

# THE NEW BRUNSWICK INSURANCE BOARD

## Parties List

IN THE MATTER OF A GENERIC HEARING ON THE ISSUE OF CONFIDENTIALITY AS IT RELATES TO INSURANCE RATE APPLICATIONS MADE TO THE BOARD:

BOARD:	Paul D'Astous	Chair
	Vincent Duff	Vice Chair
	Joanne Cowan-McGuigan	Member
	Anna Guimond	Member
	Donald Lusby	Member
	Guildard Pelletier	Member
	Gerard Hall	Member
	Al Kavanaugh	Member

BOARD COUNSEL:	David Rogers
BOARD ACTUARY:	Richard Gauthier

### PRESENTORS:

Dominion of Canada General Insurance Company

State Farm Mutual Insurance Company

TD Meloche Monnex

Insurance Bureau of Canada

Province of New Brunswick – Attorney Generals' Office

Consumer Advocate for Insurance

### WRITTEN SUBMISSIONS:

Allstate Group of Companies

Consumer Advocate for Insurance

The Co-operators Group of Companies

Dominion of Canada General Insurance Company

The Economical Insurance Group

### REPRESENTED BY:

Ms. Nathalie Begin  
Vice President & Chief Actuary

Mr. Scott Beattie  
Assistant Vice President Business Development

Mr. Richard B. Costello, Q.C.

Mr. Brian M. Sypher  
Sr. Manager/CSC

Ms. Josee Morin  
Manager, Rating & Classification

Mr. Rodney E. Larsen

Ms. Saskia Matheson

Mr. Bill Anderson, Q.C.

Mr. Ronald Godin

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Insurance Bureau of Canada

Province of New Brunswick – Attorney Generals’  
Office

State Farm Mutual Insurance Company

TD Meloche Monnex

### AFFIDAVITS SUBMITTED:

Allstate Insurance Company

Aviva Insurance Company of Canada

Elite Insurance Company

ING Insurance Company of Canada

ING Novex Insurance Company of Canada

Pafco Insurance Company

Pembridge Insurance Company

The Personal Insurance Company

Royal & SunAlliance Insurance Company of  
Canada

State Farm Mutual Automobile Insurance Company

Traders General Insurance Company of Canada

Trafalgar Insurance Company of Canada

Wawanesa Mutual Insurance Company

# THE NEW BRUNSWICK INSURANCE BOARD

**IN THE MATTER OF a Generic Hearing to consider the issue of confidentiality as it relates to insurance rate applications made to the New Brunswick Insurance Board.**

## Decision

The New Brunswick Insurance Board (the Board) issued formal Notice on April 20, 2007 calling for a Generic Hearing to review the issue of confidentiality as it relates to insurance rate applications made to the Board. The hearing was held at the Delta Hotel in Saint John on May 29, 2007.

For this hearing the Board received 9 written submissions, 13 affidavit submissions and of the 9 written submissions, 6 made presentations at the hearing.

The Board was established October 15, 2004 as a quasi-judicial administrative tribunal regulating automobile insurance rates. Prior to October 15, 2004 the former Board of Commissioners of Public Utilities of New Brunswick was the automobile insurance rate regulator.

The Board itself is currently composed of 10 members of the public representing all regions of New Brunswick, each independently appointed by the Lieutenant-Governor in Council, for the purpose of regulating automobile insurance rates for New Brunswickers in an open and transparent process.

Being a relatively new creation, the Board is still in the process of determining its own procedural policies as prescribed by section 19.41 of the *Insurance Act*, R.S.N.B. 1973, c.1-12 (referred to within this document as the *Act*).

The Board chose to hold a hearing on the issue of confidentiality for the following reasons:

- Because of the importance that the issue of confidentiality has for all parties involved in automobile insurance rate making,
- To ensure just and reasonable rates for New Brunswick automobile insurance policy holders by guaranteeing an open, transparent and fair process of rate making.

The decision of this Board should leave no question as to what sections of insurance rate applications should remain confidential in the context of section 19.61 of the *Act*.

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### Decision

The Board, with regard to the issue of confidentiality as it relates to insurance rate applications has carefully considered section 19.61 of the *Act*, section 6 of the *Right to Information Act*, S.N.B. 1978, c. R-10.3 with additional referral to the federal *Access to Information Act* R.S., 1985, c. A-1. The Board received arguments and briefs from the insurance industry as well as from representatives of the people of New Brunswick. In making its decision the Board has read and tested the arguments presented by all parties.

