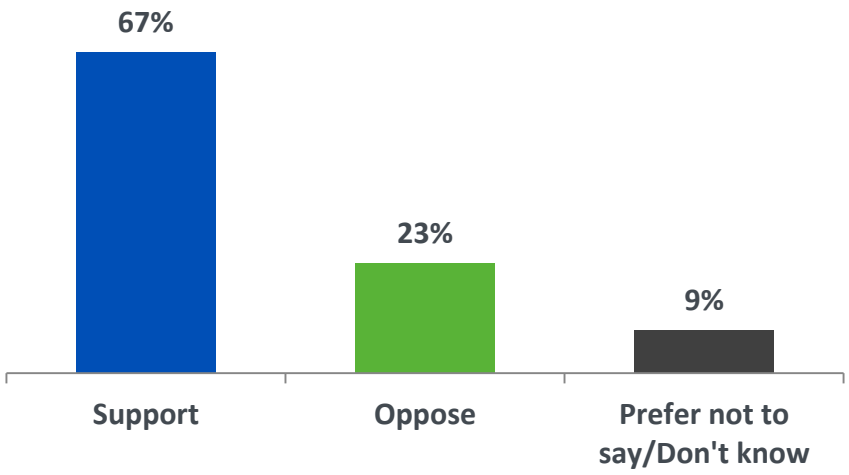
Q19. What do you feel should be the maximum percentage lawyers can charge for contingency fees?
SUBSET: Those is support of a cap
(n=319)

Choosing Your Benefits

Respondents overwhelmingly support (90%) having the option to choose their benefits as a means of reducing car insurance premiums.
Two-thirds (67%) were also in favour of making the right to sue for pain/suffering an optional benefit that could be purchased as part of their policy.



Q20. Do you support or oppose having the option to choose what benefits are included in your policy as a means of reducing your car insurance premiums?
(n=400)



Q21. Would you support or oppose making the right to sue for pain/suffering an optional benefit that you could purchase as part of your policy?
(n=400)

Comparison of Accident Benefits coverages

Province	Medical and rehab	Loss of income	Funeral expenses	Death benefits
NL	$25,000 for 4 years	Maximum $140/week; 104 weeks for partial disability, lifetime for total disability; test be disabled for at least seven days to qualify; unpaid housekeeper $70/week, maximum 12 weeks	$1,000	$10,000 head of household or spouse
NS	$50,000 for 4 years	90% of gross weekly income (less any $2,500 payments for loss of income); 104 weeks partial disability; lifetime if totally disabled (incapable of performing essential duties); maximum $250/week; must be disabled for at least seven days to qualify; unpaid housekeeper, if completely disabled, $100/week for maximum of 52 weeks	$2,500	$25,000 head of household, $25,000 spouse
NB	$50,000 for 4 years	Maximum $250/week; 104 weeks for partial disability, lifetime for total disability; must be disabled for at least seven days to qualify; unpaid housekeeper $100/week, maximum 52 weeks	$2,500	$50,000 head of household, $25,000 spouse
PEI	$50,000 for 4 years	Maximum $250/week; 104 weeks for partial disability; lifetime for total disability; must be disabled for at least seven days to qualify; unpaid housekeeper $100/week, maximum 52 weeks	$2,500	$50,000 head of household, $25,000 spouse

AVIVA

Crash, Cash and Backlash

Auto Insurance Fraud in Canada

avivacanada.com/fight-fraud

November 2017

Auto Insurance Fraud in Canada

Auto insurance fraud costs Canadians up to $2 billion every year. And it's the honest drivers who are paying for the fraudulent minority. The shocking stats do not end there…

From the multiple ways in which fraud is committed, to the vast array of players gaming the system, to the government-backed initiatives that have gone uninitiated, all signal that meaningful action is needed. There's simply too much abuse in the auto insurance system.

We surveyed consumers across Canada and found that overwhelmingly from province to province you agree. You want to pay less for your insurance. You should be paying less for your insurance. And you can pay less for your insurance, if we fight fraud. But, a problem this big can't be tackled overnight. We all have to work together to inform ourselves, protect ourselves and apply pressure in the right places for actionable reform.

The problem

Through every stage of the insurance process you can unwittingly be exposed to fraud, through no fault of your own. Check out some of the most prevalent examples and what Aviva's doing about it.

Becoming insured

1 Fake pink slips

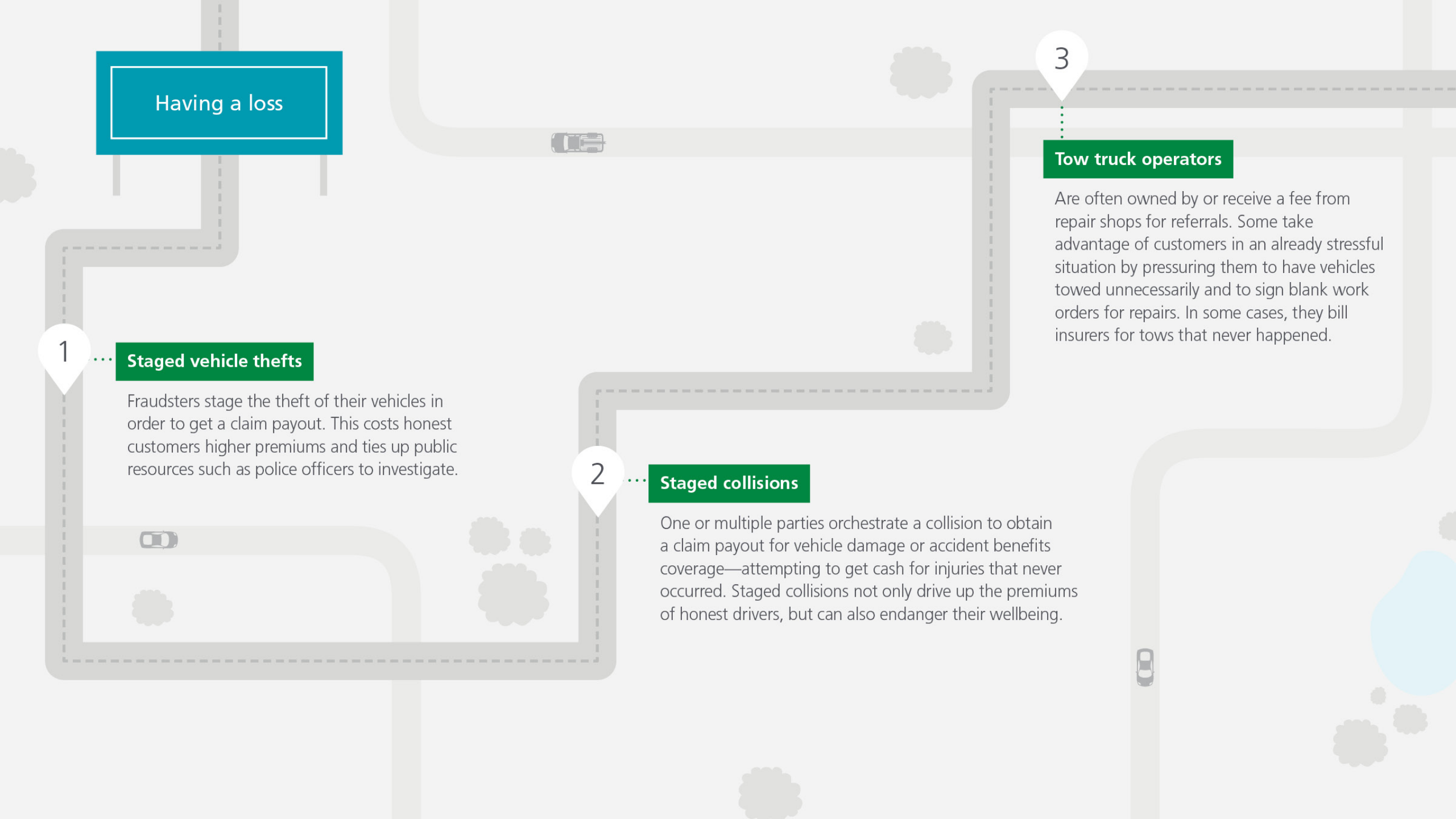
Fraudsters forge motor vehicle insurance liability cards (pink slips) and sell them to unsuspecting consumers through online sites like Kijiji and Craigslist. When you have a counterfeit insurance pink slip, you are actually not insured.

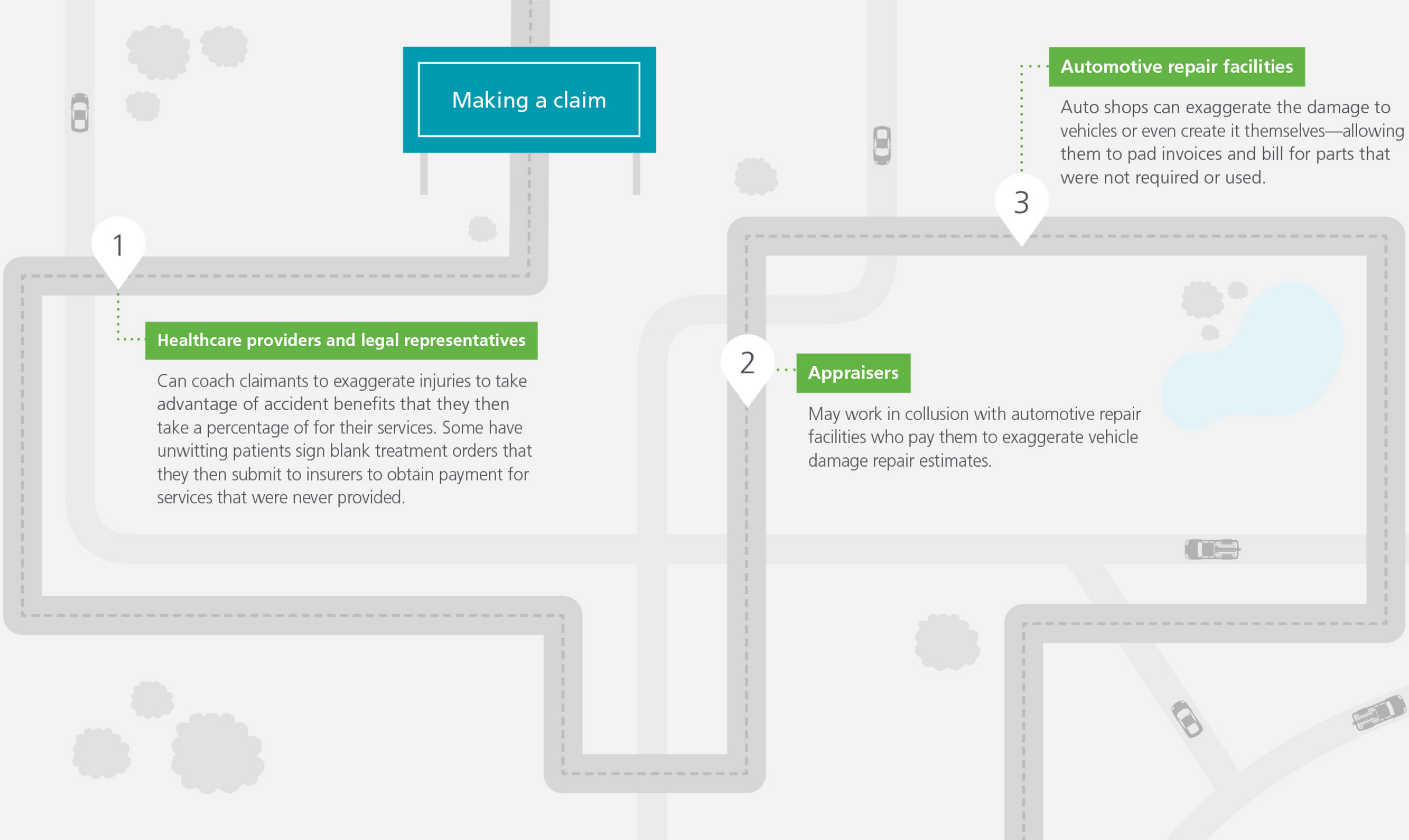
2 Unlicensed intermediaries

Prey on consumers who may otherwise have difficulty obtaining insurance. They act as a broker and take a fee for setting up a policy, often providing false and fraudulent information to insurance companies. Victims may not be covered if they make a claim.

3 Rate evasion

Residents of high-risk territories deliberately register their licenses or vehicle registration addresses to lower-risk territories to get lower premiums, which costs honest consumers.


Having a loss
1
Staged vehicle thefts
Fraudsters stage the theft of their vehicles in order to get a claim payout. This costs honest customers higher premiums and ties up public resources such as police officers to investigate.
2
Staged collisions
One or multiple parties orchestrate a collision to obtain a claim payout for vehicle damage or accident benefits coverage—attempting to get cash for injuries that never occurred. Staged collisions not only drive up the premiums of honest drivers, but can also endanger their wellbeing.
3
Tow truck operators
Are often owned by or receive a fee from repair shops for referrals. Some take advantage of customers in an already stressful situation by pressuring them to have vehicles towed unnecessarily and to sign blank work orders for repairs. In some cases, they bill insurers for tows that never happened.


Making a claim
1
Healthcare providers and legal representatives
Can coach claimants to exaggerate injuries to take advantage of accident benefits that they then take a percentage of for their services. Some have unwitting patients sign blank treatment orders that they then submit to insurers to obtain payment for services that were never provided.
2
Appraisers
May work in collusion with automotive repair facilities who pay them to exaggerate vehicle damage repair estimates.
3
Automotive repair facilities
Auto shops can exaggerate the damage to vehicles or even create it themselves—allowing them to pad invoices and bill for parts that were not required or used.

4

Coronation Insurance Co. v. Florence

The Coronation Insurance Company Limited et al., and Carol Florence, et al.
[1994] S.C.J. No. 116

[1994] A.C.S. no 116
File No. 22157

Supreme Court of Canada

Cory J.

1994: August 8.

APPEAL FROM TAXATION OF COSTS (18 paras.)

No counsel mentioned.

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1 **CORY J.**:— This is an appeal from the taxation of the costs of the proceedings in this court by the Registrar.

2 The formal judgment provides:

- "The appeal is allowed and the action is dismissed with costs to the respondents throughout, including the costs in this Court."

3 The Court was that the respondents should be awarded their cots of the trial and in the Court of Appeal. The majority awarded the respondents their costs in this Court as well as in the courts below. The position of the majority was put in this way:

- "I agree with the disposition of costs proposed by my colleague McLachlin J. except that I would order the appellants to pay the costs of the respondents before this court as well as the courts below.
- Meredith J. awarded costs to the respondents at trial. The Court of Appeal also awarded costs at trial and on appeal at an increased scale because of the difficulty of the issue and the significance of its resolution to the aviation industry."

The courts below exercised their discretion judicially in this matter and this court should not alter the results.

4 The conduct of the insurers in this transaction supports an award of costs to the respondents. The appellants voluntarily entered into a highly regulated field. They drafted the contract with a firm grasp of the applicable regulations. As evidence of this they were instrumental in gaining approval for conditions to this policy which, in the event, circumvented a minimum requirement of insurance per passenger seat envisaged by the regulations.

5 The insurers failed to take the simple step of examining their own files for a record of Taku before issuing the policy. This lapse occurred despite the fact that the name "rang a bell" with an employee involved in the transaction.

6 The families legitimately pursued this litigation. As third parties to the contract they did not have first-hand knowledge of the circumstances of its negotiation. In initiating the action they could reasonably have hoped to succeed in proving that the insurers did know of the prior history of Taku when issuing the policy and that in fact there was no misrepresentation.

7 Finally, the appellants applied for leave and obtained it on the basis of the importance of the

issue to the insurance industry. This Court has previously awarded costs to a private individual in such circumstances in Roberge v. Bolduc, [1991] 1 S.C.R. 374. The case at bar is significant to the insurance industry but there is no reason to require the unfortunate victims of an air disaster to pay the appellants' costs or indeed to be deprived of their own costs. They are the victims of an inadequate regulatory scheme. The insurers are not innocent parties on whom a fraud was perpetrated but rather companies that were so eager for a premium they failed even to examine their own records."

8 With regard to the Appellants failing to examine their own records, the following was stated:

> "Taku was a small commercial air carrier which operated in northern British Columbia. When it began to operate in 1978, the appellants (Coronation) provided the insurance. During the first year of the policy, Taku had three accidents. As a result, Coronation refused to renew the policy. In a telex dated September 24, 1979, Peter May, an employee of the insurer's agent wrote:
>
> > ... although I mentioned to Doug that I would be able to quote renewal having now looked at the file I believe we will not be able to help STOP Our contract is out of the question...
>
> Taku then obtained coverage from the British Aviation Insurance Company. Between 1979 and 1986 Taku was involved in further accidents. Its insurance was terminated and Taku began a new search for insurance coverage. The carrier applied for a policy from Coronation. Peter May handled the request from a broker. The names Taku and Bond apparently 'rang a bell' with Mr. may. He testified:
>
> > He gave me details about the Taku risk, and I specifically remember him because the name Bond and/or Taku rang bells with me, and as a result of that I specifically wanted a ten-year accident history of this client.
>
> Despite the ringing bells he did not check insurance company's files. Instead he asked Taku to disclose its records. This Taku did not do. Rather it reported but one accident which it stated occurred in 1978 when it was insured by a policy with BAIC. In reality, the reported accident occurred in 1979 at a time when Coronation still insured Taku. In any event Coronation did not undertake an investigation of Taku. It simply calculated the risk of the policy on the basis of the false, information it received from Taku. It did not consult its own records. It did not contact the previous insurer BAIC. Nor did it make inquiries at the Canadian Aviation Safety Board as to accidents in which Taku was involved."

