

# The Insurance Lobby & the Minor Injury Regulation



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On October 1, 2004, the Alberta government implemented a number of regulations “reforming” auto insurance law in the province. A grid was established to regulate the premiums that auto insurers could charge motorists.<sup>1</sup> Amendments were made to Section B of the Standard Auto Policy, relating to no-fault medical expense benefits payable to or on behalf of an insured.<sup>2</sup> Protocols for the diagnosis and treatment of soft-tissue injuries were mandated, with the initial treatments to be covered by the injured party’s insurer on a pay direct, rather than a reimbursement basis.<sup>3</sup> And, most controversially, pain and suffering compensation for certain soft-tissue injury victims of auto collisions was capped at \$4000, a figure that would be marginally increased to account for inflation on an annual basis beginning in 2007.<sup>4</sup>

A constitutional challenge to the soft-tissue injury cap was successful at the trial level in February 2008.<sup>5</sup> However, that decision was overturned on appeal in June 2009.<sup>6</sup> On December 17, 2009, the Supreme Court of Canada dismissed the plaintiffs’ application for leave to appeal the case.<sup>7</sup>

*“In short, by the spring of 2004, it was abundantly evident that the insurance industry had manufactured a crisis”*

The Minor Injury Regulation was implemented 18 years ago after a sustained lobbying effort by the auto insurance industry directed at Alberta’s Progressive Conservative government led at the time by Premier Ralph Klein. In recent years and at the behest of the powerful insurance lobby, the MIR has been “tweaked” -- firstly by Premier Rachel Notley’s New Democratic Party government in 2018 (adding fast-healing TMJ dysfunction and minor psychological trauma to the list of capped injuries) and subsequently by Premier Jason Kenney’s United Conservative Party government in 2020 (adding clinically associated sequelae of minor soft tissue injuries to the cap).<sup>8</sup> In this paper, let’s take a look back at how Alberta’s MIR came into existence in the first place, as well as some of the fallout following the enactment of this “minor injury cap”.

The terrorist attacks of September 11, 2001 were tragic, causing significant loss of life. The events of 9/11 also had negative repercussions for the insurance industry, triggering depressed investment revenues and markedly increased reinsurance costs.<sup>9</sup> With profits plummeting, the consensus in the industry was that something had to change.

The Insurance Bureau of Canada is a trade organization representing about 95% of the private (non-government) property and casualty (home, auto and commercial) insurance companies in the country. In Alberta, IBC performed the curious dual role of acting as both the industry lobby group and as the Progressive Conservative

government’s service supplier for collecting and reporting auto insurance statistics.<sup>10</sup>

In September of 2001, Alberta IBC Vice President Jim Rivait<sup>11</sup>, a former executive assistant to two Alberta Progressive Conservative (PC) party cabinet ministers, attended a Canadian Bar Association (CBA) Insurance Law sub-section meeting in Edmonton. About 45 members of the sub-section attended the meeting, mostly insurance defence counsel, but also some plaintiff personal injury lawyers including myself. Mr. Rivait asked those assembled to bear with him, as he was not really an “insurance guy,” but rather had recently been hired by the insurance industry for his “expertise in government relations”. He explained that insurers had experienced significantly reduced profits of late, but had a plan to bounce back. The plan involved hiking auto insurance premiums quite substantially and sharply, and when policyholders called insurers to complain, they were to be told that injured accident victims were to blame, and that they should call their MLAs and ask what the government was going to do about “skyrocketing” bodily injury claims costs.

The following month, Mr. Rivait penned a letter to Patricia Nelson, complaining on behalf of auto insurers about what he termed the “blatant overcompensation” of insurance claimants.<sup>12</sup> Ten years prior, Mrs. Nelson (at that time a rookie MLA using the name “Pat Black”) had chaired a committee formed to consider auto insurance reforms, including a proposed \$10,000 deductible on plaintiffs’ personal

injury claims, in response to concerns raised by the Automobile Insurance Board, chaired at the time by Justice Al Wachowich (who later became CJQB). The scheme to slash victim compensation was shelved after a strongly worded response from CBA Insurance standing committee chairman Neil Wittmann KC (later Mr. Wachowich's successor as CJQB), who stated, "Bluntly put, that kind of a scheme expropriates an innocent victim's right to compensatory damages well rooted in the common law." Mr. Wittmann warned that "Across-the-board elimination of accident victims' rights of this sort may not be constitutional and if so, the legislation will not be upheld by the courts."<sup>13</sup> Very little came of the Black committee deliberations, but by October 2001, Pat Nelson was Alberta's rookie Minister of Finance, in charge of the government department responsible for insurance legislation

Under cover of his letter to Finance Minister Nelson, Mr. Rivait enclosed an October 9, 2001 document titled "Everyone Pays: Overcompensation in Alberta's Insurance Industry". According to that document, "Statistics continue to verify that 16 or 17 year old male drivers are four times more likely to have a claim than drivers over 25 years old. Correspondingly, insurance rates for 4 young male drivers are higher than for experienced drivers." The document outlined two areas of "significant cost pressure" to insurers and through them to policyholders, namely the Alberta government's health care levy and its insurance premium tax.<sup>14</sup> The health care levy and premium tax reportedly transfer nearly 350 million dollars per year from Albertans to their government.<sup>15</sup>

The document also stated, "Actuarial analysis by Exactor Insurance Services Inc. suggests that this year, total overcompensation costs incurred by Alberta's auto insurers will exceed \$133 million in 2001."<sup>16</sup> The document continued, "Our analysis indicates that there are five key areas contributing to overcompensation in the auto insurance system directly. Wage and income compensation. Collateral benefits. Future loss of earnings in fatality cases.

Structured settlements. Pre-judgement interest on non-pecuniary damages."<sup>17</sup> Notable by its absence from this list was general damages compensation for pain and suffering.

Evidently, Mr. Rivait's document was received favourably by the Alberta government, at least in relation to reductions in cost pressures that would not consequently diminish the flow of insurance cash to government coffers. In 2002, the government passed legislation severely reducing fatal accident victim compensation<sup>18</sup> and issued a December discussion paper requesting of interested parties immediate feedback on auto insurance reform proposals to change income loss recovery from gross to net and to eliminate "double recovery" of collateral benefits.<sup>19</sup>

On January 24, 2003, IBC responded enthusiastically to Alberta Finance's December 2002 request for stakeholder feedback on proposals to reduce income loss compensation for injured auto accident victims. Additionally, IBC complained about pain and suffering awards, stating that "insurers can pay \$15,000 to \$20,000 for pain and suffering from soft-tissue injuries to those involved in a low impact crash with minimal damage (under \$800 to their car). Those injuries are often hard, if not impossible, to detect and make up 70% to 80% of the bodily injury claims."<sup>20</sup>

However, any insinuation of rampant exaggeration on the part of Alberta auto insurance claimants appeared to be unsubstantiated. A self-described "ground-breaking independent study" commissioned by the Canadian Coalition Against Insurance Fraud (an IBC affiliate) reportedly found that Alberta home and auto insurers pay an estimated \$34 million annually for personal injury claims "that contain some form of fraud". CCAIF's February 11, 2002 "Media advisory" regarding the study failed to mention that even if all \$34 million worth of these allegedly tainted claims occurred in auto insurance, that figure would work out to less than 3% of the over \$1.2 billion in annual auto insurance claims costs.<sup>21</sup>

