



February 12, 2010

Office of the Superintendent of Insurance
P.O. Box 2271
4th Floor, Provincial Finance Building
1723 Hollis Street
Halifax, N.S. B3J 3C8

Dear Sir:

Re: Atlantic Provinces Trial Lawyers Association Position

We are writing in response to the Office of the Superintendent of Insurance request for submissions on the question of the “Cap” on pain and suffering awards for minor injuries. It is the position of the Atlantic Provinces Trial Lawyers Association that no cap should be placed on pain and suffering awards and that the existing cap should be removed retroactively. Please accept the enclosed as the Association’s submissions with respect to the questions raised by the Superintendent of Insurance.

OVERVIEW:

On October 30, 2003 the Nova Scotia Government implemented a cap on general damage awards for accident victims who sustained injuries in a car crash. While the Legislation suggests that only minor injuries are capped, it is clear that the Legislation and accompanying Regulations cap general damage claims for accident victims who suffer far more serious injuries.

The Legislation, together with the Tort Recovery Limitation Regulations (NS Reg. 182/2003), establish that Nova Scotians who are involved in motor vehicle accidents will only receive general damages in excess of \$2,500.00 if they meet the following criteria:

- 1) Their injuries result in a permanent and serious disfigurement (s. 113B (1)(a)(i)). If the disfigurement is not permanent or deemed not serious, then damages are capped;
- 2) Their injuries result in a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature (s.113B (1)(a)(ii)). Injuries which are not permanent and serious are capped;
- 3) Their injuries do not resolve within twelve months (s. 113B (1)(a)(iii)).

While the third provision of the definition of a minor injury appears to temper the harshness of the first two provisions (by capping only those injuries that resolve within twelve months), the Regulations strip away any concession made to accident victims.

Regulation 2(1)(f) states that an accident victim's injuries have "resolved" unless the accident victim proves, inter alia, the following:

- 1) *That they continue to suffer a serious impairment (2(1)(f)(i));*
- 2) *That their impairment produces substantial interference with their ability to perform their usual daily activities or their regular employment (2(1)(f)(i));*
- 3) *That they have complied with all reasonable treatment recommendations of a medical practitioner (2(1)(f)(ii));*
- 4) *That there has been substantial interference with the essential elements of providing care for themselves. (2(1)(h)).*

In essence, an accident victim's injuries are deemed to be resolved unless the injury is serious, continuous, and affects their ability to look after themselves. Even if their injuries prevent them from looking after their children, parents or other family members, but do not prevent them from caring for themselves, they are capped. Even if they are unable to carry out certain treatment recommendations, due to impecuniosity, they are capped. Even if their injuries are permanent but not considered serious, then they are capped.

This harsh legislation has decimated the rights of Nova Scotians. Thousand of Nova Scotians who have suffered injuries following a car accident have been stung by the cap. The loss of benefits to accident victims has affected not only the injured party, but also their families. When an accident victim loses her right to fair compensation, the loss is spread to the victim's entire family and community. This is fundamentally unfair.

Nova Scotians who have sustained injuries, through no fault of their own, have lost a sense of fairness and justice. Prior to the implementation of the cap, accident victims were fully compensated by the at fault driver's insurer. The negligent driver then, in turn, paid higher premiums. In a sense, justice was restored. Today, the cap denies justice to accident victims. Compensation is taken away from accident victims while high risk drivers enjoy lower premiums. To an accident victim the message is clear – their pain counts for nothing.

Too many Nova Scotians have been hurt by the cap. It is impossible to name all of the victims of this Legislation, but the following stories of individuals give us an appreciation for the magnitude of the impact the cap has had on the lives of Nova Scotians.

Melissa Gionet – Melissa was 23 years old when she was involved in a motor vehicle accident on December 17, 2003. She was seven months pregnant and driving her car along Cornwallis Street in Halifax when she was struck from the side by a negligent driver. The accident caused Melissa to suffer chronic low back pain. She was unable to properly care for her new born child and had to move in with her parents who assisted with her baby's care. She never returned to her work as a cashier at the Casino – her back pain was too severe. Melissa was unrepresented and was paid \$1800 for general damages for her pain and suffering. Melissa continues to suffer from low back pain.