In earlier proceedings pertaining to the taxation of the costs, it was said:

> "Among the material filed in this Court prior to the hearing of the appeal were affidavits of Deborah Passarell and Carol Florence. They demonstrated the difficult financial situation faced by these women. Deborah Passarell deposed that she had a contingency contract with her lawyers. Carol [Florence] did not refer to such an arrangement. The respondent companies observe that it is the costs of Carol [Florence] and not Deborah Passarell which are being taxed. It is said that the contingency of Carol [Florence] was not before this Court and that it constitutes fresh evidence which should be taken into account on the issue of costs. It is said that the decision as to costs in this Court should not be make before the decision of the British Columbia Court of Appeal is rendered.
>
> With respect, I cannot agree. When the special order as to costs was made by this Court, it was aware that one of the parties before it had entered into a contingency fee contract. The existence of that arrangement did not have any effect on the decision as to costs. It should not be inferred that the existence of a similar arrangement made by Carol [Florence] would alter that decision. Any decision as to costs of proceedings in this Court must be determined by this Court. Accordingly,

the order of the Registrar adjourning the taxation will be set aside. The taxation of the proceedings in this Court including the costs of this application should proceed."

9 On this appeal the appellant Coronation first argued that s. 45 of Supreme Court Act prevents this Court from making the Order for costs. That section provides:

> "The Court way dismiss an appeal or give the judgment and award the process or other proceedings that the court whose decision is appealed against should have given or awarded."

10 The appellants contend that the law of B.C. as expressed by the Court of Appeal in Fullerton et al. v. District of Matsqui (1992), 12 C.P.C. (3d) 319 prohibits this court from ordering the payment of costs in light of the contingency fee agreement. Thus it is submitted this Court cannot make an award of costs in this case.

11 I cannot agree with that position. Section 47 of the Supreme Court Act provides:

> "The Court way, in its discretion, order the payment of the costs of the court appealed from, of the court of original jurisdiction, and of the appeal, or any part thereof, whether the judgment is affirmed, or is varied or reversed."

12 This section specifically empowers the court to make the award of costs ordered in this case.

13 The appellant next contended that costs are generally awarded to indemnify a party. It is said that the contingency fee agreement absolves the respondents from paying costs. Thus it is argued there is no need to indemnify them and costs should not be awarded. In support of this position the appellant relied upon the decision in Fullerton v. Matsqui, supra.

14 The concept of contingency fees is well established in the United States although it is a recent arrival in Canada. It's 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. For many years it has been rightly observed that only the very rich and those who qualify for legal aid can afford to go to court. This point was brought home with shocking clarity by Mr. Justice George Adams in his paper presented the week of July 11th at the Cornell Lectures. There he noted that the total legal bills to all parties in an average General Division lawsuit (including those that settle before trial) may easily amount to between $40,000 and $50,000. 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. Although I find the reasoning of Justice Seaton on this issue set out in Coronation Insurance v. Florence (1992) 73 B.C.L.R. (2d) 239 (CB) compelling and persuasive I do not find it necessary to attempt to resolve the question since in my view the costs awarded in this case are special costs in any sense of that term.

15 These costs were awarded to the unsuccessful party. That in itself is unusual and special. Further, the award of costs was made because of the irresponsible and reprehensible conduct of Coronation. It cannot be forgotten that an airline company cannot undertake to carry passengers without basic insurance coverage for those passengers. The coverage is for the benefit of the passengers who can have no part in the Coronation entered into this highly regulated field knowing that airlines must obtain coverage for their passengers. It insured TAKU without checking its accident record although that record was public. It provided TAKU with insurance without even checking its own records although the name "rang a bell". In doing so it placed the passengers at risk secure in the belief that it could avoid liability simply by demonstrating that TAKU had failed to disclose its accident record. It would be difficult to think of a more cynical and callous attitude towards the innocent and powerless passengers. The misconduct of Coronation earned the award of special costs against it. The award goes far beyond the mere indemnification of the respondent.

The award represent the courts disapproval of the conduct of the appellant. Had Coronation simply checked its own records it could have become aware of TAKU disastrous accident record and refused coverage. Even the most laissez faire approach to business morality would suggest that Coronation owed a responsibility to the vulnerable passengers to at least review its own records. If Coronation did not sign the death warrants of the passengers it certainly provided the pen and paper. Had they done so, it may well have saved the lives of the passengers. That finding is I believe sufficient basis for dismissing the appeal.

16 However, the appellant raised for the first time the issue that the contingency fee agreement in this case contained s. 78(4) of the Legal Profession Act The section provides:

> (4) A contingent fee agreement entered into on or after June 1, 1988 shall not include a provision which enables the member to receive and be paid both fee based on a proportion of the amount recovered and an amount equal to any costs awarded to the client on a party and party or solicitor and client basis by order of a court.

17 This provision has the salutary object of preventing solicitors obtaining both a portion of the clients judgment or settlement and as well the party and party costs. Here the original agreement was drafted before the 1 June 1988. It is unfortunate that the solicitors did not draft the amending agreements made subsequent to that date so as to comply with the subsection. Yet in this case there is not and cannot be any double recovery since the respondents action was dismissed. If the respondents had been successful no doubt the provision in the contingency fee agreement pertaining to costs awarded by the Court would have been struck down. Yet the failure to comply with s. 78(4) should not prohibit the recovery of the special costs awarded to reflect the callous misconduct of Coronation. The solicitors will be bound by their agreement with their client so that they will recover only 55% of the taxed costs and the clients will recover the balance. This is a small compensation indeed for the difficult and arduous work of the solicitors and the loss and damages suffered by the respondents.

18 In the result the appeal from the taxation of costs by the Registrar is dismissed with costs.

5

2002 CarswellOnt 2880
Ontario Court of Appeal

McIntyre Estate v. Ontario (Attorney General)

2002 CarswellOnt 2880, [2002] O.J. No. 3417, 116 A.C.W.S. (3d) 527,
164 O.A.C. 37, 218 D.L.R. (4th) 193, 23 C.P.C. (5th) 59, 61 O.R. (3d) 257

RONALD MCINTYRE by his estate representative MAUREEN MCINTYRE (Applicant / Respondent in appeal) and ATTORNEY GENERAL OF ONTARIO (Appellant) and THE ADVOCATES' SOCIETY and THE ONTARIO TRIAL LAWYERS'ASSOCIATION (Interveners)

O'Connor A.C.J.O., Abella, MacPherson JJ.A.

Heard: April 17, 2002
Judgment: September 10, 2002
Docket: CA C36074

Proceedings: reversing *McIntyre Estate v. Ontario (Attorney General)* (2001), 53 O.R. (3d) 137, 198 D.L.R. (4th) 165, 11 C.P.C. (5th) 267 (Ont. S.C.J.)

Counsel: *Janet E. Minor, Sean Hanley*, for Appellant
Douglas Lennox, for Respondent
Terrence J. O'Sullivan, Rochelle S. Fox, for Intervener, Advocates' Society
James Vigmond, Brian Cameron, for Intervener, Ontario Trial Lawyers' Association

Subject: Civil Practice and Procedure; Public

APPEAL by respondent from judgment reported at 2001 CarswellOnt 575, 53 O.R. (3d) 137, 198 D.L.R. (4th) 165, 11 C.P.C. (5th) 267 (Ont. S.C.J.), granting application for declaration that lawyers' contingency fee agreements are not per se contrary to *Act Respecting Champerty,*.

O'Connor A.C.J.O.:

1 This appeal raises the important question of whether lawyers and their clients are prohibited from entering into contingency fee agreements in relation to civil lawsuits in Ontario. Contingency fee agreements may take a variety of forms, but the one element common to all of them is that the client only becomes liable to pay the lawyer's fees in the event of success in the litigation.

2 The respondent has commenced an action seeking damages against Imperial Tobacco and Venturi Inc. (the "defendants") for the wrongful death of Ronald McIntyre. At the outset of the litigation, the respondent sought a declaration that a proposed contingency fee agreement with her lawyers is not prohibited by *An Act Respecting Champerty*, R.S.O. 1897, c. 327 (the" *Champerty Act*".) In a judgment dated March 1, 2001, Wilson J. granted the declaration, but held that in doing so she was not approving the fee structure set out in the proposed agreement. It is implicit in her reasons that the reasonableness and fairness of the fee structure did not inform her analysis of whether the proposed agreement is champertous.

3 The Attorney General, who was named as the respondent in the application below, appeals the judgment arguing that the *Champerty Act* constitutes an absolute prohibition of all lawyers' contingency fee agreements. For the reasons that follow, I agree with the applications judge's main conclusion that lawyers' contingency fee agreements are not *per*

se prohibited by the *Champerty Act*. However, in my view, that does not end the analysis that is required to determine if a particular agreement is champertous. It remains to be decided whether the lawyer had an improper motive in entering into the allegedly champertous agreement. In assessing the lawyer's motive, a court should consider, among other things, the reasonableness and fairness of the fee structure in the contingency fee agreement.

4 In this case, the fee structure in the proposed agreement is based on a percentage of the damages that may be recovered from the defendants. The fees are not related to the amount of time spent by the lawyers, the quality of the legal services or the many other factors that would normally be taken into consideration when determining the appropriateness of a lawyer's fees. Moreover, there is no cap or upper limit on the amount that may become owing for legal services. Because of the nature of the fee structure, it is premature at this early stage of the litigation to assess whether the fees that may become payable under the proposed agreement will be reasonable and fair. For that reason alone, I would allow the appeal and set aside the declaration that the proposed agreement does not contravene the *Champerty Act*. Given the nature of the fee structure, a determination of whether the proposed agreement is champertous will likely have to await the outcome of the underlying litigation.

Background

5 The respondent, the estate of Ronald McIntyre represented by his widow, Maureen McIntyre, has instituted an action against the defendants alleging responsibility for the illness and death of Mr. McIntyre, who died from lung cancer. It is alleged that Mr. McIntyre's death was caused by smoking cigarettes manufactured and marketed by the defendant, Imperial Tobacco, and it is further alleged that the defendant, Venturi Inc., was negligent and deceitful in its marketing of a plastic cigarette attachment, used by Mr. McIntyre, by stating that the device reduces tar and nicotine from cigarette smoke.

6 Mr. McIntyre began smoking at the age of sixteen and soon after became addicted to nicotine. In spite of efforts to stop smoking, he was unable to do so. In July 1998 he was diagnosed with lung cancer and in December 1999 he died.

7 After her husband's death, Mrs. McIntyre contacted the Canadian Cancer Society for advice and was eventually referred to her present lawyers, the law firm of Rochon, Genova, to represent her husband's estate in any legal action arising from her husband's death. Mrs. McIntyre decided to bring an action against the defendants to recover the damages resulting from Mr. McIntyre's death. It was apparent that the proposed action would involve complex product liability allegations and likely would be vigorously defended. Mrs. McIntyre was unable to prosecute an action of this nature without the assistance of counsel.

8 Mrs. McIntyre works in the medical records department of a local hospital and is a person of modest means. The applications judge found that she would be unable to finance the proposed litigation other than on a contingency fee basis.

9 On behalf of her husband's estate, Mrs. McIntyre entered into a contingency fee agreement with Rochon, Genova, which agreement was made conditional upon court approval. The McIntyre estate is only liable to pay the law firm's fees in the event that the litigation is successful. If there is no recovery, then the estate and Mrs. McIntyre will not be liable for the payment of any legal fees. In the event of success, the compensation for the lawyers is based on a percentage of the damages recovered. The estate would be required to pay to the law firm 33 percent of compensatory damages, 40 percent of punitive, aggravated or exemplary damages, 100 percent of costs recovered from the defendants in the action and 100 percent of any disbursements not otherwise recovered from the defendants.

10 Although not explicitly stated in the agreement, the law firm implicitly agrees to provide the legal services necessary to conduct the litigation and to pay the disbursements necessary to support the action.

11 The respondent brought an application in the court below requesting three declarations:

a) A declaration that the proposed agreement between the applicant and her solicitors does not offend the *Champerty Act*.

b) In the alternative, a declaration that the *Champerty Act* is of no force and effect, and is contrary to the *Canadian Charter of Rights and Freedoms*, and the *Constitution Act, 1867*.

c) In the further alternative, an order providing a constitutional exemption, allowing the respondent to retain counsel, notwithstanding the provisions of the *Champerty Act*.

12 The respondent named only the Attorney General of Ontario as a respondent to the application in the court below. The defendants in the underlying litigation were not named as respondents and did not participate in the proceeding before the applications judge.

13 The application was heard on December 7, 2000 and by judgment dated March 1, 2001, reported at (2001), 53 O.R. (3d) 137 (Ont. S.C.J.), the applications judge made a declaration that the proposed agreement between the respondent and her solicitors does not offend the *Champerty Act*. In addition, she held that it was premature to approve the proposed agreement and that the court should decide whether to approve any contingency fee agreement at the conclusion of the litigation. Because of the conclusion she reached, the applications judge did not find it necessary to address the alternative declarations sought by the respondent.

14 The Attorney General appealed the judgment. On July 26, 2001, Osborne A.C.J.O. dismissed a motion by Imperial Tobacco for leave to intervene in the appeal as an added party and to adduce evidence before this court. See [2001] O.J. No. 3206 (Ont. C.A.). On September 14, 2001, the Advocates' Society and the Ontario Trial Lawyers' Association were granted leave to intervene in the appeal as friends of the court. Both interveners appeared on the argument of the appeal and made submissions in favour of upholding the decision of the court below.

Issue

15 The single issue that needs to be addressed on this appeal is whether the applications judge erred in granting a declaration that the proposed agreement between the respondent and her lawyers does not offend the *Champerty Act*. Because I conclude that it is premature to determine whether the proposed agreement offends the *Champerty Act*, it is unnecessary to address the *Charter* relief sought by the respondent.

Analysis

16 The *Champerty Act* has only two sections. The complete text is as follows:

1. Champertors be they that move pleas and suits, or cause to be moved, either by their own procurement, or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains.

2. All champertous agreements are forbidden, and invalid.

17 I have divided my analysis into the following five sections:

a) History of the *Champerty Act*;

b) The common law of champerty and maintenance;

c) The interpretation of s. 1 of the *Champerty Act*;

d) Lawyers' contingency fee agreements; and

e) Application of the law to this case.

(a) History of the **Champerty Act**

18 The *Champerty Act* was enacted by the Ontario legislature in 1897 [1]. Section 1 is based on a provision found in an English statute which was first enacted in 1305 and which is cited as 33 Edw.1, Stat. 2. The English statute was entitled *Statutum de Conspiratoribus* or as it came to be known, the *Statute Concerning Conspirators*. It is not clear whether the predecessor language to what became s. 1 in the *Champerty Act* was included in the *Statute Concerning Conspirators* when it was originally enacted or whether it was added at some later point in time. See *A New Abridgement of the Law by Matthew Bacon*, 7th ed., Corrected (London: A Strahan, 1832) Vol. II at 27, 29. It is apparent, however, that the section finds its origins in medieval times.

19 The relevant section in the English statute, like the sections in several other medieval statutes, addressed abuses that were known in the common law as champerty and maintenance. Legal historians tell us that these medieval statutes were passed with a view to prohibiting particular practices that were prevalent in English medieval society. In those times, there existed a practice of assigning doubtful or fraudulent claims to Royal officials, nobles and other persons of wealth and influence who would be expected to receive a more favourable hearing in court than the assignors. Typically, these arrangements provided that the assignee maintain the action and that the proceeds of success would be shared between the assignor and assignee. Over time, as conditions in the administration of justice improved with the emergence of an impartial and independent judiciary, the circumstances that gave rise to the enactment of what is now s. 1 of the *Champerty Act* no longer existed. However, new and different abuses arose and were included within what the common law labelled as champerty and maintenance.

20 A reprint of the *Statute Concerning Conspirators*, published in 1763 in *The Statutes at Large*, Vol. 1, prepared by Owen Ruffhead, esq., used what was then more current language than that found in the original text. When the legislature in Ontario enacted the *Champerty Act* in 1897, it incorporated as s. 1 the identical language to that found in the 1763 reprint of the *Statute Concerning Conspirators*. The Ontario legislature added s. 2, providing that all champertous agreements are forbidden and invalid.

21 In 1967, the Parliament of the United Kingdom repealed the various medieval statutes which had until then prohibited either or both of champerty and maintenance. See *Criminal Law Act 1967*, 1967, c. 58, ss. 13(1), (2), 14. Included among the statutes then repealed was the *Statute Concerning Conspirators*. However, the *Champerty Act*, as enacted in 1897, remains in effect in Ontario.

