NOVA SCOTIA COURT OF APPEAL

Citation: *Hartling v. Nova Scotia (Attorney General)*, 2009 NSCA 130

Date: 20091215
Registry: Halifax

Between: **Docket:** C.A. 308621

Helen Hartling, Melissa Gionet, Anna Marie MacDonald and
The Nova Scotia Coalition Against No-Fault Insurance Society,
an incorporated association

Appellants

v.

The Attorney General of Nova Scotia, representing
Her Majesty the Queen in Right of the Province of Nova Scotia

Respondent

and

Insurance Bureau of Canada, an incorporated association

Respondent

And between: **Docket:** C.A. 306318

Saquoia McKinnon, an infant by her Litigation Guardian,
Kathryn Jean McKinnon and John McKinnon

Appellants

v.

Adam Thomas Roy

Respondent

and

The Attorney General of Nova Scotia, representing
Her Majesty the Queen in Right of the Province of Nova Scotia

Respondent

and

Insurance Bureau of Canada, an incorporated association

Respondent

Judges:	MacDonald, C.J.N.S.; Hamilton and Beveridge, JJ.A.
Appeals Heard:	October 13 and 14, 2009, in Halifax, Nova Scotia
Held:	Appeal C.A. 308621 is dismissed without costs; appeal C.A. 306318 is denied without costs, per reasons for judgment of MacDonald, C.J.N.S.; Hamilton and Beveridge, JJ.A. concurring.
Counsel:	John P. Merrick, Q.C., Barry J. Mason and Glenn Jones for the appellants, Gionet and MacDonald Janus Siebrits for the appellants, McKinnon Alexander Cameron and Mark Rieksts for the respondent, Attorney General Geoff Machum, Q.C. and Christa M. Brothers for the respondent, Roy Jeffrey W. Galway and Rahat Godil, for the respondent, IBC

Reasons for judgment:

OVERVIEW

[1] In two appeals that we heard together, three automobile accident victims challenge the Province's 2003 legislation capping non-monetary damages for "minor injuries"at $2,500. Specifically, they say that this law, denying them their right to full compensation, is discriminatory according to the equality provisions of Canada's *Charter of Rights and Freedoms* and as such ought to be declared invalid. Alternatively, the appellants assert that the government of the day undermined the true will of the Legislature by enacting regulations that expanded the reach of this cap beyond what the legislation ever intended.

[2] For its part, the Province insists that this legislation is not discriminatory and that the regulations are properly designed to further its objects. Instead, it says that this initiative reflects sound public policy designed to contain sky-rocketing automobile insurance premiums.

[3] For reasons that I will now develop, I would dismiss the first appeal - C.A. 308621 - and deny leave in the second appeal - C.A. 306318. With the first appeal, I conclude, as did the initial Chambers judge (2009 NSSC 2), that both the enactment and its regulations are valid. In short, the provisions are not discriminatory as contemplated by the *Charter* and I am not satisfied that the impugned regulations run afoul of the legislation. In the second appeal, I would deny leave because there is no longer an arguable issue to be resolved.

BACKGROUND

Let me now provide a brief overview of the history leading to this legislative reform, followed by a summary of the appellants' claims.

The Legislation

[4] Back in 2003 when this legislative package was introduced, Nova Scotia motorists found themselves paying more and more for mandatory insurance coverage. For example, the Nova Scotia Utility and Review Board, having been

commissioned to investigate this problem, described a dire situation that would only get worse unless changes were made:

> ¶ 99 For insurance companies writing private passenger automobile business in Nova Scotia in recent years, the financial results have been nothing short of abysmal. Their earnings from this line of business have not been adequate by any reasonable standard. It is not surprising that the automobile insurers have been taking drastic rate action to restore profitability.
>
> ¶ 116 ... The Board concludes, for the reasons set out in this report, that continuing cost increases, and therefore, premium increases are to be expected as long as the existing automobile insurance system in Nova Scotia remains as it is today.
>
> [2003 NSUARB 53; Report Date: May 13, 2003]

[5] Furthermore, the culprit appeared to be the third party liability sector and specifically the significant increases in bodily injury claims:

> ¶ 146 In the Board's view, the major reason for the losses experienced by the industry is the increasing cost of claims. In this regard, the Board finds that the evidence is compelling that the primary cause of the increased claim costs is claims for compensation for bodily injuries.
>
> ¶ 147 The evidence shows that third party liability claim costs have been increasing much faster than collision and comprehensive claim costs. The increase in the average cost of a bodily injury claim over the last five years has been dramatic.

[6] In response and as an obvious stopgap measure, the Legislature promptly passed a bill freezing premiums for the rest of the 2003 calendar year.

[7] Not surprisingly, this quandary emerged as an issue in the provincial general election held in August of that year. A minority Conservative government was elected. In its September 25, 2003 Speech from the Throne, the new government confirmed its election promise of a 20 per cent reduction in premiums (which would ultimately be funded by the $2,500. cap for "minor injuries"):

> The legislative agenda my government will pursue will also address other issues of concern to Nova Scotians, one of the most pressing being the need to ensure Nova Scotians have access to fair and affordable automobile insurance.
>
> My government has already taken a number of important steps in this regard, including implementing an eight-month freeze on new auto insurance rates and putting a stop to discriminatory insurance practices based on age, gender and non-driving-related claims. We also broadly consulted with both insurance consumers and providers on the best way to achieve our promise of a 20 per cent reduction in insurance rates.
>
> My government believes that Nova Scotians cannot wait a year or more for a break on the high cost of car insurance. With the support of this House, we will therefore provide relief to drivers, sooner rather than later, by introducing legislation that provides for a 20 per cent reduction in premiums effective November 1st of this year.

[8] The proposed reform package was introduced the very next day. The legislative debates that followed revealed significant controversy, primarily regarding the definition of "minor injury" which critics felt would capture far too many injured plaintiffs. In the ensuing weeks, an obvious compromise emerged. The definition of "minor injury" would be restricted thereby making it easier for would-be plaintiffs to avoid the cap. I will be discussing this compromise in more detail later and will now turn to the impugned provisions which became the product of this compromise.

[9] The reform was accomplished by inserting a new section into the existing *Insurance Act*, R.S.N.S., c.231 [s. 113B]. The subsections relevant to this appeal include the definition of "minor injury", together with the related term "serious impairment" [s. 113B(1)] and the operative provisions with the cap amount to be set by regulation [s. 113B(4)]:

> 113B (1) In this Section,
>
> (a) "minor injury" means a personal injury that
>
> (i) does not result in a permanent serious disfigurement,

> (ii) does not result in a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature, and
>
> (iii) resolves within twelve months following the accident;
>
> (b) "serious impairment" means an impairment that causes substantial interference with a person's ability to perform their usual daily activities or their regular employment.
>
> . . .
>
> (4) Notwithstanding any enactment or any rule of law, but subject to subsection (6), the owner, operator or occupants of an automobile, any person present at the incident and any person who is or may be vicariously liable with respect to any of them, are only liable in an action in the Province for damages for any award for pain and suffering or any other non-monetary loss from bodily injury or death arising directly or indirectly from the use or operation of the automobile for a minor injury to the amount prescribed in the regulations.

[10] The corresponding regulations, enacted the next day, October 31, 2003, confirmed that the cap would be $2,500. and that certain listed injuries, including chronic pain, would be excluded:

> Total amount recoverable for non-monetary losses
>
> 3 (1) For the purpose of subsection 113B(3) of the *Insurance Act*, the total amount recoverable as damages for non-monetary losses of a plaintiff for all minor injuries suffered by the plaintiff as a result of an incident must not exceed $2,500.
>
> (2) In subsection 113B(3) of the *Insurance Act*, "personal injury" does not include a coma, chronic pain, serious burn, or amputation of a major limb.

[11] It is obvious that the references to s. 113B(3) are mistaken. They should have been to the operative provision, s. 113B(4) and s. 113(B)(1) respectively. This was corrected by a regulation amendment in 2006.

[12] In any event, on November 21, 2003, the impugned regulations emerged. They cover three areas which, according to the appellants, make it much more

difficult to avoid the cap. Firstly, the following qualifications are added to the types of injuries that would be excluded:

> 1 (3) (d) "personal injury" does not include
>
> (i) a coma resulting in a continuing serious impairment of an important bodily function,
>
> (ii) chronic pain that
>
> (A) is diagnosed and established as chronic pain by a medical specialist appropriately trained in the diagnosis and management of pain disorders,
>
> (B) is a direct result of a physical injury sustained in the motor vehicle accident with respect to which the claim is brought,
>
> (C) results in a continuous serious-impairment of an important bodily function, and
>
> (D) is moderately severe or severe pain, as classified in the American Medical Association *Guides to the Evaluation of Permanent Impairment*, 5th edition,
>
> (iii) a burn resulting in serious disfigurement,
>
> (iv) an amputation of a major limb;

[13] Secondly, the word "resolves" contained in s-s. 113B(1)(a)(iii) is defined in a manner that the appellants say greatly widens the "minor injury" net.:

> 1 (3) (f) "resolves" means
>
> (i) does not cause or ceases to cause a serious impairment of an important bodily function which results from a continuing injury of a physical nature to produce substantial interference with the person's ability to perform their usual daily activities or their regular employment, or
>
> (ii) causes a serious impairment which results from a continuing injury of a physical nature to produce substantial interference with

> a person's ability to perform their usual daily activities or their regular employment where the person has not sought and complied with all reasonable treatment recommendations of a medical practitioner trained and experienced in the assessment and treatment of the personal injury;

[14] Flowing from this definition are two more:

> 1 (3) (g) "substantial interference" means, with respect to a person's ability to perform their regular employment, that the person is unable to perform, after reasonable accommodation by the person or the person's employer for the personal injury and reasonable efforts by the injured person to adjust to the accommodation, the essential elements of the activities required by the person's pre-accident employment;
>
> (h) "usual daily activities" means the essential elements of the activities that are necessary for the person's provision of their own care and are important to people who are similarly situated considering, among other things, the injured person's age.

[15] Lastly, the injured party bears the onus of proving that an injury is not minor:

> 3 The regulations are further amended by adding the following Section immediately after Section 4:
>
> Onus to prove injury not minor injury
>
> 5 On a determination of whether an injury is a minor injury under subsection 113B(6) or (8) of the Act, the onus is on the injured party to prove, based upon the evidence of one or more medical practitioners trained and experienced in the assessment and treatment of the personal injury, that the injury is not a minor injury.

The Appellants' Claims

[16] With this backdrop, let me now provide more detail on the concerns that prompted the appellants to contest this legislation, first before the Supreme Court of Nova Scotia and now on appeal to this court.

[17] In the first appeal, the appellants Anna Marie MacDonald and Melissa Gionet were injured in separate motor vehicle accidents in the Fall of 2003. This would be shortly after the cap came into effect. Solely for the purposes of this appeal, they concede that their injuries would be considered "minor", thereby limiting their non-monetary damages for pain and suffering to $2,500. They challenge the legislation, including its regulations, on the following four fronts.

[18] Firstly, they say that they will be denied the right to have their non-monetary claims assessed by an impartial tribunal. Instead their award will be set arbitrarily in a fashion that will likely deny them full compensation. They ask (without admitting) that if damages had to be controlled in order to prevent skyrocketing insurance premiums, why should their class of litigant bear the full burden? As counsel during oral submissions asked rhetorically on behalf of each appellant, "Why me?".

[19] Secondly, they advance an alternative submission on behalf of female "minor injury" victims. They say that females have historically been marginalised when it comes to employment and this has been reflected in damage awards where the wage loss components have traditionally been much lower. They also say that females suffer gender-specific, non-monetary loss. Therefore, for them this means that the cap is of added significance. In other words, while minor injury victims are unfairly bearing the full brunt of this reform, the burden on female victims is even more unjust.

[20] Thirdly, the appellants specifically attack the November 2003 chronic pain regulation [s. 2(1)(d)(ii)]. They assert that because this provision excludes certain types of chronic pain from the cap, it implicitly includes those chronic pain sufferers that do not meet these criteria in the definition. This, they say, represents further discrimination against those chronic pain sufferers caught by the cap.

[21] Finally, in the further alternative, the appellants attack the regulations. Here they say that the legislative intent was to produce a regime where an injury would be considered "minor" only when a victim is pain free after twelve months. In other words, the reference in s-s.113B(1)(a)(iii) to "resolves" means "pain free". Thus, by defining "resolves" in the November 2003 regulations to mean something much less than pain free, the government made it harder to escape the cap thereby thwarting the will of the Legislature.