Anna Marie MacDonald – Anna sustained neck, shoulder and back pain following a motor vehicle accident in 2004 (which was not her fault). She has carried out physiotherapy, massage therapy and chiropractic care. She continues to suffer from pain and has never returned to her work in a full time capacity. Anna Marie MacDonald has been offered \$2500 by the at-fault driver’s insurance company for pain and suffering.

1) **SHOULD THERE BE LIMITATIONS PLACED ON PAIN AND SUFFERING AWARDS?**

Why did the Nova Scotia Government take away the rights of these vulnerable people? Why was the cap imposed on Nova Scotians? The answer to those questions is found in the representations made by the Insurance Bureau of Canada to Government and Nova Scotians in 2002 and 2003.

The IBC claimed that automobile insurance settlement costs were “dramatically increasing” in Nova Scotia. As a result of these “dramatically increasing” claims costs, automobile insurers in Nova Scotia were losing money and were headed towards bankruptcy. Unless these claims, arising from minor aches and sprains, were eliminated or capped, premiums would continue to soar. If Government did not intervene, automobile insurers would stop writing insurance policies in Nova Scotia. The picture painted by the IBC was bleak. Nova Scotia was headed for a crisis unless accident victims’ rights were sacrificed.

During the constitutional challenge (Hartling v. AGNS) Barbara Jones-Gordon testified. Ms. Jones-Gordon was the point person for the auto insurance file in 2003 and was called by the Government to give evidence on its behalf. Ms. Jones-Gordon testified at trial that the IBC represented that automobile insurers in Nova Scotia were going broke and would be leaving the province unless a cap was implemented. (See quote at Appendix 1)

The representations made by the IBC in 2003 were false. The evidence clearly establishes that claims costs were **decreasing** (not increasing) prior to the implementation of the cap. The evidence further clearly establishes that automobile insurers in Nova Scotia were **highly profitable** (not going broke) prior to the cap. The representations made by the IBC were false. Unfortunately the impact of the cap on Nova Scotia accident victims has been real and devastating.

A) **Insurance Bureau of Canada stated – dramatic increases in settlement costs occurred – They Did Not**

On September 16, 2003, the IBC ran a full page ad in the Daily News stating that there were solutions to Nova Scotia’s auto insurance problems (See Tab 1). Under the heading “What caused the problem?” the IBC stated:

“There are two basic reasons behind the current problem. Dramatic Increases in claims settlement costs and, less significantly, lower returns from insurance industry investments.” (emphasis added)

As trial lawyers we knew that the IBC’s assertion that claims settlement costs were dramatically increasing was wrong. Accident victims had not experienced any significant increase in court awards prior to 2003. The IBC’s assertion was met with skepticism.

Unfortunately the Government of the day did not challenge the IBC's representation that claims costs were dramatically increasing. Today we know that claims costs for automobile insurers in Nova Scotia were actually **decreasing**, not increasing, prior to the implementation of the cap. (See Attached Appendix 2) The table attached as Appendix 2 (data forwarded by the IBC to OSFI) summarizes the claims costs for Nova Scotia auto insurers for the relevant period.

Third party liability – bodily injury claims in Nova Scotia amounted to \$167,741,246.00 in 2001. Claims costs decreased in 2002 to \$147,128,660.00. Claims costs decreased again in 2003 to \$138,328,737.00. The IBC's own data confirms that claims costs were **decreasing**, not “dramatically increasing”, prior to the implementation of the cap. This startling revelation confirms that the Government was misled by the IBC and that there was no basis for the implementation of the cap.

Would the Government have imposed a cap had they known that claims costs were decreasing, not “dramatically increasing”? Ms. Jones-Gordon succinctly stated the likely position of the Government had they known the true state of affairs. Ms. Jones-Gordon stated:

“...Q. You would agree with me, I guess, the converse of that is that if claims costs were staying the same or going down, the Government wouldn't have been interested in bringing in a cap, would they?”