(b) The common law of champerty and maintenance

22 The Attorney General argues that this appeal is concerned solely with the interpretation of s. 1 of the *Champerty Act* and that the concept of champerty found in the common law is of no assistance to the proper interpretation of that section. I agree that the interpretation of s. 1 of the *Champerty Act* is at the heart of this appeal. However, for the reasons that are developed in subsection (c) below, I am of the view the common law regarding what constitutes champerty is essential to a proper interpretation of the section. For that reason, before turning to the interpretation of s. 1 of the *Champerty Act*, it is useful to briefly review the common law of champerty. In doing so, it is also necessary to review the common law of maintenance because as I point out below, champerty is one type or a subspecies of maintenance.

23 The doctrines of champerty and maintenance played an important role in the common law in protecting the administration of justice from a variety of real or perceived abuses. At common law, champerty and maintenance were both crimes and torts and the presence of either was capable of rendering contracts unenforceable as being contrary to public policy.

24 The common law crimes and torts of champerty and maintenance were abolished by statute in the United Kingdom in 1967. The abolition of criminal and civil liability for champerty and maintenance, however, did not put an end to the use of the concepts in English law. The 1967 Act left open the possibility that champerty and maintenance could still

render contracts unenforceable as being contrary to public policy and because of that, the English courts continued to address issues relating to the enforceability of lawyers' contingency fee agreements until they were expressly permitted by statute in 1998.

25 In 1954, the Canadian Parliament abolished all common law crimes, including those of champerty and maintenance. However, champerty and maintenance continue to be actionable in tort in Ontario upon proof of special damages. See *Frind v. Sheppard*, [1940] 4 D.L.R. 455 (Ont. C.A.), rev'd [1941] 4 D.L.R. 497 (S.C.C.); and *Davidson Tisdale Ltd. v. Pendrick* (1997), 18 C.P.C. (4th) 131 (Ont. Div. Ct.) (leave to appeal); (1998), 31 C.P.C. (4th) 164 (Ont. Div. Ct.). In addition, in Ontario, the *Champerty Act* specifically provides that champertous agreements are forbidden and invalid.

26 Although the type of conduct that might constitute champerty and maintenance has evolved over time, the essential thrust of the two concepts has remained the same for at least two centuries. Maintenance is directed against those who, for an improper motive, often described as wanton or officious intermeddling, become involved with disputes (litigation) of others in which the maintainer has no interest whatsoever and where the assistance he or she renders to one or the other parties is without justification or excuse. Champerty is an egregious form of maintenance in which there is the added element that the maintainer shares in the profits of the litigation. Importantly, without maintenance there can be no champerty: *Findon v. Parker* (1843), 11 M. & W. 675 (Eng. Ex. Div.), at 682, (1843), 152 E.R. 976 (Eng. Ex. Div.), at 979; *Fischer v. Kamala Naicher* (1860), 8 Moo. Ind. App. 170 (England P.C.), at 187; *Newswander v. Giegerich* (1907), 39 S.C.R. 354 (S.C.C.), at 359, 362-63; *Colville v. Small* (1910), 22 O.L.R. 33 (Ont. H.C.), at 34, aff'd (1910), 22 O.L.R. 426 (Ont. C.A.); *Neville v. London Express Newspaper Ltd.* (1918), [1919] A.C. 368 (U.K. H.L.), at 378-79, 382-83; *R. v. Goodman*, [1939] S.C.R. 446 (S.C.C.), at 449, 453-54; *Monteith v. Calladine* (1964), 47 D.L.R. (2d) 332 (B.C. C.A.), at 342; *S. (J.E.) v. K. (P.)* (1986), 55 O.R. (2d) 111 (Ont. Dist. Ct.), at 118, 121; and *Smythers v. Armstrong* (1989), 67 O.R. (2d) 753 (Ont. H.C.), at 756-57. See also *Giles v. Thompson*, [1993] 3 All E.R. 321 (Eng. C.A.), at 357.

27 The courts have made clear that a person's motive is a proper consideration and, indeed, determinative of the question whether conduct or an arrangement constitutes maintenance or champerty. It is only when a person has an improper motive which motive may include, but is not limited to, "officious intermeddling" or "stirring up strife", that a person will be found to be a maintainer.

28 In *Buday v. Locator of Missing Heirs Inc.* (1993), 16 O.R. (3d) 257 (Ont. C.A.), at 267-68, Griffiths J.A. quoted with approval the following extract from *Monteith v. Calladine*, *supra*, at 342:

> It would appear, therefore, that champerty is maintenance plus an agreement to share in the proceeds, and that while there can be maintenance without champerty, there can be no champerty without maintenance. There must be present in champerty as in maintenance an officious intermeddling, a stirring up of strife, or other improper motive. [Emphasis in original.]

29 Similarly, Fogarty D.C.J. in *S. (J.E.) v. K. (P.)*, *supra*, at 117, summarized the need for an improper motive as follows:

> I must conclude that the motive of the party who interests himself in the suit of another is most relevant to determine whether maintenance is made out. If the motive is genuine and arises out of concern for the litigant's rights, it is not maintenance. Similarly if that interest of such party arises genuinely from an interest in the outcome, it is not maintenance and this is not restricted to blood relationships. . . .

30 The English courts also routinely held that champerty and maintenance require the element of an improper motive. See *Neville v London Express, supra*, at 378-79, 382-83, 411-12, 414-15; *Trepca Mines Ltd. (No. 2), Re* (1962), [1963] 1 Ch. 199 (Eng. C.A.), at 219-20; *Giles v. Thompson, supra*, at 328-29, 332; and at 360; and *Thai Trading Co. v. Taylor*, [1998] Q.B. 781 (Eng. C.A.), at 786-90.

31 In the same vein, the courts have allowed exceptions to what constitutes champerty or maintenance when there has been the presence of a justifying motive or excuse: *Galati v. Edwards Estate* (1998), 27 C.P.C. (4th) 123 (Ont. Gen.

Div.); *S. (J.E.) v. K. (P.), supra*; *Goodman, supra*; *Stribbell v. Bhalla* (1990), 73 O.R. (2d) 748 (Ont. H.C.); and *Buday, supra*. Lord Denning M.R. in *Trepca Mines Ltd. (No. 2), supra*, said the following at 219:

> Maintenance may, I think, nowadays be defined as improperly stirring up litigation and strife by giving aid to one party to bring or defend a claim without just cause or excuse. At one time the limits of "just cause or excuse" were very narrowly defined. But the law has broadened them very much of late . . . and I hope they will never again be placed in a strait waistcoat.

32 The fundamental aim of the law of champerty and maintenance has always been to protect the administration of justice from abuse. However, over time, that which has been considered to be champerty and maintenance has evolved. As they have done with many other common law concepts, the courts have shaped the rules relating to champerty and maintenance to accommodate changing circumstances and the current requirements for the proper administration of justice. In *Giles v. Thompson, supra*, at 360, Lord Mustill described this process as follows:

> As Steyn LJ has demonstrated, the law of maintenance and champerty has not stood still, but has accommodated itself to changing times: as indeed it must if it is to retain any useful purpose.... I believe that the law on maintenance and champerty can best be kept in forward motion by looking to its origins as a principle of public policy designed to protect the purity of justice and the interests of vulnerable litigants.

33 It is interesting to note that when addressing issues of champerty and maintenance, the courts have had little regard to the definitions and prohibitions found in the *Champerty Act* in Ontario or in the medieval statutes relating to champerty and maintenance in England. Moreover, when the courts have referred to those statutes, they have not interpreted them in a manner that would restrict or cut down the scope of what was considered necessary to constitute champerty and maintenance at common law. In *Buday v. Locator of Missing Heirs Inc., supra*, at 267, Griffiths J.A. stated:

> Whatever its historical origin, the authorities, both English and Canadian, have consistently treated champerty as a form of maintenance requiring proof not only of an agreement to share in the proceeds but also the element of encouraging litigation that the parties would not otherwise be disposed to commence. I recognize that the 1897 statute respecting champerty does not speak of officious intermeddling but the term champerty used in the statute has always by definition been regarded as a species of maintenance. [Emphasis added.]

34 In summary, I discern the following four general principles from a review of the common law of champerty and maintenance:

- Champerty is a subspecies of maintenance. Without maintenance, there can be no champerty.

- For there to be maintenance the person allegedly maintaining an action or proceeding must have an improper motive which motive may include, but is not limited to, officious intermeddling or stirring up strife. There can be no maintenance if the alleged maintainer has a justifying motive or excuse.

- The type of conduct that has been found to constitute champerty and maintenance has evolved over time so as to keep in step with the fundamental aim of protecting the administration of justice from abuse.

- When the courts have had regard to statutes such as the *Champerty Act* and the *Statute Concerning Conspirators*, they have not interpreted those statutes as cutting down or restricting the elements that were otherwise considered necessary to establish champerty and maintenance at common law.

35 The above constitute the general principles relating to champerty and maintenance found in the common law. Historically, the courts applied these principles very strictly to contingency fee agreements between lawyers and clients, holding that such agreements were *per se* champertous without the need to show a specific improper motive. I discuss the evolution of the case law as it relates to contingency fee agreements in subsection (d) below.

(c) The interpretation of s. 1 of the Champerty Act

36 The Supreme Court of Canada has described the modern approach to statutory interpretation as follows:

> Today, there is only one principle or approach, namely, the words of an Act are to be read in the entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 (S.C.C.), at 41, adopting the words of Elmer Driedger in *Construction of Statutes* (2d ed. 1983) at 87.

37 I start the analysis of s. 1 of the *Champerty Act* by noting again that the section is based on a provision that is hundreds of years old and upon the precise wording that was developed at least 240 years ago. Because of the antiquity of the language, this court should exercise some caution in attaching too much weight to the literal meaning of the words used. Clearly, the task of interpreting words from another era when some language may have been used differently than it is today can present difficulties not present when interpreting statutes enacted in modern times. Common sense suggests that when analyzing a provision from another era, like s. 1 of the *Champerty Act*, a court should pay particular regard to the context within which the provision was enacted and to the underlying aim of the legislation. This is particularly so where the language used is unfamiliar or awkward to the modern reader.

38 Let me then turn to the language used in s. 1 of the *Act*. The Attorney General submits that the language in s. 1 is clear and unequivocal, defining a champertor as one who moves a lawsuit or causes to move a lawsuit and in exchange receives a portion of the recovery. This language, it is argued, applies to a lawyer who is a party to a contingency fee agreement like that proposed in this case and who assists the plaintiff in bringing the action in exchange for fees to be paid from the recovery in the action. Because the language is clear, it is submitted, there is no reason to resort to the common law for assistance in interpreting who should be considered a champertor within the meaning of s. 1. The importance of this last point, from the Attorney General's standpoint, is that the common law requirement for champerty and maintenance that there be an improper motive is not explicit in the words of s. 1 of the *Champerty Act*. Nor, the Attorney General argues, is it open from the language in the section for an alleged champertor to raise as an answer that there was a justifying motive or excuse.

39 The effect of the Attorney General's argument is that the *Champerty Act* would create a different and more expansive class of champertors than that known to the common law. Even though one may not have an improper motive, that person would nonetheless be caught within the prohibition in the *Champerty Act* if he or she moved or caused to be moved an action in exchange for part of the recovery.

40 In my view, the Attorney General's argument must fail for two reasons. First, I do not agree that the language in s. 1 is clear and unequivocal. Moreover, the argument completely ignores the context in which the *Champerty Act* was enacted by the Ontario legislature in 1897.

41 There are two aspects of the language used in s. 1 that, in my view, are neither clear nor unequivocal. The first is the use of the words "move . . . or cause to be moved" to describe the conduct that renders one a champertor. *The Oxford English Dictionary*, 2d ed., prepared by J.A. Simpson & E.S.C. Weiner, (Oxford: Clarendon Press, 1989) Vol. X at 31-34, provides many different meanings for the word "move", some of which would buttress the Attorney General's position that the word applies to a lawyer who provides legal services to a client bringing a suit or action with nothing more. For example, the definition of "move" includes "to plead (a cause or suit) in court and bring (an action at law)". Other meanings found in the dictionary, however, support an interpretation that the word" move" in s. 1 is intended to capture more than simply providing assistance to a party in an action. "Move" is also defined to mean" to stir up or excite, to provoke" or "to urge a person to do something", concepts which incorporate aspects of what was in 1897 and continues to be required at common law for maintenance and champerty — officious intermeddling or other improper

motive. The many definitions of the word "move" found in the dictionary simply make the point that "move" can have more than one meaning, some of which could make sense in the context of s. 1 of the *Champerty Act*.

42 In addition, I do not accept the Attorney General's submission that the language in s. 1 clearly excludes a consideration of the motive of an alleged champertor. It seems to me that the use of the preposition "for", preceding the words "to have . . . part of the gains", leaves open an argument that one should examine the motive for which the alleged champertor is seeking to become involved in the litigation. Such an examination of motive is in keeping with the historical requirements for a finding of champerty. One can envision an argument that the existence of a justifiable motive or purpose for moving a lawsuit in addition to the motive of recovering part of the gains should take an alleged champertor outside the reach of the section. I put this point no higher than indicating that the use of the word" for" in s. 1 leaves open arguments in support of more than one interpretation of the section.

43 Moreover, I am satisfied that the context within which the *Champerty Act* was enacted in 1897 argues strongly in favour of the use of the common law in interpreting the meaning of s. 1 of the *Act*. In 1897, the concepts of champerty and maintenance were well developed and entrenched in the common law. At the time, champerty and maintenance were considered to be both crimes and torts at common law, and by 1897 the courts had for centuries been applying common law principles to the conduct of alleged wrongdoers. Because of the illegality of champertous behaviour, the common law also considered champertous agreements to be unenforceable. Against this background, the Ontario legislature adopted the aged language now found in s. 1 to define who would be considered a champertor. Significantly, that section had been on the statute books in England for hundreds of years and there does not appear to be anything in the jurisprudence that predated the enactment of the *Champerty Act* holding that the section created a different class of champertors than that known at common law.

44 The available record does not disclose why the Ontario legislature enacted the *Champerty Act* in 1897, nor why it chose to adopt what was even at that time aged language to define who would be considered a champertor. However, it seems logical to conclude that the legislature by using existing, longstanding language, rather than carefully crafting a new legislative provision, did not intend to render a fundamental change to the existing concept of champerty.

45 It is a settled principle of statutory interpretation that where the legislature intends to change the common law, it must do so expressly and in clear and unequivocal terms. Fauteaux J. stated the rule in *Goodyear Tire & Rubber Co. of Canada v. T. Eaton Co.*, [1956] S.C.R. 610 (S.C.C.), at 614, as follows:

> [A] Legislature is not presumed to depart from the general system of the law without expressing its intentions to do so with irresistible clearness, failing which the law remains undisturbed.

Cumming J. (ad hoc) for this court expressed the same rule as follows in *Bayer AG v. Apotex Inc.* (1998), 82 C.P.R. (3d) 526 (Ont. C.A.), at 536:

> It is generally presumed that the legislature does not intend to change existing law or to depart from established principles, policies or practices, unless expressly indicated. In other words, there is a general presumption against the implicit alteration of the law, the converse being that it is presumed the common law will not be displaced unless legislation provides an explicit instruction to that effect; . . . .

46 I am satisfied that the interpretation of s. 1 of the *Champerty Act* calls for the application of the principle that a legislature is presumed not to have intended to change existing law unless otherwise expressly indicated. Because there is no language in the *Champerty Act* that evidences a clear legislative intention to displace what were in 1897 well established and broadly applied principles relating to champerty, I approach the interpretation of s. 1 on the basis that the legislature did not intend to render the fundamental change to the existing law of champerty urged by the Attorney General. In my view, the language of s. 1 and the context in which it was enacted fall well short of establishing such a clear legislative intention. For these reasons, I conclude that s. 1 of the *Champerty Act* should be interpreted as incorporating the common law requirements relating to who should be considered a champertor.

47 Furthermore, I am satisfied that interpreting s. 1 of the *Champerty Act* in this manner is consistent with and promotes the fundamental object of the legislation. The overriding purpose of the common law of champerty has always been to protect the administration of justice from abuse by those who wrongfully maintain litigation. Its origins are rooted in a policy directed to ensuring a fair resolution of disputes and protecting vulnerable litigants from abuse. The protection afforded by the common law is advanced by looking to the propriety of the motives of those who become involved in litigation. By examining motives, one can more readily separate abusive practices from those that are justified or even beneficial to the proper administration of justice. Like the common law, the aim of the *Champerty Act* was no doubt to protect the administration of justice from abuse. It is not apparent from the historical record, nor does the Attorney General now argue, that there were abuses not caught by the common law to which the *Champerty Act* was specifically directed. It seems clear, therefore, that an interpretation of the *Champerty Act* that is consistent with the common law principles relating to champerty would also be harmonious with and promote the aim of the legislation.

