



TRIAL
LAWYERS'
PERSPECTIVE



THE MINOR INJURY CAP IN ALBERTA

OVERVIEW

Regulatory Uncertainty – The minor injury cap is rooted in a complex entanglement of laws and regulations that have only recently been clarified by the courts. Expanding these laws will create fresh uncertainty, confusion, and a burden on stakeholders including the legal, insurance, and medical industries.

Unfairness to Albertans – The government promised the cap would only apply to minor strains and sprains that resolved within three months. In practice, insurers have applied a broad interpretation of “minor injury” resulting in an unfair application of the law, a power imbalance between accident victims and insurers, and a stripping of common law tort rights from individual Albertans.

The Slippery Slope of Tort Reform – The minor injury cap was implemented following extensive lobbying by the insurance industry who claimed to be in a financial crisis. Despite repeated promises that these changes were necessary to stabilize their financial well-being, the insurance industry continues to engage in a slippery slope campaign of never-ending lobbying efforts to expand the minor injury cap and erode the tort rights of individual Albertans.

OUTLINE



1. Alberta Civil Trial Lawyers Association (ACTLA)
2. Alberta's Pre-cap Auto Insurance System
3. Insurance Legislative Changes
4. Alberta Minor Injury Cap
5. The Insurance Lobbying Efforts
6. Resisting the Efforts of Expansion
7. Recommendations

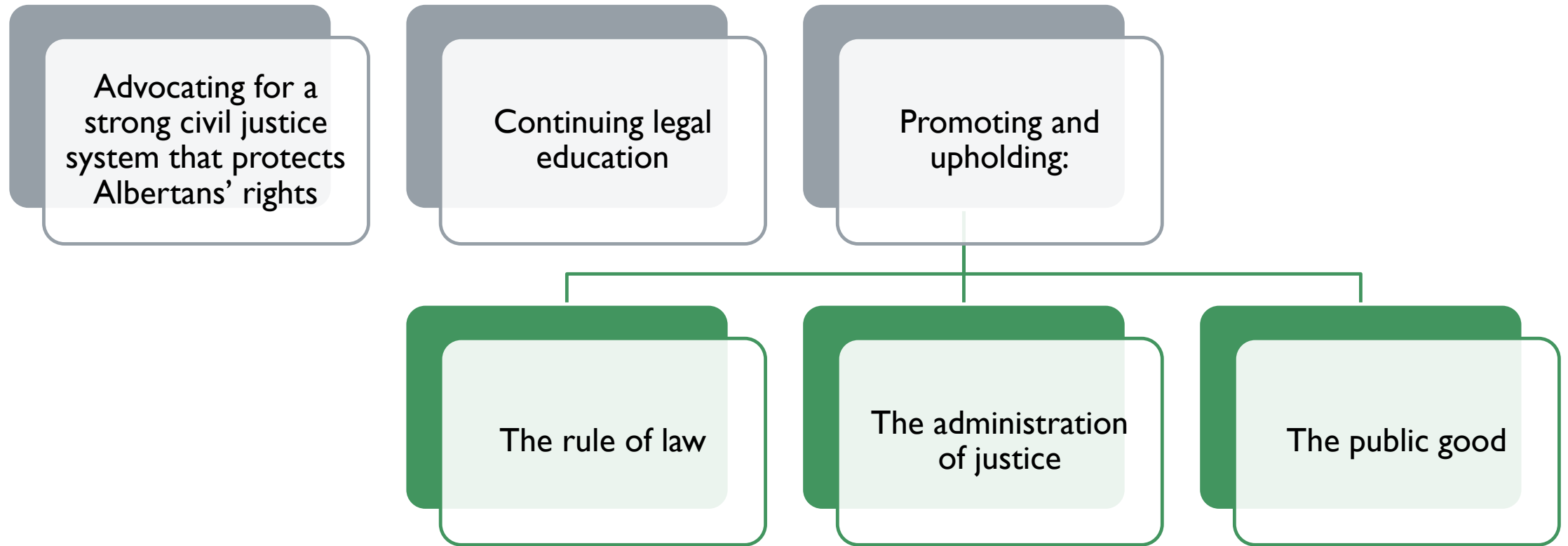


ALBERTA CIVIL TRIAL LAWYERS ASSOCIATION

FACTS

- Province wide not-for-profit association (starting in 1986)
- 600+ members representing thousands of Albertans
- Large percentage of members from smaller firms (2-10 lawyers), including defence lawyers
- Voluntary membership and board





