From: McCourt Law Offices <mccourtlaw@shaw.ca>
Subject: Fair Alberta Injury Regulations
Date: November 1, 2019 at 9:00 AM MDT
To: Premier Jason Kenney, UCP MLAs

Memo to Premier Jason Kenney and UCP Caucus

Recently, UCP MLAs became aware that civil servants had teamed up with a thief in his lawsuit against an Alberta farmer he was trying to rob -- and put an end to that presumably well-meaning but plainly impolitic alliance with all speed. Now, amply financed auto insurance industry lobbyists are quietly courting their trusty old TB & F bureaucrat buddies behind closed doors, angling for a government bailout in the form of unfair, unnecessary and unconservative regulations to further erode the legal rights of ordinary Albertans -- and it's time to blow the whistle on that cozy collaboration.

For over a quarter of a century, I've advocated for vulnerable Albertans (mostly women and children) victimized by impaired and/or reckless drivers, working hard to ensure that those Albertans are not revictimized by the corporations that insure those wrongdoers. I am a lifelong Albertan who trusts that you too will stand up for severely normal Albertans currently under odious attack by well-connected backroom lobbyists.

Links to my October blog posts on this important issue:

https://www.mccourtlaw.ca/b/the-minor-injury-regulation-15-years-later-time-to-cut-the-crap-and-scrap-the-cap

https://www.mccourtlaw.ca/b/sorry-insurance-lobbyists-but-the-alberta-government-has-better-things-to-do-

https://www.mccourtlaw.ca/b/clarity-from-an-innocent-injured-alberta-auto-accident-victim--concussions-ptsd-and-chronic-pain-are-not-minor-matters

As I mention in the last of those blog posts, surely the key factor in considering whether or not to pass any "Clare's Law" is this: will the proposed legislation or regulation help or hurt good people like Clare? [Hint: if the proposed regulatory change would hurt good people like Clare, that would be immoral and you should oppose it.] Will you be watchdogs protecting Albertans, or insurance lobby lapdogs? Please read the blog posts (and attached backgrounder) at your earliest opportunity -- and then decide where you'll stand. Thank you for your kind attention to this matter.

Sincerely,
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Sprains, Strains and Automobiles: It's Time for our UCP Government to Scrap the Cap

The *Minor Injury Regulation* O.C. 272/2004 A.R. 123/2004 and its companion, the *Diagnostic & Treatment Protocols Regulation* O.C. 271/2004 A.R. 122/2004, were passed by the Lieutenant Governor in Council on recommendation by Progressive Conservative Finance Minister Patricia Nelson on June 21, 2004, and came into force on October 1, 2004. These regulations were enacted under the authority of Bill 53, the *Insurance Amendment Act 2003 (No. 2)*, which sprinted from first reading in the Alberta Legislative Assembly through to royal assent between November 24 - December 4, 2003. The *MIR* imposes on certain injured victims of negligent drivers a cap (initially $4000, adjusted annually for inflation since 2007) on their entitlement to compensation for their pain and suffering.

Neither PC Premier Ralph Klein nor Finance Minister Nelson, who was the Minister responsible for the *Insurance Act* and regulations thereunder, participated in the legislative debates on Bill 53, a bill described by New Democratic Party MLA Brian Mason during second reading on November 26, 2003 (Alberta Hansard, p. 1926): "It's interesting that this bill follows the same sort of pattern that we've seen increasingly from this government, and that is what we call a framework bill. It has a legislative framework that allows all of the serious and important content of the bill to be established by regulation. That is, it doesn't come to this Assembly, it's not debated in public, the opposition doesn't get to speak about it, and it is just determined by the cabinet. This is a real trend here, and this bill, not to disappoint, gives the Conservative government a blank cheque to finalize its auto insurance reforms behind the closed door of the Tory caucus in the cabinet room. All major planks in the reforms will be decided behind closed doors through regulation. For example, the definition of what will constitute a minor injury, section 650.1(1), will be defined in regulation. Even the $4,000 cap on minor injuries is not contained in the legislation itself."

