McCOURT LAW OFFICES BARRISTERS & SOLICITORS
17404 - 108 AVENUE EDMONTON, ALBERTA T5S 1E8 mccourtlaw@shaw.ca MARK McCOURT PROFESSIONAL CORPORATION
PHONE 780 448-0011 **TOLL FREE** 1-877-448-0011 **FAX** 780 448-0040 MARILYN A. BURNS J. DANIEL BROMLEY

March 2020

Via e-mail

Auto Insurance Advisory Committee

Attention: Chairman Chris Daniel, Shelley Miller Q.C. and Dr. Larry Ohlhauser

Dear TBF-AIAC:

Re: Alberta Auto Insurance Review

I appreciate the invitation to present to this Committee, although I am concerned that a TBF decision to urge the provincial government to further corrupt MVA tort law is pre-ordained, notwithstanding bureaucratic assurances that "no decisions have been made." This concern is founded upon a number of factors, including comments by the TBF Minister in the legislature that tend to parrot insurance lobby talking points, the fact that the main insurance lobbyists on this file have intimate past connections to the current Premier, the fact that a leaked report commissioned by TBF and penned by a former IBC actuary apparently recommends gutting tort law while further raising auto insurance rates, the fact that this Committee's online push poll clearly and falsely insinuated that Albertans must choose between existing tort rights and no-fault benefits, and frankly, the lopsided composition of the Committee itself. Had the TBF Minister chosen to create some balance on the Committee by appointing (in addition to the medical expert) a victims' rights advocate to counter-balance the presence of noted no-fault proponent/insurance defence lawyer Shelley Miller on the Committee, perhaps I would be significantly less concerned that this panel's planned proposals are not already largely a fait accompli. Notably, less than a month before the AIRB Consumer Representative was chosen to chair this Committee, the former ACTLA president holding that Consumer Representative post resigned from that position (and from the AIRB altogether after nearly nine years of service). Some who care about the fair compensation rights of innocent injured auto accident victims might consider this a series of unfortunate events, to say the least. That said, undoubtedly the TBF bureaucracy will want to be able to show Albertans the appearance of a fair hearing by AIAC of viewpoints by stakeholders on both (or more) sides of this issue, so here we go.

Briefly by way of background, the Committee is well aware that insurance is a cyclical business typically punctuated by years of windfall profits occasionally interrupted by what the industry refers to as hard markets. In the 25 years from 1978 to 2002, the Canadian P&C industry posted 25 consecutive years of underwriting losses and yet 25 consecutive years of annual profit in the hundreds of millions of dollars, because historically, insurers make their money <u>not</u> by collecting more in premiums than they pay out in claims and operating expenses, but rather by investing premiums and accumulated capital (this perhaps is akin to media outlets which depend far more on advertising revenue than on subscriptions for profit). Post 9-11, however, it occurred to insurers (especially in auto) that an effective way to vastly increase profit would be to rate shock policyholders while weaving tall tales of skyrocketing injury claims, thereby bamboozling irate policyholders into assisting insurance lobby efforts to persuade pliable

politicians to slash victim compensation rights. This scheme worked well for insurers in Alberta in 2003-04 (as Ms. Miller and Dr. Ohlhauser, who were involved in those "reforms" back then, know well). Despite injury claims actually declining from 1999 to 2004, and despite insurers raking in all-time record high profits including unprecedented underwriting profits (all the while telling government officials that the industry was teetering on the brink of bankruptcy), Finance Minister Pat Nelson refused to let these facts get in the way of her crusade to deliver to insurers a minor injury cap in exchange for (temporarily) reduced rates for the young and the reckless. Presumably the immediate 20% hike in MVA fatalities in Alberta the following year was "acceptable collateral damage."

Here we are in 2020, and what's old is new again. Insurance lobbyists once again are keen to paint a picture of an industry in ongoing crisis due to rising claims and falling profits, when it is clear that insurers in fact are exiting that nasty hard market, that BI claims are in decline and that profits are on the rise. Insurers and consumers now enjoy an excellent mix of fair tort rights and generous accident benefits for a reasonable yet profitable price and will continue to do so, so long as the government does not come in and break what evidently has already been fixed.