On March 3, 2003, IBC's Rivait participated in an insurance industry presentation to the Alberta government's Standing Policy Committee on Economic Development and Finance. The presentation alleged that auto insurers were losing money, and suggested that in a "Perfect World", premium revenues would match claims costs and operating expenses, leaving investment income as pure profit.<sup>22</sup> This resembled a statement made by IBC in its October 9, 2001 document: "Insurance companies have two main sources of revenue - insurance premiums and investment income. In a perfect world, what an insurance company collects today in insurance premiums should cover operating costs (including government premium taxes, health levies, and other taxes as well as the cost of combating fraud) and pay the claims made by policyholders and third parties."<sup>23</sup> To help insurers reach that "perfect world", the presenters urged the Alberta government to consider tort reforms relating not only to income loss and to collateral benefits, but to "pain & suffering awards on minor injuries".<sup>24</sup>

It is worth noting that in the 25 years from 1978 - 2002, the Canadian insurance industry had never visited this "perfect world". In each of those years, the industry posted underwriting losses, meaning that the cost of claims and operating expenses combined to exceed premium revenues. Yet in each and every one of those 25 years, the industry posted net, after-tax profits in the hundreds of millions of dollars, due to the revenues earned investing premiums and accumulated capital.<sup>25</sup> Nevertheless, the IBC in 2003 evidently considered it worthwhile to lobby for government intervention to reduce compensation payable by private insurance companies to injured traffic accident victims. The Alberta government proved very receptive to the insurance industry lobby efforts.

Three weeks after the insurance industry presentation to ED & F SPC, Alberta's PC government presented Bill 33 for first reading in the legislature.<sup>26</sup> Government MLA Tony Abbott explained the objectives of Bill 33 a month later when he introduced it for second reading: "one,

to eliminate the potential for double-dipping, or recovering compensation for the same expenses from more than one insurer and two, to ensure that income replacement awards are based on an individual's net versus gross pay."<sup>27</sup>

In response to Mr. Abbott's speech, Liberal MLA Laurie Blakeman appeared to express skepticism as to whether insurers really required government protection from injured claimants. Said Ms. Blakeman, "Yeah, those poor insurance companies standing on those cold street corners, clutching about them their tattered rags, their little noses running from the cold, and their cheeks gaunt from the lack of nutrition that they'd had. My goodness, I feel so bad about those insurance companies."<sup>28</sup> Despite, or perhaps because of, apparent skepticism on the opposition benches, a number of government MLAs were quick to stand in the Legislature and echo insurance lobby assertions of widespread fraud and skyrocketing injury claims. Edmonton PC MLA Gary Masyk stated, "The incentives of the tort system encourage accident victims to inflate their insurance claims above their actual losses in order to increase their damage awards. Mr. Speaker, it's noted at some point that when somebody gets in an accident, they open the glove box and there's already an inflatable neck collar. We have to discourage these things."<sup>29</sup> Mr. Masyk's caucus colleague Ian McClelland added, evidently unconstrained by the boundaries of truth, "At the same time that cars have been becoming more expensive and the number of accidents has increased and the cost of these repairs has remained constant, the cost of bodily injury has gone up 3,000 percent."<sup>30</sup>

The spring sitting of Alberta's Legislative Assembly concluded in May 2003 without Bill 33 being passed. However, it was clear that the government intended the changes outlined in the bill as merely a "first step" towards more comprehensive insurance reforms.<sup>31</sup>

On June 6, 2003, Premier Ralph Klein spoke with media on the issue of auto insurance reform. He declined to divulge specific details, but said "I can

tell you that some people are going to be mad, probably the personal injury lawyers might not be happy with what we recommend because it will affect their ability to litigate on behalf of their clients." The Premier expressed particular concern about high premiums charged to young male drivers.<sup>32</sup>

Any doubt that the Alberta government would make auto insurance reform an urgent priority disappeared on June 9, 2003, when Premier Bernard Lord's PC government nearly lost the New Brunswick election amidst voter discontent over skyrocketing car insurance premiums. Like the Klein government, Premier Lord's PCs held all but nine seats in their legislature going into the election. After coming within one seat of losing his majority, Premier Lord said "The insurance problem is not limited to New Brunswick. It's an issue in other provinces as well. And it may have an impact on other elections in Canada, too."<sup>33</sup>

The New Brunswick election results may have been foreshadowed by George Anderson, the then-immediate past president of the IBC. In an article for the February 2003 Canadian Insurance magazine, Anderson stated: "Our whole system of government has developed in recent years with a bias to respond to crisis and with a pronounced penchant for drift the rest of the time. In insurance, crisis can come in many forms for the industry, but only one matters to governments and that is how voters are reacting to the price of the product. Price increase is the burning platform of political action on automobile insurance. But it is not enough to know that prices are going up. What is really needed is a crisis in pricing on the eve of an election. That is the opportune time, or so it seems, for change."<sup>34</sup>

In Alberta, the government called upon Medicine Hat backbench MLA Rob Renner to oversee auto insurance changes. A year prior, Mr. Renner and IBC VP Jim Rivait had made presentations at a course in Jasper called "Changing Legislation and Lobbying Government."<sup>35</sup> Before that, Renner had ably steered through the Legislative Assembly changes to the Insurance Act, barring public insurance companies from other provinces from

competing against private insurers in Alberta.<sup>36</sup> Brent Rathgeber KC, now Chief Operating Officer of the Alberta Insurance Council but at the time an Edmonton backbench MLA, appeared to question his caucus colleague's impartiality, saying "the fact that Mr. Renner may have had some previous involvement on a file, that I'm assuming the insurance industry must have lobbied for, gives me some concern."<sup>37</sup>

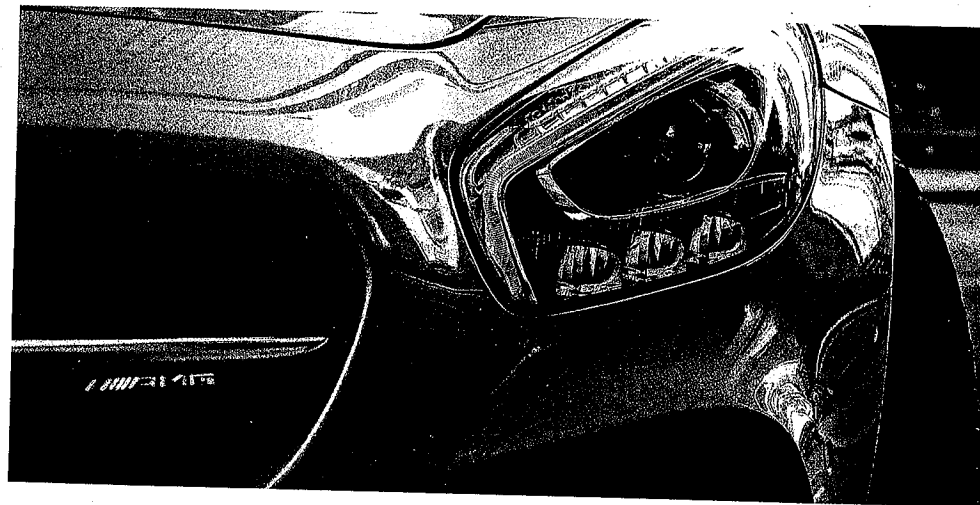
Mr. Renner, along with Alberta Superintendent of Insurance Dennis Gartner, conducted a whirlwind cross-Canada tour, meeting with various government and insurance industry officials in a number of provinces. Mr. Renner claims he quickly concluded that "unless non-pecuniary damages for soft-tissue injuries were controlled it would be impossible to get insurance costs, and therefore insurance premiums, under control."<sup>38</sup> It is questionable whether Mr. Renner came to this conclusion after a great deal of deliberation or after careful consideration of possible less intrusive means to bring premiums under control. Indeed, it has been reported that Mr. Renner took no minutes, no notes, and produced no written analysis either during or immediately after his whirlwind tour, so as to explain the logic underlying his conclusion.<sup>39</sup>