(d) Lawyers' contingency fee agreements

48 As an alternative argument, the Attorney General submits that if this court concludes that s. 1 of the *Champerty Act* should be interpreted in a manner consistent with the common law requirements for champerty, then it should apply the case law that holds that lawyers' contingency fee agreements are *per se* champertous and there is, therefore, no need to establish a specific improper motive. The motive can be inferred from the very nature of the agreement itself.

49 There is no question that for many years the courts in Ontario and in England repeatedly held that lawyers' contingency fee agreements were champertous and, as a result, unenforceable. In *Solicitor, Re* (1907), 14 O.L.R. 464 (Ont. H.C.), at 465, Chancellor Boyd expressed the then commonly held view as follows:

> [T]he confidential relation between lawyer and client forbids any bargain being made by which the practitioner shall draw a larger return out of litigation than is sanctioned by the tariff and the practice of the Courts. Especially does the law forbid any agreement for the lawyer to share in the proceeds of a litigated claim as compensation for his services. Such a transaction is in contravention of the statute relating to champerty, and it is also a violation of the solemn engagement entered into by the barrister upon his call to the Bar.

50 Similarly, in England Lord Denning described the prohibition on lawyers' contingency fees as follows, in *Wallersteiner v. Moir (No. 2)*, [1975] 1 Q.B. 373 (Eng. C.A.), at 393-94:

> English law has never sanctioned an agreement by which a lawyer is remunerated on the basis of a 'contingency fee,' that is that he gets paid the fee if he wins, but not if he loses. Such an agreement was illegal on the ground that it was the offence of champerty. . . .
>
> It was suggested to us that the only reason why 'contingency fees' were not allowed in England was because they offended against the criminal law of champerty: and that, now that criminal liability is abolished, the courts were free to hold that contingency fees were lawful. I cannot accept this contention. The reason why contingency fees are in general unlawful is that they are contrary to public policy as we understand it in England.

See also *Trendtex Trading Corp. v. Credit Suisse* (1979), [1980] Q.B. 629 (Eng. C.A.); *Hughes v. Kingston Upon Hull City Council* (1998), [1999] Q.B. 1193 (Eng. Q.B.); *Robinson v. Cooney* (1999), 29 C.P.C. (4th) 72 (Ont. Gen. Div.); and *Awwad v. Geraghty & Co.*, (1999), [2000] 1 All E.R. 608 (Eng. C.A.).

51 A review of the jurisprudence relating to champerty reveals two concerns that fuelled the courts' intolerance for these types of agreements. The first was the apprehension that lawyers, realizing that they would only be paid if an action were successful, would be tempted to resort to a host of unethical practices in order to ensure success and, therefore, payment of their fees. In *Trepca Mines Ltd. (No. 2)*, *supra*, at 219-20, Lord Denning expressed this concern as follows:

> The reason why the common law condemns champerty is because of the abuses to which it may give rise. The common law fears that the champertous maintainer might be tempted, for his own personal gain, to inflame the damages, to suppress evidence, or even to suborn witnesses.

52 The second concern prompting courts to fear the use of contingency fee agreements was the perceived need to protect the relationship of trust between lawyer and client. The fear was that if a lawyer's compensation was tied to recovery in the litigation, a lawyer might be tempted to conduct an action to further his or her own best interest rather than that of the client. More indirectly, clients might be concerned that this was in fact the case and question the strength of the lawyer's commitment to the clients' interests. In either event, the concern was that the relationship of trust between lawyer and client would be damaged.

53 There is reason to question whether the contingent nature of a fee agreement, by itself, is the significant threat to professional ethics that was feared at common law. It is interesting to note that while historically these concerns about the potential for abuse by lawyers or damage to the lawyer-client relationship were frequently expressed, there is little, if any, evidence to show that the fears were well-founded. Although the lack of evidence may be attributable to the fact that contingency fee agreements were considered to be illegal and therefore not broadly used, we do know that for years lawyers have acted in what they considered to be meritorious cases for clients of modest means with the realization, if not the express agreement, that they would only be paid in the event of success. See, for example, *Bergel & Edson v. Wolf* (2000), 50 O.R. (3d) 777 (Ont. S.C.J.), at 795; and *Finlayson v. Roberts* (2000), 136 O.A.C. 271 (Ont. C.A.) at para. 24. Lawyers acting in these "informal" arrangements were no doubt subject to some of the same temptations as those who formally agreed to be paid only in the event of a success. However, there is no evidence to indicate that lawyers who have acted in informal arrangements of this nature have performed to a lower ethical standard than those who were paid regardless of outcome.

54 In addition, we have the benefit of the experiences of the many jurisdictions that have enacted legislation permitting regulated contingency fee agreements. This court was not shown any evidence to show that lawyers in these jurisdictions, properly regulated, are more likely to engage in the types of abuse to the administration of justice that were once feared to be the result of contingency fee agreements.

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 importance of contingency fees to the legal system in *Coronation Insurance Co. v. Florence*, [1994] S.C.J. No. 116 (S.C.C.) 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.

56 Perhaps the most striking evidence of the change in attitude towards the use of contingency fee agreements is found in the fact that every Canadian province and territory other than Ontario has enacted legislation or rules of court to permit and regulate the use of contingency fees. Manitoba, for example, has authorized such fees since 1890, while most of the other provinces have permitted them for at least 25 years. [2]

57 Typically, when legislation has been enacted to permit contingency fee agreements, the legislature also has enacted regulations governing their use. The regulatory schemes vary from jurisdiction to jurisdiction. British Columbia, for example, imposes a ceiling on the percentage of the recovery that a lawyer may receive in certain types of proceedings. Most other jurisdictions impose no such restrictions. All of the provinces require that contingency fee agreements be in writing and many jurisdictions require such agreements to be filed in court. In addition, each Canadian jurisdiction provides a mechanism by which the client may seek a review of the lawyer's fee, similar to the scheme that now exists in Ontario under the *Solicitors Act*, R.S.O. 1990, c. S.15. The applications judge in this case laid out the various regulatory provisions comprehensively in an appendix to her judgment.

58 In the United States, as early as the mid-nineteenth century, the Supreme Court expressly authorized the use of contingency fees. See *Wylie v. Coxe* (1853), 15 How. 415 (U.S.S.C.). Contingency fees in the United States (in both federal and state courts) are now regulated by a combination of professional conduct rules and statutes. Most states base their rules on the American Bar Association's *Model Rules of Professional Conduct*, which impose some limitations on the use of such fee arrangements. The American regulations include required terms for contingency fee agreements and an obligation that fees be reasonable. Some states have placed caps on the percentage of the amount recovered that a lawyer may charge. Some states prohibit or restrict contingency fees in family law and/or criminal matters. See for example, *The Lawyer's Code of Professional Responsibility* (Albany: New York State Bar Association, 2002), DR (Disciplinary Rule) 2-106 — Fee for Legal Services.

59 In England and Wales, the *Courts and Legal Services Act 1990*, 1990, c. 41, s. 58, authorized the use of "conditional fees", under which lawyers may recover their normal fees plus a success "uplift", *i.e.*, an increase in their fees, up to a maximum of 100 percent, based on the chance of winning, except in family law proceedings. The 1990 statute authorized the Lord Chancellor to make Orders specifying the proceedings in which conditional fee agreements lawfully could be made. The first such Order was made in 1995, permitting such fee agreements in personal injury and insolvency proceedings, as well as for cases before the European Commission and the European Court of Human Rights. The availability of conditional fees was expanded to include all civil proceedings in 1998. Moreover, with the passage of the *Access to Justice Act 1999*, 1999, c. 22, courts also may order that a successful litigant recover the success fee and insurance from the losing party. That statute also allows a party to be funded by a trade union or other prescribed group, and authorizes such a group to recover from the opponent a sum in recognition of that liability.

60 Lawyers in all Australian jurisdictions are permitted to charge clients on a speculative fee basis, *i.e.*, they are paid their normal fees only in the event of success. See *Clyne v. Bar Association of New South Wales* (1960), 104 C.L.R. 186 (Australia H.C.); and *In the Marriage of Sheehan Husband and Sheehan Wife* (1990), 13 Fam. L.R. 736 (Australia Fam. Ct.) at paras. 82, 88, 101. In addition, several Australian states, namely New South Wales, Victoria, South Australia and Queensland, have authorized the use of "uplift" fees (in which the lawyer receives, in addition to his or her usual fee, an agreed flat amount or percentage uplift of the usual fee, if successful) in certain types of cases. See, for example, *Legal Profession Act 1987* (NSW), s. 187(2), (3), (4); *Legal Practice Act 1996* (Vic.), s. 98; *Professional Conduct Rules* (S. Aust.), r. 8.10; and *Barristers' Rules* (Qld.), r. 102A(d). Contingency fee arrangements are, however, prohibited in family and criminal law cases. Tasmania prohibits the charging of uplift fees by barristers: *Rules of Practice 1994* (Tas.), r. 92(1). In the Northern Territory and Western Australia, uplift fee agreements may amount to champerty at common law.

61 While the Ontario legislature has not enacted legislation permitting contingency fee agreements for all civil actions, it has recognized the advantages of these types of agreements for class action proceedings. In 1992, the legislature enacted the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, s. 33(1), which expressly permits and regulates contingency fee agreements for class proceedings. In enacting this legislation, Ontario has recognized the overriding importance of ensuring access to justice for those who have claims arising in the context of a class of injured victims. There is no apparent reason why a policy that favours contingency fee agreements for class actions would not apply equally to litigation brought by individuals.

62 The change in public policy favouring the use of contingency fee agreements to facilitate access to justice is not only found in legislation. In Ontario in recent years, there have been repeated calls for reform to permit and regulate contingency fee agreements. Since 1975, there have been several studies or reviews of the competing policy considerations relating to contingency fee agreements. Overwhelmingly, those studying the issues have recommended that, for reasons of promoting access to justice, contingency fee agreements should be permitted.

63 The Law Society of Upper Canada first formally supported a scheme of regulated contingency fees in 1988 and has reaffirmed that position in 1992 and again in 2000. In 1997, the Ontario Legal Aid Review recommended that the Ontario government introduce legislation that would allow contingent fee arrangements for lawyers in Ontario. The report noted that, over recent years, legal aid certificate coverage had been eliminated for most civil litigation matters and that permitting contingency fee agreements would be an important step in addressing the resulting difficulty. See Ontario Legal Aid Review, *A Blueprint for Publicly Funded Legal Services* (Toronto: Ministry of the Attorney General, 1997) Vol. 1 at 218-25. Most recently, in 2000, the Attorney General's Joint Committee on Contingency Fee, which was comprised of representatives of the Law Society of Upper Canada, the Advocates' Society and the Canadian Bar Association — Ontario, again recommended that, for purposes of increasing the access to justice, Ontario expressly permit contingency fees, *i.e.*, a percentage of the amount recovered in legal proceedings, except in criminal and quasi-criminal cases, and in family law proceedings. The *Joint Committee Report* [unpublished, 2000] stated:

> One way to make justice more accessible is to provide a flexible approach to the payment of legal services by permitting contingency fees. Contingency fees are advantageous for middle class litigants because they shift most of the risk of litigation from a client to a lawyer. Under a contingency fee agreement, the lawyer finances the litigation for the client while a case is pending. As a result, middle class clients, who are generally risk averse, do not have to commit to pay an unpredictable amount for their lawyer's services and are then able to turn to the justice system to seek redress for their injuries. . . .
>
> A variety of controls and safeguards can be imposed to regulate contingency fees to protect consumers, avoid abuse and prevent over-charging by lawyers, including: restrictions on the area of practice to which contingency fees can be applied, restrictions on clients, regulation of the lawyer's remuneration, review of the contingency fee contract, filing the contract with the court and regulating the form and content of the contract.

64 In recent years, the courts have also begun to recognize the benefits of providing increased access to the courts flowing from the use of contingency fee agreements. Some courts have softened the traditional approach of precluding recovery of fees by lawyers where there has been a contingency fee agreement and have instead focused on the need of an improper motive to render an agreement unenforceable. See *Stribbell v. Bhalla*, *supra*; *Thai Trading*, *supra*; and *Bergel & Edson*, *supra*. These cases are part of the normal process by which the common law adjusts to emerging circumstances and experiences. I recognize, however, that even in recent years not all courts have adopted this approach and some courts have continued to follow the traditional approach of finding that contingency fee agreements are *per se* champertous. See for example, *Robinson v. Cooney*, *supra*; *Hughes v. Kingston*, *supra*; and *Awwad*, *supra*.

65 The important point to be drawn from the recent jurisprudence is that the common law regarding contingency fee agreements has begun to evolve so as to conform to the widely accepted modern public policy norms recognizing the significant advantages in permitting contingency fee agreements in some circumstances. It is not surprising that all courts have not, at a single point in time, accepted the shift in attitude in favour of these types of agreements. The development of the common law most often is an evolutionary and incremental process rather than the result of a single defining judgment.

66 The Attorney General's argument is not that sound public policy does not favour contingency fee agreements for all civil proceedings, nor that contingency fee agreements do not provide significant advantages in promoting access to justice. The Attorney General also does not argue that the types of abuses that underlie the negative views the courts historically took to these types of agreements cannot be managed within the existing regulatory framework. Rather, the

Attorney General contends that any change in the law relating to champerty in Ontario must come from the legislature, not the courts.

67 I disagree with this argument. As set out above, I conclude that s. 1 of the *Champerty Act* embodies the common law principles relating to who is a champertor. The development of the common law is, of course, a matter for the courts. While it is clearly open to the legislature of Ontario to reform the law of champerty as it relates to contingency fee agreements, I am satisfied that it is also appropriate for the courts to address this issue as part of their function in developing the common law.

68 There are well-established principles governing judicial reform of the common law. An important reason why courts change the common law from time to time is to ensure that it stays in step with the evolution of society. One of the advantages of the common law is its flexibility — the capacity of the courts to address and accommodate changed needs in societal circumstances. See *Friedmann Equity Developments Inc. v. Final Note Ltd.*, [2000] 1 S.C.R. 842 (S.C.C.), at 871. I recognize, however, that when considering changes to the common law, courts must exercise caution. Changes must always be weighed against concerns about certainty and fairness. As a result, changes in the common law are generally incremental in nature, often resulting from a need to fill a gap in the law or to address an unfairness from an existing rule.

69 In my view, the current circumstances in the administration of justice in Ontario are such that the courts should take a fresh approach to the application of the common law to contingency fee agreements.

70 I am persuaded that the historic rationale for the absolute prohibition is no longer justified. The common law of champerty was developed to protect the administration of justice from abuse, one aspect of which involved the protection of vulnerable litigants. Within that broad framework, the courts historically held that contingency fee agreements were *per se* champertous. But, as examples from other jurisdictions amply demonstrate, the potential abuses that provided the rationale for the *per se* prohibition of contingency fee agreements can be addressed by an appropriate regulatory scheme governing the conduct of lawyers and the amount of lawyers fees.

71 Currently, in Ontario the *Solicitors Act* provides a comprehensive process for reviewing and assessing the reasonableness of lawyers' accounts. The *Rules of Professional Conduct* contain a complete set of standards for regulating lawyers' ethical behaviour and the complaints and discipline process of the Law Society of Upper Canada provide accessible means by which those standards can be enforced. While many of the jurisdictions that have enacted legislation permitting contingency fee agreements have enacted specific regulations to govern their use, I am satisfied that the basic regulatory framework necessary to address potential abuses in the use of contingency fee agreements is presently in place in Ontario.

72 I am also of the view that the advantages to the administration of justice from permitting properly regulated contingency fee agreements in the form of increased access to justice are compelling. Indeed, there is a strong case to be made that the continuation of a *per se* prohibition against contingency fee agreements actually tends to defeat the fundamental purpose underlying the law of champerty — the protection of the administration of justice and, in particular, the protection of vulnerable litigants. In my view, it is no longer necessary or desirable to deem contingency fee agreements *per se* champertous. Neither the contingent nature of a fee agreement, nor the fact that the lawyer's fees may be paid from the recovery in an action, without more, ought to constitute an improper motive or officious intermeddling for purposes of the law of champerty.

73 I am comfortable that this conclusion is consistent with the reasonable evolution of the common law in this area of the law. Some courts already have reached similar conclusions.

74 Further, the proposed change is not made in a vacuum. The effects of permitting contingency fee agreements have been thoroughly studied in Ontario and the experiences of the many jurisdictions that permit such agreements are well documented. As a result, this court has the benefit of a very broad base of information in assessing the potential advantages or disadvantages in developing the common law along the lines I propose. Moreover, because the issues

surrounding contingency fee agreements relate to the administration of justice, a court is in as good a position as anyone to assess the ramifications of an evolution of the law in this area.

75 To be clear, I am not suggesting that contingency fee agreements can never be champertous. Rather, I conclude only that contingency fee agreements should no longer be considered *per se* champertous. The issue of whether a particular agreement is champertous will depend on the application of the common law elements of champerty to the circumstances of each case. A court confronted with an issue of champerty must look at the conduct of the parties involved, together with the propriety of the motive of an alleged champertor in order to determine if the requirements for champerty are present.

