



July 25, 2019

Laurie Balfour, Exec Director
Automobile Insurance Rate Board
2440 Canadian Western Bank Place
10303 Jasper Avenue
Edmonton AB T5J 3N6
Via email : airb@gov.ab.ca

Re: AIRB Annual Review

With roots dating back to 1949, TD Insurance (“TDI”) is a member of TD Bank Group (“TDBG”), the second largest financial service organization in Canada. TDI offers a wide range of insurance products, including credit protection, life, health, travel, home and automobile.

TDI is the largest direct response insurer, in Canada, with more than 2.1 million policies, and more than \$3.2 billion in written premiums as of May 2019. TDI employs more than 3,900 people across Canada, with offices in Alberta, Ontario, Québec, Nova Scotia and New Brunswick.

Our home and auto insurance products are underwritten by wholly owned insurance companies: Security National Insurance Company, TD General Insurance Company, TD Home and Auto Insurance Company, and Primmum Insurance Company.

The TDI business model is direct response, meaning service is provided directly to clients, without using third-party intermediaries. Because of our position as the largest direct response insurer in Canada, no one talks to more Canadians about automobile insurance than we do. The processes and technology that we use allow us to provide quality service in a timely and efficient manner.

TDI is the second largest automobile insurer in the province with offices in Calgary and Edmonton. Our automobile market share in the province is 15.5%.

TDI conducts its business across a variety of jurisdictions and we are pleased to draw upon our expertise and share our experience in operating with a variety of models. We are committed to working with the government to maintain a healthy auto insurance environment that is efficient, affordable, cost effective and sustainable to meet the needs of Albertans.

TDI appreciates the opportunity to present comments and recommendations to the Alberta Automobile Insurance Rate Board as it undertakes its consultation to review Alberta industry loss experience for private passenger vehicles to establish industry benchmarks to be used in the review of insurers' PPV filings for basic and additional coverage.

Our submission focuses on the following factors we feel are contributing to cost pressures in the marketplace:

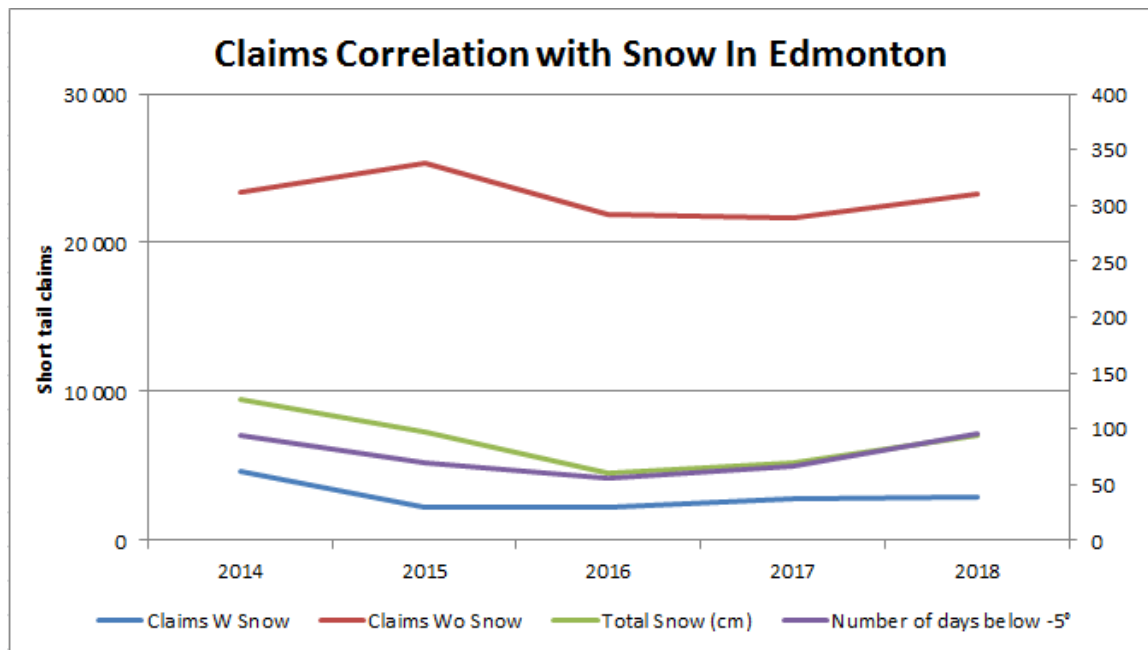
1. Weather
2. Economic Conditions
3. Loss Trends
4. Erosion of the Minor Injury Regulation
5. Disbursements
6. Observations Pertaining to the Judiciary Process

Weather

Extreme weather remains an important factor in rising costs. Winters are more severe than they used to be. This can be observed as colder temperatures have been recorded and total snowfall has increased¹. TDI observed a direct correlation between the occurrence of claims and unfavorable winter weather.