MISSION & OBJECTIVES

THE ROLE OF THE CLAIMANT'S LAWYER: AUTO INJURY CLAIMS

- Unrepresented injury claimants deal directly with sophisticated insurance representatives, therefore operating on an uneven playing field.
- When unrepresented claimants feel they are being treated unfairly, they may contact a lawyer for assistance.
- Claimant lawyers counteract the imbalance between insurers and unrepresented claimants by advising claimants on their rights and holding the insurance companies who represent the drivers causing injury to innocent victims accountable for the damages and losses they have caused.

ACTLA OPPOSES AN
EXPANSION TO THE MINOR
INJURY CAP AS IT CONSTITUTES
AN IMPEDIMENT TO ACCESS TO
JUSTICE, DEPRIVING INJURY
VICTIMS OF THEIR COMMON
LAW TORT RIGHTS



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PRE-CAP INSURANCE SYSTEM

PRE-CAP INSURANCE SYSTEM

While monetary compensation fails to reverse the effects of an accident, it can play a significant role in compensating individuals for the impact the accident has had on their life and recognizing the harm that has been suffered through the fault of wrongdoers.

In 1978, the Supreme Court of Canada imposed a rough upper monetary limit of \$100,000 for non-pecuniary damages. Adjusted for inflation, the current limit of non-pecuniary damages is around \$380,000, and such damages are reserved for the most catastrophic of injuries.

Prior to 2004, Alberta courts determined compensation for pain and suffering based on precedent and factors such as, but not limited to, the nature of the injury, the severity and duration of the injury, and the degree of impairment in daily activities.

INSURANCE LEGISLATIVE CHANGES

BACKGROUND INFORMATION: 2003/2004

Like most sectors, the insurance industry is cyclical with periods of financial highs and lows that are influenced by various factors including interest rates, investments, and claims (particularly in the non-auto property and casualty sectors).

In 2002, the insurance industry was in a cyclical low in terms of profits.

Insurance companies aggressively lobbied the government for regulatory reforms in the auto industry that would improve profit.

FINANCIAL INFORMATION

By 2003, insurer profits had recovered and insurance companies enjoyed record multibillion-dollar profits which continue to date.

2018	\$ 2,284,050,000
2017	\$ 3,532,668,000
2016	\$ 2,055,913,000
2015	\$ 5,074,427,000
2014	\$ 4,457,799,000
2013	\$ 2,924,686,000
2012	\$ 4,414,345,000
2011	\$ 3,555,610,000
2010	\$ 2,439,606,000
2009	\$ 2,524,490,000
2008	\$ 2,485,011,000
2007	\$ 4,949,025,000
2006	\$ 5,534,018,000
2005	\$ 4,043,037,000
2004	\$ 4,084,050,000
2003	\$ 2,198,844,000
2002	\$ 242,255,000

Source: Office of the Superintendent of Financial Institutions, Government of Canada

BACKGROUND TO THE CAP

Although insurance industry profits had recovered, legislative momentum could not be stopped. In 2003 and 2004, the minor injury cap was introduced into Alberta through numerous legislative and regulatory enactments, including:

- Amendments to the Alberta *Insurance Act* which provided the government with authority to regulate insurance premiums and compensation

BACKGROUND TO THE CAP: A REGULATORY SMORGASBORD

The Minor Injury
Regulation

The Diagnostic
Treatment Protocols
Regulation

The Automobile
Accident Insurance
Benefits Amendment
Regulation

The Automobile
Insurance Premiums
Regulation

The Complaint
Resolution
Regulation

The Fair Practices
Regulation

THE MINOR INJURY CAP IN ALBERTA

MAXIMUM CLAIMABLE AMOUNT

Included in the 2003/2004 reforms was a \$4,000 cap on damages for pain and suffering for “minor” soft tissue injuries (sprains and strains) that did not result in “serious impairment”.

