A. I. 4(2004)

IN THE MATTER OF the *Automobile Insurance Act,* Chapter A - 22, R. S. N. 1990.

AND

IN THE MATTER OF an application by S & Y Insurance Company for a rehearing under s.28 of the *Board of Commissioners of Public Utilities Regulations, 1996 (*the *Regulations)* in respect of Order No. A.I. 3 (2004) which approved rates for private passenger automobile insurance.

Before:

G. Fred Saunders,
Presiding Chair.

John William Finn, Q.C.,
Commissioner.

On October 28, 2004 S & Y Insurance Company ("S & Y") filed an application for rehearing in respect of Order No. A.I.3 (2004). The application was made pursuant to s.28 of the *Regulations* as follows:

> "*28.(1) Applications for re-opening an application after final submission, or for rehearing after final order, must state the grounds upon which the application is based if the application to re-open the matter to receive further evidence, the nature and purpose of the evidence must be stated if the application is for a rehearing or argument, the applicant must state the findings of fact or of law claimed to be erroneous and a brief statement of the alleged error.*
>
> *(2) When a decision or order of the board is sought to be reversed, changed, or modified by reason of facts and circumstances arising subsequent to the hearing, or to the order, or by reason of consequences resulting from compliance with that decision, order or requirement which are claimed to justify or entitle a reversal, change or modification of the facts, circumstances or consequences must be fully set out in the application."*

This application was heard by two Commissioners, G. Fred Saunders and J. William Finn, Q.C., who did not hear and decide the original application. Before considering the merits of this application for rehearing it may be useful to briefly outline the background to Order No. A.I. 3 (2004).

On August 6, 2004 S & Y, a new company recently licensed to do business in the province, filed an application with the Board proposing rates for private passenger automobile insurance for all coverages and territories in Newfoundland and Labrador (the "Application"). S & Y is associated with the Aviva group of companies which includes Aviva Insurance Company of Canada ("Aviva"), Elite Insurance Company, Scottish and York Insurance Company Limited and Traders General Insurance Company, all of which operate in the Province and in 2003 wrote a combined 21% of the direct automobile insurance premiums. Aviva is the largest single writer in the group with just over 15% of the market. By way of correspondence and information filed in support of the Application, Aviva advised of its intention to withdraw from the Newfoundland insurance market, and that S & Y was established to pick up the insureds displaced by Aviva's withdrawal.

The Board regulates automobile insurance rates in the Province using a benchmarking system which is reviewed annually and is based on industry-wide loss experience. A single rate for each territory and coverage is determined and referred to as the benchmark rate. At the time the Application was filed by S & Y the established benchmarks were based on the Board's 2001 Benchmark Report. On August 1, 2004 Government, through legislation, implemented reforms to reduce the costs of private passenger automobile insurance claims and mandated certain reductions in the rates charged by insurers throughout the Province. On September 9, 2004 the Board adopted revised benchmarks to reflect the actuarially justified rate levels arising from the 2004 Benchmark Report for all coverages and the reform initiatives implemented by Government.

The rates proposed in the Application were based on Aviva's rates prior to the mandated reductions imposed by Government on August 1, 2004. S & Y's Application was filed five days

after the legislated reforms and therefore, as noted in the Board's decision, was not subject to the mandated reductions. As S & Y did not have a book of business on which to base its rates, the rates proposed in the Application were based on Aviva's experience and book of business. The Board rejected this proposal stating that it was not convinced that, subsequent to the withdrawal of Aviva, S & Y's book of business would be reflective of the current Aviva book of business. Having rejected the Aviva book of business as an unsuitable proxy, the Board had reference to benchmark rates which represent actuarially justified industry average rate levels. The Board varied the rates proposed by S & Y to the revised benchmark rates, which is the mid-point of the range.

It appears that the Application for rehearing can be divided into two main parts. Firstly, S & Y raises the issue that it was given insufficient time to consider and address the impact of the revised benchmarks. The private automobile approved benchmark rate was revised by the Board on September 9, 2004. It is S & Y's position that, as it was only advised of the revised benchmark in correspondence dated September 21, 2004 with a referenced 48 hour time frame in which to address such issue, that this was insufficient time within which to properly reassess its position and appropriately respond with any revisions to its application in light of what it describes as a retroactive Application of a revised benchmark.

The letter to S & Y on September 21, 2004 notifying of the revised benchmark stated:

> "*In light of the application from your company currently before the Board and the associated timing issues, the Board is advising of this change in the event that it may have implications with respect to your company's filing. If you wish to provide any additional information or comment with respect to your application in light of the revised benchmarks please advise the Board no later than noon Thursday, September 23, 2004. Thereafter the Board will make a final decision on your companies rate filing based on the information on the record*."