A. Don't think there'd be any need to intervene in the market, at that point.

No cap should have been imposed on Nova Scotians.

B) Automobile Insurers were profitable prior to the implementation of the cap

In 2003 Insurers stated that they were losing money and were headed for bankruptcy. In an article dated October 29, 2003, George Cooke, President and Chief Executive Officer of the Dominion of Canada sounded the alarm bell that insurers were losing money hand over fist in Nova Scotia. (See Appendix 3)

The alarm bell sounded by Mr. Cooke was picked up upon by Mr. Stanley Giffin, President and CEO of the Insurance Bureau of Canada. In a letter dated October 23, 2003 to Premier John Hamm, Stanley Giffin wrote the following:

“...We urge you to alter this Bill. Should it pass as it currently is drafted the ramifications for Nova Scotia consumers are very serious.”

Insurance industry leaders were stating that the insurance industry was losing money and losing it fast. If the cap was not implemented the auto insurance industry in Nova Scotia would collapse.

In response to the Constitutional Challenge launched by accident victims in this Province, the Government hired Oliver Wyman to prepare an actuarial report on the health and profitability of the Automobile Insurance Industry in Nova Scotia. Ted Zubulake, partner with Oliver Wyman, testified on behalf of the Government of Nova Scotia. Mr. Zubulake prepared a chart (See

Appendix 4) which completely contradicts the IBC's representation that the auto industry was losing money prior to the implementation of the cap.

After a comprehensive examination of the IBC data filed with the Office of the Superintendent of Financial Institution and GISA, Oliver Wyman exposed startling data. The data confirmed that automobile insurers in Nova Scotia were achieving a 10.8% return on equity in 2002. **One year prior to the implementation of the cap automobile insurers in Nova Scotia were earning above the bench mark set by the Utility and Review Board as an appropriate rate of return.**

Even more startling were the record profits earned by the automobile insurance industry in Nova Scotia in 2003. The return on equity for automobile insurers in Nova Scotia, according to Mr. Zubulake, was a record setting 32.9%. Given that the cap was not implemented until October 30, 2003, Mr. Zubulake and Mr. Miller (the IBC's actuary) both testified at the Constitutional Challenge that the lion's share of the profits for 2003 were earned prior to the implementation of the cap. Profits continued to soar from 2004 to 2007.

The Automobile Insurance Industry has earned record profits in this Province. These profits have been earned on the backs of premium payers and accident victims. There was no need for the cap to be implemented to restore automobile insurers to profitability. Profitability was restored one year prior to the implementation of the cap.

No cap should have been imposed on Nova Scotians.

C) Premiums have dropped significantly prior to the implementation of the cap

The insurance industry has stated publically that insurance premiums have not only stabilized, but have been reduced significantly since the implementation of the cap. This assertion is also false.

Mr. Zubulake, in his report to the Government of Nova Scotia stated that premiums have decreased by 8.3% between 2003 and 2007. This is an extremely modest decrease in premiums given the record profits enjoyed by automobile insurers in Nova Scotia since 2002. Nova Scotia consumers have not benefitted in any material way from the cap. Only the insurers have benefitted via unconscionable profits.

The arguments put forward by the IBC in support of the cap are baseless. Accident victims have suffered as a result of the cap while insurers have experienced windfall profits. Justice demands a restoration of accident victims' rights. Our Association supports one position – the elimination of the cap of pain and suffering awards for Nova Scotians. We urge this Government to restore these rights for accident victims.

2) SHOULD ALTERNATIVES TO THE EXISTING CAP ON PAIN AND SUFFERING AWARDS BE APPLIED RETROACTIVELY:

Different systems exist in Canada for tort modification. The system of caps is well known here in Nova Scotia. Deductibles are used in Newfoundland and Ontario.

Despite the evidence to the contrary, the Nova Scotia Government proceeded to impose a CAP on damage awards to provide premium stability. Minor injuries and fraud were the targets. By eliminating the most insignificant of injuries and those who feign injury, savings would result to premium payers. The government of the day adopted this reasoning.