[22] In the second appeal, the young appellant, Saquoia McKinnon, witnessed her father being struck by a truck as they walked along the highway. This upset her to the point where she now suffers from Post Traumatic Stress Disorder. She asserts that victims with her type of injury also face discrimination. This, she says, is because they represent a class of victims suffering purely mental injuries. As such, she fears that they would be bound by the cap regardless of how severe the injury. Her concern is rooted in the definition of minor injury and specifically s-s. 113B(1)(a)(ii) which, for convenience, I restate:

> 113B (1) In this Section,
>
> (a) "minor injury" means a personal injury that ...
>
> (ii) does not result in a permanent serious impairment of an important bodily function caused by a continuing injury which is *physical in nature*, and
>
> [Emphasis added.]

[23] Thus by this provision, any injury which is not "physical in nature" would be automatically deemed a "minor injury". Her professed class of victim - those with exclusively mental afflictions - could therefore never escape the cap. This, says Ms. McKinnon, represents discrimination. Solely for the purposes of this application, the respondents concede that Ms. McKinnon suffers serious ongoing PTSD of the type that would otherwise exceed the cap.

[24] Both matters came before Justice Walter R.E. Goodfellow of the Supreme Court in October of 2008. The Gionet/MacDonald matter came by way of an originating notice directly challenging the legislation. The McKinnon challenge came as an interlocutory application arising out of Ms. McKinnon's main action against the respondent Roy, the motorist who struck her father. Goodfellow, J. heard the matters together and issued one judgment dismissing both applications. I will consider the judge's reasons in more detail later in this judgment.

ISSUES AND STANDARD OF REVIEW

The Issues as Identified by the Appellants

[25] The appellants Gionet and MacDonald in their factum present the following comprehensive list of issues:

> ¶ 7 The Trial Judge erred in law or fact, or mixed law and fact, or misapplied the law and facts in the following manner:
>
> (a) in failing to hold that the cap violated the Appellant's rights pursuant to s.15 of the *Charter of Rights and Freedoms*, Part 1 of the *Constitutional Act*, 1982, being Schedule B to the *Canada Act 1982 (U.K.)*, c.11 1982 (the "*Charter*") on the basis of physical disability;
>
> (b) in applying the incorrect burden of proof on the Applicants to prove the individual components of a s. 15 violation set out by the Supreme Court of Canada in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497.
>
> (c) in finding that chronic pain sufferers do not suffer disadvantage, historic discrimination or stigmatization, contrary to established law;
>
> ¶ 8 The Trial Judge erred in law or fact, or mixed law and fact, or misapplied the law and facts in failing to hold that the cap violated the Appellant's rights pursuant to s. 15 on the basis of sex;
>
> ¶ 9 The Trial Judge erred in law or fact, or mixed law and fact, or misapplied the law and facts in failing to hold that Regulation 2(1)(d)(ii)(D) of the *Automobile Insurance Tort Recovery Limitation Regulation*, N.S. Reg. 183/2003 (the "chronic pain" regulation) infringed the Appellant's Section 15 *Charter* rights on the basis of physical disability;
>
> ¶ 10 The Trial Judge erred in law or fact, or mixed law and fact, or misapplied the law and facts in finding that the Respondents established that the purpose of the *Automobile Insurance Reform Act* (hereinafter referred to as the "*Act*") constituted a pressing and substantial objective pursuant to s. 1 of the *Charter*.
>
> ¶ 11 The Trial Judge erred in law or fact, or mixed law and fact in finding that the Respondents established that there was a rational connection between the *Act* and the Government's objective pursuant to s. 1 of the *Charter*.
>
> ¶ 12 The Trial Judge erred in law or fact, or mixed law and fact or misapplied the law and facts in finding that the Respondents established that the *Act* minimally impaired the Appellant's *Charter Rights*.

> ¶ 13 The Trial Judge erred in law or fact, or mixed law and fact, or misapplied the law and facts in concluding that Regulations 2(1)(f), 2(1)(g) and 2(1)(h) of the *Automobile Insurance Tort Recovery Limitation Regulations*, N.S. Reg. 183/2003 were not *ultra vires* the *Act.*

[26] The appellant McKinnon in her factum identifies the issues by restating the grounds contained in her notice of appeal:

> ¶14 The Appellants' Notice of Appeal raised five grounds which read as follows:
>
> Ground of Appeal #1: The Trial Judge erred in his reasoning or in his findings, to the extent he made findings, that the agreement that was reached between counsel for Ms. McKinnon and counsel for Mr. Roy that the Appellant, Saquoia McKinnon has, for the purposes of the hearing, serious, long-standing, permanent injury (referenced at paragraphs 174 to 189 of his decision), obviates his obligation, when strictly applied (as stated in paragraph 189 of his decision), to address the issue before him (being discrimination against a group or members of a group on the basis of mental disability).
>
> Ground of Appeal #2: The Trial Judge erred in his reasoning that there was no discrimination against a group or members of a group on the basis of mental disability, because counsel for Ms. McKinnon and counsel for Mr. Roy had agreed that the Appellant, Saquoia McKinnon has, for the purposes of the hearing, serious, long-standing, permanent injury (paragraph 175 and 181 of the decision).
>
> Ground of Appeal #3: The Trial Judge erred in his reasoning that there is no discrimination against a group or members of a group on the basis of mental disability, because counsel for the Respondents agreed to interpret the phrase "physical in nature" as including psychological injuries. To avoid the *Charter* issue, counsel for the Respondents simply adopted an interpretation of the phrase "physical in nature" which included psychological injuries. Counsel for the Respondents cannot circumvent the *Charter* by indicating that their interpretation of the legislation does not offend the *Charter*. Legislation that offends the *Charter* cannot be cured by having the parties agree to an interpretation that does not offend the *Charter.* The Learned Trial Judge therefore erred in his findings, to the extent he made findings, on this issue (paragraphs 182 to 184 of the decision).

> Ground of Appeal #4: The Trial Judge erred in placing undue emphasis on the contextual background of the applicant, Saquoia McKinnon, when determining whether a group or members of a group have been discriminated against on the basis of mental disability.
>
> Ground of Appeal #5: The Trial Judge placed undue emphasis on the expert testimony in interpreting the phrase "physical in nature". The Court failed to interpret the legislation in accordance with legal principles of interpretation with respect to the ordinary use of language.

The Issues Distilled

[27] For the purposes of this appeal, I would re-arrange and distill the issues as follows. Did the judge err by finding that:

a. the legislation and chronic pain regulation [2(1)(d)(ii)(D)] did not violate the appellants' *section 15* rights on the basis of physical disability;

b. the legislation did not violate the appellants' *section 15* rights on the basis of sex;

c. the November 2003 regulations defining "resolves" and other related terms [2(1)(f),(g),(h)] were not inconsistent with the cap legislation;

d. the legislation and regulations did not violate the appellant McKinnon's *section 15* rights on the basis of mental disability.

Standard of Review

[28] Before moving on to my analysis, let me address the standard upon which these issues should be reviewed. Findings of fact are entitled to deference and we will interfere only if they reflect palpable and overriding error. On the other hand, the judge must be correct when stating the law. Often blended questions of mixed fact and law are engaged. These findings are also entitled to deference unless an obvious error of law can be extracted. See **Housen v. Nikolaisen**, [2002] 2 S.C.R. 235, at paras. 26 and 36.

[29] In this case, much of the evidence was based in social science which, some have argued, calls for a less deferential standard. This is not necessarily so. Instead, I adopt the approach taken by the Alberta Court of Appeal in **Morrow v. Zhang** (2009, ABCA 215) dealing with the constitutionality of that province's cap legislation and a body of evidence similar to the one we face. In according deference to the trial judge, the appeal court observed:

> ¶ 89 The appellants submit that the standard of review of the trial judge's findings is one of correctness because his findings were based on social fact evidence. Social fact evidence is "social science research that is used to construct a frame of reference or context for deciding factual issues crucial to the resolution of a particular case": *R. v. Spence*, 2005 SCC 71 (CanLII), 2005 SCC 71, [2005] 3 S.C.R. 458 at para. 57. Some authorities suggest that less deference is owed to a trial judge's findings of fact that are based on social fact evidence. In *RJR-MacDonald Inc v. Canada (Attorney General)*, 1995 CanLII 64 (S.C.C.), [1995] 3 S.C.R. 199, La Forest J. concluded that an "appellate court may interfere with a finding of a trial judge respecting a legislative or social fact in issue in a determination of constitutionality whenever it finds that the trial judge erred in the consideration or appreciation of the matter.": para. 81. However, both La Forest J. and McLachlin J. (as she then was) for the minority, acknowledged an exception to this standard of review when the trial judge has had the opportunity to assess the credibility of witnesses. In these circumstances, the trial judge's findings are entitled to greater deference.
>
> ¶ 90 The evidence on this issue came from many sources: *Hansard*, academic articles, an IBC survey, a booklet produced by the Canadian Coalition Against Fraud, and several experts in the areas of medicine and economics, some who provided affidavit evidence and some who testified. The expert evidence was tested under cross-examination. Indeed it was the cross-examination of the Crown's expert, Dr. Mayou, that assisted the trial judge in concluding that there was a stereotype. This was not a case where the trial judge made his finding based upon the literature alone. The respondents adduced the very type of evidence that had been suggested by the Supreme Court in *R. v. Malmo-Levine*, 2003 SCC 74 (CanLII), 2003 SCC 74, [2003] 3 S.C.R. 571.
>
> . . .
>
> ¶ 92 *In my view, the trial judge's finding is entitled to some deference. While an appellate court can read the transcripts and reports, this is not the same as a trial judge who, after listening to days of evidence, forms an impression which leads him to make a finding of fact. ...*

[Emphasis added.]

[30] All this said, as I understand the appellants' oral submissions, they allege no errors of fact with the *section 15* issues. Instead they rely on what they assert as extractable errors of law arising from the judge's handling of the relevant constitutional principles. Specifically, they say that whether or not a certain set of facts (as found by the trial judge and not under challenge) amounts to discrimination under the *Charter* represents a constitutional question of law to be reviewed on the correctness standard. I agree. See, as well, **Morrow**, *supra*, at paras. 46 to 49.

[31] Finally, the challenge to the regulation involves essentially an exercise in statutory interpretation which in these circumstances attracts the correctness standard. See: **R. v. Allen**, 2008 NSCA 118 at paras. 17-25.

ANALYSIS

Section 15 - Equality Rights Generally

[32] At the outset I will summarize the equality guarantee set out in *section 15* of the *Charter*:

> 15(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
>
> 15 (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[33] The purpose of *section 15* is to combat discrimination by ensuring substantive equality in the formulation and application of the law (**Andrews**, *infra*, at page 171). *Sections 15(1)* and *15(2)* work together in achieving this aim. *Section 15(1)* does so by prohibiting legislation that discriminates on the basis of an enumerated or analogous ground. *Section 15(2*) ensures that legislation that is designed to combat discrimination through affirmative measures is allowed and precluded from challenges under subsection (1).

[34] The operative provision in this appeal is *section 15(1)*.

[35] In **Law Society British Columbia v. Andrews**, [1989] 1 S.C.R. 143, the Supreme Court of Canada set out the template for considering challenges of discrimination under *section 15(1*). McIntyre, J., in the majority in the *section 15* analysis, stated that legislation will be considered discriminatory if it meets the following criteria. First, if it treats individuals or a group of individuals differently based on an enumerated or analogous ground. However, not all distinctions will offend the *Charter*. A distinction will only be considered discriminatory if it has the effect of imposing burdens, obligations or disadvantages on the individual or group which are not imposed on others, or if the distinction has the effect of withholding or limiting access to opportunities, benefits and advantages available to other members of society (**Andrews** at pages 174-175).

[36] This template was expanded in **Law v. Canada (Minister of Employment and Immigration)**, [1999] 1 S.C.R. 497, where Iacobucci, J., writing for the Court, introduced the concept of violation of human dignity as a marker for the presence of discrimination. Specifically, Iacobucci, J. proposed four criteria, or 'contextual factors' as tools to be used by the courts in determining whether the distinction created by the impugned law violates the claimants' human dignity and is thereby discriminatory. These contextual factors are: (i) pre-existing disadvantage, if any, of the claimant group; (ii) degree of correspondence between the differential treatment and the claimant group's reality; (iii) whether the law or program has an ameliorative purpose or effect; and (iv) the nature of the interest affected (**Law** at paras. 62-75).