It is clear from the language of this letter that the Board acknowledged that the adoption of revised benchmarks may impact on S & Y's Application. In this context the Board allowed a period of two days for S & Y to advise if they wished to make changes or provide additional evidence. A review of the record of this matter indicates that at no time did S & Y advise the Board that it required additional time to reassess its position in order to respond accordingly. Neither did S & Y, as it would be entitled to do, withdraw its Application with a view to refiling under the revised benchmark. The Board herein can find no reasonable basis to support the proposition that S & Y had been deprived in any way of the opportunity for a full and fair hearing including an opportunity to revise its initial rate filing in light of the new benchmark. The two days that the Board allowed was sufficient for S & Y to advise the Board if it required additional time to consider how it would respond to the revised benchmarks.

The second part of the re-hearing Application sets out a list of findings of fact, law and/or of mixed fact and law made by the Board which S & Y argues were erroneous. The Board will address each of the alleged errors from (a) to (e) individually.

> ***"(a) That the Board's finding that the initial rates proposed by the applicant were to be rejected in favour of the "mid-point of the benchmark" [page 11 of the Order] was erroneous. In making***

such finding, it is respectfully submitted that the Board failed to give sufficient or any weight to the actuarial evidence provided by the Applicant and acted on a wrong principle by arbitrarily setting rates at the mid-point of the new Benchmark rather than considering whether the proposed rates were reasonable".

In accordance with s.48 of the *Automobile Insurance Act* the Board has the general supervision of the rates an insurer charges or proposes to charge for automobile insurance and in accordance with s.49 the Board shall approve, prohibit or vary the rates filed by an insurer. There is no doubt, therefore, that the Board had the authority to vary the rates proposed by S & Y and to select the mid-point of the Benchmark for the reasons stated in its Order.

In respect of the suggestion that the Board failed to give sufficient or any weight to the actuarial evidence, the Board rejected the use of the actuarial evidence provided by Aviva as it was not convinced that, subsequent to the withdrawal of Aviva, S & Y's book of business would be reflective of the current Aviva book of business. It is clear from the decision that the Board did consider the actuarial evidence provided by S & Y but concluded that the Aviva experience was not a reliable proxy. Having rejected S & Y's proposed rates the Board decided to vary the rates proposed by S & Y and to allow for recovery of S & Y's costs based on the actuarial analysis inherent in the Benchmark process. In support of this decision the Board stated at page 11 of its Order "*The benchmark mid-point represents the average anticipated actuarially based loss experience expected by the industry overall in the Province and, in the absence of any other justification for rates, represents the best proxy for a new company*."

The Board does not find the above conclusions or decision to have been without sufficiently articulated reasons and/or in any way arbitrary.

"(b) That the Board's finding that the adjustment of rates of other insurers, under the Act Amendment, is a determining factor in the Board's consideration of the proposed initial rates filed by the Applicant, is erroneous. It is respectfully submitted that the foregoing finding is inconsistent with the Board's finding that the Applicant as a new entrant into the market, is not subject to the legislated reductions".

In reviewing the decision of the Board in Order No. A.I. 3 (2004) there is no finding that the adjustment of rates of other insurers was a determining factor in the Board's consideration of S & Y's filing.

"(c) That the Board's finding that initial rates proposed by the Applicant, all within or <u>below</u> the Benchmark in effect at the time of filing of the application, were to be rejected in favour of the mid-point of the new (and as of yet unpublished) Benchmark because such a decision would be "on balance, reasonable and fair to existing insurers who have been subject to the legislated reductions imposed by Government", was erroneous. It is respectfully submitted that in making such decision (i) the Board failed to consider that the proposed rates, and in particular those that were below Benchmark, were in the public (i.e. insurance consumers') interest and promoted reasonable competition within the industry and (ii) that the Board had no evidence or basis in law to support the conclusion that the midpoint of the new Benchmark was more "fair and

reasonable" than the proposed rates".

The Board in reviewing the decision does not find that the proposed rates were rejected *"because such a decision would be on balance, reasonable and fair to existing insurers who have been subject to the legislated reductions imposed by Government"*. The Board stated at page 11 of its Order the following reason for applying the mid-point of the benchmark:

> *"Given that S & Y is a new entrant without a book of business or experience to justify rates outside of the benchmark the Board finds that it is appropriate in the circumstances to vary the proposed rates so that they fall within the benchmark. The benchmark midpoint represents the average anticipated actuarially based loss experience expected by the industry overall in the Province and, in the absence of any other justification for rates, represents the best proxy for the rates for the new company.***"**

The "finding" alleged by S & Y is rather a conclusion by the Board that the decision that it had reached by following its usual process was fair to all interested persons.

