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The *Minor Injury Regulation* Ten Years Later: Can we scrap the cap already?

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 exactly a decade ago, on October 1, 2004. These regulations were enacted under government Bill 53, the *Insurance Amendment Act 2003 (No. 2)*. Many Albertans including media commentators and even government caucus members criticized the legislation -- and particularly, the minor injury cap -- as unjustly and unnecessarily revictimizing innocent injured auto accident victims. For example, Calgary Herald columnist Danielle Smith (currently Alberta's Leader of Her Majesty's Loyal Opposition) wrote, "The province should drop all proposals to cap compensation" and concluded, "If insurance reform is going to work for regular Albertans, preserving the rights and interests of victims must be the starting point." PC MLA Brent Rathgeber QC (ever the maverick, now an independent Member of Parliament and the author of a new book titled *Irresponsible Government*) added that "regulating payouts by capping injury awards was going to be a solution to nothing. But logic is no match for political brute force." Despite (or perhaps due to) the strong criticism, Bill 53 sprinted from first reading in Alberta's Legislative Assembly through to Royal Assent in ten days, between November 24 - December 4, 2003.

Neither PC Premier Ralph Klein nor Finance Minister Nelson, who was the Minister responsible for the *Insurance Act* and regulations thereunder, bothered to participate in the legislative debates on Bill 53, a bill accurately 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, the career florist who co-chaired (with Calgary lawyer and “friend of Ralph” 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 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* (Action # 0401-17808, the constitutional challenge to the *MIR*) 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. 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 by the PC Standing Policy Committee on October 27, 2003, 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 told 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 healing time for 90% of WAD I/II/sprain/strain sufferers with proper treatment is 12 weeks. On that basis, SPC approved the proposed minor injury cap, which was soon thereafter approved by 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: **"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 removed reference to this 1995 QTF study. Clearly, 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 not part of an *MIR* defined minor, capped injury. In short, as a matter of law, chronic pain is not 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 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 *Morrow* was denied by the Supreme Court in December 2009.

Therefore, and consistent with the intent of the drafters, Alberta courts evidently are 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, ie., pain that persists over three to six months post-accident

despite proper therapeutic treatment under the protocols. And indeed, in the case of *Sparrowhawk v. Zapoltinsky* 2012 ABQB 34, the Court confirmed (consistent with the clear intent of those who drafted the *MIR*) that TMJ/dental injuries are not capped, and nor are any soft tissue injuries that cause the injured person ongoing pain or discomfort while engaging in a normal activity of daily living. The *Sparrowhawk* decision was not appealed, and subsequently the Court of Appeal commented favorably on the learned trial judge's reasoning in *Sparrowhawk* in the case of *Benc v. Parker* 2012 ABCA 249.

The *Minor Injury Regulation* was implemented ten years ago after a persistent and powerful insurance lobby alleged that PC government intervention was needed 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 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. Clearly, Tory tort reforms have been lucrative for insurers but costly for victims. These are the facts, available to all on the AIRB website, and put the lie to assertions that the cap is or ever was needed.

While compensation for innocent victims of reckless drivers clearly has plummeted, and insurance industry profit has increased twentyfold, there has been a small inflationary uptick in insurance rates for the average Alberta motorist, due to 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 in 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 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 substantially reduced. The AIRB 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 to \$605 (-\$34), insurers responded by hiking optional premiums from \$384 to \$488 (+\$104). In short, for every dollar the AIRB reduced compulsory rates, insurers merely upped the optional premiums by over three times as much. After years of foot dragging, Alberta Finance finally implemented regulatory changes effective July 1, 2014 to allow some AIRB input over the setting of rates for non-compulsory auto insurance products.

The *MIR* originally was set to expire on September 30, 2011, but in March of that year, Finance Minister Lloyd Snelgrove quietly amended the expiry date to 2016 in a decision made behind closed doors, without public consultation, legislative debate or even discussion in PC caucus. In October 2011, Alison Redford became Premier, ushering in welcome discussion about reviewing the *MIR* sooner rather than later, in response to valid concerns about fairness. However, like most of Premier Redford's promises during her embarrassing reign of error, when all was said and done, more was said than done.

Regarding premiers, the PC government has embraced the sage advice of Mark Twain: "Politicians and diapers should be changed often, and for the same reason." In less than eight years, we have changed from Premier Klein to Stelmach to Redford to Hancock to our new Premier Jim Prentice, anointed by PC party members last month in an unsurprising, uninspiring first ballot coronation. The New Boss/Same As The Old Boss is promising to rectify the errors of the "previous regime", hopeful that a plurality of Albertans lacking the good sense to heed Mr. Twain's wise words will fail to grasp that the *same regime* has held uninterrupted, absolute power in Alberta for over forty-three years, longer than any other provincial or federal governing party in Canadian history. As Lord Acton said, "Power tends to corrupt, and absolute power corrupts absolutely."

If Mr. Prentice really wants to address mistakes made by this putrefied governing party, it is respectfully submitted that the *MIR* is a prime example of a regulation enacted in error. The insurance lobby secured the injury cap by misleading our 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 five years) and windfall insurance industry profits position Premier Prentice's PC 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.

When one considers the powerful insurance lobby's influence and the PC government's unblemished track record of favoring the interests of multi-billion dollar corporations over those of severely normal Albertans, let's face it: if the Prentice PCs opt not to repeal the *MIR*, while some will be appalled, few will be shocked. But at the very least, this government should amend the minor injury definition so as to expressly clarify that the

cap applies only to WAD I/II/sprain/strain injuries which heal relatively quickly, and *not* to other injuries such as TMJ dysfunction or chronic pain (pain persisting more than 90 days post-accident despite proper treatment). This housekeeping amendment obviously would be fully consistent with both the government's clearly stated legislative intent and with judicial interpretation of the *MIR*, and would probably not even be necessary but for the unfortunate fact that negligent motorists' insurance companies commonly and intentionally continue to advise injured claimants 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 a review of the *MIR* does not result in the repeal of the minor injury cap, a significant upward adjustment in the amount of the cap is recommended, perhaps in the \$7,500 to \$12,500 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 claimants who do not completely heal until six months post-accident, the current maximum of \$4777 in pain and suffering compensation is less than fair -- keeping in mind, of course, that not all minor injury victims are entitled to the full cap.

In conducting a review of Alberta's *MIR*, our government undoubtedly will carefully consider recent reviews conducted in other provinces. Three other provinces (Nova Scotia, New Brunswick and Prince Edward Island) implemented minor injury caps around the same time that Alberta did. Since then, Nova Scotia's government reviewed its minor injury cap in 2010 and tripled the amount of the cap from \$2500 to \$7500, indexed for inflation. Effective July 1, 2013, the PC government of New Brunswick followed Nova Scotia's lead and did the same. Effective today, PEI has 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. Alberta could take the role of follower, better late than never, or **our provincial government could show some bold leadership -- and scrap the 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 the 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. Mark McCourt also proudly serves as the President of Herbert Patrotage Holdings Inc. See also: www.airb.alberta.ca/public_meetings/2011/written-mccourt-law-offices.pdf