[37] Most recently in **R. v. Kapp**, 2008 SCC 41, the Supreme Court of Canada retreated from the use of human dignity as a legal test under *section 15*, as proposed in **Law**. McLachlin, C.J. and Abella, J., writing for the majority, cited the difficulties with using human dignity as a strict legal test, but stated that the concept of human dignity should be retained in the spirit of the analysis in that it remains an "essential value" underlying *section 15* claims.

[38] With these considerations in mind, McLachlin, C.J. and Abella, J. refined the analytical template into the following two questions: (1) whether the law creates a distinction based on an enumerated or analogous ground, and (2) whether the distinction creates a disadvantage by perpetuating prejudice or stereotype. In

this latter question, the contextual factors in **Law** remain relevant. If the answer to these two questions is yes, then the legislation in question is discriminatory pursuant to *section15(1)*.

[39] Across the country, there have been other constitutional challenges launched against similar provincial legislation. They too have been unsuccessful. In Alberta, for example, legislative reform was introduced in 2004 to address the rising cost of motor vehicle insurance and the increase in uninsured motorists. This reform included the enactment of the *Minor Injury Regulation,* AR 123/2004, (MIR) which, among other things, included a $4000. cap on non-pecuniary damages for minor injuries caused by motor vehicle accidents. In addition, the reform included increases in section B medical benefits for minor injury claimants, and a cap on automobile insurance premiums for all Albertans. Minor injuries under this scheme consist only of soft tissue injuries, namely sprains, strains and grades one or two whiplash disorders that do not result in serious impairment [MIR section 1(h)].

[40] A constitutional challenge was brought against this legislation by two motorists who suffered minor injuries and had their damages for pain and suffering capped. The claimants were successful at trial [**Morrow v. Zhang**, 2008 ABQB 125]. However, on appeal, Rowbotham, J.A. found that the legislative reform scheme, considered as a whole, did not offend *section 15* of the *Charter:* **Morrow v. Zhang**, 2009 ABCA 215. Specifically, the Alberta Court of Appeal held that while the MIR did create a distinction in relation to the respondents (plaintiffs) on the basis of disability, this distinction was not discriminatory. This decision largely turned on the fact that, while the legislative reforms capped non-pecuniary damages, they provided added medical benefits in exchange for reduced damages (at paras. 137-141).

[41] In Ontario, legislative reform created a no fault insurance scheme which precluded claimants who did not meet a certain injury threshold from suing in tort to recover any damages - pecuniary or non-pecuniary in nature. This threshold essentially precluded all claimants who did not have a permanent serious disfigurement or permanent serious impairment of a bodily function.

[42] A constitutional challenge was brought by a motor vehicle accident victim who suffered injuries that did not pass threshold: **Hernandez v. Palmer**, [1992] O.J. No. 2648 (Gen. Div.). The plaintiff alleged discrimination on several grounds,

including discrimination between claimants who did not pass the threshold versus (i) individuals who sustained injuries in other tortious circumstances, (ii) individuals who did meet the threshold, and (iii) individuals who sustained psychological injuries, but did not meet the required physical component. Stayshyn, J. held that the threshold provisions in the insurance scheme did not violate the *Charter*, generally, and specifically *section 15.* He found that although the legislative scheme created a distinction, it was not discriminatory. In particular, he stated that although the reform deprived the claimants of a right to sue, it exchanged this right with comprehensive no-fault benefits (at paras. 170-201). In addition, in relation to 'ii' above, Stayshyn, J. found that *section 15(2)* applied; that is, the impugned threshold provisions were aimed at ameliorating the conditions of individuals with permanent serious impairment or disfigurement and, therefore, did not offend *section 15(1)* (at paras. 202-215). The challenge under ground 'iii' above was not considered because there was insufficient material before the court (at paras. 216-253).

Alleged *Section 15* Breach - Physical Disability

[43] To advance their position on this issue, the appellants relied on the evidence of Dr. Mary Lynch, a psychiatrist with extensive experience in the area of chronic pain. She testified that many of her patients who suffer soft tissue injuries and chronic pain are stigmatized and often labelled as whiners or fraud artists. She explains this in her affidavit:

> ¶ 9 That based on my research and experience, a negative social stigma has historically attached to persons suffering from chronic pain and soft tissue injury. There has been a trend toward denying the reality of chronic pain. In my practice, I have treated many patients suffering these symptoms who have been judged negatively because they have pain where others imply or state outright that they should stop whining, try harder to get better and "get a life" as if it is the fault of the injured person that they have been left with pain. They have also been accused of exaggerating their symptoms in order to get sympathy, faking the symptoms in order to get out of work or for financial gain. To be treated in such a way is demoralizing and re-traumatizing.
>
> ¶ 10 That many of the patients I treat are concerned about the stigma in society that they are faking and are the cause of high insurance premiums and costs. This is particularly true of those who are labeled as suffering from "sprains or strains" or "minor soft-tissue injuries". Attached hereto and marked as Exhibit "B" to this my affidavit are press releases, studies prepared by the insurance industry and

> newspaper articles that try to establish a link between accident victims, fraud and insurance claim costs. It is my professional opinion that press releases, studies and articles like these contribute to the continued stigmatizing and discrimination of accident victims who have suffered soft tissue injuries or so called minor sprains and strains.
>
> [Affidavit of Dr. Mary Lynch, dated December 21, 2007]

[44] The respondents countered with a host of experts. They included Dr. Robert Maher and Dr. Michael Lacerte, specialists in physical medicine and rehabilitation; Dr. J. David Cassidy, an epidemiologist specializing in injury and musculoskeletal epidemiology, and Ms. Viivi Riis, a physical therapist. Their evidence was summarized by the judge in his written reasons to which I now turn.

The Judge's Reasoning

[45] The judge preferred the respondents' evidence on this issue. For example, while praising Dr. Lynch for her work with chronic pain, he seemed to suggest that her experience was with more severely injured patients as opposed to those who might be classified as 'minor injury' plaintiffs:

> ¶ 54 I am able to state a preliminary assessment of the relative weight to be attached to the opinions of Dr. Lynch and Dr. Mahar on this question of stigmatization and stereotyping. I begin by saying that if I ever have a problem with chronic pain of a particularly lengthy duration, ie., two to three or more years, I would without reservation seek out the assistance of Dr. Lynch.
>
> ¶ 55 I would relate their respective evidence to a basic pyramid where the sides of the pyramid reflect the length of time the patient suffers chronic pain. Dr. Lynch is a highly respected specialist who, in my assessment, deals primarily with people who had chronic pain over a prolonged period which would place her mostly (but not exclusively) at and near the top of the pyramid with the base of the pyramid representing the time of injury. Dr. Mahar who would have a much broader professional practice and experience, permitting him to express, in my opinion, views more reflective of the situation as it relates to stigmatization and stereotyping.

[46] The judge then summarized and ultimately accepted the respondents' evidence, beginning with Dr. Maher, then Ms. Riis, and finally Dr. Lacerte:

¶ 58 The evidence of Dr. Mahar, a specialist in physical medicine and rehabilitation, is that it is very uncommon for him to encounter sufferers of chronic pain who feel that they are marginalized or discriminated against by their neighbours, friends, families or co-workers as a result of their chronic pain (although they may have issues with employers or third party payors in certain cases). Similarly, the evidence of Ms. Riis (a physical therapist with may years of experience in treating patients who have suffered traumatic musculoskeletal injuries) is that she disagrees that there is general disapproval attached to victims of soft tissue injuries and chronic pain. Since she began practising as a physiotherapist, she has seen significant growth in the amount of publicity around the prevalence of these conditions. Dr. Lacerte is a physical medicine and rehabilitation specialist with broad experience in the area of medical management and rehabilitation of trauma. I specifically note that Dr. Lacerte is certified as a rehabilitation counsellor. This is amongst his very extensive qualifications and I also specifically note that he is responsible for the training of the Ontario Workplace Safety Insurance Board Roster of Physicians who perform non-economic loss medical assessments. Dr. Lacerte was accepted by all parties as an expert witness with his expertise stated as being a medical doctor with expertise in physical medicine and rehabilitation of trauma injuries. His opinion that most automobile accident victims who sustain a soft-tissue injury will not develop chronic pain or any significant long term functional impairment is accepted as having been established as credible evidence in these applications. ...

¶ 59 I do note that his strongest expression of disagreement relates to what Dr. Lynch said in paragraph three of her September 25th, 2008 affidavit. Dr. Lynch recites patients who inform her that they "have been judged" and she extends that adverse judgment to "persons in the medical profession in a negative way". In paragraph six of his affidavit he expresses the opinion which I think is accurate "in my opinion, most practitioners treating pain have a strong preference for assuming an advocacy role on behalf of their patients rather than stigmatizing them." ...

¶ 60 Dr. Lacerte went on to reciting experiences where people will talk about their soft tissue injury (i.e., on a plane trip, an individual talking about his chronic low back pain) whereas a person who is schizophrenic would not engage in conversation about her/his condition and in Dr. Lacerte's view if a person feels social stigma, they don't talk about it.

¶ 61 In short, in his view there is no basis to conclude that there is pre-existing stereotype or disadvantage relating to motor vehicle accident claimants who suffer minor injuries.

[47] The judge then highlighted the evidence of Dr. J. David Cassidy who suggested that the adversarial system may in fact hinder recovery:

> ¶ 62 Dr. Cassidy has extensive experience and qualifications. All parties agreed that Dr. Cassidy was qualified as an expert Epidemiologist, specializing in Injury and Musculoskeletal Epidemiology.
>
> . . .
>
> ¶ 76 Dr. Cassidy went on to indicate the Saskatchewan study had limitations. He referenced them in his report in detail. Dr. Cassidy was asked to explain why the elimination of compensation for pain and suffering is associated with a decreased incidents and an improved prognosis of whiplash injury and said that they observed these findings in Saskatchewan but cannot state with certainty why this happened. He said that they suspect the elimination of payments for pain and suffering might have affected the decision to claim for an injury in some cases. With respect to improved prognosis, he commented that they believe the tort system is more adversarial and that legal conflict can delay recovery. **An adversarial system focussed the patient on pain and disability which is counter to the best methods of treatment which focusses patients on their abilities** [emphasis added]. He stated "in essence, tort insurance is counter-productive to proper health care after injury".

[48] Finally, the judge returned with approval to Ms. Riis' evidence:

> ¶ 90 In her affidavit, Ms. Riis responds directly to that portion of Dr. Lynch's affidavit where Dr. Lynch references "a negative social stigma ... attached to persons suffering from chronic pain and soft injury". Her response is:
>
> > ... I do not agree that there is a general disapproval attached to victims of soft tissue injuries and chronic pain. Indeed, since I began practising as a physiotherapist more than twenty years ago, I have seen significant growth in the amount of publicity around the prevalence of these conditions. There has been a commensurate increase in the research effort in this area and in the academic journal articles making the results of this research available to health professionals.
> >
> > It is my experience that when patients become involved in legal proceedings arising from an injury, they may feel quite uncomfortable with the processes involved. By their very nature, such suits can involve various medical examinations and questioning by representatives of all the parties involved in the case. These processes can be arduous, even

> exhausting and, as a treating practitioner, I have seen the emotional impact they can have on people. I have also with some frequency encountered surprise and resistance from injury victims when their health care providers advise and advocate active approaches to treating conditions such as chronic pain. These approaches include an emphasis on movement, exercise and return to function in spite of ongoing pain.
>
> . . .
>
> ¶ 100 Wherever the evidence of Viivi Riis is in conflict with the evidence of Dr. Mary Lynch, I prefer the evidence of Ms. Riis.

[49] In the end, the judge appeared to acknowledge the requisite distinction based on the enumerated ground of physical disability, but nonetheless felt that the appellants' evidence on this issue fell short:

> ¶ 120 Unfortunately, the nature of the tort recovery system which is adversarial requires patients to focus on their pain and disability which is counter to the best methods of treatment which focusses patients on their abilities. I conclude that the evidence advanced by the applicants falls markedly short of meeting the onus that persons suffering soft tissue injuries, even those that result in chronic pain, are stereotyped, stigmatized or disadvantaged by society.