Nevertheless, here are some ideas for the Committee's careful consideration:

1. Allow insurers to sell consumers optional excess Section B coverage, just as insurers currently are able to make available to policyholders optional Section C coverage and optional excess Section A coverage, and require insurers to notify Alberta Registry Services when a motorist's policy lapses so that the proper authorities can be alerted that the motorist may be driving uninsured.

2. Bring PJI on generals in line with the interest rate on pecuniary damages. This move alone would return insurers to their "perfect world" 75% claims ratio.

3. Increase Schedule "C" costs by 60% to account for over two decades of inflation and to discourage needlessly protracted litigation, and waive Schedule "C" costs for claims resolved at the adjuster level. Increased Schedule "C" costs, used in conjunction with the Formal Offer process, would obviously be an effective way of reducing litigation costs. Of course, with mandatory ADR, the number of claims that make it to trial are minuscule as it is, and accordingly Alberta auto insurer litigation costs are a fraction of what they are for example in Ontario (a private market hybrid no-fault jurisdiction with severe tort restrictions and yet - go figure! - higher premiums than in Alberta).

4. Round down to $5,000.00 and de-index the *MIR* cap on minor sprains and strains that heal relatively quickly, i.e. within about 12 weeks with proper treatment under the *DTPR*.

5. Enact a compulsory 25% contributory negligence reduction for failure to wear a seatbelt.

6. As we know, bodily injury frequency, severity and costs per insured vehicle are all dropping. However, further traffic safety initiatives would help this trend continue. I suggest increased enforcement and penalties for distracted driving, and mandating the use of winter tires from November to March (at least until global warming renders them unnecessary).

7. The *DTPR* already has the tools to help the vast majority of injured auto accident victims recover more quickly. However, insurers rarely utilize an injury management consultant to assist in this recovery. I recommend that Dr. Ohlhauser be retained to advise insurers and health professionals how to better utilize the IMC tool.

8. Auto insurers in Alberta were more frugal with operating expenses pre-*MIR* (in the 22% ratio range in '02 and '03), but have become more spendthrift in recent times. To assist insurers in getting their operating expenses closer to the 20% range, government should scrap the premium tax (as Jack Mintz has been advising for decades) and insurers should slash brokerage commissions by a third. I note that the always helpful "non-profit" IBAA (whose CEO fails to mention in that group's submission to you that brokerage employees in Alberta are highest paid in the nation) suggests (on behalf of the consumer, or so George says) that innocent Albertans should have their tort rights confiscated, corrupted and then perhaps sold back to them if they still want them. It's unclear how pedestrians and passengers (mostly women and children) are supposed to buy back their rights in this creepy scenario. Here's a better idea: make all drivers carry mandatory minimum liability insurance so that if they recklessly hurt someone, that injured victim can be fully and fairly compensated by the bad driver's insurer, and give every policyholder the option of purchasing excess liability insurance as well as coverage (call it SEF44) so that if an underinsured motorist hurts you, your own insurer will top up your compensation if necessary. Sound familiar, like the status quo? Yeah: if it ain't broke, don't fix it.

9. Insurers like to plead poverty and beg for government protection from injured claimants whenever the claims ratio creeps over 75%. In years where the ratio drops below that figure (for example in the decade from 2003 to 2012, when the ratio was in the 60s or even 50s in 80% of those years), the insurance industry could be assessed a levy to confiscate those windfall profits to refund consumers or be put in a fund to further compensate innocent victims of reckless drivers. We could call it the MVA Claims Fund (unless of course that name is already taken). Perhaps that step should be enacted retroactive to January 1, 2003.

10. In 2003, the Klein government quietly commissioned 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. 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 and regulations were implemented the following year. For now, let's grant insurers relief pursuant to some of my ideas (I think the first five or six are particularly excellent) on the proviso that if the government ever, ever hears an insurance lobbyist whine for yet more government intervention to protect this multi-billion dollar industry from injured Albertans, the province will boot private insurers and their well fed lobbyists all the way to Ontario and replace them with one public insurer (or at least allow ATB to sell the standard auto policy as well to keep the other competitors honest).