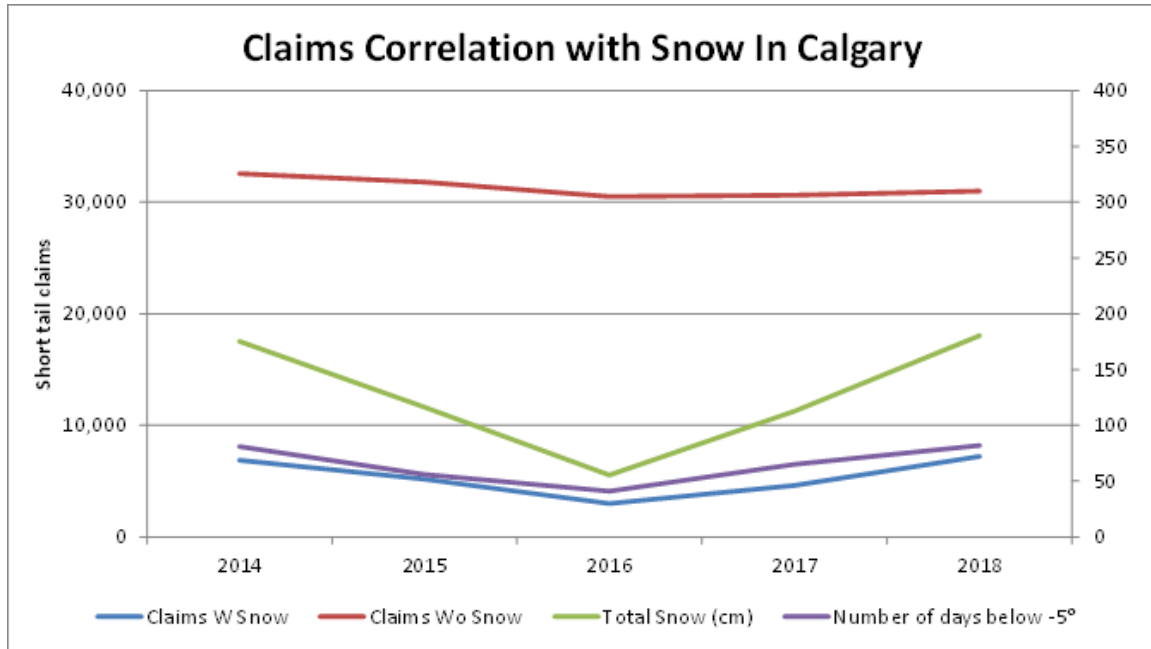
The graphs below illustrate the correlation between claims and the effects of unfavorable winter weather.

For the Edmonton area, TDI observed a correlation between the number of claims and the number of days below -5°, which create icy road conditions.



For the Calgary area, TDI observed a correlation between the number of claims and the amount of snowfall, which create visibility issues and slippery roads.

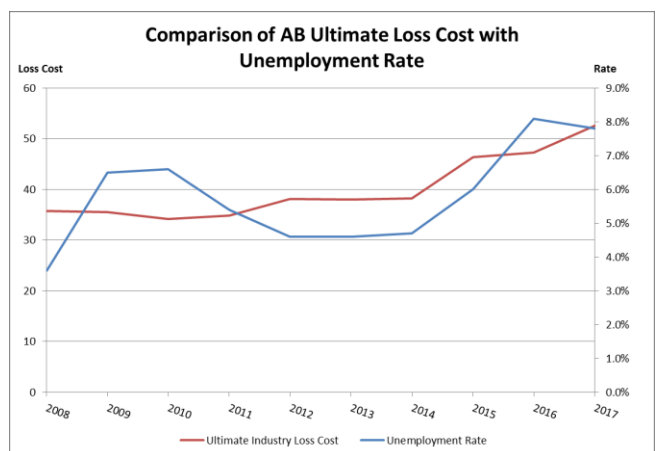
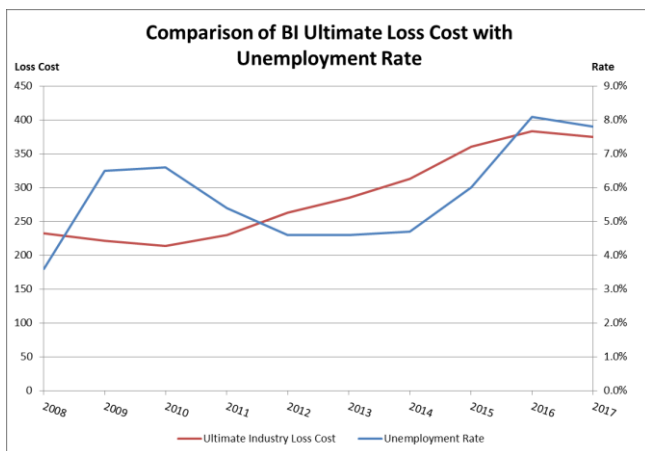
¹ Weather statistics from Government of Canada, Calgary and Edmonton weather stations
http://climate.weather.gc.ca/historical_data/search_historic_data_e.html