A cap does not accomplish the set goals for intrusion into accident victim rights. What the cap does is to marginalize moderately and severely injured claimants to the same level of compensation of those who have sustained insignificant injury or have feigned symptoms. The solution belies the goals.

On the other hand, deductibles do not marginalize significant injuries suffered by accident victims and place them with a class of injuries that are insignificant or truly minor.

Notwithstanding the above, the Atlantic Provinces Trial Lawyers Association submits that the cap on pain and suffering awards should be removed and it should be removed retroactively. The Insurance Industry will argue that the premiums will be increased if the Government takes such action. The evidence does not support the Industry's position that premiums must be increased if the cap is removed retroactively.

Automobile insurers in Nova Scotia have achieved record profits since 2002. Many have speculated why rates have not declined. One possible reason why insurers have not reduced premiums was set out by Ted Zubulake in his report to the Nova Scotia Government as part of the Constitutional Challenge. Mr. Zubulake commented as follows:

"...One possible reason for insurance companies not reducing premiums despite the relatively high ROE's is the uncertainty that surrounds the cap on minor injuries. The cap has been challenged in Nova Scotia; given the recent Court decision in Alberta (which is under appeal) the insurance companies may be reluctant to give up premium that they may very well need should the challenge be successful."

In cross-examination at the Constitutional Challenge, Mr. Ron Miller, (the IBC's actuary) stated that insurers have earned in the range of \$250,000,000.00 in profits over and above the 10% return on equity benchmark set by the Utility and Review Board between 2003 and 2007 (See Appendix 5).

Actuaries set reserves based on contingent events. It is reasonable to assume that actuaries have set aside funds to pay out claims dating back to 2003. In cross-examination at the Constitutional Challenge, Ron Miller, stated that actuaries may have set funds aside to deal with the successful constitutional challenge to the cap on pain and suffering awards. (See Appendix 6)

Given that automobile insurers have earned in excess of \$250,000,000.00 between 2002 and 2007 (over and above what was deemed to be an appropriate return on equity) leads one to conclude that insurers can remove the cap on pain and suffering awards without corresponding increases in premiums.

Those involved in motor vehicle accidents from 2003 to present date should enjoy the same rights as those injured after the cap has been removed. The rights of these accident victims can be

restored without any increase in insurance premiums to consumers of Nova Scotia. Quite frankly, the only just and fair thing to do for Nova Scotians is to eliminate the cap on a retroactive basis.

We appreciate the opportunity to provide accurate and detailed information to the Superintendent of Insurance. We are prepared to meet at any time and provide additional information to assist in the Superintendent's review.

Thank you for taking the time to review our Submissions.

All of which is respectfully submitted this 12th day of February, 2010.

ATLANTIC PROVINCES TRIAL LAWYERS ASSOCIATION

ORIGINAL SIGNED BY:

Per: George A. McAllister, APTLA President

Per: Barry Mason, APTLA NS Board Representative

Per: John McKiggan, APTLA Vice President

Per: Raymond Wagner, APTLA NS Board Representative

Per: Harvey McPhee, APTLA NS Board Representative

Per: Brian Hebert, APTLA NS Board Representative

564 MS. JONES-GORDON, CROSS-EXAM. BY MR. MASON

So I didn't mean to get you off on the wrong track.

Q. But I thought what you said earlier was the government wouldn't have been looking at capping injuries if claims costs were going down. I thought that's what you said.

A. The government was really looking at trying to create sustainability and stability in the insurance market. We wanted companies to stay in Nova Scotia and to be here to have insurance -- you know, the stability of insurance companies is very important.

Q. Sure it is.

A. We had gone through issues back in the '80s with respect to insurance companies going broke.

Q. Yeah.

A. So their financial stability is generally monitored by the OSFI, by the federal government, but we had to work in partnership with them in terms of the whole system in terms of making sure that that system was sustainable.