Backbench PC MLA Rob Renner, who co-chaired (with Calgary lawyer Jack Donahue) the Auto Insurance Reform Implementation Team and shepherded Bill 53 through the Legislature, stated during second reading (Alberta Hansard, p. 1854): "I want to spend a little bit of time talking about the proposed $4,000 cap on compensation for pain and suffering. I want to emphasize that it applies only to minor injuries, and the definition of minor injuries is well along, Mr. Speaker. Dr. Larry Ohlhauser has been working with a number of significant stakeholders: the health professions that are involved with treating injury victims. He's also had consultation with the insurers as well as the legal community and is working towards a consensus, not necessarily

unanimous but a consensus position, on exactly how we intend to define minor injury. I understand that he has advised that he's making significant progress in that task and should be back shortly with his final consensus recommendations that the government will then move forward through regulation. I want to emphasize that the proposed changes do not in any way restrict an individual's ability to sue an at-fault party for injuries that they sustained in an automobile accident, but if the injury is determined to be minor, there will be a $4,000 cap."

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 succinctly explaining with unmistakable clarity the very limited scope of the *Minor Injury Regulation*.

Filed affidavits sworn in April 2006 by Rob Renner, Jack Donahue and Larry Ohlhauser in *Morrow* v. *Zhang* (Alberta Court Action # 0401-17808, the constitutional challenge to the *Minor Injury Regulation*) evidently confirm the government's intention that the minor injury compensation cap only cover fast healing whiplash/sprains/strains. Their affidavits offer a glimpse at the behind closed doors development of the "minor injury" definition in the *MIR*.

Mr. Renner, Mr. Donahue and Dr. Ohlhauser swear that the working definition began as an exclusionary list of serious injuries that *wouldn't* be capped, enumerating non-capped injuries such as paraplegia, serious brain injury, bone fractures, TMJ dysfunction and chronic pain. That proposal was voted down on October 27, 2003 by the PC Standing Policy Committee, which ordered Mr. Renner to go back to the drawing board and narrow the definition to "truly minor injuries, that is, those generally understood by the average person as being truly minor". Next up for discussion was soft tissue injuries that heal within 18 months, but Dr. Ohlhauser advised the Implementation Team and PC Standing Policy Committee that this was far too long a time frame, "in that these injuries generally resolved much faster than this." In support, Dr. Ohlhauser cited comprehensive evidence-informed practical medical studies proving that the maximum normal recovery time for 90% of WAD I/II/sprain/strain sufferers with proper treatment is 12 weeks. With that as a basis, SPC consequently approved the proposed minor injury cap, which was soon thereafter ratified by the PC cabinet, becoming part of the insurance reform regulations (the *MIR* and *DTPR*). Mr. Donahue swears that cabinet approval was secured in part on the strength of a Finance Department Briefing Note which stated very clearly: **"Minor sprains and strains" that heal relatively quickly will be the only injuries subject to a cap on pain and suffering.**

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) has 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, and entirely in accordance with the intent of the government in passing the regulation, chronic pain and suffering compensation is <u>not</u> capped under the *MIR*.

The Alberta Court of Appeal ruled unanimously in *Morrow* v. *Zhang* 2009 ABCA 215 at paragraph 85 that chronic pain "is a more serious condition than the *MIR* defined injury." The Court of Appeal in *Morrow* referred to *Martin* v. *Nova Scotia WCB* 2003 SCC 54, 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, <u>in order to be constitutionally valid, must not</u>) apply to soft tissue injuries that evolve into chronic pain, ie., pain that persists over three to six months post-accident despite proper therapeutic treatment under the protocols. Thus, in *Sparrowhawk* v. *Zapoltinsky* 2012 ABQB 34, the Court confirmed that TMJ/dental injuries are not capped, and nor are 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* 2012 ABCA 249.

