

**NEWFOUNDLAND AND LABRADOR
BOARD OF COMMISSIONERS OF PUBLIC UTILITIES**

AN ORDER OF THE BOARD

NO. A.I. 27(2018)

1 **IN THE MATTER OF** the *Automobile*
2 *Insurance Act*, RSNL 1990, c. A-22, as
3 amended and regulations thereunder; and
4

5 **IN THE MATTER OF** an automobile
6 insurance review being undertaken by the
7 Board pursuant to a direction under section
8 3.1 of the *Insurance Companies Act*; and
9

10 **IN THE MATTER OF** an application by the
11 Campaign to Protect Accident Victims seeking
12 permission to question Aviva Canada Inc.
13

14 **Background**

15
16 On August 9, 2017 the government of the province directed the Board to conduct a review pursuant
17 to section 3.1 of the *Insurance Companies Act* and provide a report on a number of issues with
18 respect to automobile insurance in the province as set out in a Terms of Reference.
19

20 On October 18, 2017 the Board sent government its work plan for the review and advised that it
21 would hold public sessions to seek the input of consumer and industry stakeholders. Thereafter
22 several notices and media releases were issued to provide information in relation to the review and
23 encourage interested persons to participate.
24

25 The Board published notice of the review beginning on November 25, 2017 setting out:

26
27 The Board would like to hear from anyone interested in the specific areas under review
28 or other aspects of automobile insurance in the province that they wish the Board to
29 consider.
30

31 The notice advised that public sessions would be held to provide the opportunity for persons to
32 present their views directly to the Board. A media release issued on March 21, 2018 advised that
33 two expert reports had been released and stated:
34

35 The Board wishes to remind interested parties that it is seeking public input as part of the
36 Automobile Insurance Review and there are a number of opportunities available to provide
37 submissions and comments to the Board.

1 On May 5, 2018 a notice of public hearing and invitation to participate was published explaining
2 that interested persons would have the opportunity to present their views to the Board and
3 specifically stating:

4
5 You can participate in the public hearing by i) becoming an intervenor, which will give
6 you the opportunity to present evidence and ask questions of witnesses, or ii) making a
7 presentation to the Board during the hearing.
8

9 The Consumer Advocate, Dennis Browne, Q.C. (the “Consumer Advocate”), the Campaign to
10 Protect Accident Victims (the “Campaign”), the Atlantic Provinces Trial Lawyers Association,
11 Spinal Cord Injury NL, and Insurance Bureau of Canada (“IBC”) requested intervenor status in
12 the review.
13

14 On May 28, 2018 the Board wrote the intervenors to provide the hearing schedule and information
15 which set out that:

16
17 Presenters will not be sworn or subject to cross-examination. The Board’s consultants and
18 the parties’ presenters may be questioned by the Board and the other parties. The Board
19 may ask questions of all presenters.
20

21 On May 14, 2018 Aviva Canada Inc. (“Aviva”) requested the opportunity to make a presentation
22 to the Board during the hearing. On May 31, 2018 Aviva filed a written submission.
23

24 On June 4, 2018 the hearing commenced.
25

26 On June 8, 2018 the Board received a request from the Campaign for permission to ask questions
27 of Aviva. Considering that Aviva’s presentation was scheduled for June 11, 2018 the Board
28 postponed the presentation and advised the Campaign that its request should be made by written
29 motion.
30

31 **The Application** 32

33 On June 28, 2018 the Campaign filed an application seeking the Board’s permission to question
34 Aviva in relation to its written submission and its related presentation (the “Application”). The
35 Application stated that Aviva’s submission contains misstatements of fact and unsupported factual
36 allegations which should be subject to questioning. The Application claimed that Aviva made
37 unsupported factual allegations that are indicative of the attitude of insurance companies. The
38 Application stated:

39
40 Questioning Aviva will provide the opportunity to test its submissions so that the Board is
41 not misled in the information that it receives and so it can come to a more informed
42 conclusion with respect to the issues before it.¹
43

44 The Application argued that, although Aviva is not specifically named as a party, it is indirectly a
45 party through IBC. According to the Application allowing Aviva to make untested submissions

¹ Application, page 5.

1 outside the submission of IBC allows Aviva and IBC to manipulate the procedure set out by the
 2 Board. The Application claimed that, because IBC and its presenters are subject to questioning
 3 and Aviva is an entity represented by IBC, then Aviva is a de facto IBC presenter and should be
 4 subject to questioning by other intervenors. The Application also stated:

5
 6 Aviva's report provides objectives and recommendations to the Board, including
 7 reducing bodily injury claims costs through improving litigation efficiency and reviewing
 8 contingency fees paid to personal injury lawyers, which are outside the Board's terms of
 9 reference and are, instead, an attack on lawyers.²

10
 11 The Application set out that the following are some of the issues on which questioning of Aviva
 12 should be allowed:

- 13
 14 (i) Aviva's relationship with IBC;
 15 (ii) the statistics and numbers relied on, especially as it relates to the percentage of
 16 unrepresented individuals who settle accident claims without the assistance of
 17 lawyers;
 18 (iii) profits made by the insurance industry; and
 19 (iv) its position on the role of lawyers in personal injury litigation.