In late June 2003, with no plans to hold any public consultations on auto insurance, the Alberta government did quietly commission an Environics poll to gauge public opinion on possible auto insurance changes. Of 789 Albertans polled, 39 of them (5%) expressed support for a cap on injury settlements, and 7 people (nearly 1%) felt that the Alberta government should "get rid of" or at least imprison injury lawyers in order "to help insure fair automobile insurance rates." The survey also found that over 59% of Albertans supported adopting a government run automobile insurance system.<sup>40</sup> The poll results did not seem to support the government's auto insurance reform plans, and perhaps accordingly, the government declined to release the poll results to the public until after their insurance reform legislation was passed.

At the government's July 7, 2003 "Stampede caucus meeting" in Calgary, PC MLAs approved a recommendation that Alberta Finance develop a new regulatory framework that would quantify one's auto insurance premium on the basis of driving record and not age, gender or marital status.<sup>41</sup> Based on that very general policy direction from caucus, Alberta Finance quickly assembled an Auto Insurance Reform Implementation Team. Co-chairing the Team were Renner and Jack Donahue, a Calgary corporate lawyer and friend of Premier Klein. The other five members of the Team were Gregg Hanson, CEO of Wawanesa Insurance and Deputy Chair of the IBC; Nick Geer, CEO of Insurance Corporation of British Columbia; Alain Thibault, CEO of Meloche Monnex Insurance; Brian Kapusianyk, insurance defence lawyer with Gowlings law firm in Calgary; and Shelley Miller, insurance defence lawyer with Fraser Milner Casgrain in Edmonton.

Ms. Miller had particularly relevant auto insurance reform experience. In 1999, she oversaw changes in New South Wales, Australia, that resulted in the elimination of the pain and suffering compensation rights of over 90% of that jurisdiction's injured traffic accident victims, as well as nearly a \$7/month savings on the average NSW motorist's insurance premium.<sup>42</sup> "It was so much fun," said Miller of the process.<sup>43</sup> Miller noted: "The reform occurred over objections by executives of the Law Society and the Bar Association of NSW, who opposed further restriction of the rights of traffic injury victims to have the monetary value of their pain and suffering judicially determined. The reform also occurred without extensive evidence that awards for pain and suffering were too high for NSW traffic victims and did not effectively console injured persons, or that the price of the average motor accident insurance premium was prohibitive."<sup>44</sup>

PC MLA Brent Rathgeber expressed his concerns about the composition of the Team in an August 11, 2003 letter to Renner (later leaked to the media): "Where is the victims' advocate? Where is the consumers' rights advocate? I appreciate that the bureaucrats at the



Department of Finance have limited interest in an unbiased and objective analysis; however we as politicians MUST insist on objectivity and fairness both in process and result. I am concerned that the above team will achieve neither."<sup>45</sup>

Renner, a career florist prior to his election, reacted to the letter by branding Rathgeber as "uninformed".<sup>46</sup> Rathgeber had practiced personal injury and insurance law, including at McCourt Law Offices, for about 10 years prior to his election. Bureaucrat Jerry Bellikka, spokesperson for Finance Minister Nelson, added, "There's three lawyers on the team. Just because none of them run an I-Am-Hurt injury firm doesn't mean they don't know both sides of the business."<sup>47</sup>

Also on August 11, 2003, Alberta Finance hired KPMG to provide actuarial services in relation to insurance reform proposals. KPMG's report was not released to the public until December 2004. In its report, KPMG notes that in estimating costs savings that could be garnered by limiting injury awards, it relied on 2001 New Brunswick and Nova Scotia closed claims data in the absence of "recent claim data readily available for the Alberta auto insurance industry."<sup>48</sup> To its credit, KPMG acknowledged that the lack of claims data provided by Alberta auto insurers was a "major" limitation to the usefulness of its conclusions.<sup>49</sup> Interestingly, KPMG's report also revealed that Alberta Finance asked it to estimate costs savings for eleven different insurance reform scenarios, all eleven contemplating reduction in pain and suffering awards

for so-called "minor" injuries, by way of either a compensation cap or a deductible payable by the injured victim.<sup>50</sup> Consistent with the government's disinterest in considering less intrusive means to stabilize or reduce premiums, KPMG was not asked to consider costs savings alternatives other than reducing pain and suffering compensation to injured accident victims.

Around the same time that the government was hiring KPMG, the Canadian Bar Association (Alberta Branch) was retaining Gordon Smith of the accounting firm Deloitte & Touche to analyze Alberta auto insurance premium and claim statistics. According to then-CBA (AB) President Don Higa, "The Deloitte report concluded that automobile insurance premium increases of 57% in the last 18 months in Alberta were not being driven by bodily injury claims. In fact, the Deloitte report stated that bodily injury claims costs (per vehicle) have been falling since 1999."<sup>51</sup> However, to the astonishment of the CBA, Deloitte withdrew the report within hours of it being released in September 2003. It was only years later, long after the insurance reforms had been implemented, that an investigation by the Institute of Chartered Accountants of Alberta revealed that Deloitte had wrongfully withdrawn the report for fear of losing millions of dollars of insurance industry business, after receiving an email from the IBC warning "I know that Mr. Smith's efforts have caused some of your clients to question why they should stay with you."<sup>52</sup>

On September 10, 2003, IBC ran a full page newspaper advertisement in the Edmonton Sun stating, "In Alberta, claims costs amount to 74.6% of premium revenues."<sup>53</sup> This was a noteworthy admission, considering that IBC had previously admitted that Alberta auto insurer operating expenses were 25% of premium revenues.<sup>54</sup> In short, the Alberta auto insurance industry had reached its self-styled "Perfect World", where premiums meet or exceed claims costs and operating expenses, leaving investment revenue as pure profit. And the destination had been reached without a cap on pain and suffering compensation. September 2003 also saw the release of an auto insurance reform "Alert" from economist Dr. Mark Mullins on behalf of the Fraser Institute. Dr. Mullins observed that the odds of dying in a car crash are 30 times higher for people 15 - 24 years of age than for the rest of the population.<sup>55</sup> Dr. Mullins concluded that provinces that resort to "social risk pricing", i.e., artificially reducing premiums payable by high-risk young male drivers, suffer sharp increases in accidents involving young people. Said Mullins, "The unintended costs of mispricing risk are more deaths, injuries, and property damage, especially for young drivers."<sup>56</sup>