[50] Interestingly, when considering the *section 15* challenge to the chronic pain regulation [s. 2(1)(d)(ii)], the judge at the outset rejected the appellants' premise - those chronic pain sufferers who fail to meet the cap definition will by implication be caught by the cap:

> ¶ 157 This chronic pain Regulation, it should be noted, does not limit or confine what chronic pain amounts to a minor injury. Quite the contrary, what Regulation 2(1)(d)(ii) does is to provide expressly that a certain category of chronic pain are **not** considered a minor injury. It excludes certain things such as serious comas, burns and amputations, as well as a certain category of chronic pain from being considered minor injuries. This does not mean that all other such injuries **are** minor injuries. The result is that a person who meets the definition of chronic pain in the Regulation is deemed not to be a minor injury and they can sue for damages for pain and suffering without legislative limit. This is not different than the comparator group advanced by the applicants, namely, "individuals who meet or exceed the threshold". They are treated equally. Their ability to sue for pain and suffering damages is not affected and no possible case exists for discrimination. Sufferers of chronic pain outside Regulation 2(1)(d)(ii)

> are not labelled minor injuries. Their position will depend upon the application of the test in s. 113B(1) of the *Insurance Act.*

[51] Then, even accepting the appellants' premise, the judge found no discrimination:

> ¶ 158 The applicants have failed to establish on a balance of probabilities that Regulation 2(1)(d)(i) infringes s. 15(1) of the *Charter* on the basis of physical disability and, once again, on the totality of the evidence and after careful reflection of the arguments advanced by counsel I reach the same conclusion as I did on issue one, namely, the main focus of the applicants maintaining that this Regulation results in stigmatization and stereotyping of chronic pain suffers is not a conclusion supported by the evidence and what limited stigmatization and stereotyping takes place is a result of the adversarial system.

[52] Let me say at the outset that I agree with the judge's analysis of this chronic pain issue. There is no basis to suggest that those who do not meet the chronic pain definition will be automatically caught by the cap. Without this premise this aspect of the claim evaporates. Therefore, now let me turn to the rest of the appellants' alleged errors on this issue.

The Alleged Errors

[53] The appellants essentially say that the judge found some limited evidence of discrimination, but then chose to ignore it because it was outweighed by evidence to the contrary. In point form, I would summarize their position this way:

- There can be no doubt that the distinction required by *section 15* has been established. Specifically, those would-be plaintiffs caught by the cap are treated differently from those not caught by the cap.

- Furthermore, it is equally clear that those caught by the cap are disadvantaged because their non-monetary damage awards will be arbitrary and will, in all but trivial cases, prevent full compensation.

- These two factors represent important initial steps towards establishing discrimination.

- Yet when it came to assessing the evidence, the judge simply weighed that evidence supporting the existence of discrimination against that which opposed its existence. Then, in an overly simplistic fashion, he concluded that because the evidence against the case for discrimination was stronger, he could ignore all evidence supporting discrimination.

- This is an erroneous approach. Instead the judge should have isolated the evidence that he found supporting the case for discrimination and then considered whether it, however limited, was sufficient to meet the test.

- Had the judge done this, he would have found a breach of *section 15*.

[54] To support their position, the appellants highlight the following passages from the judge's decision. Firstly, the judge acknowledged an element of subjective stigmatization:

> ¶ 57 Second, the fact that certain individuals who suffer chronic pain as a result of an automobile accident may feel disbelieved or stigmatized on the basis that they are exaggerating their injuries for personal gain does not establish that as a group, this is in fact the way that society perceives or treats chronic pain sufferers.

[55] Secondly, the judge acknowledged potential objective stigmatization but felt (the appellants say incorrectly) that it had to flow from the impugned legislation to be relevant to his analysis:

> ¶ 119 The evidence before me not only fails to meet the onus on the applicants to establish an infringement of their rights on a balance of probabilities, but rather the evidence before me establishes overwhelmingly that there is no stigmatization or marginalization **resulting** from the legislation. What limited stigmatization and marginalization exists is a by-product of the adversarial system which pre-dates the legislation and which, through the process of education, etc., is ever-diminishing.
>
> . . .
>
> ¶ 124 In any event, as I have already indicated, not only have the applicants failed to establish on a balance of probabilities that the *Insurance Act* s. 113B(1) creates stigmatization and stereotyping, I have indicated that the evidence is

> overwhelming to the contrary. What stigmatization and stereotyping might be said to exist is on a reducing basis (education) and its existence pre-dates the insurance cap legislation arising on a limited basis out of the adversarial system. I conclude on the totality of the evidence which I reviewed carefully and after reflection on the arguments advanced by counsel that s. 113(B)(1)(a) of the *Insurance Act* does not infringe s. 15(1) of the *Charter*.

[56] Then the judge referred with approval to the evidence of Dr. Maher who acknowledged some stigmatization, albeit not “significant”:

> ¶ 40 Dr. Mahar was also asked to express his opinion on the very issue I am now addressing, namely, allegation of stigmatization or discrimination and his response is as follows:
>
> > Is it within your expertise as a physician, to discuss whether sufferers of chronic pain experience "negative social stigma" or "discrimination"? What is your experience respecting such alleged stigmatisation or discrimination?
> >
> > I would indicate that I see individuals with chronic pain every day in my practise. I have been a practising physician for 29 years.
> >
> > Most of these patients report negative consequences as the result of chronic pain.
> >
> > The negative social factors or discrimination appears to be largely related to stressors in dealing with employers and third party payers. That is to say, they feel marginalised by lack of remuneration or acceptance of disability by third party payers or their employer and a sense that their subjective report of pain and disability is not understood or accepted. They also commonly report a loss of personal sense of control over their life situation. I am uncertain as to whether this meets the criteria for "negative social stigma" or "discrimination".
> >
> > I also encounter many situations in which sufferers of chronic pain are in conflict with immediate family members ie., spouse as the result of ongoing pain experience. I would feel that this would not be characteristic of "negative social stigma" or "discrimination".
> >
> > It is very uncommon for me to encounter sufferers of chronic pain who feel that they are marginalised or discriminated against by their

> neighbours, friends, family or co-workers as the result of a chronic pain experience.
>
> *Therefore, within the context, I do not identify sufferers of chronic pain as experiencing significant negative social stigma or discrimination with the possible exception of issues relating to employers and third party payers.*

[Emphasis added.]

[57] The judge also referred with approval to Ms. Riis who generally denied the existence of stigmatization but then allowed for some exceptions:

> ¶ 97 With respect to malingering, the suggestion that soft tissue injury victims are malingerers she stated:
>
> > A. You know, I know there are individuals that feel that way. Again, I think there are individuals in any field, whether it being the insurance industry, the health profession, the legal profession - I think there are people in all walks of life who have that perception, but I think it's the exception and not the rule.

[58] The appellants therefore say that it was wrong for the judge to acknowledge this evidence (however limited or qualified) only to then exclude it from his analysis. In other words, simply because the preponderance of evidence refuted the existence of discrimination did not mean all evidence to the contrary could then be ignored.

Determination of This Issue

[59] At the outset, let me say that I agree with the appellants on several fronts. Firstly, their group is treated differently from other automobile accident victims who will avoid the cap. This meets the distinction required by *section 15*.

[60] Secondly, this distinction is based upon one of *section 15*'s enumerated grounds, namely, *physical disability*. Indeed, distinctions based on levels or degrees of disability can, as here, engage *section 15*. For example, the Supreme Court of Canada **in Auton (Guardian ad litem of) v. British Columbia, (Attorney General)**, [2004] S.C.C. 78, listed several such instances:

> ¶ 54 Fourth, a claimant relying on a personal characteristic related to the enumerated ground of disability may invite comparison with the treatment of those suffering a different type of disability, or a disability of greater severity: *Hodge, supra*, at paras. 28 and 32. Examples of the former include the differential treatment of those suffering mental disability from those suffering physical disability in *Battlefords and District Co-operative Ltd. v. Gibbs*, [1996] 3 S.C.R. 566, and the differential treatment of those suffering chronic pain from those suffering other workplace injuries in *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504, 2003 SCC 54. An example of the latter is the treatment of persons with temporary disabilities compared with those suffering permanent disabilities in *Granovsky, supra*.

[61] Thirdly, minor injury victims are disadvantaged by this legislation. This is obvious because when it comes to non-monetary loss, their right to recover will be subject to an arbitrary limit. This means that while there may be discretion for awards involving less than $2,500., most members of this group will be denied individualized independent judicial assessments and consequently the right to full recovery. This runs counter to the civil law principle that, as far as money will allow, a wrongdoer should return the victim to his or her pre-accident position. This principle often referred to by the Latin expression *restitutio in integrum*, is fundamental to the law of damages. Let me briefly elaborate.

[62] The principle of *restitutio in integrum* has been the guiding principle in the assessment of damages since the late 19th century where Lord Blackburn stated in **Livingstone v. Raywards Coal Co.** (1880), 5 App. Cas. 25 at 39 (H.L.):

> ... in settling the sum of money to be given for reparation of damages you should nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

[63] Fourthly, turning to whether the disadvantage "perpetuates prejudice or stereotyping" [**Kapp**, *supra*, at para. 17], I also agree that this exercise involves more than simply weighing one body of evidence against another. Instead when we encounter a distinct disadvantaged group, any evidence of prejudice or stereotyping, regardless of how limited, must be carefully considered.

[64] All this said, my agreement with the appellants ends at this juncture. I say this because in my view, the judge gave sufficient weight to the evidence

highlighted by the appellants. Furthermore, and in any event, this evidence falls short of establishing that the legislation perpetuates prejudice or stereotyping sufficient to trigger *section 15*. I say this for the following reasons.

[65] First, as a basic proposition, it is not enough for the appellants to simply establish that their distinct group is disadvantaged; an invitation that the appellants came very close to extending. Instead, to succeed they must go a step further and establish that their disadvantage reflects discrimination. For example, in **Ermineskin Indian Band and Nation v. Canada**, 2009 SCC 9, [2009] S.C.J. No. 9, Rothstein, J. stated:

> ¶ 188 This Court's equality jurisprudence makes it clear that not all distinctions are discriminatory. Differential treatment of different groups is not in and of itself a violation of s. 15(1). As this Court stated in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at p. 182 (restated in *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483, at para. 28), a complainant must show "not only that he or she is not receiving equal treatment before and under the law or that the law has a differential impact on him or her in the protection or benefit accorded by law but, in addition, must show that the legislative impact of the law is discriminatory" (emphasis added). The analysis, as established in *Andrews*, consists of two questions: first, does the law create a distinction based on an enumerated or analogous ground; and second, does the distinction create a disadvantage by perpetuating prejudice or stereotyping.

[66] This takes me to the heart of the issue: Does the evidence in this case meet the test for discrimination? The answer will emerge from a consideration of the four contextual factors set out in **Law**, *supra*, namely: (a) pre-existing disadvantage; (b) correspondence between the legislation and the appellants' circumstances; (c) other ameliorative purposes, and (d) the nature of the interest affected. I will now address each of these factors in order.

(a) Pre-Existing Disadvantage

[67] Iacobucci, J. summarized this criterion by listing four pre-existing experiences that could buttress a case for discrimination. They are disadvantage, vulnerability, stereotyping or prejudice:

> ¶ 63 As has been consistently recognized throughout this Court's jurisprudence, probably *the most compelling factor favouring a conclusion that differential treatment imposed by legislation is truly discriminatory will be, where it exists,*

> *pre-existing disadvantage, vulnerability, stereotyping, or prejudice experienced by the individual or group*: see, e.g., *Andrews, supra,* at pp. 151-53, *per* Wilson J., p. 183, per McIntyre J., pp. 195-97, *per* La Forest J.; Turpin, supra, at pp. 1331-33; *Swain, supra,* at p. 992, *per* Lamer C.J.; *Miron, supra,* at paras. 147-48, *per* McLachlin J.; *Eaton, supra,* at para. 66. These factors are relevant because, to the extent that the claimant is already subject to unfair circumstances or treatment in society by virtue of personal characteristics or circumstances, persons like him or her have often not been given equal concern, respect, and consideration. It is logical to conclude that, in most cases, further differential treatment will contribute to the perpetuation or promotion of their unfair social characterization, and will have a more severe impact upon them, since they are already vulnerable.
>
> [Emphasis added.]