20
 21 According to the Application, if questioning of Aviva is not allowed, then fairness dictates that the
 22 Board should not receive Aviva's submission into evidence.

23 24 **Submissions**

25
 26 On July 18, 2018 the Board received submissions from the Consumer Advocate, IBC and Aviva
 27 on the Application. The Campaign filed a reply submission on July 31, 2018.

28
 29 The Consumer Advocate supported the Application and argued that Aviva's written submission,
 30 as well as any oral presentation, should be subject to questioning by any party to the proceeding.
 31 The Consumer Advocate submitted that s. 19 of the *Board of Commissioners of Public Utilities*
 32 *Regulations* allows for examination by or on behalf of an applicant, an intervenor, or the Board.
 33 The Consumer Advocate stated:

34
 35 Put plainly, the parties should be allowed to elicit a full understanding of Aviva's positions
 36 via oral examination, which examination we suspect may in turn produce evidence
 37 important for the Board's consideration.³

38
 39 The Consumer Advocate proposed that, to make examination efficient, written questions be
 40 submitted to Aviva and also, being conscious of the time allotted in the hearing, that any party
 41 wishing to question Aviva should be limited to one hour.

42
 43 IBC opposed the Application noting that the hearing procedures established by the Board provided
 44 that presenters would not be sworn or subject to cross-examination. IBC stated that Aviva is not a

² Application, page 3.

³ Consumer Advocate's Submission, page 1.

1 party and the Board should adhere to the procedures established prior to the Aviva submission and
2 the commencement of the hearing. According to IBC allowing questioning of Aviva at this stage
3 will unduly lengthen the proceeding. IBC submitted that there is nothing in the questioning of
4 Aviva which will advance the mandate of the Board. IBC clarified that it is a national trade
5 association for companies that insure homes, cars and businesses and membership is voluntary.
6 When preparing submissions IBC seeks guidance from its members but member companies remain
7 free to present their own submissions.

8
9 IBC addressed each of the issues which the Application suggested required the questioning of
10 Aviva as follows:

- 11
12 (i) Ms. Amanda Dean, VP Atlantic for IBC, has already been questioned about IBC's
13 mandate and its relationship with its members.
14 (ii) The statistics and numbers relied on by Aviva are dealt with in the closed claim study
15 summary prepared by Oliver Wyman.
16 (iii) There is no practical purpose to question Aviva on the profits of the insurance
17 industry, Oliver Wyman has provided a complete report on profit and rate adequacy,
18 and the mandate of the Board is to look at the experience of the entire industry and
19 not individual companies such as Aviva.
20 (iv) The role of lawyers is not part of the mandate of the review and Aviva's position on
21 that issue will not assist the Board.
22

23 IBC submitted that the procedure, whereby non-party presenters are entitled to make a submission
24 without being subject to questioning, was set out in advance of the hearing and the Board is
25 completely free to do what it wishes with Aviva's submission.
26

27 Aviva opposed the Application and asked that it be dismissed. Aviva submitted that it has the right
28 to be treated fairly under the stated and established procedures of the Board. Aviva stated that the
29 Board provided a procedure for participation which allowed persons to choose whether to be an
30 intervenor, a presenter, or to provide comments to the Board. According to Aviva the Campaign
31 is seeking an order from the Board which would effectively force Aviva to be a party and deny
32 Aviva its right to choose how Aviva participates in the review. Aviva further stated that, if the
33 Board grants the Application, the treatment of Aviva as a presenter would be of a differential
34 nature than other presenters and would be contrary to the Board's duty to act fairly when making
35 decisions.
36

37 Aviva cited the Board's hearing guidelines, the hearing information for the review, and Supreme
38 Court of Canada case law and submitted that procedural fairness is flexible and dependent on
39 context, and that there are five factors to be considered when addressing procedural fairness. Aviva
40 provided its views in relation to these factors, as follows:
41

- 42 (i) If Aviva is allowed to be questioned, the decision will be prejudicial to Aviva and
43 would treat Aviva differently than all other presenters.
44 (ii) The regulations grant the Board discretion in its procedures and the Board has
45 distinguished intervenors from presenters. Aviva relied on the representations of the
46 Board and is not an intervenor.