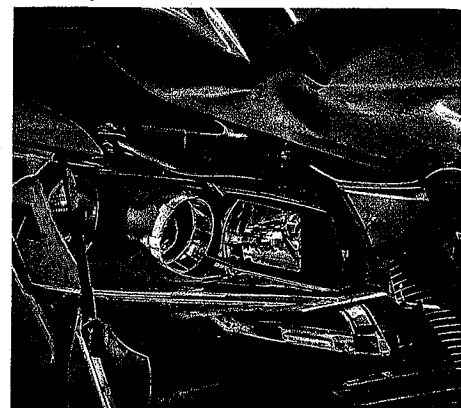
Dr. Mullins was echoing concerns raised by IBC a year prior. In an article titled "False Kindness", IBC noted, "Inappropriate regulations can have terrible consequences. One disturbing example involves interventions in some parts of Canada to artificially lower the price of insurance for young drivers. This tragic social experiment has contributed to thousands of additional traffic fatalities and hundreds of thousands of preventable injuries over the past quarter decade. Insurers strive to set prices that reflect the risk of providing coverage. Young drivers are up to three times more likely to be at fault in a motor vehicle collision and so their cost of insurance is higher. Young male drivers have the highest collision rates, so they should pay more for insurance to offset their higher level of risk."<sup>57</sup>

Be that as it may, Edmonton Sun columnist Neil Waugh concisely outlined

Alberta Finance's theory of the "advantage" of introducing social risk pricing as part of its insurance reform package. Said Waugh, "all you have to do is click on the Saskatchewan Government Insurance home page to see just how much better the Saskatchewan Advantage is and why thousands of former Saskatchewan residents continue to run green and white licence plates on their vehicles, make the trek home on Thanksgiving long enough to eat turkey with their folks and renew their insurance. Why not? An 18-year-old called Troy driving a 2002 Ford Taurus with one accident and a \$500 deductible pays a crushing \$6885 a year in Calgary under Ralph Klein's wonderful government-mandated insurance system. His equivalent, Ryan, in Saskatoon, pays only \$1270."<sup>58</sup> According to Brent Rathgeber, it was a "standing joke" amongst Mrs. Nelson's caucus colleagues that she was quite amenable to a rights for rates swap, sacrificing the rights of injured claimants in exchange for reduced rates for "Troy".<sup>59</sup>

On October 15, 2003, Rob Renner presented his Team's recommendations to the ED & F SPC. Renner recommended passage of Bill 33, which his Team estimated would reduce claims costs by \$63 million per year. He also recommended increasing the Section B medical expense limit from \$10,000 to \$50,000, which he estimated would increase costs by \$27 million per year. And most notably, he recommended a \$4,000 cap on pain and suffering compensation for non-catastrophic injuries, which he estimated would reduce claims costs by \$214 million per year. According to Mr. Renner, KPMG's analysis was that these three auto insurance reforms would result in net claims costs savings of approximately a quarter of a billion dollars per year.<sup>60</sup>

Under Mr. Renner's proposal, auto accident injuries that would not be subject to the \$4,000 cap included death, quadriplegia, paraplegia, serious traumatic brain injury, limb amputation, internal organ injury, fracture to the spine or to a weight-bearing bone, third degree burns, loss of one or more of the five senses, TMJ dysfunction, fibromyalgia, chronic pain



syndrome, or any other physical injury likely to result in permanent disfigurement or permanent impairment of an important bodily function that substantially interferes with a person's ability to perform that person's usual daily activities or regular employment.<sup>61</sup>

Mr. Renner's proposal was strongly backed by ED & F SPC member Pat Nelson, but was fiercely opposed by ED & F SPC member Brent Rathgeber, who said, "We have to look for different solutions. I think it's fundamentally wrong to lump people with injuries into arbitrary categories." Mr. Rathgeber suggested that the government consider less intrusive means to reduce claims costs and insurer expenses, such as scrapping the premium tax and/or emulating the solution accepted years ago in Victoria, Australia.<sup>62</sup> In 1989, Victoria, an Australian province comparable to Alberta in population, decided to markedly increase public spending on traffic safety initiatives from \$2 million per year (about what Alberta spends)<sup>63</sup> to around \$22 million per year. From 1989 - 1992, Victoria invested approximately \$88 million in traffic safety, and saw a \$968 million reduction in claims costs, an 11 - 1 return on investment. According to Dr. Nigel Waters, a University of Calgary professor, "Victoria became acknowledged as a world leader in traffic safety. Collisions dropped 22 percent, fatalities 44 percent (776 to 396) and injuries 37 percent during four years."<sup>64</sup>

The October 15 SPC meeting was adjourned to October 27, 2003 for further discussion and a possible vote. Between the two meetings, University

of Alberta torts professor Lewis Klar (who subsequently sat for a time on the Auto Insurance Rate Board) expressed his opposition to the proposed cap, saying, "Why would you want to penalize accident victims who have already been hurt? There is no reason to do that, except the myth that they have been taking advantage of the system, which I don't think has been demonstrated."<sup>65</sup> However, the Alberta government website maintained that a \$4,000 compensation cap "is necessary to reduce costs to the auto insurance system, in order to bring down premiums."<sup>66</sup>

On October 26, 2003, an article by influential newspaper columnist Danielle Smith (who at the time of writing this article appears to be the frontrunner in the race to replace Jason Kenney as UCP leader and Premier of Alberta) appeared in the Calgary Herald. Stated Smith, "If you believe Nelson, the reason Alberta needs insurance reform at all is because a bunch of summer students are being refused jobs by companies that don't want to pay astronomical premiums to let them drive the company truck. If you believe Nelson's critics, it's because her own son was hit with an eye-bugging insurance rate

increase in recent years." Smith scoffed at claims by Finance Minister Nelson and lawyer Jack Donahue that the cap would only apply to "minor strains and sprains", and questioned whether the cap would violate the equality rights provisions set out in section 15 of the Charter of Rights and Freedoms. She wondered why the government was not considering less intrusive means to stabilize and reduce premiums, such as numerous suggestions put forward by the grassroots lobby group Accident Victims/ Insurance Policyholders Advocate (AVIPA). Concluded Smith, "The province can use whatever terminology it wants to try and sell this scheme, but it still stinks. If insurance reform is going to work for regular Albertans, preserving the rights and interests of victims must be the starting point."<sup>67</sup>

At the October 27, 2003 SPC meeting, Finance Minister Nelson put forward the Renner - Donahue Team's proposals as a Ministerial Recommendation (MR) and called a vote. Of 33 government MLAs present at the meeting, 16 voted in favor of the MR, and 17 (including Rathgeber) voted against it. On the front page of the Edmonton Journal the following day

under the headline, "Fictional victim helps fell Tory Goliath", journalist Graham Thomson wrote, "Even Goliath didn't go down this hard. Finance Minister Pat Nelson's plan for reforming Alberta's auto insurance industry was toppled with the help of a seven-year-old accident victim named Rebecca. To add insult to injury, Rebecca isn't even real. Neither was her accident. She is a fictional character in an ad campaign presented by a lobby group run by personal injury lawyers, the Accident Victims/Insurance Policyholders Advocate or AVIPA." Thomson concluded, "Finance Minister Nelson must be especially worried. She just got clobbered by a seven-year-old girl."<sup>68</sup> On October 29, 2003, IBC submitted a revised insurance reform proposal to the Alberta government, dropping its demand for a pain and suffering compensation cap. The proposal suggested that "Stabilization of premiums can be accomplished through the following changes to the Tort and Claims environment", and went on to list ten items including passage of Bill 33, elimination of pre-judgment interest, waiver of Schedule C costs on claims settled at the adjuster level, mandatory mediation on request of either party at six months post accident or later, a freeze