More recently, the learned trial judge in the cases of *McLean* v. *Parmar* 2015 ABQB 62 and *Jones* v. *Stepanenko* 2016 ABQB 295 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 quite obviously is NOT capped.

The *Minor Injury Regulation* was implemented fifteen years ago after a persistent and powerful insurance lobby alleged that PC government intervention was urgently required to end industry losses caused by skyrocketing bodily injury claims. However, it has long been a matter of record that these insurance lobby allegations were demonstrably and notoriously false.

In reality, the insurance industry earned all-time high profits ($2.63B) in 2003, a record broken ($4.2B) in '04, and again ($6.5B) in '05. By 2006, the industry's $7.7B profit was over 2000% higher than profit figures for 2002 ($340M). Furthermore, Alberta's Automobile Insurance Rate Board confirms that bodily injury claims actually were *in sharp decline* from 1999 to 2004, prior to enactment of the injury cap. Between 2002 and 2004, when the insurance lobby was alleging skyrocketing injury claims, in fact the bodily injury payout in Alberta per insured vehicle dropped from $441 in 2002 to $400 in 2003 to $325 in 2004. This precipitous decline, which predated the cap by years, has of course continued post-cap, all the way down to $154 in 2010, a 65% reduction in payouts to injured auto accident victims as compared to 2002. It is incontrovertibly apparent that Tory tort deforms were very lucrative for insurers but extremely costly for many thousands of innocent Albertans injured by negligent or impaired drivers. These facts, available to all on the AIRB website, put the lie to any assertions that the cap is or ever was necessary. Put bluntly, it seems evident that insurer "sky is falling" claims tend to be similar in substance to what Minister Toews likely cleaned off the bottom of his boots before Budget Day.

While monetary compensation for innocent Albertans victimized by reckless or drunk drivers evidently has plummeted, and insurance industry profit has increased twentyfold, there has been a small inflationary uptick in insurance rates for the average Alberta motorist because of a relatively sharp hike in unregulated non-compulsory auto insurance coverage. In 2002, the average compulsory premium was $691, and the average overall auto insurance premium was $1018 (including $327 for optional coverage, primarily collision coverage). By 2010, the basic premium had dropped 16.75% (a far cry from the 65% drop in bodily injury payouts) to $575, but the overall premium cost had jumped to $1081, because of a 54.75% increase in optional coverage (up to $506). Therefore, given that the vast majority of Alberta motorists carry collision coverage, most Albertans have seen a modest increase in their premiums, even though their compulsory rates have been marginally reduced and their compensatory pain and suffering benefits have been quite substantially reduced. The AIRB ably illustrated this fact in their 2010

Annual Report, noting that between 2005 and 2009, during which time the board directed a reduction in compulsory premiums from $639 down to $605 (-$34), insurance companies responded by hiking optional premiums from $384 up to $488 (+$104). In short, for every dollar that the AIRB reduced compulsory rates, insurers merely upped the optional premiums by a little over three times as much. After years of foot dragging, Alberta Finance finally implemented regulatory changes effective July 1, 2014 to allow the AIRB some input over the setting of premiums for non-compulsory auto insurance products.

The cap was set to expire last year, but Rachel Notley's NDP quietly eliminated the expiry date in a decision made behind closed doors without any legislative debate whatsoever. Adding insult to injury, the NDP government also added severely normal Albertans with certain TMJ (jaw joint) and psychological injuries to the list of car crash victims subject to an insurance compensation cap. Considering that the NDP vocally opposed the cap when their PC predecessors introduced it, Nötley Crüe's decision to favor the multi-billion dollar insurance industry over vulnerable Alberta automobile insurance consumers smacks of rank hypocrisy.