[68] Of the four, the only *pre-existing* experience relevant to our analysis and for which there is at least some evidence is “stereotyping”, (referred to in the evidence as “stigmatization”). I say this because up to the time of the cap, this group enjoyed the benefit of full recovery for non-monetary claims without any “disadvantage”, “vulnerability” or “prejudice”. Thus framing the appellants’ case at its highest, we are left with a new disadvantage that may have been motivated by pre-existing stereotyping. To this, I say two things.

[69] Firstly, to the extent that the judge acknowledged the existence of stereotyping, he, as noted, found it to be extremely limited. To him, the instances were primarily subjective; a product of the adversarial system and, with ongoing education, diminishing. In my view, this is not the type of discrimination that courts have targeted under this criterion. For example, consider the cases referred to by Iacobucci, J. in the above passage, and the type of alleged discrimination they involve:

- **Andrews** - Fully trained lawyers permanently resident in Canada were incapable of practising law unless they held Canadian citizenship. This was held to be discriminatory.

- **Turpin** - Persons accused of murder and other serious offences could not elect a judge-alone trial, unless living in Alberta. This was found to be non-discriminatory.

- **Swain** - Accused persons can have the defence of insanity raised by the Crown against their wishes. This too was found to be non-discriminatory.

- **Miron** - Automobile insurance benefits that excluded common law spouses were found to be discriminatory under *section 15*.

- **Eaton** - A child with cerebral palsy was removed from her neighbourhood school and placed in a special educational class against her parents' wishes. This did not violate *section 15*.

[70] Secondly, the existence of some limited stereotyping is just one of the several contextual factors we are encouraged to consider. As Iacobucci, J. explains again in **Law**, not all pre-existing negative experiences make the case for discrimination:

> ¶ 67 At the same time, I also do not wish to suggest that the claimant's association with a group which has historically been more disadvantaged will be conclusive of a violation under s. 15(1), where differential treatment has been established. This may be the result, but whether or not it is the result will depend upon the circumstances of the case and, in particular, upon whether or not the distinction truly affects the dignity of the claimant. There is no principle or evidentiary presumption that differential treatment for historically disadvantaged persons is discriminatory.

[71] In summary, I do not find the evidence under this criterion to be compelling.

(b) Correspondence Between the Appellants' Circumstances and the Impugned Legislation

[72] Although, as noted, there has been a retreat from the concept of human dignity in the wake of **Kapp**, *supra*, Iacobucci, J.'s summary of this criterion in **Law** remains instructive:

> ¶ 70 It is thus necessary to analyze in a purposive manner the ground upon which the s. 15(1) claim is based when determining whether discrimination has been established. As a general matter, as stated by McIntyre J. in *Andrews*, *supra*, and by Sopinka J. in *Eaton*, *supra*, and referred to above, legislation which takes into account the actual needs, capacity, or circumstances of the claimant and others with similar traits in a manner that respects their value as human beings and members of Canadian society will be less likely to have a negative effect on

> human dignity. This is not to say that the mere fact of impugned legislation's having to some degree taken into account the actual situation of persons like the claimant will be sufficient to defeat a s. 15(1) claim. The focus must always remain upon the central question of whether, viewed from the perspective of the claimant, the differential treatment imposed by the legislation has the effect of violating human dignity. The fact that the impugned legislation may achieve a valid social purpose for one group of individuals cannot function to deny an equality claim where the effects of the legislation upon another person or group conflict with the purpose of the s. 15(1) guarantee. In line with the reasons of McIntyre J. and Sopinka J., I mean simply to state that it will be easier to establish discrimination to the extent that impugned legislation fails to take into account a claimant's actual situation, and more difficult to establish discrimination to the extent that legislation properly accommodates the claimant's needs, capacities, and circumstances.

[73] For further guidance on this criterion, we also have **Martin v. Nova Scotia (Workers' Compensation Board)**, [2003] S.C.C. 54, where the Supreme Court considered legislation that denied benefits for chronic pain sufferers. There, Gonthier, J. invites us to first explore the overall purpose of the legislative scheme:

> ¶ 94 Another vital consideration in a case such as this one is the overall purpose of the legislative scheme at issue: see *Gibb*s, *supra*, at para. 34; *Granovsky*, *supra*, at para. 62. A classification that results in depriving a class from access to certain benefits is much more likely to be discriminatory when it is not supported by the larger objectives pursued by the challenged legislation.

[74] Following this guidance, I ask what is this legislation's overall purpose and how does it accommodate the appellants' needs, capacities and circumstances? In my view, there can be little dispute that the purpose of this legislation is to control sky-rocketing insurance premiums. The legislative debates make this clear, as I will discuss in more detail when considering the appellants' challenge to the regulations. Further, while the legislation featured the mandatory 20% premium reduction financed by the impugned cap, there were other measures ancillary to this goal. Goodfellow, J. succinctly identified them in his decision dealing with the *section 1* issue [**Hartling v. Nova Scotia (Attorney General)**, 2009 NSSC 38]:

> ¶ 104 There is no doubt that there has been considerable benefit to the citizens of Nova Scotia in the passing of this legislation. I will not attempt an exhaustive listing of the benefits but they include the overall purpose of the legislation was to reduce automobile insurance rates which had reached skyrocketing premiums

> (producing "rate shock") with dire consequences for Nova Scotians, particularly those with reliance on motor vehicles for employment, access to employment, medical attention, hospitals, doctors offices to avail themselves of the normal services necessary for existence. A number of measures provided benefit including (1) setting up the Insurance Review Board to examine automobile insurance rates and the factors affecting the rates; (2) amending s. 30 of the *Judicature Act*, R.S.N.S. 1981 c. 240, to allow courts to impose structured settlements; (3) eliminating double claims for injuries that are compensated by an accident victim's own insurance; (4) allowing insurers to provide expanded levels of choice in Section B coverage to allow those who want to purchase extra coverage for general damages awards; (5) moving the review of rates for the Facility Association from the Utility and Review Board to the Insurance Review Board and limiting the ability of the Facility Association to a apply for rate increases only once a year; (6) increase the minimum coverage under a motor vehicle liability policy from $200,000 to $500,000; (7) introducing the risk-classification system to determine the rates for each category and coverage of automobile insurance; moreover, an insurer must apply to the UARB for approval of any change to its risk-classification system; and (8) limiting general damage awards for minor injuries.

[75] Another question therefore emerges: In addressing this objective, does this legislation sufficiently accommodate the appellants' needs, capacities and circumstances? For the reasons that follow, I believe that it does.

[76] I have already introduced the legislation's negative features and the fact that many "minor injury" claimants will be denied an independent assessment and full recovery for their non-monetary claims.

[77] Further, the appellants urge us to consider a more serious negative consequence. They assert that in many cases, especially those involving little or no monetary loss, the cap will make it impractical if not impossible for would-be minor injuries claimants to obtain legal counsel. I agree that this is a worthy consideration but, as will become evident, not significant enough to establish a breach of *section 15*.

[78] Instead, for the complete context, it is important to highlight what the cap does not restrict. In other words what benefits still exist to address the appellants' needs? Most of these are obvious but nonetheless worthy of mention. First of all, non-monetary awards are not eliminated but simply capped. Secondly, all other rights of recovery remain intact. These represent a variety of monetary awards,

including claims for wage loss and other out-of-pocket expenses; the costs of future care; or, where a wrongdoer's actions are particularly egregious, "aggravated" or "punitive "damages, together with a commensurate contribution towards the victim's legal bill. Finally, the appellants, like all Canadians, continue to have their medical needs met through our system of universal health care.

[79] With these benefits remaining intact, it appears clear to me that the circumstances faced by the appellants are very different from the chronic pain sufferers in **Martin**, *supra*. They were denied all rights of recovery except for a four week "functional restoration program"; all in circumstances where injured workers cannot sue their employers in tort. Gonthier, J. explains:

> ¶ 95 The challenged provisions, however, while maintaining the bar to tort actions, exclude chronic pain from the purview of the general compensation scheme provided for by the Act. Thus, no earning replacement benefits, permanent impairment benefits, retirement annuities, vocational rehabilitation services or medical aid can be provided with respect to chronic pain. Employers are also exempt from the duties to re-employ them and accommodate their disability, which are normally imposed by the Act. Instead, workers injured on or after February 1, 1996, who suffer from chronic pain are entitled to a four-week Functional Restoration Program, after which no further benefits are available. In addition, if a chronic pain claim is not asserted within a year of the accident taking place, no benefit will be provided at all. Workers injured before March 23, 1990, are excluded from all benefits under the Act with respect to chronic pain. Finally, workers injured in the interim period are subject to transitional provisions whose constitutionality is not at issue before us.

[80] Thus, according to Gonthier, J., the victims in **Martin** received a message that they were "not equally valued and deserving of respect as members of Canadian society":

> ¶ 101 In contrast to the scheme upheld in *Gosselin, supra,* the chronic pain regime under the Act not only removes the appellants' ability to seek compensation in civil actions, but also excludes chronic pain sufferers from the protection available to other injured workers. It also ignores the real needs of workers who are permanently disabled by chronic pain by denying them any long-term benefits and by excluding them from the duty imposed upon employers to take back and accommodate injured workers. The Act thus sends a clear message that chronic pain sufferers are not equally valued and deserving of respect as members of Canadian society. In my view, the second contextual factor clearly points towards discrimination.

[81] Here, unlike the victims in **Martin** and despite the challenge of securing counsel in some cases, I see no such message.

[82] Therefore, considering all the circumstances and especially the many rights of recovery that this legislation leaves untouched, it, in my view, sufficiently corresponds to this group's needs.

(c) Ameliorative Purposes or Effects

[83] On this factor, Iacobucci, J. in **Law** said this:

> ¶ 72 Another possibly important factor will be the ameliorative purpose or effects of impugned legislation or other state action upon a more disadvantaged person or group in society. As stated by Sopinka J. in *Eaton*, *supra*, at para. 66: "the purpose of s. 15(1) of the *Charter* is not only to prevent discrimination by the attribution of stereotypical characteristics to individuals, but also to ameliorate the position of groups within Canadian society who have suffered disadvantage by exclusion from mainstream society". An ameliorative purpose or effect which accords with the purpose of s. 15(1) of the *Charter* will likely not violate the human dignity of more advantaged individuals where the exclusion of these more advantaged individuals largely corresponds to the greater need or the different circumstances experienced by the disadvantaged group being targeted by the legislation. I emphasize that this factor will likely only be relevant where the person or group that is excluded from the scope of ameliorative legislation or other state action is more advantaged in a relative sense. Underinclusive ameliorative legislation that excludes from its scope the members of a historically disadvantaged group will rarely escape the charge of discrimination: see *Vriend*, *supra*, at paras. 94-104, *per* Cory J.

[84] This criterion has little relevance to this appeal. I say this because its ameliorative purpose is to protect the entire driving public. In other words, neither its design nor effect benefits a group more disadvantaged than the appellants' group. While more disadvantaged sub-groups may exist within the larger driving public, this, in my view, is not the type of circumstance envisioned by the Supreme Court when identifying this factor. The relevance of any broader ameliorative effect would, in my view, be better left to a potential *section 1* analysis.

(d) The Nature of the Interest Affected

[85] Again I turn to Iacobucci, J. in **Law** for guidance with this final factor. He elaborates:

> ¶ 74 A further contextual factor which may be relevant in appropriate cases in determining whether the claimant's dignity has been violated will be the nature and scope of the interest affected by the legislation. This point was well explained by L'Heureux-Dubé J. in *Egan*, *supra*, at paras. 63-64. As she noted, at para. 63, "[i]f all other things are equal, the more severe and localized the . . . consequences on the affected group, the more likely that the distinction responsible for these consequences is discriminatory within the meaning of s. 15 of the *Charter*". L'Heureux-Dubé J. explained, at para. 64, that the discriminatory calibre of differential treatment cannot be fully appreciated without evaluating not only the economic but also the constitutional and societal significance attributed to the interest or interests adversely affected by the legislation in question. Moreover, it is relevant to consider whether the distinction restricts access to a fundamental social institution, or affects "a basic aspect of full membership in Canadian society", or "constitute[s] a complete non-recognition of a particular group".

[86] The interest at stake in this appeal has two relevant characteristics. Firstly, it is economic in nature and, secondly, it is in many ways already arbitrary by nature. Let me elaborate on each.