Economic Conditions

The economic climate in Alberta has also impacted personal injury litigation. With the downturn in the economy and in particular the oil industry, we have seen an influx of new lawyers into this area of law. This influx has changed the profile of litigation when we compare it to 7+ years ago. Arguably, litigation has become more complex and the quality of plaintiff representation has improved. These conditions continue to put upward pressure on overall claims costs.

The unemployment rate also appears to be a factor which contributes to the rising costs. Starting from 2012, TDI has observed a correlation between the unemployment rate² and the Accident Benefits and Bodily Injury loss costs, as illustrated by the graphs below.



² Unemployment rate from Statistics Canada, [Table 14-10-0106-01 Employment and unemployment rate, annual, population centres and rural areas](#)

It continues to remain uncertain as to how the current economic conditions will evolve and how this may have a future impact the insurance industry.

Loss Trends

TDI observes increasing loss cost trends for all coverages; similar to those selected by Oliver Wyman.

Coverage	TDI's Trends	OW's Trends
Bodily Injury	7.3%	7.5%
Property Damage	1.0%	2.0%
Third Party Liability	5.4%	6.0%
Accident Benefits	10.0%	9.5%
Collision	1.0%	2.5%
Comprehensive	5.4%	8.5%

For Bodily Injury, TDI observes similar increasing loss trends as those selected by Oliver Wyman. As shown above, TDI continues to see an upwards trend in the average incurred amount of the Bodily Injury claims.

For Accident Benefits, we continue to observe a steep increase in loss trends particularly since 2015, which is consistent with the findings in the Oliver Wyman report.

Like the industry, TDI also observes an upward trend in the comprehensive loss cost, mainly due to a sharp increase in the frequency of theft claims. As this trend continues, it will put upward pressure on the comprehensive loss trends for the next years.

Erosion of the Minor Injury Regulation

Further to the *Sparrowhawk v Zapoltinsky* decision in 2012, Temporomandibular Joint Disorder ("TMJ") was determined not to be a "minor injury" and thus began the erosion of the minor injury definition. Erosion continued through other decisions such as *Jones v Stepanenko* and *McLean v Parmar*.

Sparrowhawk led to a significant increase in claims involving alleged TMJ injuries and the continued erosion of the definition regarding other conditions related to soft tissue injuries such as psychological sequela.

This is a pattern that we have seen in other provinces, including Ontario. After definition erosion, the response is typically to review applicable legislation and attempt to tighten or clarify the minor injury definition through legislative amendment.

The minor injury definition was revisited and clarified to specifically include TMJ in its definition assuming there is no damage to bone, disc or teeth. It was also amended to include physical or psychological conditions that arise from a soft tissue injury. The expected downstream impact to this amendment is two-fold:

1. Increase in frequency of claims for both TMJ injuries with bone and/or teeth damage and psychological injuries that are claimed to be distinct from the underlying soft tissue injury.
2. As observed in other provinces, we will likely see more claims of chronic pain, psychological impairment and brain injury which will attract higher general damage awards on non-minor injury claims. We also anticipate after a few years, we will again start to see erosion of the amended definition through Court interpretation.

Damages continue to increase overall

Damages are increasing at a dramatic pace. General damages at trial and JDR (Judicial Dispute Resolution or mini trial) continue to increase with increased emphasis by plaintiff counsel, with increased expert involvement, on chronic pain and psychological components as well as greatly increased emphasis on other heads of damage such as housekeeping and loss of earning capacity.