Adjusted for inflation, the current minor injury cap is \$5,202.

INTRODUCTION OF THE MINOR INJURY CAP

When the minor injury cap was introduced, the Alberta Minister of Finance promised that the law's application was limited to injuries that truly were "minor" and that healed quickly:

*"We have always said the cap will only apply to **minor injuries** that heal relatively quickly...about 90 percent of people with minor injuries will recover from their injury within 12 weeks. The other 10 percent may require further treatment, which will be available to them, or their injuries may not be minor, in which case the cap would not affect them."*

- Alberta Minister of Finance, Patricia Nelson, June 2004

MINOR INJURY CAP REGULATIONS

The regulations surrounding the interpretation and application of the minor injury cap created a convoluted, complex, and confusing entanglement of laws for the courts to sort out. These regulations created a number of adverse consequences, including the following:

1. Inconsistent application and understanding of the laws among experienced insurance representatives and lawyers.
2. The ambiguity surrounding the laws resulted in an uneven playing field. Insurers applied the cap broadly and unassuming or unrepresented claimants accepted that non-minor injuries were capped, such as concussions, psychological injuries, jaw disorders, neurological disorders, and chronic pain, among others.

MINOR INJURY CAP REGULATIONS CONTINUED

3. Risks associated with litigating the uncertainties surrounding the regulations acted as a significant disincentive to claimants pursuing fair compensation. Alberta's 'loser pays' costs system meant that unsuccessfully challenging an insurance company could result in significant court costs.
4. The regulations entangled the medical profession and the Superintendent of Insurance into the costs and administration of the regulatory scheme surrounding the cap. Such costs include those associated with the administration of the diagnostic and treatment protocols and certification and administration of a roster of certified medical examiners who opine on whether or not an injury is minor.

THE CONSEQUENCES



These uncertainties led to **substantial litigation**, both in terms of the laws' constitutionality and interpretation. The following summarize some of the important cases dealing with the minor injury cap and their interpretation.

These cases have provided much needed **clarity** to the laws surrounding the minor injury cap.

MORROW V. ZHANG (2008/2009)



Plaintiff involved in accident in 2004, challenged constitutionality of the minor injury cap, was successful at trial in 2008. [The Alberta Court of Appeal](#) overturned this decision and upheld the constitutionality of the law in 2009.

SPARROWHAWK V. ZAPOLTINSKY (2012)

Plaintiff involved in accident in 2005, resulting in an injury to the mouth and temporomandibular joint dysfunction (TMD) of the jaw. The insurance company sought to cap the damages on the basis that the injuries were minor. The court disagreed and confirmed that jaw injuries did not meet the definition of “minor”.

“[132] There are therefore three independent bases to conclude that Mr. Sparrowhawk’s jaw and mouth injuries are not minor injuries:

- 1. the tooth and cartilage injuries are not muscle, tendon, ligament, or WAD injuries,*
- 2. the jaw injury caused serious impairment, and*
- 3. all injuries treated principally by dentists, such as TMD and tooth injury, are never minor injuries.”*

MCLEAN V. PARMAR (2015)

The plaintiff's vehicle was struck by a city bus that ran a red light. In its decision, the court discussed the serious impact of the injuries she suffered including chronic pain and psychological injuries. The decision confirms that chronic pain and psychological injuries can cause serious impairment and are therefore not minor injuries. Insurance companies can no longer impose the minor injury cap on chronic pain or psychological injuries causing serious impairment.

“...Ms. McLean suffered from a variety of injuries as a result of being hit by a bus in January 2008. They include a moderate whiplash injury to her neck and back, numbness and tingling into her right arm, a TMJ disorder and pain, PTSD and depression, and a mild concussion, all of which caused her chronic pain which lasted two and a half years. Her strains, sprains and WAD injuries are not “minor injuries” as defined in the MIR.”