Q. Well you're taking me off track a little bit, but I do want to follow up with that. What the IBC was telling you is that companies were going to go broke in Nova Scotia if they didn't get this cap. Correct?

A. That would be one of the things they were saying.

Q. Yeah.

A. But also, you know, I mean, you look at the general market and what was happening. And we had had a bit of a recession in 2000/2001. So it was taking them a while to get back on track.

Q. And they were telling you that they were going to pull out of the market too. Correct?

A. There were some that said that. That's correct.

Q. Yeah. But it's clear, at least in 2001, that claims costs appear to have been going down based on this chart. Correct?

A. Based on his chart, yes.

Q. And you didn't track this data because you say you weren't able to get it until November 2003?

A. That's correct.

Q. Did you ask for it?

A. It would only become available from the insurance companies after a certain point in time. It doesn't

APPENDIX 2

Review and Analysis of Nova Scotia PPAXF Recent Experience to 30/06/2007

Exhibit 1 - All-Industry Full Accident Year Projected Historical Ultimate Experience Exhibit - Page 1

Nova Scotia Private Passenger Automobile (excluding Farmers)

Valuation Date: 20070630

Data Basis: Direct All-Industry Calendar/Accident Year Data (incl. Facility Association)

Coverage/KoL: Third Party Liability - Bodily Injury (KoL 01,02)

Data Source: IBC AIX 2007-1 All-Industry Nova Scotia Private Passenger (ex. Farmers) Loss Development Exhibit

Item: Historical Ultimate Experience by Fiscal (prior July 1 to current June 30) Accident Year

Description: Estimated All-Industry Full Year Experience (including ULAE and Health Levy)

Fiscal Acc. Year	Car-Years Earned Exposure	Pro Rata \$ Earned Premium	Ultimate Claim Count	Ultimate \$ Claim Amount	Ultimate % Claim Frequency	Ultimate \$ Claim Severity	Ultimate \$ Avg. Claim Cost	\$ Avg. Earned Premium	Ultimate % Loss Ratio
1995	419,364	106,718,547	2,645	92,916,808	0.631	35,129	221.57	254.48	87.1
1996	420,712	114,521,554	2,651	99,455,076	0.630	37,516	236.40	272.21	86.8
1997	422,257	119,021,107	2,804	106,151,737	0.664	37,857	251.39	281.87	89.2
1998	431,175	122,356,125	2,896	117,423,383	0.672	40,547	272.33	283.77	96.0
1999	433,595	123,543,868	3,131	133,787,953	0.722	42,730	308.56	284.93	108.3
2000	437,776	121,522,538	3,369	147,766,601	0.770	43,861	337.54	277.59	121.6
2001	453,970	134,416,332	3,607	167,741,246	0.795	46,504	369.50	296.09	124.8
2002	460,637	160,978,586	3,418	147,128,660	0.742	43,045	319.40	349.47	91.4
2003	459,591	214,318,708	3,161	138,328,737	0.688	43,761	300.98	466.32	64.5
2004	459,700	238,403,057	2,501	102,109,016	0.544	40,827	222.12	518.61	42.8
2005	471,071	237,146,261	2,734	93,335,804	0.580	34,139	198.14	503.42	39.4
2006	480,980	222,400,857	2,452	96,489,326	0.510	39,351	200.61	462.39	43.4
2007	489,509	219,135,720	2,473	91,432,417	0.505	36,972	186.78	447.66	41.7

Time: 8:57:58 a.m. Mar. 20, 2008

consumer behavior was led by Scott Wheeler, a 20+ year veteran in the collision repair industry from Minnesota. Scott spent years as a shop owner, and in the Marketing Dept of ABBRA, and now works as a BDM with Akzo Nobel.

Specifically Scott addressed the issues of the difficulties in changing traffic patterns to today's collision centers, "the closing ratio must be higher given that it can take months and years for other marketing initiatives to direct more traffic to a shop.

Scott spoke passionately about his experiences in the collision repair industry and his learning by consulting with many shops throughout the USA. According to Scott, you have to think creatively "don't tell me an idea won't work unless you can propose a better way" This type of statement set the tone for a very informative, innovative and unprecedented session.

