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February 2010

CANADIAN Lawyer

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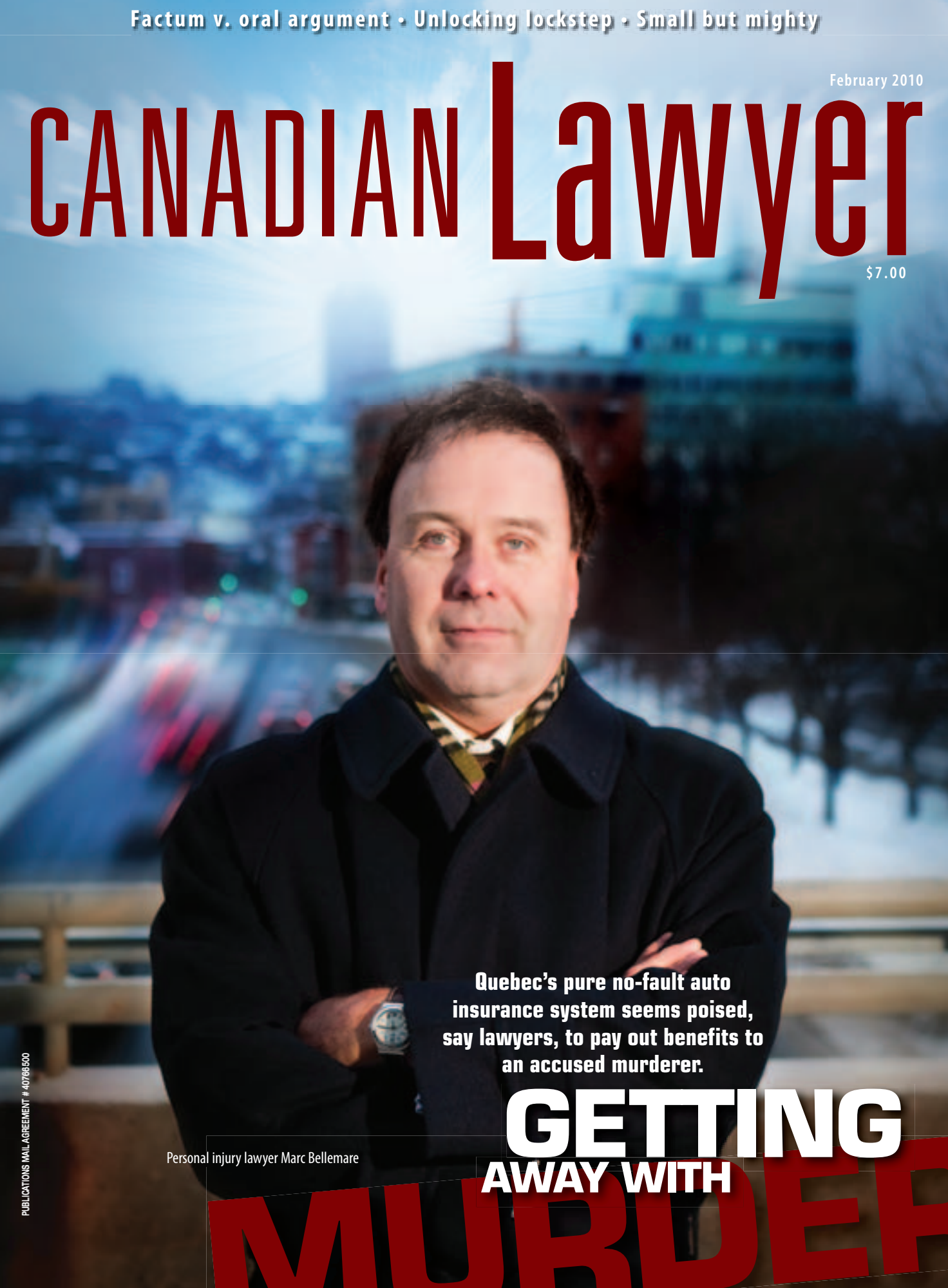

Quebec's pure no-fault auto insurance system seems poised, say lawyers, to pay out benefits to an accused murderer.