76 When considering the propriety of the motive of a lawyer who enters into a contingency fee agreement, a court will be concerned with the nature and the amount of the fees to be paid to the lawyer in the event of success. One of the originating policies in forming the common law of champerty was the protection of vulnerable litigants. A fee agreement that so over-compensates a lawyer such that it is unreasonable or unfair to the client is an agreement with an improper purpose — *i.e.*, taking advantage of the client. See *Thai Trading*, *supra*, at 788, 790. The applications judge in this case dealt with this concern as follows, at 157:

> The suggested compensation may or may not be fair and reasonable, depending upon the outcome of the litigation in light of the difficulty of the case, as well as the time and expenses incurred. Counsel should be well rewarded if the litigation is successful, for assuming the risk and costs of the litigation. The compensation however should not be a windfall resembling a lottery win.

77 I agree with these comments.

(e) Application of the law to this case

78 The applications judge granted a declaration that the proposed fee agreement does not violate the *Champerty Act*. The proposed agreement provides for payment to the respondent's lawyers of a fee in the amount of 30 percent of compensatory damages recovered, 40 percent of punitive damages, costs recovered in the action and any unrecovered disbursements. Depending on the amount recovered in the underlying action, the fees to be paid to the lawyer could be enormous. The lawyers who drafted the agreement provided an example of the potential fees which totalled over $9,000,000. While the amount of the damages on which the example is based may or may not be realistic, the example does make the point that unacceptably large fees could become payable under the agreement.

79 The fee structure in the proposed agreement is related to the amount of money that is recovered on behalf of the respondent. The fee structure has no relationship to the amount of time spent by the lawyers, the quality of the services provided, the level of expertise of the lawyers providing the services, the normal rates charged by the lawyers who provide the services, or the stage of the litigation at which recovery is achieved. Under the terms of this agreement, the respondent would be obliged to pay the lawyers the same amount of fees if the litigation is settled early in the process as she would if the same amount of money was recovered after a lengthy trial and appeal. In addition, the agreement raises the prospect of double recovery for the lawyers — fees from the respondent as well as costs recovered from the defendants in the action. There is no way of telling at this point whether the fees that would be paid to the lawyers under this proposed agreement would be reasonable and fair. When an agreement like this one is structured so that the fees are based on a percentage of the recovery, the determination of whether the fees are reasonable and fair will normally have to await the outcome of the litigation.

80 I have concluded in subsection (d) above that contingency fee agreements do not *per se* contravene the *Champerty Act*. However, in my view, contingency fee agreements that provide for the payment of fees that are unreasonable or unfair are agreements that have an improper motive and come within the prohibition in the *Act*. Because it is premature to address the issue of the reasonableness and fairness of the proposed agreement, it is my respectful view that the applications judge should not have granted the declaration sought by the respondent.

81 I want to address three other matters that were touched on during the arguments of counsel. The first relates to the criteria that should be used in assessing the reasonableness and fairness of fees in a contingency fee agreement. Contingency fee agreements have been expressly permitted by statute in many jurisdictions. Often, the authorizing legislation has also provided for a regulatory regime that addresses the manner in which the propriety of contingency fees may be determined. See for example, the *Class Proceedings Act*, s. 33(1).

82 Ontario, of course, does not have legislation specifically directed at regulating non-class action contingency fee agreements. Until such legislation is passed, the regime in the *Solicitors Act* for assessing lawyers' accounts will apply. When assessing a contingency fee arrangement, the courts should start by looking at the usual factors that are considered in addressing the appropriateness of lawyer-client accounts. See *Cohen v. Kealey & Blaney* (1985), 10 O.A.C. 344 (Ont. C.A.), at 346.

83 In addition, I see no reason why courts should not also consider compensation to a lawyer for the risk assumed in acting without the guarantee of payment. This is, of course, where the discussion becomes controversial. Some argue that allowing a lawyer to be compensated for the risk assumed increases the concerns about the abuses that historically the law of champerty aimed to prevent. However, I do not think that that needs to be the case. The emphasis here should be on the reasonableness and fairness of the compensation to the lawyer for assuming the risk. Many jurisdictions that have expressly approved contingency fee agreements have set out the criteria for addressing the amount of compensation that will be permitted. Indeed, Ontario has done so in the *Class Proceedings Act*. In these instances, one element giving rise to compensation is often the acceptance of risk and an assessment of the level of risk involved.

84 That said, I want to sound a note of caution about the potential for unreasonably large contingency fees. It is critical that contingency fee agreements be regulated and that the amount of fees be properly controlled. Courts should be concerned that excessive fee arrangements may encourage the types of abuses that historically underlay the common law prohibition against contingency fee agreements and that they can create the unfortunate public perception that litigation is being conducted more for the benefit of lawyers than for their clients. Fairness to clients must always be a paramount consideration.

85 Notwithstanding my conclusion that contingency fee agreements should no longer be absolutely prohibited at common law, I urge the government of Ontario to accept the advise that it has been given for many years to enact legislation permitting and regulating contingency fee agreements in a comprehensive and co-ordinated manner. There are obvious advantages to having a regulatory scheme that is clearly and specifically addressed in a single legislative enactment. There is no reason why Ontario, like all the other jurisdictions in Canada, should not enact such a scheme. Again, I wish to make clear that this comment is not intended to apply to family law matters, where different factors apply.

86 The second matter I wish to briefly address is the effect of the *Solicitors Act* of Ontario on the disposition of this appeal. I start by noting that the underlying application does not raise the question whether the proposed agreement breaches the *Solicitors Act* and, strictly speaking, it is not necessary to comment on the effect of that *Act* on the issues raised in this case. However, for completeness, I think a few comments are warranted.

87 Section 28 of the *Solicitors Act* reads as follows:

> 28. Nothing in sections 16 to 33 gives validity to a purchase by a solicitor of the interest or any part of the interest of his or her client in any action or other contentious proceeding to be brought or maintained, or gives validity to an agreement by which a solicitor retained or employed to prosecute an action or proceeding stipulates for payment only in the event of success in the action or proceeding, or where the amount to be paid to him or her is a percentage of the amount or value of the property recovered or preserved or otherwise determinable by such amount or value or dependent upon the result of the action or proceeding.

88 I agree with the applications judge and others who have observed that this section and other similarly worded sections do not prohibit contingency fee agreements. See *Bergel & Edson* at 791-92; and *Thai Trading, supra*, at 785. The section says nothing more than contingency fee agreements are not permitted by the *Solicitors Act* if they are not otherwise permitted.

89 Finally, I want to address the *Rules of Professional Conduct* of the Law Society of Upper Canada. Again, the application that underlies this appeal does not call for a determination whether the proposed agreement contravenes these *Rules*. Because this argument was not fully developed on the appeal, I think the issue of the application of those *Rules* is better left for another occasion. That said, the *Rules of Professional Conduct* and the complaints and disciplinary regimes of the Law Society clearly have a role to play in ensuring that lawyers who enter into contingency fee agreements follow the ethical and professional standards set out in the *Rules*, so that the abuses feared in the past do not become a reality in the future.

DISPOSITION

90 For the reasons above, I would allow the appeal and set aside the judgment of the court below. Rather than dismissing the application brought by the respondent, I would stay that application on the basis that it is premature.

91 As to costs, the respondent has achieved substantial success on the central issues raised by the application and on this appeal. The applications judge determined in the exercise of her discretion that, because of the novelty of the issue raised, this was a case in which there should be no order as to costs for the proceeding before her. I would not interfere with that decision.

92 However, I would order that the appellant pay to the respondent 80 percent of the costs of this appeal on a partial indemnity basis. If the parties are unable to agree upon the amount of the costs, the respondent shall deliver a bill of costs, together with any submissions in writing within 30 days of the release of this judgment. The appellant shall have 7 days from the date of receiving such submissions to make written submissions in response.

93 I would make no order with respect to the costs of the interveners.

Abella J.A.:

I agree.

MacPherson J.A.:

I agree.

Appeal allowed; application stayed for being premature.

Footnotes

1 While the text of the *Champerty Act* is not printed in the Revised Statutes of Ontario 1990, the statute, as enacted in 1897, remains in effect. See Schedule C: Table of Unconsolidated and Unrepealed Acts, R.S.O. 1990, vol. 12.

2 Family law cases are generally excluded from such legislation and in the discussion that follows, my comments about the advantages of contingency fee agreements are intended to apply to civil actions other than family law matters.

6

This is an official version.

Important Information

(Includes details about the availability of printed and electronic versions of the Statutes.)

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2016 NLTD(G) 179
Newfoundland and Labrador Supreme Court (Trial Division)

Anderson v. Canada (Attorney General)

2016 CarswellNfld 431, 2016 NLTD(G) 179, [2017] 1 C.N.L.R. 1, 273 A.C.W.S. (3d) 251

CAROL ANDERSON, ALLEN WEBBER AND JOYCE WEBBER (Plaintiffs) and THE ATTORNEY GENERAL OF CANADA (Defendant) and HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR (First Third Party / Discontinued) and THE INTERNATIONAL GRENFELL ASSOCIATION (Second Third Party / Discontinued)

TOBY OBED, WILLIAM ADAMS AND MARTHA BLAKE (Plaintiffs) and THE ATTORNEY GENERAL OF CANADA (Defendant) and HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR (First Third Party / Discontinued) and THE INTERNATIONAL GRENFELL ASSOCIATION (Second Third Party / Discontinued)

ROSINA HOLWELL AND REX HOLWELL (Plaintiffs) and THE ATTORNEY GENERAL OF CANADA (Defendant) and HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR (First Third Party / Discontinued) and THE INTERNATIONAL GRENFELL ASSOCIATION (Second Third Party / Discontinued)

EDNA WINTERS AND JAMES ASIVAK (Plaintiffs) and ontinued) and THE INTERNATIONAL GRENFELL ASSOCIATION (Second Third Party / Discontinued)

ROSINA HOLWELL AND REX HOLWELL (Plaintiffs) and THE ATTORNEY GENERAL OF CANADA (Defendant) and HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR (First Third Party / Discontinued) and THE MORAVIAN CHURCH INNEWFOUNDLAND AND LABRADOR (Second Third Party / Discontinued) and THE MORAVIAN UNION(INCORPORATED) (Third Third Party / Discontinued)

JOYCE ALLENAND DOMINIC DICKMAN (Plaintiffs) and JOYCE ALLENAND DOMINIC DICKMAN (Defendant) and HER MAJESTY IN RIGHT OF NEWFOUNDLAND AND LABRADOR (First Third Party / Discontinued) and THE MORAVIAN CHURCH INNEWFOUNDLAND AND LABRADOR (Second Third Party / Discontinued) and THE MORAVIAN UNION(INCORPORATED) (Third Third Party / Discontinued)

Robert P. Stack J.

Heard: September 27, 2016; September 28, 2016
Judgment: November 7, 2016
Docket: 200701T4955CCP, 200701T5423CCP, 200801T0844CCP, 200801T0845CCP, 200801T0846CCP

Counsel: Kirk Baert, Celeste Poltak, Steven Cooper, David Rosenfeld, Ches Crosbie, Q.C., for Plaintiffs
Jonathan Tarlton, Paul Vickery, Catherine Moore, for Attorney General of Canada

Subject: Civil Practice and Procedure

APPLICATION by plaintiffs for approval of settlement in class action and for approval of fees and disbursements of class counsel.

Robert P. Stack J.:

INTRODUCTION AND BACKGROUND

1 This decision brings to an end these long-standing, complex and historic class actions between the Plaintiffs and the Defendant, the Attorney General of Canada ("Canada"). The Plaintiffs and Canada have reached a settlement that I have already formally approved. These are my reasons for doing so.

2 Class members are aboriginal persons who attended schools, dormitories or orphanages (collectively, the "Facilities") from 1949 until 1980 in what is now the Province of Newfoundland and Labrador (the "Province"). The Plaintiffs claim that by its purpose, operation or management of the Facilities, Canada breached a fiduciary duty owed to students who attended the Facilities to protect them from actionable physical or mental harm.

3 The common issues trial arising out of these five class actions commenced on September 28, 2015. Following the conclusion of the Plaintiffs' case on February 1, 2016, the parties requested adjournment of the trial so that they could explore the possibility of a settlement. On April 26, 2016 the Court was advised that a settlement (the "Settlement") had been achieved.

4 By section 35 of the *Class Actions Act*, S.N.L. 2001, c. C-18 (the "*Act*"), Court approval is required for the implementation of a proposed settlement in a class action and for payment of the fees and disbursements of class counsel. For the reasons detailed below, I have approved the Settlement. I am satisfied that it is fair, reasonable, made in good faith, and is in the best interests of the class as a whole. I am also satisfied that the fees and disbursements of Plaintiffs' counsel are fair and reasonable in the circumstances and ought to be paid. Let us see why.

SETTLEMENT APPROVAL

The Terms of the Proposed Settlement

5 Because of the historic nature of the Settlement for the aboriginal class members, I will detail its provisions. The Settlement provides for an all-inclusive fund of $50,000,000 (the "Compensation Fund") to provide compensation to class members in accordance with a plan proposed by the Plaintiffs that includes a residence-based payment and compensation for more serious abuse (the "Distribution Plan"). Out of the Compensation Fund will also be paid the cost of notice to class members of the hearing to approve the settlement, legal fees and disbursements of Plaintiffs' counsel, and the costs of providing notice of settlement approval and of administering the settlement process.

6 The key terms of the Settlement include:

1) the $50,000,000 Compensation Fund;

2) notice costs, administration costs, and legal fees and disbursements, to be paid from the Compensation Fund;

3) General Compensation Payments ("GCP") for years resided at a Facility;

4) Abuse Compensation Payments ("ACP") depending on the harm suffered;

5) a paper-based claims application process; and

6) a commitment by Canada to fund mutually agreeable commemoration and healing initiatives with class member input, over and above the Compensation Fund.

The Proposed Distribution Plan

7 The Settlement provides for claims-based compensation with two streams for compensation — a GCP and, for those eligible, an ACP.

General Compensation Payment

8 A GCP will be paid to an eligible class member who resided at a Facility for any length of time during the class period. To qualify for a GCP claim, a claimant must only have resided at a Facility and need not provide evidence of abuse. GCP payments of $15,000 are to be made to those who resided at a Facility for less than five academic years or parts thereof and $20,000 to those who resided at a Facility for five or more academic years or parts thereof.

9 The GCP is the primary component of compensation in the Settlement and is to be paid out in full before any ACPs are made.

10 If there are insufficient funds in the Compensation Fund to pay the GCPs in full after payment of legal fees, disbursements, notice costs and administration costs, then a determination will be made by the claims administrator in consultation with Plaintiffs' counsel on how to distribute the GCP payments. The intention is to pay GCP on a *pro rata* basis.

Abuse Compensation Payment

11 ACP claims require a claimant to provide details of the harm or abuse suffered by him or her while attending the Facilities. The claimant need not have resided at a Facility to make an ACP claim. An ACP will be awarded based on the severity of the harm suffered in accordance with a schedule of incidents of abuse as follows:

Level	Description	Compensation Amount
1	• One or more incidents of fondling or kissing. • Nude photographs taken of the Class member. • The act of an adult exposing themselves. • Any touching of a student, including touching with an object, by an adult which exceeds recognized parental contact and which subjectively violates the sexual integrity of the Class member. • One or more incidents of simulated intercourse. • One to three incidents of masturbation.	$50,000.00
2	• One to three incidents of oral intercourse. • One to three incidents of digital anal or vaginal penetration. • One to three incidents of attempted anal or vaginal penetration. • Four or more incidents of masturbation. • One or more physical assaults causing a physical injury that: o led to or should have led to hospitalization or serious medical treatment by a physician o caused permanent or demonstrated long-term physical injury o impaired or disfigured o caused loss of consciousness o broken bones o caused serious but temporary incapacitation requiring bed rest or infirmary care for several days. Examples include severe beating, whipping, and second-degree burning.	$100,000.00
3	• One to three incidents of anal or vaginal intercourse. • Four or more incidents of oral intercourse. • One to three incidents of anal or vaginal penetration with an object.	$150,000.00
4	• Four or more incidents of anal or vaginal intercourse. • Four or more incidents of anal or vaginal penetration with an object.	$200,000.00

12 The claims administrator will review the claims submitted and assign the necessary compensation.

13 ACPs will only be made if there are funds remaining after payment of all approved GCP claims. In the event that there are insufficient monies in the Compensation Fund to pay all ACP claims as evaluated, the ACP claims will be paid *pro rata* based on the amount of each ACP awarded.

Eligibility

14 Class members are "All persons who attended [the Facility], located in [community], between March 31, 1949 and the date of closure of the [the Facility]". To be eligible for compensation a claimant must:

1) be a class member;

2) be alive as of November 23, 2006;

3) for a GCP, to have resided (as defined in the Settlement) at one of the Facilities during the "Class Period";

4) for an ACP, to have either resided at or attended one of the Facilities during the "Class Period" and to have suffered compensable abuse; and

5) have been under twenty one (21) years of age at the time of residence at one of the Facilities or when the compensable abuse was suffered.