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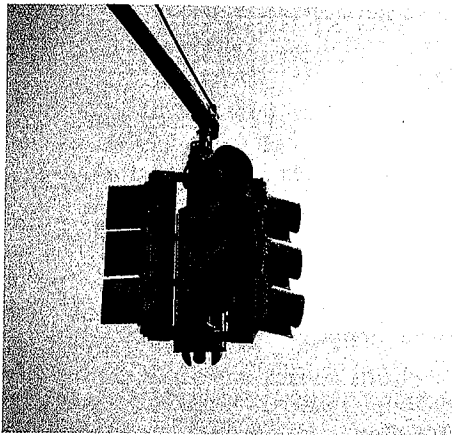
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The next day, under the headline "Insurers back off injury-claim cap", the Edmonton Sun reported, "The auto insurance industry completed a dramatic U-turn on the road to reform yesterday by dropping demands for a cap on injury claims. 'They could have a cap and it could be worthless,' said Insurance Bureau of Canada regional vice-president Jim Rivait, after submitting a new proposal to the Alberta government, minus any mention of a cap. 'It's not in the proposal because I don't think the government will be able to do it. If they manage to do it, it will be watered down.' Rivait has repeatedly called on the government to introduce a cap on claims, saying injury-related lawsuits are to blame for skyrocketing premiums. The government's reform implementation team, led by Medicine Hat Tory MLA Rob Renner, proposed a \$4,000 cap after heavy lobbying from the industry. But Renner's proposal was voted down by Tory MLAs earlier this week, amid concerns over the cap."<sup>70</sup>

The Accident Victims/Insurance Policyholders Advocate immediately voiced its tacit support for the revised IBC plan. As founder of and counsel for AVIPA, I stated, "If you get rid of that \$4,000 cap, I think there is substantial consensus for solutions."<sup>71</sup> I added, "It is almost unthinkable a plan enjoying

such consensus and support would be unsatisfactory to the government."<sup>72</sup> With the insurance lobby scrapping its cap demands, the government had a golden opportunity to exercise sober second thought, to switch gears on the road to Alberta auto insurance reform. However, Premier Klein had other thoughts, announcing a premium freeze on October 30, 2003 and expressing frustration that his Finance Minister's proposal had been defeated at the SPC meeting earlier that week. "I'd like to see this thing resolved as quickly as possible," said Klein, adding that "hopefully we'll have this thing resolved by the end of the year."<sup>73</sup> Brent Rathgeber later remarked that "freezing premiums at all time highs and regulating payouts by capping injury awards was going to be a solution to nothing. But logic is no match for pure political brute force."<sup>74</sup>

In November 2003, a joint proposal of AVIPA, the Alberta Civil Trial Lawyers Association (ACTLA), the Canadian Bar Association (Alberta branch) and the Fight for Right Coalition was submitted to government. The proposal quoted John Crosbie, former Justice Minister and Attorney General of Canada, who said, "Why should we, because of concern about the mounting cost of automobile insurance premiums, accept a solution that restricts the rights of innocent third parties to be compensated for the pain and suffering they experienced because of the fault or carelessness of a motorist? Surely, we, as a feeling and informed and thinking society can do better than that!" The joint proposal outlined 25 alternative means to reform auto insurance and rein in premiums rather than capping the pain and suffering compensation of innocent victims injured in Alberta traffic accidents.<sup>75</sup>

By this point, however, the government was preparing for the fall sitting of the Legislature and neither the Premier nor the Finance Department were in any mood to consider changing course. IBC's revised reform proposal was dismissed summarily, and there is no evidence that the joint proposal of AVIPA, ACTLA, the CBA and Fight for Right Coalition was considered at all.

Instead, the Alberta government opted to proceed with its \$4,000 cap, albeit abandoning the exclusionary "serious injuries" list proposed at the October SPC meetings. In a press release dated November 19, 2003, the government said, "A compensation limit of \$4000 will be introduced, but only on minor sprains and strains, as defined by medical experts and only for pain and suffering."<sup>76</sup> Said Mr. Renner, "There was commitment made on my part that we would have a clear understanding of what is meant by minor injury, that being sprains and strains, the kind of injury the average man on the street would clearly understand as a minor injury."<sup>77</sup>

Despite Renner's commitment, orthopedic specialist Dr. Guy LaVoie expressed his serious reservations in a letter dated November 27, 2003, which read, "As a physician, I am troubled by the reports that a task force of insurance industry representatives would like the government to impose reductions on the amount that private insurance companies pay victims of vehicle collisions. I treat patients suffering from soft tissue injuries most every day. Some have what the man on the street would consider a 'minor sprain and strain', i.e., an injury that resolves within a few weeks. Many others only recover after several months of treatment, and a significant number never fully recover from their injuries. In my opinion, it would be folly to depart from the current norm, which is to treat each patient as an individual, on a case by case basis, rather than trying to lump them into an arbitrary funding category or rigid treatment protocol. What these changes could do for my patients is deeply concerning to me and I urge these representatives to reconsider their impending action."<sup>78</sup>

Bill 53, the Insurance Amendment Act 2003 (No. 2), subsumed Bill 33, the proposed legislation introduced but not passed in the spring sitting. Bill 53 was rushed through all three readings and royal assent between November 24 - December 4, 2003. In the legislature, Premier Klein explained, "Where the discrepancy lies is in the extraordinary amount that young drivers with good driving records are paying and older drivers are paying and

also as it relates to younger drivers, young males in particular. What we want to do is deal with that complaint mostly.”<sup>79</sup> PC backbench MLA Jon Lord added that “profiting from accidents is what has been the big concern of everyone for some time now. We have people who get rear-ended and then wind up suing for hundreds of thousands of dollars for what many would consider questionable injuries. This is something that is proving absolutely disastrous to the industry as payments are becoming larger and larger, and that’s driving up premiums, no pun intended.”<sup>80</sup> Finance Minister Nelson concluded, “We have not taken access to the courts away from anyone that’s involved in an automobile accident. What we have done, though, is put a cap on for what we call minor strains and sprains, and we’ve put that in place to do a number of things. One is to keep costs down but also to process claims on a quicker basis.”<sup>81</sup>

In fact, Bill 53 was for the most part a piece of enabling legislation with scant content, designed to allow the Finance Minister to pass the actual details of auto insurance reforms relating to “minor” injuries in subsequent regulations when and as she deemed appropriate, in consultation with her cabinet colleagues.<sup>82</sup> With the passage of Bill 53, section 597 of the Insurance Act now says that the Lieutenant Governor in Council (effectively the responsible Minister with approval of cabinet) may make regulations defining what constitutes a “minor” auto accident injury and capping (or limiting by way of a deductible) non-pecuniary damages compensation for minor injuries.<sup>83</sup>

The government’s tactic, of passing skeleton legislation and leaving the flesh to regulations that can be formulated and passed without debate and behind closed doors, attracted criticism from perhaps an unlikely source. On December 15, 2003, Thompson’s Insurance News reported that it had obtained a copy of a “strongly-worded” letter from Dominion Insurance CEO George Cooke to the Alberta government. The letter expressed doubt that most Albertans would see rate reprieve as a result of the insurance reforms. “The letter said also the Bill

ought to offend the legislature and hence the people of Alberta. It appears to transfer all the authority for reform to cabinet, deferring accountability to a future time.”<sup>84</sup>