GETTING AWAY WITH MURDER

Personal injury lawyer Marc Bellemare

PUBLICATIONS MAIL AGREEMENT # 40766500

GETTING AWAY WITH MURD

Quebec's pure no-fault insurance system seems poised to pay out benefits to an accused murderer. While most no-fault systems have many good aspects, they are often outweighed by the bad, say lawyers.

Quebec personal injury lawyer Marc Bellemare is on somewhat of a personal crusade against no-fault insurance.

By Mark Cardwell

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Personal injury lawyer and former Quebec justice minister Marc Bellemare thought he'd seen the summit of injustice 20 years ago, when a drunken army corporal who killed four young people during a high-speed chase through a Quebec City suburb received $86,000 in indemnities for a lost eye — twice the amount the victims' grieving families got in total. But if the alleged murderer of the four women found in a car at the bottom of a canal in

Kingston, Ont. last summer get the $300,000 in benefits Bellemare believes they are entitled to under Quebec's no-fault public insurance system, it would mark a new high, or low. "Crime pays in Quebec," says the longtime anti-no-fault crusader, who went into politics in 2003 with the express goal of modifying the system but quit cabinet a year later when the Liberal government failed to act. "When it comes to indemnities, as long as a motor vehicle is involved, people here can get away with murder."

Such an absurd scenario wouldn't be possible elsewhere in Canada, since no other province or territory — or American state for that matter — has a pure no-fault auto insurance regime quite like Quebec's. But as many jurisdictions across the country consider legislation, or calls for legislation, to introduce, repeal, or tinker with no-fault laws or complex no-fault systems like thresholds, deductibles, caps, and combinations, it is indicative of both the problems and the passions raised by an insurance system that provides benefits to all accident victims, regardless of fault, while restricting or denying the rights of innocent victims to sue reckless drivers who are responsible for their injuries. "There are a lot of good things about a no-fault system," says Bellemare. "But the bad things outweigh them, especially when permanent disabilities are involved."

Debate over the merits of no-fault insurance is not new. First elaborated in Saskatchewan in 1947 as a way to settle accident claims faster than the traditional tort liability system — reducing court and legal costs in the process and leading, so the theory goes, to lower premiums — it has been adopted by two provinces (Quebec and Manitoba) and 17 U.S. states since the 1970s. From the get-go, however, no-fault has been fiercely opposed in many jurisdictions by coalitions of trial lawyers, consumer, and community groups, including those that represent people with disabilities, mostly for limiting or denying the rights of innocent victims to pursue claims in court. As a result, Manitoba and six states have either repealed or limited parts of their comprehensive no-fault systems, and no province or state has adopted a no-fault system since the early 1980s.

All provinces, however, have cherry-picked from the no-fault tree in recent years by developing accident benefits that provide coverage according to intricate sets of rules which vary in complexity from province to province. No two provinces, for example, offer the same coverage for medical and rehabilitation treatments, funeral expenses, loss of income, or economic losses for people who are injured or killed in motor vehicle accidents. As a general rule, the difference comes down to the weight accorded in each province to a person's right to sue for pain and suffering versus

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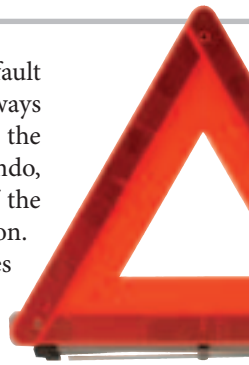


the limitations placed on those rights by the no-fault system (or access to accident benefits). "It's always difficult to balance the rights of the innocent with the need for first-party compensation," says Dale Orlando, a Toronto plaintiffs' lawyer and president-elect of the 1,100-member Ontario Trial Lawyers Association. "That's especially true when catastrophic injuries are involved."