The Board's *raison d'être* is to ensure that automobile insurance rates are just and reasonable. The decision process by which the Board arrives at this objective must be fair to all parties. For this reason the Board has been granted by law, broad regulatory powers including the power of inquiry.

It is important to note that the Board does not regulate an industry operating in a quasi-monopolistic environment. The Board is regulating insurance rates in an open market environment where approximately 75 insurance companies are licensed to carry on the business of writing automobile insurance in the province of New Brunswick. As part of the regulatory process, auto insurance companies cannot use rates that have not been approved by the Board and companies must file their rates at least once every 12 months. Included with these rate filings is a significant amount of highly technical and sensitive financial information. Furthermore, the Board is cognizant of the sensitive nature and intrinsic value of each company's rate making formulas and algorithms.

Insurance companies are also regulated by a Superintendent of Insurance at the provincial level for such things as licensing, forms and levies. The Industry is also regulated federally by the Office of the Superintendent of Financial Institution of Canada. Needless to say, the automobile insurance industry is one of the most regulated in Canada. The need to have a well regulated industry is very important because laws in most Canadian jurisdictions require policy holders to purchase a minimum of \$200,000 Section A –Third Party Liability. This mandatory coverage requirement leaves consumers with no choice as to whether or not to purchase basic insurance coverage but with only a decision as to which insurance company they will purchase it from. The mandatory requirement to buy a product brings a strong argument for the right to information for consumers as opposed to the right to confidentiality for companies doing business in the auto insurance industry.

Therefore, the Board is required to balance competing principles in the determination of what, if any, information received by the Board while conducting its regulatory role should be kept confidential. Open and transparent access to the decision making process is a key element of an open society. In the realm of regulatory review, less choice for consumers, such as in the area of quasi-monopolistic public utilities, should result in greater access to the elements considered in the decision. However, as noted previously, the auto insurance market in New Brunswick is a highly competitive market with dozens of companies vying for the business of consumers. The Board believes that strong competition is one of the strongest factors in ensuring that the auto insurance products offered to consumers are properly priced.

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## Decision

The Board is of the view that competition will be significantly lessened through a process that allows all auto insurers to review the cost and price development data of their competitors. Such a process will reduce the incentives to innovation that invariably lead to lower and appropriate pricing. However, the public should have access to as much information as possible with regard to the decision making process, the information on which the decisions are based and the results of decisions that are made in order to maintain the confidence that the process serves the best interests of consumers of auto insurance products.

The Board has received and reviewed all written submissions as well as all the submitted affidavits. The participation of all parties has been invaluable to the Board. The Board will limit its comments to only three of those submissions:

- I. Submission by the Consumer Advocate for Insurance
- II. Submission by the Attorney General
- III. Submission by the Insurance Bureau of Canada

### I. Submission by the Consumer Advocate for Insurance

New Brunswick is one of only a few jurisdictions to have a Consumer Advocate for Insurance. The Office of the Consumer Advocate for Insurance was put in place to act as an ombudsman in order to protect insurance consumers on all facets of a complicated industry. Pursuant to the *Consumer Advocate for Insurance Act*, S.N.B. 2004, c.17.5 the Consumer Advocate may appear at any hearing held by the Board. This access is part of the process to ensure the openness and transparency of the Board.

In his submission the Consumer Advocate has referred to a considerable number of cases from various Canadian jurisdictions. The Consumer Advocates' submission clearly indicates the Dagenais/Mentuck test, as expressed by the Supreme Court of Canada, to be the basis of his opinion. The Consumer Advocates goes on to explain that the Board should only allow very limited information to be confidential and that the Board should apply the Dagenais/Mentuck test, which is based on the Oakes test, when considering the issue of confidentiality. The Board concurs with the Consumer Advocates' position in general.

In his conclusion the Consumer Advocate states that "...while the need for access to information of a confidential nature in the public interest varies according to the context, we must recognize the strong interest of consumers in all information relating to insurance rate applications presented to the Board and the importance of respect for the fundamental values that must properly be taken into consideration." The Board could not agree more with this statement and in the context of an administrative tribunal; the Board has to bring the same standard to all parties involved.