Arguably, the government’s reaction to Mr. Cooke’s letter was illustrative of its general attentiveness to insurer concerns. According to Finance Minister Nelson, “On November 5 Mr. Cooke did in fact write to the Premier. We responded. On November 11 the Deputy Minister of Finance along with the Assistant Deputy Minister of Finance met with Mr. Cooke and the other Insurance Bureau of Canada representatives in Toronto. On November 25 there was a letter from Mr. Cooke that went to the Deputy Minister of Finance. On November 27 the Deputy Minister of Finance and the assistant deputy met with Mr. Cooke and, again, other IBC representatives in Toronto. On December 11 and 12, Mr. Speaker, the Deputy Minister of Finance and the ADM of Finance met with Mr. Cooke again in Toronto. On December 16 the Assistant Deputy Minister of Finance met with the IBC representatives. On December 19 I personally met with the IBC representatives.”<sup>85</sup>

By Order in Council on January 26, 2004, Finance Minister Nelson proclaimed into force the auto insurance reforms eliminating “double recovery” and many subrogated claims, as well as changing income loss recovery from gross to net.<sup>86</sup>

In mid-March 2004, it was revealed that the Canadian insurance industry had posted all-time record high profits for 2003, a total of about \$2.63 billion (up from the industry’s 2002 profit figure of \$340 million).<sup>87</sup> In the Maritimes, where all four PC governments had also intervened at the auto insurance industry’s request to reduce pain and suffering compensation, provincial politicians expressed shock and chagrin. For example, an angry Nova Scotia Insurance Minister Ron Russell said, “Last year I was being told that 2003 was going to be a disastrous year for the insurance industry... they were an industry teetering on the edge of bankruptcy.”<sup>88</sup> But the Alberta government appeared unconcerned. Said

Mr. Renner, “We came to the conclusion the market was not operating effectively in a competitive marketplace, and it was necessary for government to step in and do some regulation. That, I think, is more critical and more important than worrying about if someone made a profit or not.”<sup>89</sup>

Not only were insurance industry investment profits up sharply, the industry also posted an underwriting profit, something it had not done in any of the previous 25 years. IBC VP Jim Rivait even conceded that the 2003 “auto loss ratio” in Alberta was 71.4%, resulting in underwriting profit in the Alberta auto insurance industry.<sup>90</sup> Evidently, the industry had reached and comfortably settled into the “Perfect World” prior to implementation of any of Mrs. Nelson’s insurance reforms.

It had become evident that insurance lobby assertions of skyrocketing bodily injury claims and an industry in crisis were, to borrow a phrase from philosopher Harry Frankfurt, “not germane to the enterprise of describing reality.” Alberta auto insurance premiums certainly had skyrocketed, boosted into the stratosphere with the help of Alberta’s Auto Insurance Board, appointed by the Finance Minister. From 2001 - 2003; the Board approved 412 of 418 insurer rate increase applications.<sup>91</sup> According to Statistics Canada, Alberta auto insurance premiums spiked 57% from December 2001 - December 2002.<sup>92</sup> But as for bodily injury claims, they were actually decreasing. According to IBC data, the average injury claim payout in Alberta dropped from \$20,108 in 2001 to \$19,500 in 2002.<sup>93</sup> Injury claims frequency rates were in sharp decline from 1999-2004.<sup>94</sup> And bodily injury claims costs per insured vehicle in Alberta dropped from \$419 in 1999 to \$400 in 2003 to \$325 in 2004, continuing to plummet all the way down to \$154 in 2010.<sup>95</sup>

In short, by the spring of 2004, it was abundantly evident that the insurance industry had manufactured a crisis, spiking rates not to match injury claims costs (which in fact were going the other way), but rather for two reasons: one, to create an atmosphere conducive to

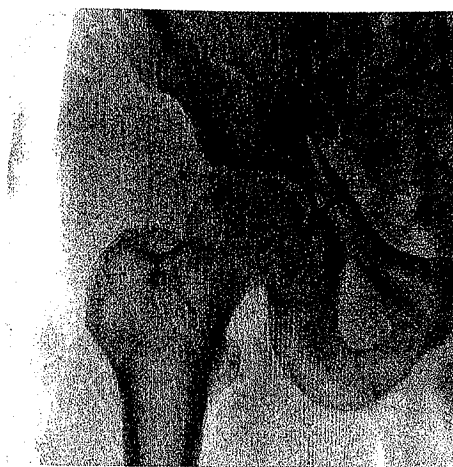


their efforts to lobby the government for tort reforms, and two, simply to make exponentially higher profits than the industry had historically enjoyed. Faced with mounting evidence that a soft-tissue injury cap was completely unnecessary, a government concerned with accountability might have decided not to implement such a cap. But in Alberta, where elections have seen the Conservative party of the day (be it PC or UCP) lose just once in over 50 years, accountability is not nearly the consideration it might be in most democracies.

Premier Klein succinctly stated the impetus for his government's insurance reforms in a statement in the Legislative Assembly on March 29, 2004: "If the truth be known, the whole government initiative relative to insurances was launched because of the concerns of small businesses, particularly those who use vehicles, plumbing outfits and welding outfits, and those involved in apprenticeship programs. Basically there were a number of complaints to this government that these small businesses couldn't hire people between the ages of 16 and 25 because their insurance rates would go sky high. So we took action. We took very definitive and very positive action to make it illegal for insurance companies to penalize good male drivers between the ages of 16 and 25, whereas under the old rules those people were penalized simply because they were between the ages of 16 and 25 and because they were male."<sup>96</sup>

However, Fraser Institute economist Dr. Mark Mullins repeated his concerns about government intervention to subsidize young male drivers' insurance rates: "The evidence is pretty clear here that when you...misprice risk you tend to get too many of these risky people on the road. I would say if I were to do a study in five or 10 years in Alberta, I would probably see a noticeable increase in the number of collisions."<sup>97</sup>

Throughout the Legislative Assembly's 2004 session, which ended in May, Premier Klein defended the government's insurance reforms in Question Period. On April 22, 2004, Liberal MLA Hugh



MacDonald asked, "given that this cap is a huge financial break for the insurance industry, which has recently posted record windfall profits, how much money will the \$4,000 cap save the insurance industry at the expense of innocent accident victims in this province?" The Premier responded, "Mr. Speaker, could I pose a question to the hon. member? Is he deaf or just stupid?" After hearing from the Speaker that no, he could not pose a question, let alone one so inappropriate, the Premier replied, "I'm sorry, Mr. Speaker. I'm sorry for calling the member stupid and deaf."<sup>98</sup>

A couple of weeks later, in response to a question on auto insurance reform from NDP MLA Brian Mason, Mr. Klein replied, "I look forward to the absolute annihilation and elimination of this individual in the next election."<sup>99</sup> And a couple of days after that, in response to a question from Official Opposition Leader Dr. Kevin Taft, the Premier explained his opposition to public auto insurance, stating, "maybe the hon. member will explain to the media outside the House - I know he won't here - how he plans to dismantle all of the insurance companies that exist here in Alberta and say: with the great hand of government the Liberals will now socialize all insurance. It sounds like Allende in Chile, you know, when he took over all the copper mines and said: the Americans are out; the government now owns all the copper mines, all the minerals, all the resources, all the mining, all the newspapers. Pinochet came in, Mr. Speaker - and I'm not saying that Pinochet was any better, but because of the only elected communist in Chile, Allende, and the socialist reforms he put in, Pinochet

was forced, I would say, to mount a coup. As a dictator he was no better than Allende. Of course, the debate still goes on. All you need to do is go on the web site. As a matter of fact, I did a paper on it, and I'll give it to you."<sup>100</sup>