[87] Firstly, this interest is purely economic and represents that amount of money which a “minor injury” claimant would have received but for the cap, less $2,500. That said, purely economic interests have, in the past, received *section 15* protection. Again, **Martin** represents a good example:

> (iv) Nature of the Interest Affected
>
> ¶ 103 The Court of Appeal accepted the respondents' argument that the disadvantage suffered by injured workers was solely economic in nature and that the deprivation of benefits was relatively minor. First, I believe it is important to clarify the status of economic interests in the substantive discrimination context. While a s. 15(1) claim relating to an economic interest should generally be accompanied by an explanation as to how the dignity of the person is engaged, claimants need not rebut a presumption that economic disadvantage is unrelated to human dignity. In many circumstances, economic deprivation itself may lead to a loss of dignity. In other cases, it may be symptomatic of widely held negative attitudes towards the claimants and thus reinforce the assault on their dignity.

[88] Secondly, this interest has already been labelled by some as arbitrary by nature. Let me elaborate. One of the appellants' main complaints with the cap is that it renders a plaintiff's interest in non-monetary damages arbitrary. Yet, in many ways, non-monetary awards already have this same feature. Indeed, a cap for such awards is nothing new. In fact, back in 1978, the Supreme Court of Canada created a ceiling of $100,000 on non-monetary awards for victims of catastrophic injury in what has become known as the *trilogy*: **Andrews v. Grand & Tory Alberta Ltd.**, [1978] 2 S.C.R. 229 at 260-261; **Arnold v. Teno**, [1978] 2 S.C.R. 287 at 332-333; **Thornton v. School Dist. No. 57 (Prince George)**, [1978] 2 S.C.R. 267.

[89] Since that time what was referred to by the Supreme Court in 1978 as a "rough upper limit" has essentially been honoured as a judge-made cap, subject only to adjustments for inflation. See: **Whiten v. Pilot Insurance Co.**, [2002] 1 S.C.R. 595 at para. 164; and **ter Neuzen v. Korn**, [1995] S.C.J. No. 79 at para. 114. Furthermore, the 1978 Supreme Court had similar motivations - to check sky-rocketing insurance premiums.

[90] To me, this is significant because it highlights a fundamental aspect of non-monetary damages. They are not the product of arithmetic. Instead, they represent attempts to provide solace; a concept that by necessity may appear arbitrary. As Dickson, J. (as he then was) back in 1978, observed:

> ... But the problem here is qualitatively different from that of pecuniary losses. There is no medium of exchange for happiness. There is no market for expectation of life. The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but *the award must also of necessity be arbitrary or conventional. No money can provide true restitution.* ... [**Andrews** at p. 261]
>
> [Emphasis added.]

[91] Furthermore, the 1978 cap has withstood the test of time despite the emergence of the *Charter*. See **Lee v. Dawson** (2006), 267 D.L.R. (4th) 138 (B.C.C.A.) at para. 78; leave to appeal to the Supreme Court of Canada denied, [2006] S.C.C.A. No. 192.

[92] In fact, the Supreme Court has recently re-affirmed that non-monetary damages are not necessarily proportional to the nature of the injury suffered. For example, in **ter Neuzen v. Korn**, *supra*, Sopinka, J. for the majority, stated the following:

> ¶ 106 ... It is simply impossible to put a money value on the non-pecuniary losses which have been suffered by the plaintiff. Therefore, the award of non-pecuniary damages "is a philosophical and policy exercise more than a legal or logical one" ([*Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, at] p. 261). This Court has adopted the "functional" approach to assessing such damages. That is, rather than attempting to evaluate the loss of happiness, non-pecuniary damages seek to provide the plaintiff with reasonable solace for the misfortune suffered. Money acts as a substitute for the pleasure and enjoyment which has been lost and endeavours to alleviate, as far as possible, the pain and suffering that the plaintiff has endured and will have to endure in the future.

[93] In short, at risk in this case is an economic interest that, in many ways, is already arbitrary by nature.

Conclusion on this Issue

[94] In the end, I believe that the judge was correct to reject this aspect of the appellants' claim. In summary, while the cap represents a new disadvantage, there is no evidence of an historic disadvantage and very sparse evidence of past stereotyping. Furthermore, this reform is sufficiently attentive to the appellants' needs, capacity and circumstances. Specifically, the appellants will continue to be fully compensated for all direct financial losses. As well, the interest affected is already arbitrary by nature. In other words, while this legislation results in a disadvantage, it is not the product of prejudice or stereotyping as envisaged under *section 15*.

[95] I would therefore dismiss this aspect of the appeal.

Alleged *Section 15* Breach - Sex

The Appellants' Position

[96] The appellants assert that this legislation creates a further adverse consequence for women. Specifically, they say that because women have long been

disadvantaged in the workforce and consequently earning significantly less than men, non-monetary awards represent a much greater portion of their loss. Further, they assert that non-monetary loss for women is more significant, due to complications involving such things as pregnancy and childcare. With no special accommodation for women in this legislation, the result is added discrimination. They explain it this way in their factum:

> ¶ 58 There is no requirement to prove that the Legislature intended to discriminate against women. The effect of placing a cap on non-pecuniary general damage awards disproportionately impacts women as women, as a group, are paid less than men and receive a larger percentage of their total compensation in the form of non-pecuniary general damages. ...
>
> ¶ 61 In addition Dr. Lynch testified that women suffer unique injuries following motor vehicle accidents which are gender specific. Dr. Lynch testified that women may have problems with pregnancy, breastfeeding, caring for children and homemaking, following a motor vehicle accident. Women are more likely than men to experience a variety of recurrent pains. These are losses that would be typically compensated by way of an award of non-pecuniary general damages. By capping this award women are being disadvantaged to a greater extent than men.

The Evidence on this Issue

[97] To advance this claim, the appellants relied on the evidence of Professor Lucinda Finley and Dr. Lynch. Dr . Finley succinctly presents her position on the wage loss issue**:**

> ¶ 5 That based on my research and review of the legislation, the $2500 cap on non-pecuniary damages for “minor injuries” established by the legislation will have a significant adverse effect on women in Nova Scotia. The impact on women will be disproportionate to the impact on males in the Province. Studies, including my own research published in the Emory Law Journal, have shown that juries consistently award women more in non-economic losses than men and that the non-economic portion of women’s total damage award is significantly greater than the percentage of men’s tort recoveries attributable to non-economic damages. Historically and statistically, women are more likely to be unemployed outside the home or marginally employed than men. Economic loss damages, particularly damages to compensate for past or future wage loss, have not been impacted by the cap. Such damage awards provide the most benefit to higher wage earners. Women receive lesser amounts of economic-loss compensation than more economically well-off men. Any cap on non-economic loss damages

> will deprive women of a much greater proportion of what a jury awards than men. Such caps lead to an inequality in compensation for women and unequal access to justice for women.
>
> [Affidavit of Lucinda Finley, dated December 31, 2007]

[98] Then Professor Finley offers this on the gender specific aspects of non-monetary awards:

> ¶ 3 ... Rather, the point is that there are types of harms or aspects of harms that are compensated primarily or exclusively through non-pecuniary damages, and that they are gendered harms that disproportionately affect women. Examples include reproductive harms, and an impaired ability to care for, play with, and interact with one's children. This point is relevant to explaining why women are more dependent on non-pecuniary damages, i.e., why this type of damages represents a greater proportion of women's damage awards.
>
> [Reply Affidavit of Lucinda Finley, dated September 29, 2008]

[99] Further, on the "gender specific" issue, Dr. Lynch added this in her first affidavit:

> ¶ 4 That there are additional non-monetary losses suffered specifically and solely by female patients as a result of soft-tissue injuries and chronic pain. Such losses include difficulties initiating or maintaining a pregnancy and difficulty in breast-feeding children.
>
> [Affidavit of Dr. Mary Lynch, dated December 21, 2007]

[100] Yet the judge rejected Professor Finley's testimony (and inferentially, that of Dr. Lynch). Instead he favoured the respondents' expert, Professor Michael Trebilcock:

> ¶ 153 Rather than add several pages to this already lengthy decision I simply want to comment that I am impressed with the evidence and affidavit of Michael Trebilcock. He certainly appears to have an excellent grasp of the insurance industry, both in Canada and the United States of America; however, more to the point, I find the opinions he expresses in paragraphs 37 to 39 inclusive commenting on the opinion that Professor Finley used and I accept Professor Trebilcock's views and conclude that he knows that of which he speaks based on

> extremely extensive and broad experience and I therefore prefer his expert opinions over those of Professor Finley.

[101] At paragraphs 37 to 39 of his affidavit (adopted by the judge above), Professor Trebilcock addressed and then dismissed each one of Professor Finley's assertions:

> ¶ 37 With respect to the opinion filed by Professor Lucinda Finley, she makes three principal points, all of which I reject. First, she claims that a cap on non-pecuniary damages discriminates against women in particular (and also the elderly and children). The basis for this claim, based on an analysis of a small sample of Nova Scotia closed claims, is that in the case of women, non-pecuniary damages, prior to the recent reforms, constituted a larger percentage of total tort awards than for men. The principal basis for her finding is that economic damages recovered by women, on average, are smaller than those recovered by men, so that an equivalent amount of non-pecuniary damages will constitute a higher percentage of total tort awards on average for women relative to men. This may well be true, but this relates entirely to the quantum of awards for economic damages, where women, on average, recover less than men because they are full-time caregivers or employed in the workforce at lower paid jobs than men. Thus, while capping pecuniary damages in identical ways for men and women is not discriminatory in itself, Professor Finley argues that it is at least indirectly discriminatory given the disproportionate impact on total tort awards. However, to the extent Professor Finley has a complaint, this presumably relates to the relative size of economic awards for men and women, not the treatment of non-pecuniary damages. Non-pecuniary damages cannot reasonably be justified as a mechanism for redressing whatever inequities women may sustain in their economic roles in society and hence their entitlement to economic damages in tort claims.
>
> ¶ 38 Second, Professor Finley argues that some forms of non-pecuniary losses are more severe or salient in the case of women relative to men, and hence a cap on non-pecuniary damages will directly discriminate against women. However, I note in this respect that the data she presents from her analysis of a sample of Nova Scotia closed claims prior to the recent reforms show that non-pecuniary damages for men and women are roughly equivalent (and indeed somewhat lower in some cases for women), so that there is no evidence that prior to the cap non-pecuniary damages were capturing damages to which women were especially vulnerable.
>
> ¶ 39 Third, Professor Finley claims in her opinion and elaborates on in her attached article from the *Emory Law Journal*, that reducing tortious recoveries for non-pecuniary damages will have no impact on insurance premiums, which are

> largely determined by the so-called insurance cycle. While the insurance cycle may be an important factor in explaining movements in liability insurance premiums, to argue that insurance premiums bear no relationship to underlying claims costs defies credulity. In a competitive insurance market (and she adduces no evidence that the liability insurance market in the U.S. or Canada is not competitive), one would expect that auto insurance premiums would be competed down roughly to levels that cover claims and other costs plus a reasonable return on capital. Where the auto insurance market is not competitive and is subject to some form of regulation, one would expect that a well-designed regulatory regime would ensure that premiums bear some reasonable relationship to claims costs. Hence, I reject the proposition that reducing claims costs has no impact on the affordability of automobile insurance.
>
> [Affidavit of Michael Trebilcock, dated April 23, 2008]

[102] By accepting Professor Trebilcock's assertions, the judge made a finding of fact that defeats the charge that women are more impacted by the cap because they suffer gender specific losses. That said, the wage loss aspect of this claim, in my view, cannot be so readily dismissed. Let me elaborate.

[103] Professor Trebilcock does not challenge Professor Finley's assertion that the cap more severely impacts victims earning less money because the non-monetary loss will represent a larger percentage of the overall claim. Nor does he disagree that women have been historically disadvantaged in the workplace. In fact, the Supreme Court of Canada has recently said that "womens' jobs" are chronically underpaid: see **Newfoundland (Treasury Board) v. N.A.P.E.** (2004), 244 D.L.R. (4^{th}) 294 (SCC):

> (1) Pre-Existing Disadvantage
>
> ¶ 45 "Womens' jobs" are chronically underpaid. As Abella J.A. wrote in a 1987 law journal article:
>
> > The existence of a gap between the earnings of men and women is one of the few facts not in dispute in the "equality" debate. There are certainly open questions about it, the two main ones being the width of the gap and the right way to go about closing it. But no one seriously challenges the reality that women are paid less than men, sometimes for the same work, sometimes for comparable work.
>
> (R. S. Abella, "Employment Equity" (1987), 16 *Man. L.J.* 185, at p. 185).