That balance, he warns, is being thrown increasingly out of whack in places like Ontario, which has a hybrid system that allows people to bring a tort action to sue for pain and suffering or future loss of income injuries provided they meet stringent conditions. One is the need for people to reach the claims threshold by satisfying a judge that the injuries they sustained in an accident have left them with permanent and serious physical and/or cognitive impairments. If they are unable to do that, they are not entitled to compensation. If they can, they then face a head-on collision with the province's $30,000 deductible on the $100,000 maximum amount that is set for pain and suffering (more in cases deemed catastrophic that require lifelong care benefits) according to payment tables (known as "meat charts") that set out the indemnities for all imaginable injuries. "It's a double whammy," says Orlando. "That's a sizeable amount of money, when you keep in mind that a brain-damaged quadriplegic might be awarded a total of $330,000." In addition to being too excessive, Orlando believes the deductible is a significant barrier for access to justice because it eliminates most cases involving minor injuries.

At the same time, the many updates, changes, and amendments made to Ontario's no-fault insurance system since it was introduced in 1990 are driving many plaintiff lawyers in the province to distraction. "A car accident isn't rocket science — but understanding what benefits accident victims are entitled to sure is," says Brian Goldfinger, a personal injury lawyer and blogger. He laments, for example, the myriad forms and paperwork people, many of them immigrants with a tenuous grasp of English or French, need to fill out just to get the claim process started. "It's sad for clients and lawyers," says Goldfinger. "The Canadian Charter

of Rights and Freedoms is only a couple pages long but a simple auto insurance claim form in Ontario is like a book written in fine print. I consider it an impairment to access to justice."

Then there is the claims process aimed at providing compensation for injured people according to the Statutory Accident Benefits Schedule, a regulation under Ontario's Insurance Act. In Ontario, motor vehicle claims have two cases: a no-fault case against one's own insurance company, and a tort case against the person and/or insurance company of the driver who may have caused the accident. "Sometimes there's an accident benefit claim and no tort claim, sometimes there's a tort claim and no accident benefits claim, sometimes there's both an accident benefits claim and a tort claim," says Goldfinger. "It all depends on the facts of the case and the extent of the injuries. Lawyers really have to be on their game to stay on top of all the changes being made and the possibilities in each case, which can involve different sets of laws from different periods of time."

To help improve the situation, the OTLA last year recommended one of two options to the Ontario government: the elimination of the threshold or the cutting in half of the pain and suffering deductible to $15,000. Instead, the government chose to remove the $15,000 deductible in fatality claims, an apparent cost-saving measure that Orlando calls "pretty minor." He blames the government's resistance to changing the no-fault deductible on the lobbying power of the Insurance Bureau of Canada, which represents private home, car, and business insurers that control some 95 per cent of the national property and casualty market. They have a total premium base of $39 billion, roughly half of which is derived from automobile insurance. "[The IBC] says it is losing money so it wants to pay less," says Orlando. "But the result is the gradual erosion of no-fault rights in Ontario without a return of the right of innocent victims to pursue claims in court." Neither the IBC nor the Financial Services Commission of Ontario, an arm's-length agency of the Ministry of Finance that regulates automobile insurance in the province, returned calls to discuss those claims.

Personal injury lawyers and anti-no-fault coalitions across Canada had pinned their hopes for significant changes in deductibles on the cases of Peari Morrow and Brea Pederson in Alberta, where the no-fault model in regards to pain and suffering is skewed to the right to sue. They argued the cap on auto insurance payouts for soft-tissue injuries they sustained in separate car crashes in 2004 and 2005 were unconstitutional. A backdrop to the case was a study carried out for the Alberta branch of the Canadian Bar Association that found auto insurers would continue to make money even if the $4,000 cap was removed. "This report supports our view that the cap denies Albertans the right to access justice [and that] even with no cap, the auto insurance industry would still earn reasonable profits," said McCuaig Desrochers LLP's Tom Achtymichuk, a past president of the CBA in Alberta, at the time. He also noted the study showed "the insurance industry was profitable and that claims were not out of control prior to introduction of the cap [in 2004]."

