

**CANADIAN
DEFENCE
LAWYERS**

October 27, 2020

The Hon. Jason Kenney, PC
Premier of Alberta
Office of the Premier
307 Legislature Building
10800 - 97 Avenue
Edmonton, AB T5K 2B6

The Honourable Travis Toews
President of Treasury Board and Minister of Finance
Office of the Minister
208 Legislature Building
10800 - 97 Avenue
Edmonton, AB T5K 2B6

Dear Hon. Premier and Minister:

Re: Open Letter to the Premier and Minister re: Proposed Changes to the Minor Injury Regulation, AR 123/2004

I write on behalf of the Canadian Defence Lawyers (CDL), the only national organization representing the interests of about 1300 civil defence lawyers in Canada – lawyers whose practices are largely devoted to the defence of claims, including injury claims arising from car accidents. The defence bar plays a significant role in the auto claim assessment process and is, therefore, interested in issues that promote fairness in the legal process together with reducing barriers to exercising legal rights.

CDL is aware of the proposals to reform auto insurance in Alberta, which is currently underway. In particular, it has reviewed the proposals of the Insurance Bureau of Canada in its “Driving Change” report, dated March 6, 2020.

CDL has the following serious concerns regarding the proposals, which impact fundamental issues of fairness in the legal system:

- (a) **Lack of data that the system is broken:** The premise of “Driving Change” is that the system is broken. What is the evidence that the current auto insurance system is unsustainable, particularly with the economic slowdown experienced since March of 2020? Who is the custodian of statistics on the auto insurance premiums collected as against the cost of claims? What is the evidence that no-fault, or a variation of no-fault, decreases premiums? The State of Colorado eliminated their no-fault system in 2003 and returned to full tort. Premiums decreased as a result. Further, a hybrid no-fault

system, such as what exists currently in Ontario, has also shown no significant, year over year decrease in premiums.

(b) Negative impact on minorities and breadwinners perpetuating systemic inequalities: The current auto injury claims litigation field sees a significant number of actions filed, but very few proceed to trial. The majority of the actions are settled after questioning, or after mediation. The settlements are tailored to the evidence that the plaintiff presents and therefore the settlement is supportive of the unique needs of minorities, different cultural practices and, in particular, the replacement of any household economic support lost due to the collision. CDL is concerned that a move to extend no-fault beyond the current Section B payments together with the inclusive definition of common injury or minor injury will eliminate individualized settlements and thereby perpetuate systemic inequalities in Alberta society negatively impacting:

- the indigenous population,
- single parent families and
- those who are unable to work as a result of what the schedule says is a minor injury and therefore be unable to support inter-generational family members living in their household.

A failure to meet these economic needs will translate into greater health care costs and further pressure social agencies that are already taxed.

(c) Lack of detail on the checks and balances on the discretion of the insurance adjuster: Appendix B to Driving Change reads: *An injured person would only be eligible for more than \$5,000 in med/rehab if he or she proceeds through a program of care, a physician or nurse practitioner determines that his or her injury is more serious than a common injury, and the insurer agrees with the physician or nurse practitioner's opinion.* If the insurer does not agree with the medical opinion that more care is required, what system will be implemented to challenge the insurer's decision? Is that system one that will achieve the cost reductions underlying the proposal?

(d) Reducing the ability of the insurance claims industry to deal with fraudulent claims: Defence counsel operating in a tort system are instrumental in detecting fraudulent claims. The Ontario experience generated [a task force](#) dedicated to the elimination of fraud in the administration of statutory accident benefits. An extensive no-fault system allows fraud to occur and it is difficult to root out.

(e) Two-tiered justice: Under the proposal, only those who purchase coverage for non-pecuniary (general) damages would be entitled to claim those damages if they sustain a serious injury, defined as "loss of a body part, significant disfigurement or significant scarring, a displaced fracture of a weight-bearing bone, loss of a fetus, and permanent physical or psychological injury. In addition, any physical or psychological injury would be considered permanent when it prevents the injured person from functioning normally even with further medical treatment based on objective medical proof". The

2018 Canadian Income Survey, found Alberta families earned an average of \$72,700 in 2018, about \$11,000 more than the national average of \$61,400. However, it is highly likely that the twin economic impacts of the downturn in the resource sector and the public health restrictions to prevent the spread of COVID-19 will erode those numbers. What are the actuarial numbers to predict the percentage of the population that is likely to buy this optional coverage? CDL's concern is that this will deprive an entire cohort of the population (the lowest half of the population, single parents, young adults) of access to justice for the serious injuries that they have sustained. In addition, the current proposal goes further and states that those who do purchase the option will have the award deducted from their pecuniary damages that replace the income that they lost and is otherwise claimable. So what is the advantage to them to buy the coverage? "If the person who received a payment under this option has a serious injury and is eligible to sue for non-pecuniary damages, the payment from the option would be deducted from any subsequent tort-based non-pecuniary damages compensation." This suggests that the proposal is a de facto elimination of the award of general damages for any injury sustained by a reason of the use and operation of a vehicle.

(f) Societal economic impact of "Driving Change": There are also many concerning employment consequences of the proposed no-fault or hybrid no-fault model, which will negatively affect certain employment sectors in Alberta:

- law firms, for example, provide professional employment to a number of employees (lawyers, support staff, paralegals etc.), many of whom will be negatively affected by this proposed reform. This includes small, mid and large size firms that service both plaintiffs and defendants;
- access to justice will be impacted by the foreseeable loss of legal representation, particularly in the many small towns in Alberta. For many small town firms, prosecuting Plaintiff personal injury claims is a source of necessary revenue for the town barrister and solicitor(s); and
- the new proposed reforms will disproportionately, negatively impact women in professional employment and women who are the primary breadwinner for their household, as women overwhelmingly comprise those employed in the primary, secondary and tertiary industries that serve the current auto insurance sector in Alberta. These include insurance adjusters, insurance brokers, Court reporters, Occupational Therapists etc.

In summary, CDL opposes the process of pushing through a largely no-fault insurance system in Alberta, where there is a lack of publicly available data that the current system is unsustainable; a lack of data that a no-fault regime will be 'a fix'; lack of evidence of how these changes will impact minorities; lack of analysis as to whether a move to no-fault will indirectly perpetuate ethnic and racial divides in Alberta society.

Canadian Defence Lawyers welcomes a consideration of re-vamping the schedule of Section B benefits under the existing auto policy and a re-examination of the calculation of pre-judgment interest on non-pecuniary damages. However, these changes and all other changes cannot be made

without full consultation regarding the existing Minor Injury Regulation with all stakeholders before any changes are made.

All of which is respectfully submitted,



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