- 1 (iii) If parties are permitted to question Aviva, this would essentially force it to withdraw
2 its presentation and would deny Aviva's contribution to the public discourse.
- 3 (iv) The Board made express written representations that a presenter would not be subject
4 to questioning and, where a party has a legitimate expectation that a procedure will
5 be followed, the duty of fairness requires that procedure be followed.
- 6 (v) A high degree of procedural fairness is owing to Aviva based on the Board's written
7 and verbal representations relating to the hearing procedures and only the Board has
8 the opportunity to ask questions of the presenters.
9

10 The Campaign, in its reply, agreed that public authorities, including the Board, have a duty to act
11 fairly when making decisions and submitted that this duty of procedural fairness extends to the
12 Campaign as well as to Aviva. The Campaign submitted that any right of procedural fairness that
13 exists to allow Aviva to present their case in the manner they choose requires the balancing of
14 procedural fairness to other parties in the review. The Campaign stated:

15
16 To allow otherwise would mean that Aviva would effectively be dictating the entire process
17 concerning the manner in which it provides information or evidence to the Respondent. If
18 this is permitted, a distinct lack of procedural fairness will arise in the proceeding.⁴
19

20 The Campaign further submitted that it has a legitimate expectation that if the second largest
21 property and casualty insurance group in Canada is making submissions that, as a matter of
22 fairness, an opportunity to ask questions on those submissions would be granted. The Campaign
23 stated:

24
25 It would not be reasonable for the Applicant to expect that it would only be permitted to
26 ask questions of the IBC, while individual IBC member companies would be permitted to
27 then put separate submissions and information before the Respondent on which the
28 Applicant and other parties could ask no questions.⁵
29

30 The Campaign submitted that Aviva would be considered a witness within the meaning of the
31 regulations. The Campaign also submitted that the Board has the discretion to alter its process and
32 allow Aviva to be questioned, for reasons of procedural fairness and public interest.
33

34 According to the Campaign, Aviva has not adduced evidence or provided an explanation of how
35 it will be prejudiced if it is required to answer questions on its submissions. The Campaign stated
36 that treating Aviva differently from other presenters does not equate to prejudice. The Campaign
37 reiterated that Aviva is a different kind of presenter which requires permission to ask Aviva
38 questions on its submissions. The Campaign reiterated that Aviva, as the second largest property
39 and casualty insurance group in Canada, and having chosen to depart from the submissions of IBC,
40 is in a different position than other presenters. The Campaign disagreed with Aviva's submission
41 that the Application would effectively force Aviva to be a party in this review. The Campaign
42 submitted that it is in the public interest that a fulsome opportunity should be provided for the
43 examination of Aviva submissions.

⁴ Campaign's Reply, page 2.

⁵ Ibid.

1 The Campaign stated that Aviva should not be permitted to hide behind a threatened refusal to
2 participate in the proceeding as a means of allowing it to make a presentation without allowing the
3 Campaign to ask questions. The Campaign submitted that the requirement of procedural fairness
4 should not be dissolved simply by reason that Aviva feels it would prefer not to make a
5 presentation if subject to questioning by the Campaign.

7 **Board Findings**

8
9 The Board was directed to undertake this review pursuant to section 3.1 of the *Insurance*
10 *Companies Act*, which states:

- 11
12 (3) The provisions of the *Public Utilities Act* relating to the constitution,
13 powers, procedures and practices of the board apply to and in respect of the
14 board in the conduct of a review under this section.
15 (4) The provisions of the *Public Utilities Act* relating to investigations generally
16 shall apply to and in respect of the board or commissioners of the board in
17 the conduct of a review under this section.
18

19 Subsection 3(2) of the regulations under the *Public Utilities Act* provides:

20
21 In any application or other proceeding, the board may dispense with, vary or supplement
22 any provisions of these regulations on those terms as the board considers necessary.
23

24 The Board has the clear authority to establish the process and the rules to be followed in its
25 proceedings. While the principles of natural justice and procedural fairness are observed in all
26 proceedings before the Board, this does not mean that the rules and process which are established
27 in a matter will be the same in every case. The process will be determined by the Board in each
28 case based on what is appropriate in the circumstances, including the nature and purpose of the
29 proceeding.
30

31 In this case the Board is conducting a review pursuant to a statutory direction by government. The
32 Board has been asked to gather information and provide a report which may be considered by
33 government with respect to the development of policy and legislation related to automobile
34 insurance in the province at some point in the future. The Board will not be making any decisions
35 but will report with respect to all the information, analysis and opinions provided during the
36 review. The intervenors and presenters in this review may also provide their views and concerns
37 related to this review and other automobile insurance issues directly to government for its
38 consideration.
39