Ms. Miller will note that not one of these suggestions involves banning or further regulating plaintiff lawyer contingency agreements. Of course, that's because contingency agreements actually discourage frivolous litigation. An injury lawyer who is paid a percentage of recovery is not likely to take a claim where the recovery will probably be negligible. And undoubtedly while I do not have to explain the following to you, it seems that some politicians and perhaps even the IBAA don't get that injured claimants have the burden of proof. No proof, no recovery, no plaintiff counsel fee if that lawyer was hired pursuant to a contingency agreement. Also, any contention that contingency arrangements aren't already strictly regulated is patently false. If anything, the rules governing contingency agreements are stringent to a fault. The Alberta Rules of Court mandate that legal bills be reasonable, and reviewable by the taxation officer upon the client's request. The taxation officer has the power to reduce the legal fee. Contingency agreements must be in writing and must expressly advise the client of the right to tax the bill. The bill must do likewise. Contingency agreements must also expressly permit the client to void the agreement without any fees being payable, within five days of the client receiving a copy of agreement. Of course, the agreement must be fully explained to the client, and the client must sign the agreement. The firm entering into the contingency agreement must swear affidavits confirming that the client signed and received a copy of the agreement. As Ms. Miller is aware, insurance defence counsel, collecting their fees win or lose on an hourly basis, are subject to far fewer restrictions. And while we are on the subject, Ms. Miller is also well aware, as the Committee's resident legal expert, that contingency fees add NOT ONE RED CENT to injury claims costs and insurer expenses. Not once has an adjuster or a defence lawyer or a judge, in determining compensation payable to an injured claimant, grossed up the figure payable to that injured person to take into account the contingent fee payable to plaintiff counsel. If the former insurance defence lawyer on this Committee is musing about recommending a reduction in lawyers' fees to save "poor, malnourished" auto insurance companies money, then a cap on insurance defence counsel hourly rates would make more sense. On the other hand, perhaps better still would be to leave well enough alone and let the free enterprise market operate.

It is clear from my previous e-mail correspondence and the numerous links therein, all of which forms part of my submission, that I have been giving Alberta auto insurance much thought and study since the turn of the millennium if not for a good decade earlier than that (albeit advocating from the innocent victim perspective, as opposed to, for example, Ms. Miller's and perhaps Mr. Daniel's insurer perspective). I hope the concerns outlined at the beginning of this letter are unfounded, and that in fact TBF-AIAC will, after careful review and consideration of all the material (including links to documents) that I have provided, advise our Alberta Conservative government that, thanks to a number of factors including the stabilization and indeed recent decline in BI claims costs and the expiry of the rate cap last summer, the hard market appears in the rearview mirror and the current auto insurance system is back on track, traveling down the right road for accident victims, policyholders and insurers. Some minor adjustments can be made, specifically some (likely not all) of my ideas, but please realize and advise that massive government intervention and red tape designed to shield powerful insurers from vulnerable, innocent injured Albertans is unnecessary, unAlbertan, unconservative and unfair.

I'll conclude with a few choice words from my long-time senior litigation assistant, Rachelle Leger, a former auto insurance adjuster with over a decade of experience with MVA BI claims:

To quote Ronald Reagan, "the nine most terrifying words in the English language are 'I'm from the government and I'm here to help.'" It is queer how positively aghast some allegedly free enterprise Conservative politicians in our legislature seem at the prospect that an occasional overdue market correction will cause the average cost of an automobile insurance policy to rise, when as a matter of statistical fact, the average cost of automobiles, and of automobile repairs, has risen exponentially higher over the past sixteen years than the average cost of basic insurance coverage for those automobiles. Even with premium increases in 2020, Alberta auto insurance is a terrific bang for the buck in terms of the liability and benefits coverage you get for your premium dollar, and is amongst the most affordable standard auto policies in the country as a percentage of disposable income. With about 50 insurers to choose from, it's prudent to shop around! My expert advice to our government politicians on the auto insurance file: There's an Auto Insurance Rate Board. Let the AIRB do its job, stay in your lane, resist any latent socialist urges to engage in needless and harmful marketplace meddling, and ABC -- always be conservative.

I look forward to discussing this further at our meeting (virtual rather than in-person, due to the COVID-19 pandemic) on March 30, 2020.

Yours truly,

McCOURT LAW OFFICES
Per:

K. Mark McCourt

K. MARK McCOURT
KMM/rll

PS - As indicated, my previous e-mails and links therein are to be considered part of this submission. Kindly treat them as such. Thanks very much!