Collision Associates partners and front line staff and managers participated in breakout sessions with jobbers. Shops learned that it is about "what you do beyond fixing the car that really counts and that creates a truly memorable experience for the client" Participants teamed up to create new ways of presenting to the consumer, focusing on education to increase closing ratios. Developing strategies to gain commitment from customers was also a key focus. Scott Wheeler also spent half a day explaining the benefits of tracking customer satisfaction through and independent Research Company and how to use the report as a key marketing tool.

"The training was a tremendous success says terry Hill", of The Coachworks Limited, a Collision Associates partner - "Scott provided many ideas that will improve my business"

Collision Associates is a repair network comprised of independent and dealer collision centers committed to business development and customer satisfaction.

Insurance Executive Speaks Out On Nova Scotia Automobile Insurance

TORONTO, Oct. 29 /CNW/ - "We are shocked and deeply offended by the punitive insurance legislation passed by the Government of Nova Scotia", said George Cooke, President and Chief Executive Officer of The Dominion of Canada General Insurance Company. "I strongly urge the Premier not to proclaim this Bill, start over and get it right."

"The government has ordered 20% reductions in automobile insurance premiums, effective November 1, 2003, and extended its price freeze to November, 2004." Mr. Cooke continued to explain: "Nova Scotians deserve rate relief, but that can only be realized if compensation levels - which are set by the government and over which the industry has no control - are reduced appropriately."

A report written by a government-appointed actuary, and shared with industry, concludes that the amendments to the auto insurance product contained in Bill 1 will not result in cost savings (a range of +3.1% to -4.6%). This is a far cry from the 20% represented by government. Interestingly, this report has not yet been made public.

The reforms in Bill 1 will not reduce costs by 20%. Assuming there are any insurers left in Nova Scotia a year from now when the freeze is lifted, prices will again rise 20-35% because legitimate cost reform has not been introduced.

"Furthermore," continued Mr. Cooke, "the government has introduced non-withdrawal clauses which purport to prevent companies currently operating in Nova Scotia from modifying business practices in response to changing environmental factors - one of which is this legislation."

Cooke continued to explain that The Dominion is 100% Canadian-owned and its parent company is publicly traded. "We have a duty to our shareholders to invest their capital responsibly. These shareholders are members of pension funds, retirees and families who rely on our prudent fiscal management."

commends the Atlantic Canada task force report. Throughout these discussions, the government confirms its understanding of the issues and indicates it continues to work on a solution. 40 28

October 21, 2003 a revised Bill 1, as amended by the Law Amendments Committee, is introduced. The amendments significantly erode the threshold for injury claims above the cap. The report of the independent actuary retained by government estimates the amended threshold reduces the claims costs savings to 3%, far short of the 20% needed for government promised 20% reduction. No amendments are made to deal with the application of the rate reduction. The insurance industry advises government that a forced 20% price reduction and an 18 month freeze combined with no cost savings is unworkable.

On October 28, 2003 the Nova Scotia Government announced that Bill 1 had received Third Reading.

June 2002

Nova Scotia's Collision Repair Association (CRANS) has just held their annual meeting at the Sheraton Hotel in Halifax featuring a new constitution and a new executive. We have a new web site at www.crans.ca and have just released the results of an apprenticeship survey. The recent Skills Nova Scotia held at NSCC Akerley College in Dartmouth was a big success for our industry and over \$4000 of prizes, mostly tools was raised for students. Thanks to our generous sponsors: 3M Canada, BASF, CARQUEST, CMAX, Dupont, Eastern Enviromental, Fiberglass-Evercoat, Norton Canada, PPG Canada, Sherwin Williams, Uni-Select and Unitool.