JONES V. STEPENENKO (2016)

The insurance company took the position that the plaintiff's chronic pain injuries were capped, and that fibromyalgia could not be caused by an accident. The court noted that in 15 years of assessing injuries, the defence's Certified Medical Examiner had never found someone to have suffered from a "serious impairment", which is a component of whether an injury will be classified as "minor".

The court **affirmed** that Albertans suffering from chronic pain are **entitled** to compensation **outside of the minor injury cap**, chastised the insurance expert's lack of objectivity, and held that recognized medical conditions such as fibromyalgia can be caused by a car accident.

THE MINOR INJURY CAP IN ALBERTA

In 2018, further amendments were made to the *Minor Injury Regulation*, which expanded the definition of minor injury to include **TMJ injuries** and **physical** and **psychological conditions** that arise from and resolve with a minor injury. These changes will inevitably result in **further litigation** to untangle their meaning and application.

ACTLA contends that the minor injury cap **disproportionately harms** those who are susceptible to the effects of soft-tissue injuries, such as: those predisposed to chronic pain or other forms of physical and psychological injury, those with less access to justice such as the poor and immigrant communities, and those who will mostly be affected by the effects of physical injury such as the elderly and workers.

THE INSURANCE LOBBY'S EFFORTS

INSURANCE BUREAU OF CANADA (IBC): FACTS

The IBC does not represent individual Albertans, they represent insurance companies:

“Insurance Bureau of Canada (IBC) is the national industry association representing Canada’s private home, auto and business insurers. Its member companies make up 90% of the property and casualty (P&C) insurance market in Canada”

– Insurance Bureau of Canada

The IBC is a sophisticated organization that engages experienced lobbyists to advocate for their stakeholders’ best interests. They understand how Governments work.



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*“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”*

– George Anderson, Past President of the Insurance Bureau of Canada, Canadian Insurance, February 2003

INSURANCE COMPANY EFFORTS TO BROADEN THE CAP

Despite representations that the minor injury cap would improve profits and stabilize the insurance industry, and despite further amendments to the *Minor Injury Regulation* in 2018, the insurance lobby has continued to push for a never-ending expansion of the minor injury cap.



More specifically, it appears that the insurance industry wants to expand the definition of minor injury beyond what was originally enacted, beyond what the Government of the day promised, and beyond the application of the law as interpreted by the courts.

WHAT INSURANCE COMPANIES INTEND TO ACCOMPLISH

- While the insurance industry lobbies the government to **expand the regulations** surrounding the cap on minor injuries, they are simultaneously pressuring the government to **scrap the regulations** that impose a cap on insurance premium increases. Their efforts to increase regulation on the one hand while insisting on deregulation on the other **cannot be reconciled**.
- As it was in 2002, the insurance industry's primary interest has been financial. Ultimately, it appears the insurance companies want to **increase** their profits even if it is at the **expense** of injured Albertans.
- Similar to the experience of 2002, the insurance industry is **relying** on many of the **same arguments** in terms of their financial well being in order to justify reforms that will benefit their well-being at the **cost of injured Albertans**.

INSURANCE INDUSTRY: ARGUMENTS & TACTICS



The insurance industry tends to rely on 'sky is falling' arguments to justify further reforms to Alberta's tort system. They argue that the health of Alberta's insurance industry is imperiled by ever increasing bodily injury claims and payouts.

However, the data and statistics used in support of these arguments must be carefully scrutinized. *The insurance industry's facts cannot always be accepted as realities.*

SOME EXAMPLES FOLLOW

INSURANCE INDUSTRY: ARGUMENTS & TACTICS

Claim Payout Manipulation - Insurance companies have the ability to increase settlements and advances as necessary to create the appearance of higher cost claims, lower profits, and a lack of financial viability. The Oliver Wyman report (September 18, 2018), prepared for the AIRB, noted that there were inconsistencies and anomalies in the reports of reserves and claims paid from Alberta Insurers. It concluded that “the changes in claims reserving and reporting claim counts by individual insurers continues to make the selection of development factors challenging for Bodily Injury”.