15 The Settlement permits class members who became deceased after November 23, 2006 to be eligible for compensation.

16 "Class Period" is defined in the Settlement for each of the Facilities as follows:

Makkovik - April 1, 1949 to June 30, 1960

Cartwright - April 1, 1949 to June 30, 1964

Nain - April 1, 1949 to June 30, 1973

St. Anthony - April 1, 1949 to June 30, 1979

Northwest River - April 1, 1949 to June 30, 1980.

Paper-based Claims Process

17 The Settlement provides for a confidential paper-based claims process that does not require any claimant to testify or appear in person. This is designed to alleviate any hesitancy among class members about coming forward. Plaintiffs' Counsel has advised the Court that they have acted in a number of class proceedings involving systemic abuse at residential schools and other similar institutions. Class members often convey to class counsel that they are reluctant to be involved because they are embarrassed, ashamed or do not want what happened to them to be publicly known.

18 The proposed paper-based claims process will not require class members to testify. The claim form will require the claimant to swear that the information provided is true. Claimants will be assumed to be acting honestly in completing and swearing their forms. Only if deemed necessary in consultation with the claims administrator, will a claimant be subject to the audit or verification process put in place to ensure the validity of claims made.

19 Only if a claim has been rejected, in whole or in part, can a claimant request a hearing before a hearing officer. The claimant may be questioned under oath and the hearing officer may request documents or other evidence to validate a claim. The hearing officers appointed for this role will be former adjudicators in the Indian Residential Schools Settlement. There is no opportunity for Canada to respond to, cross-examine on or otherwise contest the claims.

Oversight of Claims Process

20 The Honourable Mr. Frank Iacobucci has agreed to serve as the overseer of the claims administration process. Mr. Iacobucci, with Crawford Class Action Services ("Crawford") as the administrator, will create protocols and procedures for the oversight of the claims review process pursuant to the Settlement.

Priority of Payments from the Compensation Fund

21 The Settlement provides for an all-inclusive Compensation Fund. The priority of payments out of the Compensation Fund is as follows:

1) notice costs, administration costs, and approved legal fees and disbursements of Plaintiffs' counsel;

2) GCP to all eligible class members;

3) ACP to all eligible class members;

4) Late claims (as defined in the Settlement); and

5) Surplus funds payable to GCP recipients.

22 This last item is important - any surplus in the Compensation Fund after all other claims have been paid shall be divided equally among GCP recipients. There will be no reversion of monies to Canada.

Commemoration and Healing Benefits

23 In addition to the Compensation Fund, Canada has agreed to pay for mutually agreeable healing and commemoration initiatives with input from the class members.

24 Representatives from three indigenous organizations, the Nunatsiavut Government ("NG"), the Innu Nation and NunatuKavut Community Council ("NCC") [1] , participated in a commemoration and healing *ad hoc* group. The Court is advised that based on the meetings held to the date of the application for settlement approval, it is anticipated that commemoration will be manifested in the following ways:

1) a logo design contest among notable indigenous artists from Labrador with the logo being incorporated into commemorative pins and on informative plaques to be located in Happy Valley Goose Bay and in each of the five communities in which a Facility was located;

2) an archivist will be hired to identify, collect, catalogue, preserve and digitize material relevant to the residential school legacy in Newfoundland and Labrador. Part of this mandate will be to identify archival material located outside of Canada and, in collaboration with the Government of Canada and the appropriate indigenous organizations, attempt repatriation of those materials where appropriate. The archivist will also be directed to prepare a mobile historical display based on the information found to better educate the public about the residential school system in Newfoundland and Labrador; and

3) a prominent Labradorian will be engaged to conduct community visits to receive and memorialize, both publicly and privately, stories tendered by those connected with the residential school system, including but not limited to the class members. The mandate will include receiving information and advice on appropriate healing processes and will result in a formal report.

25 It is also anticipated that the healing component of the Settlement will be addressed by payments made to the individual indigenous organizations with a portion set aside for class members who do not identify with any of those organizations.

26 All commemoration and healing proposals remain subject to Canada's approval in accordance with the Settlement.

The Proposed Claim Form

27 The proposed claim form is intended to be a plain-language communication that will be simple and straightforward to complete. It is expected that the claim form will be translated into Inuktitut and Innu-aimun, the languages of the Inuit and the Innu, respectively.

Proposed Notice Materials

28 The Plaintiffs intend to provide significant notice of the Settlement to class members, which will include, among other things, direct mailings to class members, direct mailings to third parties, dissemination of a short form notice in various media, and direct community outreach and meetings. The proposed notice materials are intended to be simple and easy to read and understand.

The Statutory and Regulatory Regime

29 The *Act* governs the conduct of class actions in the Province. By section 35(1), a class action may be discontinued "only with the approval of the court on terms the court considers appropriate". Section 35 also addresses the basis upon which a settlement can be approved by the Court.

30 Section 40 of the *Act* provides that the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D, apply to class actions to the extent that the rules do not conflict with the *Act*.

31 Because the common issues trial is underway, it cannot be discontinued without leave of the Court (Rule 19.02).

32 Although section 35 of the *Act* provides that a settlement agreement in a class action must be approved by the Court to be binding on class members, it is Rule 7A.10(2) that sets out what materials and information must be included in an approval application:

> **7A.10.** (2) An application to court for approval of a settlement of a class action shall include:
>
> (a) a brief history of the proceeding;
>
> (b) a brief statement of the facts that form the basis of the settlement;
>
> (c) a discussion of the relevant issues of law;
>
> (d) the terms of the settlement and its amount;
>
> (e) a statement of the form of payment of the settlement;
>
> (f) the method of quantifying individual claims and the distribution of the settlement funds to class members;
>
> (g) the total amount of legal fees and disbursements and their impact on the settlement;
>
> (h) details of unresolved claims, if any, including their number and how they are to be resolved;
>
> (i) a plan of action for resolving individual claims;
>
> (j) a statement of any differences in the manner of treatment of class members;
>
> (k) the procedure for disbursing unclaimed funds;
>
> (l) information of related class or representative proceedings in other jurisdictions; and

(m) the form of a notice proposed to be sent to class members.

33 By Rule 7A.10(3)(a), in considering whether to approve a settlement in a class action, the Court is to consider whether it is fair, reasonable and made in good faith.

34 The approval application was made by Plaintiffs' counsel. I am grateful for the comprehensive nature of the material provided. It comprised well over 1000 pages of submissions, affidavits, exhibits and authorities, thus enabling me to consider all of the relevant factual matters and the applicable law so that I may render a fully informed decision.

The Position of Canada

35 Canada's position on the application was succinctly put. It consented to the approval application and to the form of order requested by Plaintiffs' counsel except in respect of honoraria proposed to be paid to the representative Plaintiffs and the other class members who testified during the trial. Canada raised no objection to this latter aspect of the application, which I will address later in these Reasons. Canada provided no submissions on the approval sought for the payment of fees to, and reimbursement of disbursements paid for by, Plaintiffs' counsel.

36 Counsel for Canada advised the Court that reconciliation with its aboriginal persons is a high priority for the federal government. It settled the matter for $50 million with that in mind. Although Canada left to the Plaintiffs the manner of distribution of the Settlement among the class members, it supports the application for approval based upon the proposed Distribution Plan. The Settlement was reached following receipt of advice from independent actuaries and was contingent on amounts being paid to both resident class members and day students. It was also important for Canada that legal fees and administration costs be paid out of the Compensation Fund. Importantly, says Canada, the commemoration and healing components of the Settlement are an additional step towards reconciliation.

How the Court Approaches Settlement Approval

37 In *Doucette v. Eastern Regional Integrated Health Authority*, 2010 NLTD 29 (N.L. T.D.), this Court approved a settlement in a class action. Thompson, J., at paragraphs 7 to 9, canvassed authorities from across Canada and provided a helpful summary of the various principles considered when approving a class action settlement. His starting point was that a settlement may be less than perfect:

> [7] Settlements are a product of compromise and are not held to a standard of perfection. As Schulman J. held in *Semple*, a proposed settlement need only fall within 'a zone of reasonableness' to be approved. Similarly, Chief Justice Brenner of the B.C. Supreme Court in *Sawatzky v. Societe Chirugicale Instrumentarium Inc.* wrote: 'All settlements are the product of compromise and a process of give and take and settlement rarely gives all parties exactly what they want. Fairness is not a standard of perfection. Reasonableness allows a range of possible resolutions. A less than perfect settlement may be in the best interest of those affected by it when compared to the alternative of the risks and costs of litigation'.

38 Given that a settlement may be less than perfect, better becomes the enemy of good. Consequently, the Court's role in reviewing a settlement in a class action is to approve it or to reject it. The Court cannot modify it:

> [8] A court has the power to either approve or reject a settlement agreement. It may not substitute its own terms. Schulman, J. specifically cautioned that a court should be reluctant to attach conditions on approval lest the settlement be lost: '[T]he court should also consider whether the refusal of approval or attaching of conditions to approval, puts the settlement in jeopardy of being unraveled. It should be remembered that there is no obligation on parties to resume negotiations, that sometimes parties have reached their limit in negotiation, resile from their positions or abandon the effort'.

39 Thompson, J. sets forth the factors to be considered in evaluating a settlement:

[9] Rule 7A.10(3)(a) stipulates that 'in considering whether to approve a settlement of a class action, the court shall consider whether the settlement is fair, reasonable and made in good faith.' Courts in Canada have held the test to be whether the settlement is 'fair and reasonable and in the best interests of the class as a whole.' Courts have identified the following factors that may assist in making this determination:

- likelihood of recovery, or likelihood of success;
- amount and nature of discovery evidence;
- settlement terms and conditions;
- recommendation and experience of counsel;
- future expense and likely duration of litigation;
- recommendation of neutral parties, if any;
- number of objectors and nature of objections;
- presence of good faith and absence of collusion;
- degree and nature of communications by counsel and Plaintiff with class members during the litigation;
- information conveying to the court the dynamics of, and the positions taken by the parties during, the negotiation; and
- the risk of not unconditionally approving the settlement.

40 We saw above that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions (*Verna Doucette* at paragraph 12). It is an objective standard that allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.

41 Later, at paragraphs 15 to 17 of *Verna Doucette*, Thompson, J. provided further guidance to a judge considering whether to approve a settlement in a class action:

> The parties proposing the settlement bear the onus of satisfying the court that it ought to be approved ... On an application to approve a settlement in a class proceeding, all parties and their counsel are obliged to provide full and frank disclosure of all material information. ... The court is entitled to sufficient evidence to permit the judge to exercise an objective, impartial and independent assessment of the fairness of the proposed settlement. [Authorities omitted]

42 In early stage class action settlements there may not be a "strong initial presumption of fairness" (*McIntyre (Litigation guardian of) v. Ontario*, 2016 ONSC 2662 (Ont. S.C.J.)at paragraph 3). But in cases such as this, where the Settlement was negotiated and pursued at arm's-length by experienced class counsel after a long and difficult court process, I am satisfied that the following applies:

> Where the parties are represented — as they are in this case — by highly reputable counsel with expertise in class action litigation, the court is entitled to assume, in the absence of evidence to the contrary, that it is being presented with the best reasonably achievable settlement and that class counsel is staking his or her reputation and experience on the recommendation.
>
> [*Serhan Estate v. Johnson & Johnson*, 2011 ONSC 128 (Ont. S.C.J.) at paras. 55-56.]

43 Consequently, in the circumstances of this case it would take convincing evidence to the contrary for me not to approve the Settlement.

Rule 7a.10(3)(a) Factors

44 Rule 7A.10(3)(a) stipulates that "in considering whether to approve a settlement of a class action, the court shall consider whether the settlement is fair, reasonable and made in good faith." I must also be satisfied that the Settlement is in the best interests of the class as a whole. As we look at each of the factors to be considered, we will see that they all militate towards approving the Settlement.

1. Likelihood of Recovery, or Likelihood of Success

45 Settlement in this matter was made close to the end of the common issues trial after the Plaintiffs had closed their case but before Canada adduced any evidence. Although I did not have the advantage of hearing all of the proposed evidence and the parties' respective closing submissions, I did receive and review extensive pre-trial briefs comprised of more than 700 pages of material. The relative strengths and weaknesses of the positions asserted by the parties were well understood by me by the time the Settlement was achieved.

46 Not having heard the complete case it would be inappropriate for me to comment in depth on the likelihood of success. Nevertheless, Plaintiffs' counsel has identified the following litigation risks, with which I cannot disagree.

General Litigation Risks

47 There are a number of general litigation risks that the Plaintiffs faced in the common issues trial, including:

1) Risk of historical claims — This class action involved allegations concerning events that occurred between 35 to 65 years ago and spanned a 30 year period. Hundreds of class members and former staff of the Facilities are now of advanced age; many have passed away. Risks associated with continuing the common issues trial included fading memories of elderly witnesses, incomplete document retention, and a potential inability to adduce evidence because of a lack of witnesses.

2) General litigation risks — As with all actions, there existed the risks of witnesses not providing sufficient evidence, the documentation not being sufficient, and the uncertainty associated with the Court making findings of fact.

3) Consolidated action risks — Litigation risks are amplified in this proceeding, which concerns five Facilities with differing class periods, but litigated together. This increased the risk of failing to prove the existence or breach of a fiduciary duty over the years for one or more of the Facilities; and

4) Class action litigation risks — as with many class actions, there was the risk that I would find there to be insufficient evidence or inferences necessary to find liability for the entire class across the entire class period for each of the Facilities.

Uncertain Results

48 In addition, case-specific litigation risks resulted in the following uncertainties:

1) the Plaintiffs could be unsuccessful in proving that a fiduciary duty existed;

2) the Plaintiffs might establish the existence of a fiduciary duty, but be unsuccessful in proving the duty was breached in common across the class over the entire class period for each of the five Facilities;

3) the Plaintiffs might succeed in establishing a breach of fiduciary duty but not be awarded aggregate damages resulting in the Court ordering individual assessment hearings; and

4) the Plaintiffs might succeed in proving a breach of fiduciary duty but some or all class members' claims may be barred by virtue of the application of a limitation period.

Potential Individual Hearings

49 If individual assessment hearings were ordered instead of aggregate damages, such hearings:

1) would likely be adversarial in nature, which could require legal representation resulting in increased costs for class members;

2) would require significant time to complete, resulting in prejudice to the aging class and a denial of timely access to justice;

3) may require class members to testify, forcing a traumatic recounting of the abuse they suffered;

4) may require significant travel by elderly class members, causing barriers to participation for some; and

5) would likely limit recovery to those class members who are willing to come forward and be cross-examined about their difficult childhood experiences.

Delays Associated With Trial and Appeals

50 At the conclusion of the common issues trial, I would have likely reserved my decision and, given the complexity of the issues, it would have been at least several months before a decision would be filed. There would then be the inevitable appeals. Consequently, even if the Plaintiffs were successful at the common issues trial, there would likely be a significant delay in obtaining compensation.

51 Although those of us involved in the administration strive to resolve matters as quickly as possible, Plaintiffs' counsel reasonably estimate that they faced at least one and a half to two years before a final determination of the common issues trial and appeal, with no guarantee of success. This estimate does not include a possible appeal to the Supreme Court of Canada

52 In addition, in the event that the Plaintiffs were unsuccessful in their claim for an aggregate award of damages, individual assessments of the class members could take years given the size of the class and the nature of the claims being made.

53 I agree with Plaintiffs' counsel that these inherent delays would result in additional prejudice to the aging class members, and accordingly, a denial of access to justice.

2. Amount and Nature of Discovery or Trial Evidence

54 As mentioned, on February 1, 2016, after 35 days of trial, the Plaintiff concluded presenting their evidence, including the introduction of 700 historical documents, and the testimony of 29 class members and 5 expert witnesses. Canada advised the Court that it required less than a week to present its evidence. Before Canada presented its evidence, however, a requested postponement was granted and the Settlement was reached. Consequently, the Court and the parties had the advantage of having heard most of the trial evidence prior to settlement being reached.

55 Furthermore, I am aware that there had been extensive discoveries, not only of representatives of the parties and their experts, but also of representatives of third parties against whom proceedings were discontinued during the course of the trial. Documentary production was exhaustive (if not complete given the historical nature of the claims). In addition, the parties' extensive pre-trial briefs set forth in detail the nature of the evidence that they expected to come out at trial and their respective legal argument for and against the relief sought.

56 As a result of the foregoing, the parties were in a very good position to evaluate the totality of the evidence and the current state of Canadian law on the matters at issue in order to assess the prospects of success.

3. Settlement Terms and Conditions

57 This is an historic settlement. It is for this reason that I have set out its terms in detail. Not only does it provide $50 million for class members (including paying the administration cost of the settlement and the fees and disbursements of Plaintiffs' counsel) but also meaningful commemoration and healing initiatives to be funded entirely by Canada. This latter benefit is the creature of the Settlement and could not be imposed by the Court. Furthermore, the Settlement provides a much more stream-lined claims process than did the Indian Residential Schools settlement. Finally, all of the net settlement proceeds will go to class members, with none reverting to Canada.