> ***"(d) That the Board's finding that approving the initial rates proposed by the Rate application would be tantamount to the Board being seen "as an instrument to render the intent of Government mandated reforms "moot" [page 6 of Order] is erroneous. It is respectfully submitted that the foregoing finding is inconsistent with the Board's finding that the Applicant "as a new entrant into the market, is not subject to the legislated reductions".***

The Board can find no basis in the decision for S & Y's allegations of a "finding" by the Board that approving the initial rates would be tantamount to the Board being seen "as an instrument to render the intent of the Government mandated reforms "moot". The Board specifically, with reference to new entrants, outlines its approval and review process when it states at page 6 thereof as follows:

> *"While the Board is concerned about capacity issues associated with Aviva leaving the market in the context of its decision, it cannot as part of the rate approval process be guided by the fact that an insurer will withdraw from the market if its proposed rates are not approved. In this application the Board must, as it does with every application, consider the proposed rates in the context of those which are actuarially justified which, absent loss experience, are generally within the benchmark rates established by the Board. Notwithstanding the relationship between S & Y and Aviva, S & Y is a new company in the market and as such it must be treated by the Board as a new market entrant in the context of the Board's overall regulatory framework for setting automobile insurance rates, without specific reference to Aviva. Therefore, consideration of these proposed rates will be done in the usual course in the context of the Board's benchmarks. This approach maintains fairness and consistency to both consumers and insurers."*

Irrespective of the mandated reductions and Aviva's threat to leave the market, the process which the Board followed and which was outlined is the usual process followed by the Board in these cases regardless of government reforms.

> ***"(e) That the Board's finding that it was the Applicant's evidence that 60% of the total vehicles insured in Newfoundland and Labrador carry only Third Party Liability coverage [page 11 of the***

Order] is erroneous. From the data the Applicant reported to the IBC in the latest calendar year, 32% of the private passenger vehicles Aviva Insurance Company of Canada ("Aviva") insures in this Province carry only Third Party Liability coverage, and 67% of the total private passenger automobile premiums Aviva collects comes from Third Party Liability coverage".

The record discloses that Aviva in correspondence dated September 8, 2004 faxed to the attention of Mr. Robert Byrne of the Board from Jennifer Power, Senior Vice-President, Atlantic Region (Aviva) specifically advised in paragraph 3 thereof that "Over 60 % of the total vehicles insured in Newfoundland and Labrador carry only third party liability." There is nothing in the record to indicate any fact to the contrary. While S & Y now says that these general industry statistics are not applicable to the Aviva book of business, the Board is satisfied that the decision was based on the best information available at the time, information that had been provided by S & Y. In addition the Board notes that the additional information does not substantially change the basis for the decision of the Board since it confirms that a significant portion of the Aviva book of business has only third party liability coverage.

"(f) The Board's findings that "since [the Applicant's] actuarial evidence is based on Aviva's experience, it [sic] not helpful to the Board in consideration of the filing" [page 11 of the Order], and that other than the Benchmark mid-point there was an "absence of any other justification for rates" applied for by the Applicant [page 11 of the Order], are erroneous. In light of the fact that the Applicant was a new entrant, and therefore did not have any loss experience of its own in the Province, it was reasonable for the Applicant to present actuarial evidence based on the experience of a related insurer, Aviva, with experience and a book of business in this Province. Moreover the Aviva loss experience supporting the Applicant's actuarial evidence is more current, and in the view of the Applicant more reliable in respect of the Applicant's circumstances, than industry averages intended to be reflected by the Benchmark. In these circumstances, Aviva's experience was the most reasonable and suitable proxy for the Rate application".

It was within the purview of the Board to determine as it did that the Aviva loss experience was not appropriate to use in setting rates for S & Y. The Board in its decision gave detailed cogent reasons for its determination. S & Y does not raise any errors, substantive or procedural, to undermine the Board's determination that the Aviva book of business is not a suitable proxy. Nor has S & Y proffered any additional or new evidence to support the proposed rates, actuarial or otherwise.

The rehearing process is a procedure which allows the Board to efficiently address new evidence or correct errors of fact or law, neither of which can be found in this case. This process should not be used as a second opportunity to make the same arguments on the same facts.

Having reviewed the Board's Order No. A.I. 3 (2004) in detail, the record before the Board in that application, and the grounds set forth by S & Y herein for seeking an order for rehearing, the Board finds that the Order was not based upon any error of law or of fact or mixed law and fact and that S & Y had not been deprived in any way of an opportunity for a full and fair hearing. The request for an order for rehearing will therefore be denied.

IT IS THEREFORE ORDERED THAT:

1. The Application herein for an Order for rehearing of the Application in respect of Order No. A.I. 3 (2004) is hereby denied.

Dated at St. John's, in the Province of Newfoundland and Labrador this 19th day of November 2004.

G. Fred Saunders,
Presiding Chair.

John William Finn, Q.C.,
Commissioner.

G. Cheryl Blundon,
Board Secretary.