In reality, this is a smoke and mirrors manipulation of their actual financial situation. This is but one example of why data provided by insurance companies should be scrutinized carefully and not accepted at face value.

In fact, the Wyman reports are based on financial information **received from the IBC**, which has not been **audited, verified** or even **reviewed** by the government auditors. It is interesting that the financial information is received from the very organization that lobbies for the insurance industry.

INSURANCE INDUSTRY: ARGUMENTS & TACTICS

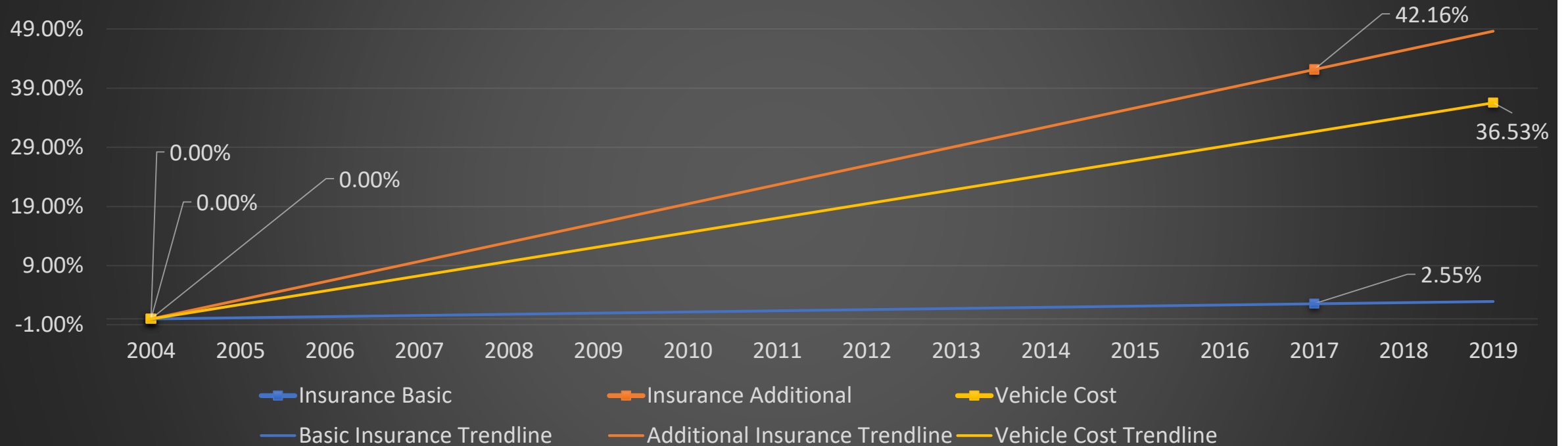


Conflating Premium Increases with Claim Payouts - The insurance lobby has argued that premium increases are a reflection of higher bodily injury claim payouts when the greatest increases have occurred with premiums that do not involve bodily injury claims.

- When one looks at basic rates alone, they have **only increased 2.5%** since 2004*.

* Source: AIRB 2018 Annual Review Report – Alberta Private Passenger Vehicles

Insurance VS Vehicle Costs



*Graph does not take into account annual fluctuations.

Source: AIRB 2018 Annual Review Report – Alberta Private Passenger Vehicles & Statistics Canada. Table 20-10-0001-01. New motor vehicle sales.

FLUCTUATIONS IN AUTO INSURANCE (BASIC & ADDITIONAL)

- Basic Auto Insurance Premiums – Increased **2.5%** since 2004
- Additional Auto Insurance Premiums – Increased **42.16%** since 2004
- Average Vehicle Cost – Increased **36.53%** since 2004

A **2.5% increase** is well below any inflationary increases which would be ³⁵ **expected**.

INSURANCE INDUSTRY: ARGUMENTS & TACTICS

Claim Cost Increases - The insurance lobby has argued that injury claims and claim costs are increasing and affecting profitability.