See also **Canada (Human Rights Commission) v. Canadian Airlines International Ltd.**, 2006 SCC 1 at para. 17.

[104] Therefore, although the appellants did not pursue this alternative submission in oral argument, (relying only on their factum), I believe that this claim requires careful consideration because it involves a detriment that more acutely impacts a group that has been historically disadvantaged. That said, in the end, I remain unconvinced that the judge erred in dismissing this aspect of the claim. I reach this conclusion after again considering the four criteria set out in **Law**. My summary follows.

[105] With the first factor - *pre-existing disadvantage* - I repeat that women have historically been disadvantaged in the workplace.

[106] Regarding the *correspondence* between the legislation and the needs of this group, I repeat my earlier analysis and confirm that, but for the gender issue, the legislation sufficiently addresses the needs of minor injury victims. The important question therefore becomes: Does my conclusion change when considering the plight of female minor injury victims?

[107] The answer is no because, fundamentally, the problem identified by the appellants has nothing to do with the cap. Instead, the root problem is discrimination in the workplace and the consequential reduction in wage loss claims. Yet, the appellants' submission would, in effect, have us look to non-pecuniary damages for a solution to that unrelated social issue. This, respectfully, misses the mark. In other words, while the effects of this legislation may be more acute for women, the solution, in my view, lies elsewhere. Specifically, the solution to this problem lies with ongoing efforts towards pay equity. In this light, the legislation, for all the reasons highlighted above, sufficiently addresses the needs of this female group.

[108] Turning to potential *ameliorative effects*, I go back to my earlier analysis and confirm that this factor has no application to this issue either.

[109] Finally, the *interest affected* remains the same as with my earlier analysis. It is an economic interest representing what a "minor injury" claimant would have received before the cap, less $2,500. All other rights of recovery remain intact.

Furthermore, while this interest will be more significant for low income earners such as women, it remains nonetheless an interest where, historically, exact quantification seemed elusive, and carried with it ingrained elements of arbitrariness. Therefore, for all the reasons discussed earlier, even for females, this legislation does not trigger *section 15* protection. I would therefore dismiss this aspect of the appeal.

The Legality of the Regulations

Framing the Issue

[110] To repeat, the heart of this submission lies with the definition of "minor injury".

> 113B (1) In this Section,
>
> (a) "minor injury" means a personal injury that
>
> (i) does not result in a permanent serious disfigurement,
>
> (ii) does not result in a permanent serious impairment of an important bodily function caused by a continuing injury which is physical in nature, and
>
> (iii) resolves within twelve months following the accident;

[111] The appellants correctly assert that this provision is the product of a legislative compromise. As noted, the debates leading up to its passage confirm that the minority government was forced to restrict the cap's reach. For example, the definition was initially introduced not as legislation but as a draft regulation containing only sub-clauses (i) and (ii) separated by the word "or'. In other words, by virtue of either (i) or (ii), the cap was initially so wide, it captured all but permanent injuries. The House debates demonstrate that both opposition parties were concerned about this. In fact, the then opposition New Democratic Party wanted little to do with the entire scheme. However, the Liberal party agreed to work with this framework, provided that the cap's reach was restricted. Enter the compromise. The definition would be moved from regulation status to the body of the bill, sub-clause (iii) limiting "minor injury" to those that "resolve" within twelve months would be added, and "or" would be replaced with "and", meaning

all three conditions would have to be met for the cap to apply. On these basic points, the compromise appears clear. However, for the appellants, the compromise involved more.

[112] Specifically, the appellants insist that the government acceded to opposition demands for a cap that would catch only those victims who were "pain free" within twelve months. On this basis, they say that the government of the day thwarted the will of the Legislature when, through a unilateral government regulation, it [re]defined "resolves" in s-s. 113B(1)(c). In other words, for the appellants, these regulations extend the reach of the cap much further than the Legislature ever intended. They explain it this way in their factum:

> ¶ 181 Regulations 2(1)(f), (g) and (h), all substantially expand on the definition of a "minor injury" to cover a far greater number of accident victims. The Regulations are inconsistent with the intent of the Legislature to minimize the impact of the cap on accident victims by adding a third definition of a "minor injury". The Regulations are contrary to the plain and ordinary meaning of the word "resolve". The effect of the Regulations is to take away a massive number of accident victims' claims which were not covered under the *Act.*
>
> ¶ 182 The Appellants submit that Regulation 2(1)(f), (g) and (h) are clearly inconsistent with the *Automobile Insurance Reform Act* and ought to be struck as *ultra vires* the Legislation.

[113] The respondents, on the other hand, say that the government's only concession was to exclude from the cap non-permanent injuries that did not "resolve" within twelve months. They add that "resolve" could never have meant "pain free" because the number of claims caught by the cap would then become restricted to the point of jeopardizing the savings projected to finance the 20% premium reduction. The respondents therefore insist that the impugned regulations are no more than a realistic attempt to give effect to this legislative compromise - namely allowing non permanent injuries (lasting beyond twelve months) to escape the cap while achieving the necessary decrease in claims to finance the 20% premium reduction. In other words, for the respondents, it was all about striking the appropriate balance.

[114] This frames the issue which I will now resolve in two steps. Firstly, I will consider the judge's analysis. Secondly, I will consider the appropriate legal

principles and the House of Assembly Debates to determine the Legislature's true object.

The Judge's Analysis

[115] The judge found the regulations to be consistent with legislation. He summarized it this way:

> ¶ 168 I conclude that the definitions "resolves", "substantial interference" and "usual daily activities" are consistent with the objectives of controlling claim costs with automobile accidents, reduction of automobile insurance premiums and the desire to strengthen the consumer protection provisions of the *Insurance Act.* Automobile insurance is to most Canadians a necessity. The situation confronting the Nova Scotia House of Assembly was not dissimilar to what occurred elsewhere in Canada and, indeed, outside of Canada, namely that insurance premiums were rising to the point where many members of society and, in particular, elders, youths, single parents, low income citizens, *et cetera* were not only in danger of but had reached the stage where insurance costs were beyond their capacity.

[116] The judge then correctly went on to consider the provision as a whole and in the process, rejected the appellants' "pain free" thesis:

> ¶ 169 In my view the House of Assembly was aware of s. 5(3)(na) of the *Insurance Act* which provides the Governor in Council may make Regulations defining any word or expression used but not defined in the *Act* and, further, that it would be necessary to define various terms in the new legislation to ensure that the intent and objectives of the House of Assembly were met. The argument that the definition of "resolves" constitutes an attempt to amend the legislation has not been established. The phrase "resolves within 12 months" must be interpreted in light of the first two parts of the definition of minor injury and quotes in s. 113(B)(1)(a)(i)and (ii) interpreting words in a section of an Act in their entire context consistent with the purpose of the Act has been acknowledged by the Supreme Court of Canada to be the preferred approach to statutory interpretation **Bell Express Vu Limited Partnership v. Rex**, [2002] 2 S.C.R. 559. Based on the evidence before me, the term "resolves" does not mean that in the definition of minor injury one has to be "pain free" within 12 months following the accident. "Resolves", based on the evidence, must be interpreted in the context of functional impairment as opposed to pain measurement. It is acknowledged that the Governor in Council does not have unfettered discretion in terms of defining terms used in the parent legislation however I conclude that the definitions here

> were anticipated and considered to be necessary and advisable to accomplish the objectives of the legislation.

The Law on this Issue

[117] The applicable law involves three basic premises. Firstly, it is customary for legislation in furtherance of its objects, to authorize the government (by way of order-in-council) to proclaim appropriate regulations. The **Insurance Act**, *supra*, is no exception. Specifically I refer to:

> 5 (3) The Governor in Council may make regulations ...
>
> (na) defining any word or expression used but not defined in this Act;
>
> (o) generally for the better carrying out of the provisions of this Act and the more efficient administration of it.

[118] Secondly, regulations must nonetheless be consistent with and not beyond the scope of the legislation. For example, in **Way v. Covert**, (1997) 160 N.S.R. (2d) 128 (C.A.), this court held:

> ¶ 84 ... it is trite law that a regulation cannot stand if it is inconsistent with its parent statute (*Booth v. R.* [1915] 21 D.L.R. 558 (S.C.C.) and *The Grand Truck Pacific Railway Co. v. The City of Fort William* (1910), 43 S.C.R. 412.
>
> ¶ 85 The parent Statute here, the *Family Benefits Act*, establishes a basic standard of eligibility for benefits. It is a "person in need" (or a "family in need") who is eligible for benefits. The Regulations cannot be inconsistent with this basic standard of eligibility.
>
> ¶ 86 Since the appellant, a disabled person, is eligible for benefits under the Statute (because her income, and what is deemed to be her income, is not sufficient to meet the costs of the basic necessities of life) the Governor-in-Council cannot pass a regulation which takes away that eligibility because of the level of income of her brother. Such a regulation is inconsistent with the parent Statute; and is therefore invalid.

See also **Morine v. L & J Parker Equipment Inc**., 2001 NSCA 53, at para. 49.

[119] Thirdly, the regulations are presumed valid unless demonstrated to be otherwise. In other words, the appellants bear the onus. For example, as stated by L'Heureux-Dubé, J. in **114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)**, 2001 SCC 40:

> ¶ 21 ... The party challenging a by-law's validity bears the burden of proving that it is ultra vires: see *Kuchma v. Rural Municipality of Tache*, [1945] S.C.R. 234, at p. 239, and *Montréal (City of) v. Arcade Amusements Inc.*, [1985] 1 S.C.R. 368, at p. 395.

House Debates

[120] What then was the extent of this legislative compromise? In my view, the House Debates offer a clear answer.

[121] First of all, the record leaves no doubt that this reform was designed to tackle sky-rocketing automobile insurance premiums. It shows that this was an election issue in the Summer of 2003 and then the new government's first order of business. One need look no further than the Speech from the Throne, *supra*, just prior to the introduction of the impugned legislation.

[122] Further, the record makes it equally clear that the 20% premium reduction would be achieved by capping non-monetary awards for "minor injuries". For example, in introducing the bill, the Minister of Transportation and Public Works explained:

> Mr. Speaker, this legislation is putting hard-earned money back into the consumer's pocket. In addition to this immediate rate relief, all future applications for rate increases will have to be reviewed and approved by the Nova Scotia Insurance Review Board. This new system will protect Nova Scotia drivers from unreasonable rate increases that many have experienced over the past two years. This lower rate is achieved by changing the current insurance package. The changes include an increase in minimum liability protection from $200,000 to $500,000. *Insurance companies have indicated that their largest cost is minor soft-tissue injury claims. Therefore, this legislation will limit excessive awards paid for minor injuries. Controlling these costs and implementing other changes to the system will reduce insurance companies' costs by at least 20 per cent. The companies in turn will pass a 20 per cent reduction on to consumers.*
>
> [Emphasis added.]

[123] Therefore, in my view, the record could not more clearly confirm the legislative intent to lower insurance premiums. Yet the appellants advance a modified theory. They say that while the intent of the legislation was originally to lower insurance premiums, it changed to that of protecting accident victims. They explain it this way in their factum:

> ¶ 165 Tracing the legislative history and evolution of the definition of a "minor injury" identifies a couple of important points. First, the original intent of the legislation was to reduce automobile insurance premiums. However, as the Bill proceeded through the Legislature, members of the Legislature became increasingly concerned with the impact the Bill would have on accident victims. The third definition of a minor injury - "resolves within twelve months" - was clearly intended to protect accident victims. In essence the Legislature was intending to balance the rights of accident victims with the need to curb automobile insurance premiums. The Appellants submit that the Trial Judge's conclusion that the sole intention of the Legislature was solely to reduce automobile insurance premiums is an error.

[124] Respectfully, I cannot accept this theory because the record simply cannot support it. Instead, the legislative intent was constant throughout and unchanged by the compromise. Of course, in meeting the need for reduced premiums, the rights of litigants would have to be considered. In fact, in the above passage, the appellants acknowledge the need to balance these interests. However, that did not alter the legislation's fundamental goal of reducing premiums.