On May 12, 2004, Finance Minister Nelson appeared before the Public Accounts Committee and commented, "I have two groups that are warring, the injury lawyers on one side and the insurance companies on the other side. If both of those are equally mad at me, then I must be doing something right for the consumer in the middle."<sup>101</sup> However, the Consumers' Association of Canada disputed Mrs. Nelson's logic and conclusion, stating in a May 25, 2004 press release: "Last year Statistics Canada reported auto insurance rates in Alberta increased by 50%. This past week the Alberta Government announced its solution to these massive price increases. The Government announced it would roll back auto insurance rates by 5% and cap benefits for innocent victims of car crashes." Said CAC President Bruce Cran, "The Alberta Government is trying to spin its announcement as good news for consumers. The reality is that it is bad news for consumers. The Government needs to design a solution beneficial to consumers and crash victims."<sup>102</sup>

Also on May 25, 2004, Drs. Michael Freeman and Christopher Centeno of the US-based Spinal Injury Foundation provided written comments in relation to a leaked draft of the government's definition of so-called "minor" injuries to be subjected to a \$4,000 cap. Understanding the minor injury definition to be a sprain, strain or minor whiplash "that is expected to recover with prompt diagnosis and treatment and results in no serious ongoing impairment that substantially interferes with the ability to perform: a) essential activities of regular employment, occupation or profession, b) essential activities of training or education, or c) normal activities of daily living",<sup>103</sup> Drs. Freeman and Centeno wrote: "Is the above definition of a 'minor sprain or strain' appropriate or does the above definition include much more serious injuries (moderate, serious and/or permanent)?"



Response: The definition is highly inappropriate, and makes assumptions that are not medically, scientifically, or logically valid."<sup>104</sup>

The PC caucus met on May 27, 2004, to approve or reject Minister Nelson's proposed insurance reform regulations. MLA Rathgeber again led opposition to the cap, joined by his Edmonton caucus colleague Thomas Lukaszuk and others. Rathgeber argued that the contrived insurance "crisis" had been exposed as a scam, that capping pain and suffering compensation was unfair and unnecessary, and that the government should merely exercise its regulatory power to bring down artificially inflated premiums on compulsory auto insurance. The proposed cap was defeated in a close vote that morning, but Mrs. Nelson requested a lunch break and another vote in the afternoon. Rathgeber replied, "Are we going to keep having periods until you win?" After lunch, PC MLAs who had been opposing the cap in the morning were reading from prepared scripts praising the proposed reforms. The afternoon vote was not close. "I got the crap kicked out of me," said Rathgeber. "Some calls were made over the lunch hour, and I don't know who talked to whom, but everybody folded."<sup>105</sup>

In a letter dated July 19, 2004, Finance Minister Nelson wrote, "As I have always said, the cap only applies to minor injuries that heal relatively quickly." After consultation with Dr. Larry Ohlhauser and others, Mrs. Nelson added, "The reasoning behind the regulation is based on medical science showing that with fast, effective treatment, about 90 per cent of people with minor injuries will recover

within 12 weeks." This pronouncement was consistent with numerous previous letters signed by Mrs. Nelson (including one in June of 2004 to Alberta Civil Trial Lawyers Association member Joe Nagy) succinctly explaining with unmistakable clarity the very limited scope of the Minor Injury Regulation.

Effective October 1, 2004, the Minor Injury Regulation capped at \$4,000 general damages compensation for certain sprains, strains, or Grade I or II whiplash associated disorders. IBC VP Jim Rivait erroneously predicted that this definition would be broad enough to cap at least 85% of those persons injured by negligent drivers in Alberta.<sup>106</sup> The government estimated that the cap would reduce claims costs by \$200 million per year, most of which would be distributed, in the form of premium reductions, to "the young drivers and the drivers who don't have a particularly good record", according to Rob Renner.<sup>107</sup>

Having succeeded in her crusade to cap victim compensation and reduce premiums for the young and the reckless, Patricia Nelson promptly retired from politics, declining to run in the November 2004 provincial election (an election in which the ruling PC party lost about a third of its popular vote, but still won handily). The following spring, the Klein government passed legislation granting cabinet ministers (and former cabinet ministers) immunity from any lawsuits arising out of the "reform" regulations.<sup>108</sup>

As 2004 came to a close, IBC VP Jim Rivait seemed extremely pleased with the new insurance reforms. The December 24, 2004 Edmonton Sun reported, "The changes limit soft-tissue injury payouts to \$4,000 while making it easier for higher-risk drivers to get affordable coverage. 'Many companies are (seeing more clients) and brokers will also tell you they have all kinds of new business,' said Jim Rivait of the Insurance Bureau of Canada. Lower rates for some higher-risk motorists and for people who couldn't afford coverage are reasons for the boom, he said. 'Companies are taking business they never, ever could before,' said Rivait."<sup>109</sup>

The insurance industry, which was reaping

record-high profits even before the cap was implemented, went on to enjoy even higher profit figures. On February 18, 2005, Canada's P & C insurers announced a \$4.2 billion profit for 2004, three quarters of which pre-dated the implementation of the \$4,000 cap. Not only did that profit figure eclipse the all-time record high profit of \$2.63 billion set in 2003, it in fact exceeded the profit totals of all of 2001 (\$465 million), 2002 (\$340 million) and 2003 combined. I was quoted in the Edmonton Sun the following day: "I don't begrudge an industry turning a profit, but this is an industry that was pleading poverty and successfully begging the Klein government for legislative protection from innocent injury victims. And now we find out insurance companies in fact were raking in record profits and laughing all the way to the bank."<sup>110</sup>

Edmonton Sun columnist Paul Stanway (who later became Premier Ed Stelmach's communications director) said, "I've given up trying to figure out how or why the free-enterprise Klein Tories got involved in setting auto insurance rates. It began as a personal crusade by former provincial treasurer Pat Nelson to get a better deal for Alberta's young drivers (she had one at home at the time), developed into a controversial \$4,000 cap on personal injury claims, and somehow morphed into a promise by the premier to bring our rates into line with those levied by public insurers in the other western provinces."<sup>111</sup> And Calgary Herald columnist Tom Olsen (who later became CEO of Premier Kenney's infamous Energy "War Room") wrote, "The whole thing started a couple of years ago when former Finance Minister Pat Nelson decided she was fed up with the crazy rates young people (like her son) were forced to pay... If Canada's insurers continue to post exorbitant profits while denying consumers meaningful price breaks, the provincial government will have no choice but to lower premiums. And scrap the cap."<sup>112</sup>

Profits hit \$6.5 billion in 2005.<sup>113</sup> On February 11, 2008, Statistics Canada reported that Canada's P & C insurance industry profit in 2006 was \$7.7 billion.<sup>114</sup> Compared to the 2002 profit figure of \$340 million, that represents over a 2000% increase in four years. On June

16, 2008, the CBA released an Economica report which proved conclusively that Alberta's automobile insurance industry was profitable before the cap was implemented, that bodily injury claims were not spiking, and that profits from 2003 - 2006 went through the roof, averaging \$368 million per year, an astronomical 25% return after tax. The CBA's Tom Achtymichuk KC succinctly stated the obvious conclusion: "Even with no cap on damages, the auto insurance industry would still earn reasonable profits."<sup>115</sup>

On November 3, 2008, Superintendent of Insurance Dennis Gartner released his Annual Report for 2007, showing that Alberta auto insurers enjoyed a 61.3% auto loss ratio on premiums of about \$2.979 billion over claims of about \$1.825 billion.<sup>116</sup> Consider that in March 2003, insurance lobbyist Jim Rivait had described to an Alberta government Standing Policy Committee the insurance industry's ideal "Perfect World", where premiums collected would match claims and expenses paid, leaving investment income as pure profit. On a 25% expense ratio, Mr. Rivait explained that the auto loss ratio in an insurance industry "Perfect World" would therefore be 75%.