40 As set out in the notices and media releases issued in this review, one of the objectives of the Board
41 was to encourage the public and industry stakeholders to provide their views on the specific issues
42 in the Terms of Reference issued by government and any other issues which they feel should be
43 addressed. The Board believes that there is value in the opinions and views of the public and
44 industry in relation to the issues under review, in addition to the analysis and information provided
45 through the intervenors, experts and other presenters. To encourage participation, the process
46 which was established provided a number of ways that interested persons could participate,

1 including becoming an intervenor or making a presentation. The Board also provided the
2 opportunity for any interested person to provide their opinions by way of written submissions or
3 comments. While intervenors can present evidence and ask questions of witnesses, presenters are
4 not subject to questioning. The Board notes that the views presented in written submissions and
5 comments are also not subject to questioning. This approach was intended to encourage interested
6 persons to present their views to the Board.

7
8 The information issued by the Board in advance of the hearing clearly set out that presenters would
9 not be required to be sworn and would not be subject to cross-examination. Aviva submitted that
10 based on the express written representations of the Board and the conduct of the hearing thus far,
11 it had a legitimate expectation that it would not be questioned. According to Aviva, allowing it to
12 be questioned would be contrary to the Board's duty to act fairly. IBC also argued that the Board
13 should adhere to the procedures which were established. The Board believes that it is reasonable
14 for Aviva to expect, based on the clearly established process and the process to date, that it would
15 not be subject to questioning by the parties.

16
17 The Campaign submitted that it is in the public interest that a fulsome opportunity should be
18 provided for the examination of Aviva and, if questioning is not permitted, then Aviva's
19 submission should not be received into evidence. The Consumer Advocate was also of the view
20 that questioning Aviva may produce evidence important for the Board's consideration. The Board
21 recognizes that a presentation which is not subject to cross-examination is not fully tested in the
22 way that evidence would be tested in a judicial proceeding. Further, opinion evidence would
23 normally be subject to additional process. Nevertheless, the Board believes that the opinions of
24 stakeholders may be informative in relation to the issues which are set out in the Terms of
25 Reference and may raise other automobile insurance issues which should be considered. The Board
26 believes that there is value in these opinions themselves in addition to the other analysis and
27 information provided. In particular, Aviva, as a significant insurer in this province, can offer a
28 unique perspective on many of the issues in this review. The Board notes that the intervenors may
29 provide information during the hearing to address any issue, including those raised by Aviva and
30 the written submissions of other insurers. In addition intervenors may provide submissions at the
31 conclusion of the hearing in relation to any of the information and opinions provided during the
32 review. Following the filing of final submissions the Board will review the record and will
33 complete its report clearly documenting all the information, analysis and opinions provided on the
34 issues throughout the review.

35
36 According to the Campaign, Aviva's right of procedural fairness must be balanced with the right
37 of procedural fairness to be afforded to the parties in the proceeding. The Campaign submitted that
38 it has a legitimate expectation that, as a matter of fairness, the parties would be provided an
39 opportunity to ask questions on the submissions of the second largest property and casualty
40 insurance group in the country. The Board acknowledges that Aviva is a large sophisticated
41 corporate group which presumably has more resources and expertise than most public presenters.
42 Nevertheless, the Board believes that Aviva should have the opportunity to participate in this
43 review in the way that it determines is appropriate. Aviva's decision to not become an intervenor
44 was within the process established for this review and should be respected. The Board does not
45 accept the Campaign's argument that Aviva is indirectly a party because of its membership in IBC.
46 Aviva is no more a party in this review than individual trial lawyers would be parties by virtue of

1 the standing of the Atlantic Provinces Trial Lawyers Association. It is clear that Aviva and IBC
2 are separate entities that can choose to participate in this review in a way which suits their
3 respective interests. The Campaign cited several specific issues on which questioning Aviva
4 should be allowed, including its relationship with IBC, the statistics and numbers relied upon, the
5 profits of the insurance industry, and its position on the role of lawyers in personal injury litigation.
6 The Board does not believe that it is necessary for Aviva to be questioned on any of these issues.
7 Any party or presenter is free to provide their own views or additional information in relation to
8 any of these issues before the conclusion of this review.

9
10
11 **IT IS THEREFORE ORDERED THAT:**

- 12
13 1. The Application is dismissed.

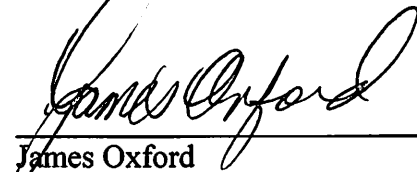
DATED at St. John's, Newfoundland and Labrador, this 15th day of August, 2018.




Darlene Whalen, P. Eng., FEC
Chair & CEO



Dwanda Newman, LL.B.
Vice-Chair



James Oxford
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Cheryl Blundon
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