In reality, the numbers provided by auto insurers are self-serving and should not simply be accepted without scrutiny. Insurance industry numbers come from the General Insurance Statistical Agency (GISA). At the 2016 Alberta Insurance Rate Board Annual Review, the Government's own actuary raised serious questions about data being provided to the GISA by some of Alberta's largest auto insurers.

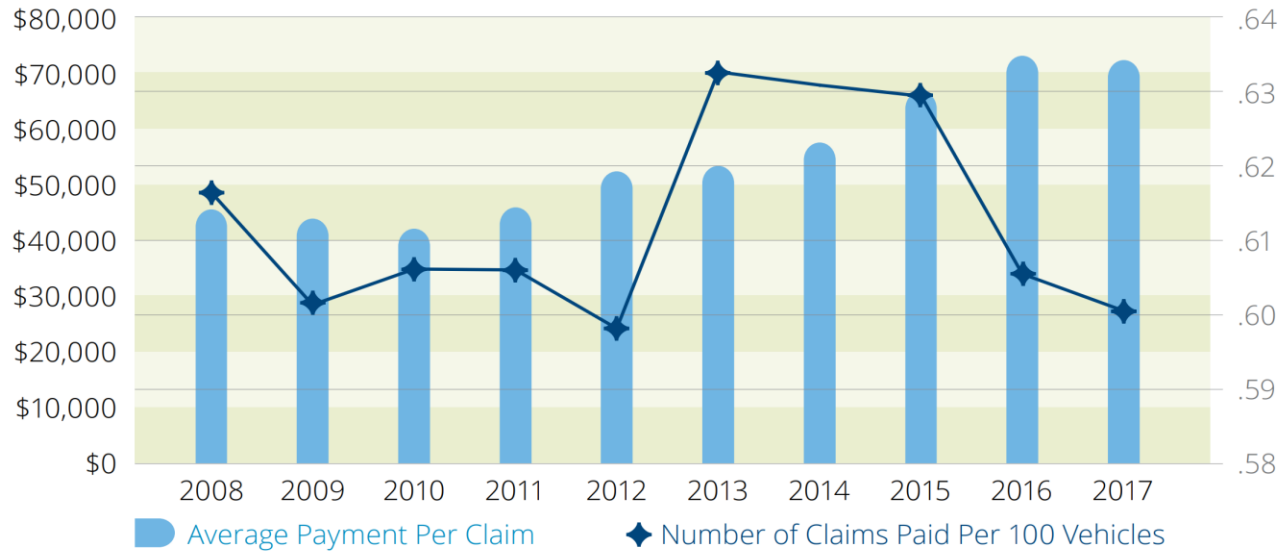
IBC has not and does not provide raw data in support of its statistics

However, data that is available shows claims and associated costs stabilizing over the last number of years.

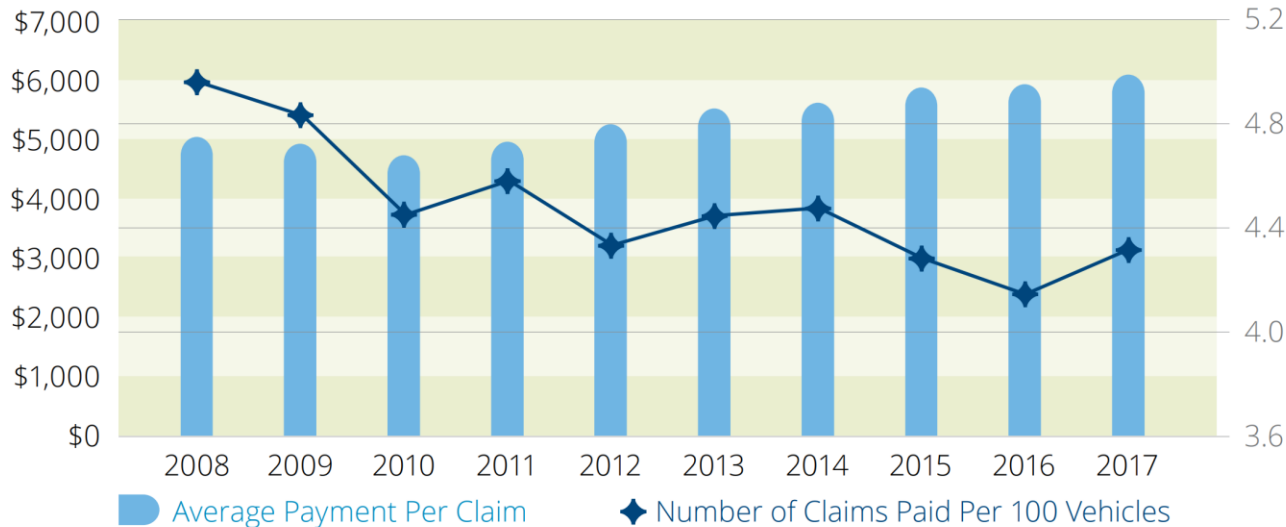
The argument that claims costs is responsible for financial woes ignores the cyclical ups and downs that the insurance industry regularly encounters, and the significantly more impactful role that interest rates, investments, and property & casualty claims play in the overall health of insurance companies.