Those hopes were dashed on Dec. 16, 2009, when the Supreme Court of Canada announced it would not hear an appeal of an Alberta Court of Appeal ruling from last June that overturned a lower court decision to remove the cap and award Morrow and Pederson general

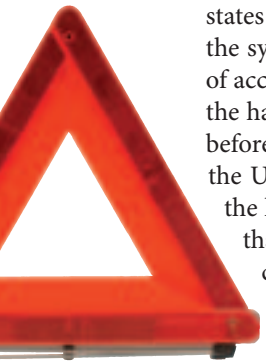
damages for pain and suffering of $20,000 and $15,000 respectively. "I know that there will be people all over Alberta applauding — insurance brokers, people [who] got the benefit of ower rates because of the reforms we made," Alberta Finance Minister Iris Evans crowed following the Supreme Court's decision. "I think we're relieved that it's over and that constitutionally, it has ruled in our favour and it is a win, certainly on the side of insurance reform, because of that." Not surprisingly, the lawyer who represented the women had a much different take. "This essentially means that innocent victims [in Alberta] will continue to be limited in their ability to have a court determine how much compensation they should have received, which will be a benefit to insurers," says Fred Kozak of Reynolds Mirth Richards & Farmer LLP. "Whether the benefit is passed on to Alberta drivers is another issue."

No-fault opponents in other parts of the country found some solace in the SCC's refusal to hear the case. Notably, they point to the argument made by the Court of Appeal that the cap law did not discriminate against injured people because the Alberta government increased accident medical benefits available under no-fault in the months after the law was brought in. This 'trade-off' is expected to become an important issue in *Hartling v. Nova Scotia (Attorney General)*, the latest constitutional challenge being mounted by anti-no-fault coalition forces in the Maritimes, where a $2,500 cap on soft-tissue injuries was enacted several years ago.

On Dec. 15, the Nova Scotia Court of Appeal released its decision in *Hartling*, upholding the $2,500 cap on all grounds, "which was a surprise to myself and many others in the legal and insurance communities," wrote David Brannen, a personal injury lawyer from Halifax, on his blog. Brannen also believes the SCC's refusal to hear the Alberta cap case means the constitutional challenge to Nova Scotia's cap "has hit the end of the road."

Apart from constitutional challenges, the results of a number of recent studies are also providing no-fault opponents with ammunition to counter the decades-old argument — advanced mostly by insurance companies and the two provinces that have adopted comprehensive no-fault systems — that no-fault is more cost-effective and efficient than tort schemes.

According to Christopher Bruce, an economics professor at the University of Calgary and president of



Economica Ltd., a research company that conducted the report on personal injury damages for the CBA, there are virtually no cost savings to be had switching from tort law to no-fault insurance. "The evidence is clear," Bruce told *Canadian Lawyer*. "Experience in no-fault states and jurisdictions around the world indicate that the system is not effective in reducing the overall cost of accident compensation." To the contrary, Bruce says the half-dozen major studies carried out on premiums before and after the adoption of no-fault insurance in the U.S. and Canada show no-fault jurisdictions have the highest rates. Those rates are also going up faster than in at-fault auto insurance systems. Insurance company profits, too, appear to go up as a result of the introduction of no-fault. Bruce noted, for example, that the IBC reported the insurance industry made $750 million more in 1991 — a year after Ontario adopted its no-fault threshold — with no appreciable decrease in premiums.

Those profits have only continued to grow, a trend that has not been lost on no-fault opponents. "The Insurance Bureau of Canada can spin it any way they want," said Robert Creamer, past president of the Atlantic Provinces Trial Lawyers Association, after the IBC announced the nation's insurance industry had made a record profit of $4.2 billion in 2005, a year after the IBC successfully lobbied the Maritime provinces to bring in the soft-tissue injuries cap. "The fact of the matter is [that] is a staggering amount of money, premiums for consumers are higher than ever, and car accident victims' rights have all but been expunged due to the arbitrary capping of injury damages."

The evidence and arguments against no-fault, however, aren't limited to money and unfairness to innocent victims. Bruce notes several studies, including one from the University of Ottawa that looked specifically at Quebec, have concluded no-fault systems produce five- to 10-per-cent more fatal and serious car accidents than tort-based regimes. That adds empirical evidence, he says, to the gut feeling no-fault opponents have always had that at-fault systems are a better deterrent for reckless, negligent, and criminal drivers. "No-fault appears to discourage personal responsibility," says Bruce, "while incremental insurance seems to add to the perception of punishment."