The Board also understands the unique position of the Consumer Advocate towards the interest of policyholders in New Brunswick and why the Consumer Advocate would give predominance to the part of section 19.61 of the *Act* that deals with the necessity of

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revelation in the public interest and placing the burden of proof on the party seeking confidentiality. However, the Board has to deal with the full text of section 19.61 and for this reason the Board can not embrace the full submission of the Consumer Advocate for Insurance. The Board's decision will be based on the full text of section 19.61 of the *Act*.

### II. Submission by the Attorney General

The Attorney Generals' submission is divided into two parts. Part 1 deals with the function of the Attorney General as it relates to the Crown and as it relates to the protection of the public interest. Part 1 also deals with the standing attributed to the Attorney General in front of the Board. Part 2 deals with the impact of section 19.61 of the *Act*.

#### *Part 1.*

*Function of the Attorney General as it relates to the Crown and as it relates to the protection of the public interest.*

The Attorney Generals' submission makes reference to his possible conflict with the current policy of government. The Board feels that in the case of protecting public interest, the public interest outweighs the possible conflict. The Board accepts that in the case of protecting public interest the Attorney General does not advocate on behalf of the Crown nor does he receive instruction or direction from the Crown.

Government could appoint a public intervenor and by so doing eliminate any real or perceived conflict. In such a case the role of the Attorney General acting as the defender of the public interest would be transferred to the public intervenor.

The Board agrees with the Attorney General that if the Attorney General is accorded standing to appear in the public interest he should be attributed full standing as defined by the New Brunswick Insurance Board.

The Board also agrees with the Attorney General that in the context of a hearing, parties that appear with full standing should have the right to review the applicants' evidence upon which the Board will rely in making its decision.

#### *Part 2.*

*The effect of section 19.61 of the Insurance Act.*

The Board agrees with the Attorney General that section 19.61 does not deny a party the opportunity to obtain information but rather prevents the publication or revelation of that information other than for the purposes of the investigation or the proceeding in which the information is disclosed.

If the Board grants full standing to the Attorney General or any party as an intervenor, to appear at a hearing, the Board agrees that release of otherwise confidential information to

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the intervenor, subject to possible restrictions, in that context is necessary in the public interest.

### III. Insurance Bureau of Canada

The Board has chosen to comment on the submission from the Insurance Bureau of Canada (IBC) because IBC is the trade association representing the interests of member insurers before government, the media and the public in all jurisdictions in Canada. IBC's submission has two central themes.

1. Legal principles
2. Application of legal principles

#### *1. Legal Principals*

In its submission, IBC affirms that the Act gives a statutory protection to insurers and that the provision mandates a strict approach to the revelation of confidential information obtained by companies. IBC states "The threshold is a high one – only where the publication is necessary in the public interest may such information be revealed."

The Board is not in disagreement with this statement and indeed the Board believes that the threshold is actually higher where the information is concerning the costs of an insurer. However, other information considered confidential by its nature may not need to meet as high a threshold. The fact that there is a mandatory requirement for drivers to purchase insurance is the very reason that section 19.61 ends with "...unless in the opinion of the Board such publication or revelation is necessary in the public interest"

#### *2. Application of Principles*

The Board agrees that the onus is on the party seeking disclosure to satisfy the Board of the necessity of the revelation of any confidential information.

The Board does not agree with IBC's interpretation of section 19.61 that the Board ought not to engage in a balancing process of weighing the perceived interest of the public in disclosing certain information versus the harm that would ensue to the insurers with the release of such information. The Board, when reviewing rate applications, will always balance the particular interests of all parties so that approved rates are just and reasonable.

### Conclusion

The New Brunswick Insurance Board following deliberations has come to a unanimous decision on the subject of confidentiality as it relates to insurance rate applications made to the Board.

# THE NEW BRUNSWICK INSURANCE BOARD

## Decision

The Board accepts that there is a confidential nature to some of the information provided to the Board in automobile insurance rate applications made to the Board and therefore orders that the following sections of rate applications as laid out in the New Brunswick Insurance Board Filing Guidelines shall remain confidential under section 19.61 of the *Insurance Act* except as ordered otherwise by a decision of the Board:

Section 11: Summary of the Current and Proposed Base premiums and differentials;

Section 13: Exhibit I Territorial Change Exhibit;

Section 15: Actuarial Justification; and

Appendix A: Summary of Information;

Dated at the City of Saint John, New Brunswick, this 24<sup>th</sup> day of September 2007.

By Order of the Board



Paul D'Astous  
Chairman