And, in a presentation to Alberta's Auto Insurance Rate Board on June 17, 2009, Mr. Rivait advised the Board that in 2008, Alberta auto insurers wrote \$3.2 billion in premiums and paid out \$1.8 billion in claims.<sup>117</sup> That represents an all-time low 56.25% auto loss ratio, all the more astonishing considering that throughout 11 of 12 months in 2008, Alberta auto insurers were operating under the "burden" of an unfavorable court ruling respecting the constitutional validity of the so-called "Minor" Injury Regulation. Consider that in 2008, Alberta auto insurers could have paid out an additional \$600 million in claims costs (three times what the cap was supposed to save insurers on an annual basis), and they still would have achieved their 75% "Perfect World" auto loss ratio. Evidently, any notion that a compensation cap on victim pain and suffering compensation was needed to keep premiums in check in Alberta has been thoroughly discredited

by the insurance industry's own statistics.

Apart from insurance companies, which reaped all-time high windfall profits, the biggest beneficiaries of Alberta's 2004 insurance "reforms" were reckless drivers. No less an authority than lobby group/government stats provider IBC admits on its website, "bad drivers are now paying much less than they should. Good drivers, on the other hand, are paying quite a bit more than they should."<sup>118</sup> In its submission to the Automobile Insurance Rate Board in 2006, the Facility Association pointed out that underage drivers with two at-fault accidents in the previous three years had seen rate reductions of over 80% as a result of the regulations passed in 2004 by Finance Minister Patricia Nelson.<sup>119</sup> Not surprisingly, traffic accident fatality rates in Alberta spiked by over 20% in the year following implementation of the "reforms".<sup>120</sup> On July 27, 2009, Alberta Transportation confirmed that traffic collisions in the province increased, both in absolute numbers and on a per-capita basis, each and every year from 2004 to 2008.<sup>121</sup>

To conclude, what injuries are captured by the MIR? Is chronic pain capped? As Minister Nelson "always said", and despite amendments by the Notley and Kenney administrations, the minor injury cap indeed only applies to minor soft tissue injuries that heal relatively quickly. Section 4(2) of the MIR says that "the determination as to whether an injury is a sprain, strain or WAD injury must be based on an individual assessment of the claimant in accordance with the diagnostic protocols established under the Diagnostic

and Treatment Protocols Regulation." Both the original and updated (effective July 1, 2014) DTPR mandate reference to the International Classification of Diseases, which recognizes chronic pain (defined by the ICD-10 as pain lasting longer than three months post-accident) as a different diagnosis than a minor sprain, strain or whiplash injury. Notably, while the earlier version of the DTPR also referred to the Scientific Monograph of the Quebec Task Force on Whiplash Associated Disorders: Redefining "Whiplash" and Its Management (which defined chronic pain as pain persisting six months post injury), the updated DTPR (O.C. 239/2014 A.R. 116/2014) quite purposefully removed reference to this 1995 QTF study. Evidently, an initially diagnosed acute traumatic sprain, strain or whiplash-associated disorder that does not resolve pain-free by three months post-accident (or certainly within six months) by definition evolves into chronic pain, a different medical condition which is more serious than and distinct from an MIR defined minor, capped injury. In short, as a matter of law, chronic pain and suffering compensation is not capped under the MIR.

The Alberta Court of Appeal ruled unanimously in *Morrow v. Zhang*<sup>122</sup> that chronic pain "is a more serious condition than the MIR defined injury." The Court of Appeal in *Morrow* referred to the Supreme Court's ruling in *Martin v. Nova Scotia*<sup>123</sup> in which chronic pain was defined in the judgment's opening paragraph as "pain that persists beyond the normal healing time for the underlying injury". Mr. Martin's back sprain was diagnosed as having evolved into chronic pain six months later. The Supreme Court of Canada held unanimously that legislation which denies a chronic pain sufferer such as Mr. Martin benefits enjoyed by other injured claimants is an unconstitutional breach of the equality rights provisions of section 15 of the Canadian Charter of Rights and Freedoms. Leave to appeal the *Morrow* decision was denied by the Supreme Court in December 2009.

Therefore, and consistent with the intent of the drafters, Alberta courts are legally bound to conclude that the



minor injury cap on pain and suffering compensation does not (and, in order to be constitutionally valid, must not) apply to soft tissue injuries that evolve into chronic pain, i.e., pain that persists over three to six months post-accident despite proper therapeutic treatment under the protocols. Thus, in *Sparrowhawk v. Zapoltinsky* 124, the Court confirmed that the cap does not apply to soft tissue injuries that cause the injured person serious impairment, ongoing pain or discomfort while engaging in a normal activity of daily living. The *Sparrowhawk* decision was not appealed, and subsequently the Alberta Court of Appeal commented favourably on the *Sparrowhawk* ruling in *Benc v. Parker* 125. Thereafter, the learned trial judge in the cases of *McLean v. Parmar* 126 and *Jones v. Stepanenko* 127 ended any lingering doubt on the matter, correctly ruling that pain lasting longer than three to six months post-accident is by definition "chronic pain" and therefore is clearly not a minor injury under the MIR and not capped.

## ENDNOTES

About the author: Edmonton injury lawyer Mark McCourt, founder of McCourt Law Offices and the now-defunct Accident Victims/Insurance Policyholders Advocate, was recognized in 2004 by Alberta Venture magazine as one of the province's 50 most influential people, as a result of his leading role in opposing the Alberta government's tort "reform" initiatives, particularly the cap on pain and suffering compensation.

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100. "Legislative Assembly Minutes", Alberta Hansard, May 6, 2004, p. 1291. In his book *Democracy Derailed* (Red Deer Press, 2007), Dr. Taft recounted how Mr. Klein followed up on his bizarre remark by indeed publicly releasing his term paper (for a course he was taking through Athabasca University), triggering public controversy over whether the paper was plagiarized, followed by simultaneous letters to the editors of major Alberta newspapers by the Presidents of the University of Alberta and University of Calgary defending the Premier and praising his "commitment to lifelong learning". It didn't take long for the newspapers to find out that the letters were submitted at the request of the PC government. Remarkably Dr. Taft at page 19 of his aptly-named book "This affair provided an unusually public display of how political power in Alberta now works."
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124. Sparrowhawk v. Zapoltinsky 2012 ABQB 34.
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126. McLean v. Parmar 2015 ABQB 62.
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