[125] Again, the record is clear. The opposition Liberal party supported the bill's object to reduce premiums. Its concern was not that there was a cap but that it was too sweeping. They wanted a definition of "minor injury" that would narrow its scope. The House Debates are replete with examples of this. Here is but one from Liberal Leader Daniel Graham speaking on his Party's behalf:

> Madam Speaker, I would invite him to read his own legislation in these circumstances. What does serious mean? And what does permanent mean? If we had somebody with two broken legs and they were in a coma for six months, they recover, more or less, fully, it's not a permanent injury. Therefore it does not qualify as a minor injury under this legislation. Therefore those people in those kinds of circumstances would find themselves with a cheque, when they woke up, for $2,500. That is not what was intended. I hope that it wasn't what was intended when these remarks were made by the government when they were looking to curry favour with Nova Scotia voters. It is unacceptable that this be put forward.

[126] In short, the definition of “minor injury” was the supporting Liberal Party’s prime concern and it was never their intention to back away from the goal of reducing premiums. Instead, the challenge was to find the right balance with a cap that would finance the premium reduction without casting too wide a net. In fact, it was Mr. Graham who called for this balance and the need to compromise:

> Our Party wants to make it work in the interest of all Nova Scotians. Many Nova Scotians won't care about all the fine details that we discuss in the back rooms and perhaps in Law Amendments Committee. What they care about is that they get reasonable compensation for reasonable rates. Hopefully many of them will be appearing before the Law Amendments to hear Bill No. 1. I look forward to their comments. Our Party looks forward to a constructive discussion with the government to ensure that the balance that is needed is ultimately there. We feel that we have the foundation for something that is ultimately workable. In order for that to happen, compromise is necessary.

[127] In the end, Liberal M.L.A. Michel Samson confirmed the compromise - not everything that his party wanted but they secured significant improvements while still meeting the goal of a 20% reduction in premiums:

> Yet, fortunately, Mr. Speaker, agreement was reached, significant changes were made to the definition. Is it the definition the Liberal caucus wanted? No. Had we put in the definition we wanted, the government made it clear the bill would be unworkable and they wouldn't call it.
>
> Again, who would be the losers? The Liberal caucus could have claimed victory, we had our definition, yet the bill doesn't get called and doesn't get passed. So, who wins? Certainly wouldn't have been a victory for us. Nova Scotians would have been the losers. So we went forward from there on that basis. An agreement was reached to bring the definition as close as possible to what the government wanted or what the government was saying they were going to do during the campaign, yet, at the same time, being respectful of the fact the bill had to be able to achieve a 20 per cent reduction which is what the government said they wanted.

[128] Furthermore, I can find nothing in the House Debates to support the appellants’ assertion that the compromise meant that the cap would cover only those victims pain free within twelve months. Instead, in my view, the debates appear to confirm the balance that the two political parties searched for -

calibrating the definition of minor injury so that the cap is just broad enough to achieve the savings necessary to finance the premium reduction.

[129] Therefore, while these regulations may have made it harder to avoid the cap, I cannot say that they are inconsistent with the compromise reached through the legislative process. It follows that the judge was correct. The appellants failed to establish that the regulations run afoul of the legislation. I would dismiss this aspect of the appeal.

Alleged *Section 15* Breach - Mental Disability

[130] Again, let me frame this issue. The appellant McKinnon asserts that because her injury (seeing her father being struck by a truck) was purely "mental" as opposed to "physical" in nature, she is automatically caught by the cap regardless of how much she might suffer.

[131] Yet the judge's resolution of this issue is interesting. Instead of embarking on a *section 15* analysis, he rejected this appellant's premise that her injuries were purely mental in nature. In fact, the judge relied on expert evidence to conclude that Post Traumatic Stress Disorder triggers detectable physical changes in the brain. On this basis the judge concluded that Ms. McKinnon's injury was indeed "physical in nature", thereby rendering the cap available should her injury be deemed sufficiently serious. Thus Ms. McKinnon's fear that she would be automatically caught by the cap proved to be unfounded. In other words, her injury was no different from any other injury that was "physical in nature". Without that distinction, there could be no basis for discrimination. The judge reasoned:

> ¶ 207 Ms. McKinnon has led absolutely no evidence to rebut the expert medical testimony provided by Dr. Gnam, Dr. Bagnell and Dr. Rosenberg which evidence I find impressive and most convincing. I accept the conclusion that the brain is part of the body and that PTSD has been established to be an injury "physical in nature". Ms. McKinnon has led no evidence to the contrary. The accepted evidence of the three experts is definitive. I do not accept the argument advanced by Ms. McKinnon's solicitor that the terminology used by the Legislature "physical in nature" was meant to reinforce and strengthen the word "physical" from what it would have meant if it stood alone. If the intention were to strengthen the word "physical" then it could easily have been done by adding such terminology as "purely physical", "solely physical", *et cetera*. The addition of the words "in nature" obviously, rather than reinforce and strengthen the word "physical", were intended to extend what the word "physical" would mean if it

> stood alone. I conclude that Ms. McKinnon, if she has a permanent, serious impairment of an important body function which is caused by a continuing injury or an injury which is not "resolved" within 12 months, then she will not be restricted in terms of her claim and her non-pecuniary damages given the fact that her injuries are "physical in nature". The trial judge can only make a determination based on the case that is the evidence before it and I find as a fact that in the terms of Ms. McKinnon's s. 15(1) challenge no distinction has been made with respect to her injury on the basis of mental disability ...

[132] In my view, this immutable factual finding, specific to this case, renders Ms. McKinnon's appeal moot. I say this because she won her application on its merits. She is not inevitably trapped by the cap as she feared. She is free to pursue her main action against the respondent Roy. The cap may or may not apply, depending on how the evidence ultimately unfolds, but does not apply by reason of her injury being non physical in nature. In fact, the respondents concede that her injuries are physical in nature.

[133] Nonetheless Ms. McKinnon urges us to consider the constitutionality of s. 113B(1)(a)(ii), if not on her behalf, then on behalf of other would-be plaintiffs whose injuries are purely "mental" as opposed to "physical" in nature.

[134] I would decline this invitation for several reasons. Firstly, we would face this inescapable paradox. For her claimant group, Ms. McKinnon identifies would-be plaintiffs whose injuries are <u>not</u> "physical in nature". Yet that would make her a part of the more advantaged comparator group that she has identified - would-be plaintiffs whose injuries <u>are</u> "physical in nature". This is simply untenable. In other words, there may be a potential constitutional issue for victims with injuries that are <u>not</u> "physical in nature". However this is clearly not that case. As the Supreme Court has cautioned, unless judicial notice is called for, there should be an evidentiary basis to buttress any *section 15* claim. For example, in **MacKay v. Manitoba**, [1989] 2 S.C.R. 357, Cory, J., for the Court, held at paras. 8-9:

> ¶ 8 *Charter* cases will frequently be concerned with concepts and principles that are of fundamental importance to Canadian society. For example, issues pertaining to freedom of religion, freedom of expression and the right to life, liberty and the security of the individual will have to be considered by the courts. Decisions on these issues must be carefully considered as they will profoundly affect the lives of Canadians and all residents of Canada. In light of the importance and the impact that these decisions may have in the future, the courts have every right to expect and indeed to insist upon the careful preparation and

> presentation of a factual basis in most *Charter* cases. The relevant facts put forward may cover a wide spectrum dealing with scientific, social, economic and political aspects. Often expert opinion as to the future impact of the impugned legislation and the result of the possible decisions pertaining to it may be of great assistance to the courts.
>
> ¶ 9 *Charter* decisions should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues. A respondent cannot, by simply consenting to dispense with the factual background, require or expect a court to deal with an issue such as this in a factual void. *Charter* decisions cannot be based upon the unsupported hypotheses of enthusiastic counsel.

[135] Furthermore, since this is an interlocutory appeal, Ms. McKinnon requires leave to appeal pursuant our *Civil Procedure Rules* and *Judicature Act*, R.S.N.S. (1989), c. 240. For many of the same reasons, I believe that leave should be denied. Let me simply add this regarding our court's practice when considering leave applications.

[136] In essence, we consider whether or not the appeal presents an arguable issue. For example in **Pearce v. Nova Scotia (Workers' Compensation Board)**, [1996] N.S.J. No. 433:

> ¶ 13 The test on a leave application is whether the appellant has raised an arguable issue; that is, an issue that could result in the appeal being allowed *Coughlan v. Westminer Canada Ltd. et al.* (1993), 125 N.S.R. (2d) 171 (C.A.).

See also **Geldart v. Nova Scotia (Workers' Compensation Board)** (1996), 155 N.S.R. (2d) 51.

[137] In **Coughlan v. Westminer Canada Limited et al.** (1993), 125 N.S.R. (2d) 171 (C.A.), Freeman, J.A. articulates what exactly is meant by an 'arguable issue'. While this discussion was undertaken in the context of an application for a stay of execution, it is nonetheless relevant here:

> ¶ 11 "An arguable issue" would be raised by any ground of appeal which, if successfully demonstrated by the appellant, could result in the appeal being allowed. That is, it must be relevant to the outcome of the appeal; and not be based on an erroneous principle of law. *It must be a ground available to the*

> *applicant*; if a right to appeal is limited to a question of law alone, there could be no arguable issue based merely on alleged errors of fact. An arguable issue must be reasonably specific as to the errors it alleges on the part of the trial judge; a general allegation of error may not suffice. But if a notice of appeal contains realistic grounds which, if established, appear of sufficient substance to be capable of convincing a panel of the court to allow the appeal, the chambers judge hearing the application should not speculate as to the outcome nor look further into the merits. Neither evidence nor arguments relevant to the outcome of the appeal should be considered. Once the grounds of appeal are shown to contain an arguable issue, the working assumption of the chambers judge is that the outcome of the appeal is in doubt: either side could be successful.
>
> [Emphasis added.]

[138] The problem with this appeal is that there no longer exists an arguable issue between these parties. As noted, Ms. McKinnon has been successful in her application and is free to advance her claim proper against the respondent Roy. In my view, there is nothing to be gained by exploring what has now been rendered a hypothetical question. In fact, this request is akin to a constitutional reference which in this context would be prohibited. In other words, this moot appeal is not one of those cases identified in **Borowski v. Canada (Attorney General)**, [1989] 1 S.C.R. 342, with sufficient importance to trigger our discretion to see it proceed.

[139] In fact, in the past this court has taken the same approach in similar circumstances. For example, in **Breton Bay Nursing Home Ltd. v. Canadian Union of Public Employees**, Local 1183, [1999] N.S.J. No. 212 (C.A.), the appellant Union applied for leave to appeal and, if granted, appealed an interlocutory injunction restraining certain picketing activities. By the time of the hearing of the application, the parties had reached an agreement on the matters that led to the strike. In an oral decision, Flinn, J.A. for the court denied leave essentially because the appeal had become moot:

> ¶ 3 Since the strike has been settled, we must first decide if this appeal is moot; and, even if it is, whether we should exercise our discretion and hear this appeal on its merits.
>
> ¶ 4 In our opinion this case does not meet the "live controversy" test as that is enunciated by Justice Sopinka in **Borowski v. Canada (Attorney General)**, [1989] 1 S.C.R. 342 (see also **Children's Aid Society of Halifax v. L.H.** (1989), 90 N.S.R. (2d) 44). The appeal is, therefore, moot.

> ¶ 5 Further, while the appellants raise some interesting issues concerning the extent of the restraint which the trial judge placed on certain of the Union's activities in this specific situation, no practical benefit can flow from using the resources of this court to deal with those issues. The Court is not prepared to exercise its discretion so as to adjudicate upon the merits of this moot appeal.
>
> ¶ 6 Leave to appeal is denied, under the circumstances, without costs.

See also **R. v. Hershey**, [1988] N.S.J. No. 423 (C.A.) and **Nova Scotia Association of Health Organizers v. Nova Scotia (Workers' Compensation Appeal Board)**, [1994] N.S.J. No. 676 (C.A.).

[140] For all these reasons, I would deny Ms. McKinnon's application for leave to appeal.

DISPOSITION

[141] I would dismiss the first appeal, but in the circumstances, without costs. I would deny leave in the second appeal, but again, without costs. Finally, in light of this result, there is no need for me to consider the respondents' contention that even had the legislation breached *section 15*, it would have been saved by *section 1* of the *Charter*.

MacDonald, C.J.N.S.

Concurred in:

Hamilton, J.A.

Beveridge, J.A.