Paul McIntyre admits no-fault isn't perfect. That's why, as assistant vice president of injury claims with SGI, the corporation that runs Saskatchewan's compulsory auto insurance program, he says he's happy to be living in the only province that offers residents a choice between

no-fault and tort coverage for auto injury insurance. "I think we've struck a good balance," says McIntyre, a litigator who has worked both sides of the personal injury fence. Though no-fault benefits were first introduced in the province in 1948 — the first place in the world to do so — as an add-on to the tort system, he says the introduction of a full-blown no-fault regime in 1995 "radically changed the landscape." Since then, numerous revisions have given the roughly 6,000 people who make new claims every year in the province "a relatively simplified choice" between comprehensive no-fault benefit packages and tort coverage that covers some expenses for injured people and, in the event someone else is found responsible for the accident, the ability to sue for pain and suffering and other expenses. "People here seem satisfied," says McIntyre, who says SGI has a customer satisfaction rating of around 90 per cent. "We don't get a lot of complaints."

The spokesman for Manitoba Public Insurance, which runs the province's pure no-fault program (called the Personal Injury Protection Plan or PIPP) says much the same. "Manitobans love [no-fault]," says Brian Smiley, a media relations co-ordinator with MPI, which was introduced in 1994 and is modeled on Quebec's system. According to Smiley, lawyers' fees accounted for roughly one third of the payments meted out by the courts under the province's old tort system. "Lawyers were opposed to no-fault because they weren't involved in the system," he says. "But the system has proven itself. We have some of the lowest insurance premiums in Canada [and] we get consistently high ratings from consumers groups."

A big reason for that satisfaction, adds Smiley, is that Manitoba has continued to refine and streamline its no-fault scheme, which received nearly 17,000 claims for bodily injury related to motor vehicle accidents and paid out $208 million in benefits in 2008. One notable change was a modification in the province's insurance law two years ago that prevents spouses from receiving death benefit payments if they are found criminally responsible for the accident that caused the death. Enacted following a review of a crash in which the wife of a drunk driver died in an accident he caused, and for which he received death benefits, the changes direct payments instead to the estate of the deceased or the executor of his or her will. In terms of injuries, too, injured spouses and children get all entitled benefits for everything from rehabilitation and living needs to grief counselling and home renovations, while those found to be criminally at fault get only partial payments.

For its part, Quebec has stubbornly resisted making similar changes to its pure no-fault regime, enacted in 1977 by the first Parti Québécois government under René Lévesque. According to Claude Gélinas, a lawyer for the past 23 years and now vice president of legal affairs for the Société de l'assurance automobile du Québec, which runs the province's no-fault system, the issue of payments to the criminally responsible has been debated often — but never acted upon legislatively. "The basic question or principle is whether we should simply compensate events, which we do, or be selective," says Gélinas, who adds that payments to people found criminally responsible for the accidents in which they and others are injured or killed represent only a fraction of the $1 billion the SAAQ pays out in indemnities each year. "If we make modifications and open it to court challenges it could be detrimental to the regime itself."

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>
> — Dale Orlando

Bellemare calls that poppycock. While lauding the avoidance of long and costly lawsuits and the expedient settlement and payment of small claims under no-fault — though he believes the system can be sped up through the elimination of "stupid review boards that always side with the government insurer [and] drag files for two or three years" — he says a few minor changes to Quebec's auto insurance law would put an end to what he calls "a moral and legal injustice" in pure no-fault schemes. They could include the legal redefinition of an accident, and the rewording and addition of a fifth exemption to s. 10 (modifications he says he proposed as justice minister to Premier Jean Charest, whose refusal to present them to cabinet prompted Bellemare's abrupt departure from politics). "No law should protect a criminal from the consequences of their crime and no lawyer should have to tell their client that they have been victims of a crime but they can't sue," he says. "The first step of social and psychological rehabilitation is justice — then money. But with the way our courts tap criminals on the wrists when motor vehicles are involved [and] the limits no-fault puts on innocent victims, if your daughter is killed or permanently disabled by a drunk driver in Canada, you don't get either." CL