Alberta's UCP government has an opportunity to review the *MIR* and, it is submitted, come to the inescapable conclusion that this regulation was enacted in error by its PC predecessors. Let's be clear: the insurance lobby secured the injury cap in 2004 by misleading the Alberta government about both the industry's profit situation and bodily injury claims trends. The combination of other auto insurance reforms, traffic safety initiatives (which may well be responsible for the steady decrease in Alberta motor vehicle accidents and MVA injuries over the past several years) and windfall insurance industry profits positions Premier Jason Kenney's government to repeal the minor injury cap while maintaining stable insurance rates for good Alberta motorists, who at present heavily subsidize the rates of careless drivers.

Despite overwhelming evidence that the *MIR* is unnecessary, the fact of the matter is that for far too many years, the path between the Alberta Finance and insurance lobby offices has been short, yet well worn. With that repugnant reality in mind, it is respectfully submitted that in the event that the lavishly financed insurance lobby somehow persuades the Alberta government to keep the cap, careful consideration should be given to amending the minor injury definition in the *MIR* so as to expressly confirm that the cap applies only to WAD I/II/sprain/strain injuries which heal relatively quickly, and *not* to other physical and psychological injuries such as TMJ dysfunction, concussions, PTSD and chronic pain (pain that persists for more than 90 days post-accident despite proper protocols treatment). This housekeeping amendment would be entirely consistent with both the clearly articulated legislative intent and with judicial interpretation of the *MIR*, and probably wouldn't even be worth considering but for the NDP's asinine amendment last year as

well as the unfortunate fact that negligent motorists' insurance companies commonly and intentionally continue to advise innocent injured auto accident victims that the cap covers injuries far more substantial than minor injuries which heal relatively quickly. As a result, it is well established that too many injured Albertans with longer lasting injuries are being forced either to accept the woefully inadequate minor injury cap compensation for their pain and suffering, or else face several years of costly and time-consuming litigation.

Further, if the provincial government's *MIR* review does not result in the repeal of the minor injury cap, then a significant upward adjustment in the amount of the cap is recommended, perhaps in the $7,500 to $10,000 range, indexed for inflation. If the cap applies not only to claimants whose soft tissue injuries fully resolve by the end of the 90 day protocols period, but even to car crash victims who do not completely heal until six months post-accident, then the current maximum of $5202 in pain and suffering compensation is less than fair -- keeping in mind, of course, that not all minor injury sufferers are entitled to the full cap.

In conducting a review of Alberta's *MIR*, our government undoubtedly will carefully consider reviews conducted in other non-socialist provinces over the past several years. Three other PC governments (in Nova Scotia, New Brunswick and Prince Edward Island) implemented minor injury caps around the same time that Alberta's PC government did. Since then, Nova Scotia reviewed its minor injury cap in 2010 and tripled the amount of the cap from $2500 to $7500, indexed for inflation. In 2013, New Brunswick followed Nova Scotia's lead and did the same. And on October 1, 2014, PEI followed suit, tripling the cap from $2500 to $7500, indexed for inflation, and amending PEI's "minor injury" definition so as to reduce the number of injured PEI motor vehicle accident victims subject to that cap. Our province certainly could opt for the role of follower, better late than never, but I suggest that instead, **Alberta's United Conservative Party government show some bold leadership and at long last, scrap the compensation cap!**

About the author: Edmonton injury lawyer Mark McCourt, the founder of McCourt Law Offices and the long-defunct Accident Victims/Insurance Policyholders Advocate, was recognized in 2004 by *Alberta Venture* magazine as one of our province's 50 most influential people as a result of his leading role in opposing the Alberta government's tort "reform" initiatives, specifically the cap on victim pain and suffering compensation. For further reading on this subject, please see Mr. McCourt's 2009, 2010 and 2011 written submissions to the Automobile Insurance Rate Board, available on the AIRB's website:

https://airb.alberta.ca/industry-information/annual-review/2011/written-mccourt-law-offices.pdf
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