58 There is no doubt that there is an inherent arbitrariness to the Distribution Plan. For example, a survivor who resided at a Facility for four years will be paid the same GCP as a person who only resided there for one year. In addition, the compensation chart relating to ACPs brings many individuals with different experiences into a single compensation category. But, a settlement does not have to be perfect and it does not have to treat every survivor equally (*Fraser v. Falconbridge Ltd.* (2002), 24 C.P.C. (5th) 396, 33 C.C.P.B. 60 (Ont. S.C.J.) at paragraph 13; *McCarthy v. Canadian Red Cross Society* (2007), 158 A.C.W.S. (3d) 12, [2007] O.J. No. 2314 (Ont. S.C.J.), at paragraph 17).

59 Individual class members may have fared better had the case been won and they had their damages assessed individually. But such an outcome was far from certain — reaching it was fraught with risk, cost and delay. I am satisfied that the class members will be treated equitably, if not equally, and that the terms of the Settlement are fair and reasonable for the class members as a whole.

4. Recommendation and Experience of Counsel

60 The Plaintiffs were represented by three experienced class action law firms, based, respectively, in Newfoundland and Labrador, Ontario and Alberta. The experience of Plaintiffs' counsel, both in this jurisdiction and elsewhere, militates towards approving the Settlement. This is particularly so where a number of the lawyers involved have been associated with the Indian Residential Schools settlement and other cases of alleged institutional abuse.

5. Future Expense and Likely Duration of Litigation

61 We have already speculated as to the time it would take for this litigation to come to a final conclusion. Had the trial proceeded to judgment, Plaintiffs' counsel estimate that they would have devoted additional time with a value of approximately $300,000 to $400,000 and likely would have incurred an additional $50,000 in disbursements, primarily for expert fees and travel. In addition, say Plaintiffs' counsel, an appeal to the Court of Appeal of the common issues trial decision would have required additional professional services with a value of approximately $250,000, plus disbursements of approximately $50,000. An appeal to the Supreme Court of Canada would likely have cost as much again.

6. Recommendation of Neutral Parties, if Any

62 I am advised by Plaintiffs' counsel that the NG, NC and ITK have all endorsed the Settlement Agreement and Distribution Plan. Although these are not neutral parties, representing as they do the broader interests of most of the class members, they are one step removed from the proceeding itself and their perspectives are therefore valuable.

63 The Innu Nation has not provided any statements for or against the Settlement, although they have identified that they have 30 class members. They have been represented by legal counsel, one of whom attended the community meeting in Happy Valley Goose Bay. They have also been actively involved in the commemoration and healing components of the Settlement.

7. Number of Objectors and Nature of Objections

64 Notwithstanding the broad notice to and consultations made with class members about the Settlement, the Distribution Plan and the fees and disbursements being sought by Plaintiffs' counsel, not a single voice was raised in objection, either before or at the approval hearing.

8. Presence of Good Faith and Absence of Collusion

65 Given the public nature of the Defendant and the value of the Settlement for the Plaintiffs and class members, there is no hint of bad faith or collusion.

9. Degree and Nature of Communications by Counsel and Plaintiff with Class Members during the Litigation

66 Notice of the Settlement approval hearing, along with a notice of community meetings was mailed to the 520 individuals listed on Plaintiffs' counsel's client database and later emailed to 88 additional individuals. As new class members were identified, this information was provided to them. As of the hearing date, more than 700 class members have personally received this material.

67 NG widely disseminated information about the Settlement and the community meetings to its membership. NCC shared the Notice of Settlement and notice of community meetings with 26 members of their staff to be distributed to their membership. The Notices were also posted to their Facebook page.

68 CBC Newfoundland & Labrador broadcast a recorded public service announcement with all relevant information for the community meetings to be played in advance of and on each morning of the community meetings.

69 Mr. Cooper attended information meetings in the following communities and noted the attendance numbers:

1) June 11, 2016 — Ottawa - 5 people attended

2) June 13, 2016 - Nain — 71 people attended

3) June 13, 2016 - Natuashish — 3 people attended

4) June 13, 2016 - Hopedale — 48 people attended

5) June 15, 2016 - Cartwright — 41 people attended

6) June 15, 2016 - Goose Bay — 140 people attended

7) June 16, 2016 - Postville — 16 people attended

8) June 16, 2016 - Makkovik - 11 people attended

9) June 16, 2016 - Rigolet - 23 people attended

10) June 16, 2016 - Black Tickle - 3 people attended.

70 Community meetings were also held in these communities as follows:

1) July 6, 2016 - Edmonton — 9 people attended

2) July 16, 2016 - St. John's — 15 people attended

3) July 17, 2016 - Halifax - 15 people attended

4) July 18, 2016 - Moncton - 5 people attended.

71 Almost all attendees identified themselves as class members, but a small percentage were there on behalf of deceased class members or as companions of the class members.

72 At each meeting Mr. Cooper explained the Settlement and Distribution Plan in detail, including the procedure for objecting to the Settlement, the procedure for opting in or opting out of the class, and the fees being sought by Plaintiffs' counsel.

73 Of the anticipated 800 or so eligible class members, Plaintiffs' counsel currently have an active database of 763 class members with whom they are in regular mail and email contact. Mr. Cooper advises that he has personally responded to approximately 75 phone calls and 110 emails from class members since May 10, 2016 answering a variety of questions primarily around eligibility and potential timing of payments.

74 From discussions that Mr. Cooper has had with those who attended community meetings, be believes that those class members not located in Newfoundland and Labrador are likely to receive notification of the Settlement. For example, a class member in Cartwright indicated that his three sisters live in the United States and that they were regularly in contact with him. A further example is an email exchange Mr. Cooper had with a class member in the United Kingdom. Her sibling told her of the Settlement. Similarly, in Hopedale, a class member confirmed that she had a sister in the United States who was receiving the Settlement material.

10. Information Conveying to the Court the Dynamics of, and the Positions Taken by the Parties, During the Negotiation

75 In this case I need not rely solely upon the parties describing to me the dynamics of, and the positions taken by the parties during, the negotiations. Beginning in December of 2013 I was assigned as trial judge and managed the proceeding as it approached trial. I received extensive materials maintained by the previous case management judges and reviewed all of the decisions rendered by them and the two decisions of the Court of Appeal. From September 28 of last year I have presided over the trial.

76 From my review of the materials that predate my involvement through my personal participation in the proceeding, I have seen each side resist almost every move by the other in an adversarial manner. I was aware that the parties had attempted to reach a settlement without success on several occasions, notwithstanding the assistance of a retired justice of this Court.

77 Mildly put, this was a hard fought case with no ground conceded by either side. That is until sometime in early 2016 when Canada received instructions to seek an out of court resolution.

11. The Risk of Not Unconditionally Approving the Settlement

78 Although, as stated, I have a sense of the dynamics between the parties, I was not present in the room when the Settlement was negotiated. I do not know what points were conceded and what principles were held on to dearly. Most importantly, I do not know at what point a good settlement could be lost in a search for the better. I accept, however, that it would be imprudent for the Court to weigh into the process to try to impose or broker a different deal.

Honorarium Payments to the Representative Plaintiffs and the Survivor Witnesses are Appropriate

79 On an application for settlement approval, I have jurisdiction to grant a request for honorarium payments to the representative Plaintiffs, paid out of the settlement fund (*Wilson v. Servier Canada Inc.* (2005), 252 D.L.R. (4th) 742, 137 A.C.W.S. (3d) 1104 (Ont. S.C.J.) at paragraph 95; *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233 (Ont. C.A.) at paragraphs 133-136). Class counsel seeks approval of honorarium payments of $10,000 for each of the representative Plaintiffs and $1000.00 to each of the non-Plaintiff survivors who testified at the trial. The representative Plaintiffs' accomplishments in this case far exceed their respective individual interests and payment is appropriate to recognize those accomplishments and provide some indemnity for their time and effort devoted to prosecuting the actions. So,

too, is a largely symbolic payment appropriate for the other survivors who had the courage and fortitude to relive in Court the abuses they suffered in the Facilities.

80 Although honorarium payments are infrequently made, the factors to be considered include a plaintiffs' involvement in the "initiation of the litigation and retainer of counsel", "significant personal hardship or inconvenience in connection with the prosecution of the litigation", and "participation at various stages in the litigation, including discovery, settlement negotiations and trial" (*Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 (Ont. S.C.J.) at paragraphs 26-43). It is in the last two respects that honoraria are also appropriate for the witnesses who are not Plaintiffs.

81 Representative Plaintiffs and other survivor witnesses in systemic abuse cases are exposed in a way most other class members are not: their very personal experiences became matters of public record. Each of them was required to: describe the abuse they alleged in the statement of claim; swear affidavits in support of certification; endure cross-examinations on those affidavits; participate in examinations for discovery; participate in preparations with counsel for all such attendances; and, finally, travel to St. John's and testify at the common issues trial. This is one of those special cases where their contribution has gone well beyond the call of duty, warranting separate recognition (*Garland v. Enbridge Gas Distribution Inc.* (2006), 153 A.C.W.S. (3d) 785, 56 C.P.C. (6th) 357 (Ont. S.C.J.)).

82 In *Johnston v. Sheila Morrison Schools*, 2013 ONSC 1528 (Ont. S.C.J.), at paragraph 43, Justice Perell approved $5,000.00 honorarium payments to the two representative plaintiffs in an institutional abuse action, reasoning that "the honorarium is not an award but a recognition that the representative plaintiffs meaningfully contributed to the class members' pursuit of access to justice". Similarly, in *Slark (Litigation guardian of) v. Ontario*, 2013 ONSC 6686 (Ont. S.C.J.), and *McKillop (Litigation guardian of) v. Ontario*, 2014 ONSC 1282 (Ont. S.C.J.), the settlement approval judges approved honorarium payments of $15,000.00 and $5,000.00, respectively, to the representative plaintiffs.

83 It is noteworthy that none of the above three cases went to trial and each of them was conclusively resolved in about five years. While those plaintiffs were examined for discovery, they did not confront the emotionally gruelling experience of giving *viva voce* testimony and being cross-examined about exceedingly personal details at a public trial.

84 The Plaintiffs and other witnesses have provided access to justice for hundreds of vulnerable individuals in a historic case. The largely symbolic honoraria are appropriate small tokens of recognition for that effort and are approved.

Disposition of the Application for Approval of the Settlement

85 On the first day of trial, a year to the day before I approved the Settlement, Plaintiffs' counsel came into the historic Courtroom #1 in downtown St. John's seeking $50 million as compensation for the losses suffered by their Inuit and Innu clients. Both sides are to be congratulated on settling the litigation for exactly that amount. It is admitted by Plaintiffs' counsel that they likely could not have fared better had they completed the trial and been totally successful there and on appeal. But the Plaintiffs and Canada have achieved even more — they have also chosen to implement, at Canada's cost, a process of commemoration and healing that would have been beyond the jurisdiction of the Court to award. These meaningful measures of commemoration and healing, it is hoped, will also be important steps towards reconciliation.

86 The Settlement will take some time to fully implement. Because the Court remains interested in the matter until it is finally concluded, I have ordered that Plaintiffs' counsel report to the Court as they deem appropriate, but not less than twice a year and again when the Distribution Plan has been completed.

87 On the basis of the foregoing, therefore, I am pleased to approve the Settlement because it is fair and reasonable, was made in good faith, and is in the best interests of the class as a whole.

FEES AND DISBURSEMENTS OF PLAINTIFFS' COUNSEL

The Legal Test for Retainer Agreement and Fee Approval

88 In determining whether to approve the Retainer Agreements and the corollary legal fees, I must determine whether those fees are fair and reasonable in all the circumstances. An example of the factors to be taken into account is set out in *Smith Estate v. National Money Mart Co.* at paragraph 80, as follows:

> 1) the legal and factual complexities of the action;
>
> 2) the risks undertaken, including that the action might not be certified;
>
> 3) the degree of responsibility assumed by class counsel;
>
> 4) the monetary value of the matters at issue;
>
> 5) skill and competence demonstrated by class counsel;
>
> 6) the results achieved;
>
> 7) ability of the class to pay and the class expectations of fees;
>
> 8) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation.

89 Each case will turn on its facts and the factors listed above from *Smith* provide a guide only. A key factor will be at what point in the course of the litigation the proceeding settles - whether before or after certification, before or after discoveries, or before or after trial. Depending on the circumstances, therefore, a court may look at different or other factors. There will be occasions when some of the factors are self-evident — for example, in this case the monetary value of the matters at issue and the results achieved are obvious from the fact that the case opened with Plaintiffs' counsel seeking $50 million on behalf of class members and it closed with them obtaining $50 million for the class members. I have, therefore, organized my analysis of whether the fees sought here are fair and reasonable in a slightly different manner than in *Smith*, but with the same focus on the risk, skill, competence and dedication assumed by Plaintiffs' counsel in the advancement of the class actions.

The Retainer Agreements

90 Pursuant to section 38(1) of the *Act*, an agreement respecting fees and disbursements between a solicitor and representative plaintiff must be in writing and, by section 38(2), must be approved by the Court. The Retainer Agreements have been filed with the Court, along with the internal consortium agreement among Plaintiffs' counsel outlining how the fees shall be split among them.

91 The relevant portions of the Retainer Agreements provide as follows:

> 8. Legal fees shall be paid only in the event the Class Action is successful in obtaining judgment on the common issues in favour of some or all Class Members or in obtaining a settlement that benefits one or more Class Members (defined herein as "Success"). The legal fees shall be paid by a lump sum payment out of the proceeds of such judgment or settlement under the Act.
>
> . . .
>
> 10. In the event of Success, The Firm shall be paid an amount equal to any disbursements not already paid to them by the Defendants as costs, plus applicable taxes, plus interest thereon in accordance with subsections 38(4) and (5) of the Act, plus the greater of:
>
> > (a) The usual class action hourly rates of the legal professionals (e.g. lawyers, law clerks or students) who perform work on the case multiplied by the number of hours worked by each such professional (the "Base Fee")

increased by a multiplier of four (4), less the fee portion of any recovered costs already paid to the Firm, plus applicable taxes; or

(b) If the Class Action is settled before the commencement of the examinations for discovery, twenty-five percent (25%) of the recovery less the fee portion of any costs already paid to the Firm, plus applicable taxes, or

(c) If the Class Action is settled after completion of the oral portion of the examinations for discovery excluding consideration of refusals and undertakings, thirty-percent (30%) of the recovery less the fee portion of any costs already paid to the Firm, plus applicable taxes; or

(d) If the action is settled after the commencement of trial of the Common Issues or determined by judgment after the trial, thirty-tree and one third percent (33 1/3%) of the recovery, including any amounts awarded under section 28 or 29 of the Act, excluding any amount separately identified or specified as costs and/or disbursements, less the fee portion of any costs already paid to the Firm, plus applicable taxes.

[emphasis added]

. . .

16. From any recovery, the Firm shall be paid for all the disbursements they reasonably incurred in relation to the Class Action. Recoverable disbursements shall include all amounts reasonably incurred in connection with the Class Action, the trial of the Common Issues, the settlement of the Class Action, the assessment of and recovery of damages for the Class Members, any appeals relating to or arising out of the Class Action, including but not limited to expenses incurred for investigation, court fees, duplication, travel, lodging, long distance phone calls, the cost of a toll-free hotline, specialized computer equipment and software, computer consultants, couriers, postage, facsimile, expert witnesses and agents retained by or at the direction of The Firm.

17. If, during the course of the Class Action, the court awards costs to the Client on a motion/application or other interlocutory proceeding and such costs are paid by Canada, the Firm may apply such costs against its accumulated fees or disbursements incurred to the date of payment.

18. The Client acknowledges that time spent by the Firm prior to the date of execution of this agreement is to be included in the Base Fee.

. . .

21. The Client acknowledges that, in view of the nature of the Class Action, the Firm may require the assistance of additional lawyers or law firms to work on the common issues and class wide issues in the contemplated Class Action. The Client hereby authorizes the Firm to assemble and maintain a consortium of lawyers or law firms to conduct the Class Action. The Firm shall have overall responsibility for the conduct of the Class Action. The Firm may change the composition of the consortium and assign tasks among consortium members, as they consider advisable from time to time. The fees for the consortium shall be treated as part of the Firm's fees and shall be determined as set out above."

92 Pursuant to the terms of the Retainer Agreements, Plaintiffs' counsel seek approval of fees of $16,665,000.00, which amounts to a contingency fee percentage of just slightly less than the 33 $^{1}/_{3}$% provided for.

93 I am satisfied that the terms of the Retainer Agreements are consistent with other retainer agreements that have been approved in class actions. Retainer agreements in class actions usually provide for a contingency fee in the range of one-fifth to one-third of recovery.