- WAD II with chronic pain general damages \$75,000 reduced to \$60,000 for failure to mitigate, *Stevenson v. Thompson*, 2017 A.J. No.765.
- Housekeeping is awarded as a lump sum in addition to general damages, *Jones v. Stepanenko*, 2016 A.J. No.559.

Loss of earning capacity is awarded in almost every case and is often an award of one to two years gross income. Loss of earning capacity has been awarded in addition to an award for loss of competitive advantage, *Chisholm v. Lindsay*, 2012 ABQB 81.

General damages have even increased in instances where the plaintiff's credibility was questioned.

- *Petz v. Duguay*, 2017 A.J. ABQB 90, the Court concluded that Ms. Petz was not credible yet awarded general damages in the amount of \$50,000.
- *Bumstead v Dufresne*, 2015 ABQB 787, the Court noted that the plaintiff's credibility had been seriously compromised and concluded that the plaintiff was not credible yet awarded general damages of \$50,000.

Disbursements

Costs and disbursements paid in Alberta as part of the civil trial process are excessive and continue to increase with Plaintiff counsel frequently engaging multiple experts, even in the same or overlapping disciplines.

Personal injury cases in Alberta present significant disbursements when compared to similar cases in other jurisdictions. In some instances, bills of costs are 4 to 5 times what is seen in other jurisdictions for like cases. It is not uncommon to see \$200k-300k in plaintiff disbursements.

Insurers have had little success in challenging these unreasonable amounts before the Assessment Officer. These insurance payments are not going to accident victims but to professional experts who are profiting greatly from the current system while at times delivering questionable value to the court in their duty to provide "impartial" testimony.

The current system forces plaintiff and defense lawyers to obtain their own expert witnesses rather than allowing for the appointment of a truly independent expert to provide assistance to the court.

This results in a fundamental inequity in favor of plaintiffs in terms of availability of expert testimony. Plaintiffs' lawyers may obtain as many experts as they wish at almost any time leading up to trial.

In addition, the opportunity for the defense to obtain a follow-up examination as trial approaches is limited. This inequity is exacerbated by the excessive delay in trial dates. If the defense obtains its medical examinations in a timely manner in order to facilitate early resolution of the case, the reports will be stale dated and thus open to collateral attack on that basis by plaintiffs' counsel at trial.

Observations Pertaining to the Judiciary Process

Judicial Appointments

In Alberta, there appears to be a lack of judicial resources available to conduct civil trials, resulting in trials being scheduled three or more years out from trial date selection.

The July 2016 Supreme Court of Canada decision in *Jordan*, creating timelines for the hearing of criminal matters, has placed tremendous strain on the Alberta Courts. Alberta Courts were unable to simply redirect resources from civil to criminal courts resulting in an inability to deal with the backlog.

In Calgary in 2016 the average time for a civil case to be brought to trial was 92 weeks. By March 2018 it was double that.³ Retired Chief Justice Neil Wittman also remarked, "You cannot keep up the pace that this court is presently being subjected to and get the quality of justice I think the public deserves."⁴

There remains a lack of justices in the province (new appointments are only keeping pace with attrition rather than adding net new justices), this is creating delays, which is only then exacerbated by criminal and family law cases necessarily taking precedence over civil cases.

³ CBC News, Carolyn Dunn, March 28, 2019

⁴ Referencing the strain on Alberta Courts due to the *Jordan* decision and resulting backlog, as quoted by [CBC News March 28, 2018](#)

There is also a lack of physical space within Edmonton, Grande Prairie and Fort McMurray all of which are in need of new courthouses.

This lack of judicial resources also hinders all parties' ability to obtain a timely JDR (Judicial Dispute resolution or mini trial), which can be of great assistance in resolving litigation short of trial.

Alberta courts assign fixed trial dates rather than holding trial sittings. Trial sittings allow jurisdictions to place many pending cases on a running list to be heard at certain set times or "sittings" during the year. This system avoids long waits for trial dates and promotes earlier resolution of cases by providing access to justice in a timely manner. This also promotes effective use of judicial resources by avoiding set court dates going unused when cases resolve just prior to trial. Trial sittings have been effective in many Ontario jurisdictions for years.

Delays are equally prevalent and devastating to civil actions in the scheduling of hearings before Masters and Justices in Chambers to deal with interlocutory matters and dismissal applications.

We appreciate your consideration of our submission, and want to again, thank-you for the opportunity to provide input for the annual review. We very much look forward to meeting with the AIRB on August 15th 2019.

Sincerely,

Lynn Whitehead
Director, Government & Industry Relations
TD Insurance