Additionally, in the new draft of the Wyman report, it states on page 10 that the “*GISA advises caution in the use of the data due to reporting problems and errors by individual users*”.* This is important as it can be extremely difficult to trust data when there is a possibility of misrepresented information. Further, the information received is not audited, verified or reviewed for the purposes of the Wyman report.

BODILY INJURY CLAIM SEVERITY AND FREQUENCY



COLLISION CLAIM SEVERITY AND FREQUENCY



Source: 2018 AIRB Report


Claim Cost Increases Continued

Data from the 2018 AIRB Report, shown in the graphs to the left, demonstrates the following:

- Aside from a brief spike in claims between 2013 and 2015, the **current number of bodily injury claims have dropped since 2015** and are on par with pre-2013 rates (top graph).
- The **average payment per claim has only risen slightly from 2015 to 2017**, and has actually dropped from 2016 to 2017 (top graph).
- Between the reduced number of claims and payouts, **insurance companies appear to be paying out less for bodily injury claims today than in 2015** and certainly less than in 2016.
- There is no mention of **inflationary increases** in any of the statistics employed in the AIRB or Wyman reports despite the **increase** in the Cap amount and inflationary increases with respect to legal, adjuster, expert and other insurance costs. ³⁷

INSURANCE INDUSTRY: ARGUMENTS & TACTICS

Insurers Will Leave- The insurance lobby has argued that auto insurers will leave Alberta if claims costs are not controlled through an expansion of the minor injury cap.

 In reality, the auto insurance industry in Alberta appears to be **healthy and competitive**. Given the profitability of the auto insurance industry after 2004, there was an **increase** in the number of auto insurers entering the Alberta market. It would further appear that insurance companies in Alberta are currently profitable. According to *AMA Insurance's Q1 – 2019 financial report*, the company brought in a **net income** of **\$8,063,000*** for the first quarter of 2019 in follow up to a full year net income of **\$15,592,000** in 2018**.

 Currently, there are approximately **70 auto insurance companies in Alberta**, which speaks to the ongoing competitiveness of the market. This competitiveness is likely a significant reason why so few insurers choose to increase their premiums – i.e., they want to maintain market share. In fact, of the companies that applied to the AIRB for premium increases in 2018, only about **20% accepted the maximum 5% increase*****.

Contrary to conventional wisdom, this demonstrates that insurance companies are keeping premiums low in an effort to remain competitive and maintain market share. It also demonstrates that insurance companies are not likely to leave the province in droves, as the **insurance industry suggests**. Regardless, it is natural for businesses in the insurance sector to undergo a natural cull in accordance with cyclical periods of financial highs and lows, especially when **increased competition keeps premiums low in an effort to maintain or increase market share**.