We are also working on issues such as the rising cost of materials study and the issue of salvage vehicles in this province. We are also working on our Youth at Risk program For more information, please call Brian Slaunwhite at CRANS at (902) 453-5968 or Lindsay Gates (902) 876-2591

CRANS SHOWS RESULTS OF APPRENTICESHIP SURVEY (ms word format)

Table A-5

Accident Year	Estimated All Coverages Combined After-tax ROE
1997	5.6%
1998	3.7%
1999	-6.2%
2000	-1.3%
2001	1.7%
2002	10.8%
2003	32.9%
2004	31.4%
2005	27.5%
2006	25.3%
2007	20.3%

Table A-5 shows that the estimates of the after-tax ROE's earned by the Industry are below the 10% target in each of the years 1997-2001, just above the target in 2002 at 10.8%, and significantly above the target in each of the years 2003-2007.

MR. MILLER, CROSS-EXAMINATION BY MR. MASON

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A. Or in an average sense ---

Q. Yeah.

A. --- in terms -- yes, but in terms of what

the rate level was at the -- when the freezing went in on May 1, 2003 it's a much bigger drop.

Q. And I would suggest to you and correct me if I'm wrong when -- if we looked at ten percent being the appropriate return on equity for insurers in the Province of Nova Scotia, we see that 2002 all the way through 2007 insurers have achieved more than that.

A. And we're looking at what?

Q. Oh, I'm sorry, page 12 just what we looked at a moment ago.

A. Yeah.

Q. This is return on equity?

A. Yes.

Q. And do you have any kind of estimate, Mr.

Miller, that you can provide to me that would indicate how much money insurers in Nova Scotia have made over and above the ten percent that they were looking for, that the UARB had set as a benchmark between 2002 and 2007.

A. --- two. 2002 I see as a loss situation but 2003 forward for my -- anyway, yeah, there would be numbers and if the loss -- you know the loss ratio in 2007 is 60 that's -- and in 2006 the current estimate is at 56 so there'd -- and the premium was still about four hundred million.

So there would be -- if it's forty or forty-five million for 2007 it would be a little higher for 2006. So you have five years of stuff. Might be a couple of -- two hundred and fifty million. I don't know.

Something of that ---

Q. Thank you. That gives me a ballpark figure.

A. Yeah.

Q. I mean, wouldn't you agree with me that that's been an absolute windfall for the insurance industry in Nova Scotia, what these reforms brought about in 2003?

A. Yes, for that period but again if I look at this graph what you're calling I guess excess profit over the benchmark ---

Q. Yes.

A. --- is kind of like the area from the middle of this yellow down to this black line, okay. But then if you

1290 MR. MILLER, CROSS-EXAMINATION BY MR. MASON

this period, there's, quote, "an excess profit." If you go back a bunch of other years, there's not. And is that a fair thing to do?

If the target -- I think others have testified that one has a target return on equity, if you like. You don't generally achieve that in any given year. Some years, you achieve more. Some years, you achieve less. Over the long term, the hope is that, on average, you would get that. Well, if you do this kind of process and take that money, that excess profit, if you like, from that timeframe and apply it against that deficit, then insurers don't even have a hope of making 10 percent ROE.

Q. Yeah. So they can use this to catch up the losses they've made in the '90s. Yes?

A. Not a catch-up in that sense, but yes, they can -- they can offset -- that profit would offset some of the losses, yes.

Q. But it does appear that there's increased profits that are being held by the insurers that haven't been given back to the consumers.

A. They apparently have not, yeah.

Q. And it appears that from Mr. Zubulake's report and his evidence, the reason they're not giving that back is because they're concerned that the challenge that's being advanced today is going to be successful.

A. I'm sure that that's an element in that situation, yes. I agree with Mr. Zubulake.

Q. So they've reserved for it, at least
it.

A. Reserved?

Q. Well they've got the money on hand to take care of at least some of the losses that you're talking about, the four hundred and twenty-five million.

A. Where the money has gone, I don't know. But if you wanted to look at that profit level over the last few years, one could say, yes, that could be used to subsidize.

Q. All right. Those are my questions. Thank you, Mr. Miller.

MR. MASON: Thank you, My Lord.

THE COURT: Any further cross-examination?

MR. SIEBRITS: Nothing for me, My Lord.

THE COURT: Thank you. Re-examination?