94 Although a fee agreement reached between a representative plaintiff and class counsel should not be blindly accepted by the Court, it also should not be easily rejected or ignored. It has generally been recognized that the fee agreement entered into between the client and counsel should be the starting point of the court's "fair and reasonable" analysis:

> This is not to fix a fee either by a reconsideration of all the evidence and the application of judgment or arbitrarily, however one characterizes such a process, but rather to decide whether the agreement operates reasonably in the context... With all this in mind, the court must then ask, as a matter of judgment, whether the fee fixed by the agreement is reasonable and maintains the integrity of the profession? In other words, I think the amount payable under the contract is the starting point for the application of the court's judgment.
>
> [*Commonwealth Investors Syndicate Ltd. v. Laxton*, [1994] B.C.J. No. 1690 (B.C. C.A.) at para. 47]

95 Contingency fee agreements based upon a percentage of recovery are common in litigation, especially for personal injuries and in class actions. Another approach is to apply a multiplier to the normal fee based upon the hours expended by class counsel. In my view, the "multiplier" approach is less satisfactory because of its reliance on a statement by counsel of the time expended which is then multiplied by hourly rates that are also set by counsel. There is no real way to test the former and the latter may or may not reflect the going rates for similarly experienced lawyers in the jurisdiction where the class action is brought. This explains why courts have found that the "contingency fee approach to class counsel compensation is much more principled than the 'multiplier' approach and should be the preferred method for class counsel compensation" (*McIntyre (Litigation guardian of)*, at paragraph 42).

96 Personal injury litigation conducted across Canada has long allowed counsel to work on a contingent basis with counsel receiving a premium on fees based on contingency agreements upwards to 33%. In such litigation, awarding counsel a premium on her fees in exchange for a contingency agreement is generally considered to reflect a fair allocation of risk and reward as between lawyer and client. As Justice Strathy (as he then was) determined in *Baker Estate v. Sony BMG Music (Canada) Inc.*, 2011 ONSC 7105 (Ont. S.C.J.), at paragraph 64:

> There should be nothing shocking about a fee in this range...It serves as an inducement to the lawyer to maximize the recovery for the client and it is regarded as fair to the client because it is based upon the 'no cure, no pay' principle. The profession and the public have for years recognized that the system works and that it is fair. It allows people with injury claims of all kinds to obtain access to justice without risking their life's savings.

97 In *Cannon v. Funds for Canada Foundation*, 2013 ONSC 7686 (Ont. S.C.J.) at paragraphs 3 and 10, Belobaba, J. approved a fee award of 33% of the settlement amount, declaring such a percentage "presumptively valid" pursuant to the terms of the retainer agreement. In *Cassano v. Toronto Dominion Bank* (2009), 178 A.C.W.S. (3d) 1015, 79 C.P.C. (6th) 110 (Ont. S.C.J.), at paragraph 63, Justice Cullity approved the terms of the contingency fee retainer finding:

> They had accepted their retainers on the basis of a fee calculation that would vary directly according to the degree of success that was achieved. The percentage of recovery to be applied was not unreasonable, the risks were considerable, the degree of success was substantial.

98 In Justice Cullity's view, contingency fee agreements ought to be *prima facie* accepted as appropriate and reasonable, unless there was something "in the manner in which the proceeding was conducted to justify a refusal to approve the fee determined in accordance with the terms of which the fees were accepted".

99 Justice Strathy (as he then was) also considered the propriety of "one-third" contingency fees in *Abdulrahim v. Air France*, 2011 ONSC 512 (Ont. S.C.J.) and determined at paragraph 13 that:

> A contingency fee of one-third is standard in class action litigation and has been common place in personal injury litigation in this province for many years. It has come to be regarded by lawyers, clients and the courts as a fair

> arrangement between lawyers and their clients, taking into account the risks and rewards of such litigation. Fees have been awarded based on such a percentage in a number of class action cases.

100 Notwithstanding the foregoing, I may still examine the reasonableness of the resulting percentage based fee against the actual time incurred and using prevailing multipliers as a crosscheck (*Rideout v. Health Labrador Corp.*, 2007 NLTD 150 (N.L. T.D.), at paragraphs 167 and 168). That is, percentage-based fees and multiplier-based fees may be assessed as against one another, depending on which approach is being used in any particular case (*Gagne v. Silcorp Ltd.* (1998), 167 D.L.R. (4th) 325, 27 C.P.C. (4th) 114 (Ont. C.A.), at paragraph 14).

101 In this case, Plaintiffs' counsel advises that they devoted 19,930 hours to this litigation. A fee of $16,665,000 represents a multiplier of 1.81 based upon the hourly rates cited by them. A multiplier of 1.81 is at the low end of class action jurisprudence given the risks, substantive legal hurdles and stage of proceeding at the time of settlement. Plaintiffs' counsel provided a chart that demonstrated court approved multipliers from 1.3 to more than 5, with the majority at greater than 2. Notwithstanding the inherent weaknesses of using lawyers' docket time and assigned rates as a basis for awarding a fee, the exercise in this case does assist me in determining that the fees sought here are reasonable in all the circumstances.

102 I am satisfied that there is no reason justifying disregard of the terms of the Retainer Agreements in these actions because Plaintiffs' counsel doggedly prosecuted these risky and challenging actions over many years and ultimately achieved substantial success. Let us look more closely at the circumstances of the litigation.

Specific Legal Risks Assumed by Class Counsel in Prosecuting the Action

103 This proceeding starkly reveals both the risk in, and the need for, class actions. It proved to be the first common issues trial of its kind in Canada. These class actions represent the quintessential access to justice case, where the consideration of risk to class counsel has been a guiding consideration in my assessment of the fairness and reasonableness of the fees sought:

> Another fundamental objective [of class proceedings] is to provide enhanced access to justice to those with claims that would not otherwise be brought because to do so as individual proceedings would be prohibitively uneconomic or inefficient. The provision of contingency fees ... is an important means to achieve this objective. [Payment of a contingency] fee if the class action succeeds gives the lawyer the necessary economic incentive to take the case in the first places and to do it well. However, if the Act is to fulfill its promise, that opportunity must not be a false hope.
>
> [Gagne at paragraph 14]

104 The quantum of a class counsel fee is "not only to reward counsel for meritorious efforts, but it should also encourage counsel to take on difficult and risky class action litigation" (*Abdulrahim*, at paragraph 9). These actions were on the far end of the continuum of difficult and risky litigation; Plaintiffs' counsel assumed substantial risk in putting an extraordinary amount of time into these matters over nine years, on a contingent basis, with highly uncertain results throughout.

105 I accept the facts as sworn to by Mr. Cooper in his affidavit in support of approval of the fees and disbursements of Plaintiffs' counsel. He identifies the unique factor present in this case which is lacking in almost all other class proceedings: for decades, the claims of these class members languished with no counsel wanting to take up their cause. This was despite the fact that nationally, hundreds of lawyers on the plaintiffs' side were involved for decades in residential school litigation, national negotiations and, ultimately, a pan-Canadian settlement (the "IRSSA") in 2005. But, as stated by Mr. Cooper, for these individuals in Newfoundland and Labrador:

> 1) There was no clamour by litigation counsel to take on the case. The technical evidentiary issues, the uncertainty of liability, the defences available, the time required to advance the case, the prospect that the claims might ultimately

have to be assessed on an individual basis, and the financial exposure of class counsel would have made this proceeding less than attractive to counsel.

2) The prevailing legal advice in 2006 was to seek to have these claims appended to IRSSA failing which they were unlikely to be resolved in favour of the survivors. Once Plaintiffs' counsel commenced these actions, inclusion into IRSSA had already been denied because Canada had refused to add the Facilities as "Eligible Indian Residential Schools" to IRSSA.

3) Nevertheless, "it was in the face of this advice that I [Mr. Cooper] and ultimately my co-counsel decided to advance the Claim. In essence, the Claim had been considered by competent senior counsel under the aegis of the Nunatsiavut Government and was rejected. This gives some insight into the risk that was associated with the advancement of the class action as known by Class Counsel in 2007."

106 This is a compelling starting point for an assessment of the degree of risk, skill, competence and dedication assumed by Plaintiffs' counsel in the advancement of this proceeding.

107 I discussed in detail above the legal risks involved in these claims in the context of why it was appropriate to approve the Settlement. Those same risks — the difficulties of proving historic claims, the challenges of establishing a fiduciary duty and its breach, the risk of not obtaining an award of aggregate damages, and others — also apply to my consideration of the reasonableness of the fees and disbursements sought by counsel. These were neglected cases that were difficult to carry over uncharted legal terrain. Plaintiffs' counsel struggled for nine long years, expended more than a million of their own dollars in disbursements, suffered innumerable set-backs and delays, but persevered to achieve a laudable resolution for the class members. Failing was a real possibility. Had they failed, Plaintiffs' counsel would not only have been paid nothing for their nine years of work but would have been left holding the disbursement bag as well.

Expectations of the Class, Ability to Pay and the Importance of the Issues

108 The representative Plaintiffs in each of the five actions executed the Retainer Agreements. They have identical provisions with respect to the fees of Plaintiffs' counsel, as reproduced above. Each of the representative Plaintiffs has also sworn in an affidavit that they:

1) were aware of the percentage of compensation Plaintiffs' counsel would seek if successful;

2) knew that Plaintiffs' counsel had spent hundreds of thousands of dollars in fees and disbursements prosecuting the case without promise of payment unless successful;

3) believe the fees sought are fair in all the circumstances, especially given the risks in the proceeding and the length of time the actions took to conclude; and

4) believe that had Plaintiffs' counsel not started these actions, these class members would have never received the recognition, compensation, commemoration and healing that the Settlement provides.

109 As described above, pursuant to my order of May 10, 2016, fourteen community meetings were held in June 2016 to communicate the terms of the proposed settlement and the dates of the approval hearing to all interested persons. In each location Plaintiffs' counsel also advised all in attendance that they would be seeking one-third of the Compensation Fund for legal fees. As sworn to by Mr. Cooper in his affidavit:

Despite noting this request [for fees] at every community meeting and in every notice published or sent, no Class Members has [*sic*] indicated to me [Mr. Cooper] any concern about such proposed fees, disbursements or taxes. In fact, some in attendance have openly stated their view of the fairness of the fees sought.

110 The class members are some of the most disadvantaged and vulnerable people in society, most of whom attended the Facilities at very young ages. These class members have lived for decades with their experiences without compensation

or acknowledgement of the wrongs done to them while at the Facilities, many of which involve serious allegations of harm.

111 Historical cases involving vulnerable persons who have experienced serious and lasting harms are important to society. For the class members the issues are profound and immensely personal. These class actions provided a means for them to bring their claims before the Court and to create public awareness of the history of, and their experiences at, the Facilities (see *McIntyre (Litigation guardian of)* at paragraph 4).

112 These class members could not have financially supported this proceeding. Many live in poverty or close to it, many in remote communities, and many are unemployed or out of the labour force. Without a class proceeding, these individuals would have had no prospect of accessing the justice system for redress. This is self-evident from the fact that not one individual proceeding exists in the court system in Newfoundland and Labrador on behalf of a former resident of any of these Facilities.

Time and Legal Fees Incurred by Class Counsel

113 These actions were large, complex and vigorously defended. As we saw above, Plaintiffs' counsel devoted a significant amount of lawyer, student and clerk time to prosecuting these actions efficiently and effectively. To this point of the proceeding Plaintiffs' counsel report that they have devoted approximately 20,000 hours of lawyer, student and clerk time.

114 Although docketed time has been described as irrelevant by one judge (see the comments by Belobaba, J. in *Cannon* at paragraphs 4 and 5) it can, like the multiplier, provide a check against which to assess the reasonableness of the contingency fee charged. This is true even if one accepts, as I do, the presumptive validity of a properly understood retainer agreement that leads to a percentage based contingency fee that is not excessive in the circumstances. For example, a substantial fee would be reasonable had Plaintiffs' counsel achieved a settlement of $50 million by expending just "one imaginative, brilliant hour". But I would be unlikely to approve more than $16 million in compensation in those circumstances. Similarly, had the Plaintiffs' been awarded the $90 million sought by way of disgorgement, would fees of almost $30 million be fair and reasonable? These considerations are particularly apt where the fees are being paid out of a comprehensive settlement fund with no reversion to the defendant such that the more that is paid to the lawyers the less that will be paid to the class members.

115 I note that one way to mitigate against a contingency fee becoming excessive is to have it graduated based upon the point in the litigation process that settlement is achieved and the amount of the settlement. The factor for calculating fees could be stratified upwards based upon progressive litigation milestones (certification, discovery, trial, etc.) *and* also downwards based upon the settlement amount (for example, W% on the first $X of settlement amount, Y% (where Y is less than W) on the next $Z, and so on). That the Retainer Agreements here provide for the former but not the latter does not change my determination that they are fair and reasonable in the circumstances of the settlement, however. The foregoing comment is provided for general guidance as to one factor that the Court may consider when assessing reasonableness.

116 Perhaps in cases where settlement is achieved prior to or just following certification, the hours expended by counsel are less helpful in assessing the reasonableness of the fees charged. In this case, however, where the matter has been vigorously prosecuted and defended for nine years, the hours confirm the efforts of Plaintiffs' counsel and assist me in concluding that the Retainer Agreements are reasonable.

Estimate of Settlement Implementation Time

117 This proceeding is not over. It simply moves to a new, and final, phase. Implementation will require additional time and effort by Plaintiffs' counsel. They will have to devote significant hours to the implementation of the Settlement to:

1) review, revise and approve notice materials;

2) monitor notice to ensure it has been disseminated in accordance with the approved notice plan;

3) communicate with class members who contact Plaintiffs' counsel with questions;

4) assist class members with claim forms and commissioning affidavits, if necessary;

5) communicate with third parties such as caregivers, family members, community organizations, and others who contact Plaintiffs' counsel about the claims process;

6) communicate with the representative Plaintiffs;

7) monitor settlement implementation to ensure the processes are being followed;

8) address any questions or issues raised by the claims administrator in the administration of claims;

9) review updates from the claims administrator;

10) prepare and file semi-annual reports to the Court;

11) review final distribution of compensation; and

12) attend to any other matters that may be raised during settlement implementation that require Plaintiffs' counsel's attention.

118 I am advised by Plaintiffs' counsel that in *Slark (Litigation guardian of) v. Ontario*, 2013 ONSC 6686 (Ont. S.C.J.) and *McKillop*, which involved claims processes similar to that proposed in the Settlement, class counsel devoted over 2,500 hours of lawyer, student and clerk time towards the administration and implementation of the settlements agreements, with a value of over $820,000 (not including taxes), after the hearing of the settlement approval motions. One would expect, however, there to be efficiencies in implementation of the Settlement based on Plaintiffs' counsel's work and experience in those cases. In addition, the class size in this proceeding is approximately one quarter of that in those classes. As a result, Plaintiffs' counsel estimates that they will devote additional time with a value of approximately $300,000 to $400,000 during the implementation phase of the Settlement.

119 In a case of this magnitude, therefore, with a settlement of $50 million that must be administered for some time following approval, I would normally be inclined to have a portion of the fees held back until the Distribution Plan has been completed. In this case, however, given the many years that have already passed, the significant contribution of professional time and disbursements by Plaintiffs' counsel, and most importantly, their demonstrated commitment to the interests of the class members, I am satisfied that no hold back of the legal fees is required.

Conclusion on Retainer Agreements Approval

120 Based upon the foregoing I am satisfied that the Retainer Agreements are fair and reasonable and so they are approved. I also approve payment out of the Compensation Fund to Plaintiffs' counsel fees in the amount of $16,665,000 (together with HST of $2,176,259.92), and reimbursement of disbursements of $1,397,828.10 (including applicable taxes).

DISPOSITION

121 The Settlement brings to an end this lengthy, novel and historic legal battle between members of this Province's indigenous communities and Canada. The compensation being made available to the class members is fair, certain and immediate. The healing process is furthered by commemoration and healing initiatives that will be paid for outside of the monies paid to class members. Although there may be other elements required to effect reconciliation, these are important steps. From the perspective of the Court, access to justice has been achieved, despite the challenges faced by the Plaintiffs and the passage of so many years.

122 Through the courage and strength of the indigenous persons who carried the case and the purposeful and tenacious efforts of Plaintiffs' counsel, the $50 million sought on behalf of the class members on the first day of trial became a reality exactly one year later. The settlement is approved, as are the Retainer Agreements and the fees and disbursements sought by Plaintiffs' counsel. The Plaintiffs are given leave to discontinue the actions.

Application granted.

Footnotes

1 The Nunatsiavut Government is an Inuit regional government. Although Nunatsiavut remains part of Newfoundland and Labrador, the NG has authority over many matters of central governance, including health, education, culture, language, justice, and community matters. NG has a membership of approximately 9000, most of whom are located in Labrador. The NG is one of the constituent organizations of the Inuit Tapiriit Kanatami ("ITK"), the national organization representing all Inuit rights-holding land claims organizations, which represents Canada's 60,000 Inuit, and acts to protect and advance the rights and interests of Inuit in Canada. The Innu Nation is the organization that formally represents the Innu of Labrador, approximately 2200 persons in total, most of whom live in the two Innu communities of Sheshatshiu and Natuashish. The NunatuKavut Community Council is the representative governing body for approximately 6,000 Inuit of south and central Labrador, collectively known as the Southern Inuit of NunatuKavut.