Sources:

*AMA - 2019 Q1 Financial Report

**AMA - 2018 Financial Report

***2018 AIRB Report



COMPETITIVE MARKETPLACE

“WITH MANY COMPANIES WRITING IN ALBERTA, IT IS A **COMPETITIVE MARKET** FOR AUTOMOBILE INSURANCE. THIS ALLOWS INSURANCE COMPANIES TO COMPETE ON PRICE, PRODUCT, AND SERVICE, WHICH **PROMOTES EFFICIENCY AND SERVICE QUALITY**. CONSUMERS HAVE THE ABILITY TO CHOOSE BETWEEN THE DIFFERENT PROVIDERS.”

Source: 2018 AIRB Report

INSURANCE INDUSTRY: ARGUMENTS & TACTICS



Deregulation - The insurance lobby has championed the promise of deregulation in support of lobbying efforts to eliminate the cap on auto insurance premium increases. But in conjunction, they lobby the government to expand regulations surrounding the minor injury cap.

In essence, **the insurance industry wants to operate without regulation and restrict the rights of its customers** through regulation. As noted, these positions cannot be reconciled.



RESISTING EFFORTS TO EXPAND THE CAP

RESISTING THE URGE

The minor injury cap is rooted in a confusing, convoluted, and complex regulatory entanglement. These laws have only recently been interpreted by the courts, which have thankfully brought increased clarity and certainty to their application.

Expanding the minor injury caps will only upset this newfound certainty and impose a further strain on stakeholders such as injured Albertans, medical professionals, insurance adjusters, courts and lawyers.

Efforts to expand the cap arise out of a crisis that has been manufactured by the insurance industry. The insurance industry's numbers and arguments should not simply be accepted without thorough review and scrutiny. The insurance industry does not need what is tantamount to a Government bailout.

01

There is little to no evidence showing that a minor injury cap (in Alberta or elsewhere) has resulted in reduced insurance premiums for consumers, instead it increased profits for insurers.

02

The pendulum has already swung far enough in the insurance industry's favor, at the expense of individual Albertans' rights.

03

If the slippery slope erosion of Alberta's tort system continues, Alberta's auto insurance system will effectively become a government run no-fault jurisdiction.

04

Changes to the minor injury cap inevitably lead to more litigation. This includes constitutional challenges:

- AB (2008)
- BC (recently)

PROTECTING ALBERTANS

TECHNOLOGY CHANGES

Recent advances in collision avoidance technology will begin to reduce accidents, claims, and claims costs, without needing to expand/adjust minor injury regulations:

- Forward collision avoidance systems (all new vehicles by no later than 2022).
- Automatic emergency braking systems (studies show that these are the single most effective).
 - reduces rear-end collisions by **40%**.
- Automated/Self-driving vehicles (will likely reduce insurer claims costs through accident avoidance or by shifting liability to manufacturers of the technology).
- New technology to reduce the prevalence and incidence of distracted driving (apps that limit phone use while driving).
- New technology to monitor driving behavior.





RECOMMENDATIONS

OUR SUGGESTIONS

Rather than expanding minor injury cap regulations, ACTLA recommends:

- ✓ Less regulation.
- ✓ No changes to the existing minor injury regulation, which would further erode the rights of injured Albertans for the profits of multinational insurance companies.
- ✓ The Government and the insurance industry should implement strategies to accelerate the universal adoption of collision avoidance systems (rebate program and/or reduced insurance premiums for equipped vehicles).
- ✓ Maintain the current system which has been interpreted by the courts and maintains the original intention of the Legislature to limit the cap to true “minor injuries” and not expand as requested to chronic conditions.

OUR SUGGESTIONS CONTINUED

- ✓ Public marketing and education campaigns to reduce distracted driving/encourage safe driving led by insurance industry (US insurers have begun incentivizing the use of apps that monitor driving habits through reduced insurance premiums).
- ✓ A Government re-evaluation of the grid system (ensuring at-risk drivers are paying appropriate premiums and that drivers can have access to pricing based on their limited use of vehicles).
- ✓ A Government conducted review of current premium rates to determine whether regulation surrounding premiums can be reduced (Alberta basic auto insurance premiums are among the lowest in Canada).

THANK YOU

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